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European Council
on Refugees and Exiles

PROTECTED ACROSS BORDERS: MUTUAL RECOGNITION OF ASYLUM DECISIONS IN THE EU

**ECRE'S ASSESSMENT OF LEGAL PROVISIONS AND PRACTICE ON
MUTUAL RECOGNITION, AND ITS RECOMMENDATIONS FOR REFORMS
TO CREATE A STATUS "VALID THROUGHOUT THE UNION"**

I. INTRODUCTION

The asylum landscape in Europe has changed dramatically over the last two years. In 2015, more than one million asylum applications were registered. Of those that received an asylum hearing, approximately half were recognised as in need of international protection at first instance. At the same time, the numbers claiming asylum in EU Member States located at the EU's external land and sea borders are increasing due to the implementation of the hotspot approach and the application of the Dublin Regulation. Beneficiaries of international protection then find themselves in situations where they must remain in a Member State where they have no ties, and have little ability to move elsewhere.

Mutual recognition of positive asylum decisions with enhanced free movement for protection beneficiaries would reduce the importance of the particular Member State in which an asylum claim is determined. Regardless of where a person is recognised as a refugee or subsidiary protection holder, she or he, could, in principle, seek to take up residence in another Member State, where she or he has closer ties, or language or professional skills that are in demand in the local labour market. This could be possible at an earlier stage than under the amended Long Term Residence Directive. Nevertheless, the current proposals reforming the asylum acquis leave little room to facilitate this.

Despite acknowledgement from Member States and EU institutions of the necessity to promote integration tools and conditions, the new asylum acquis does not take into account the positive impact mutual recognition could have in ensuring better integration and instead takes a predominantly punitive approach to enforce compliance. In particular, there is an emphasis on preventing the secondary movements of applicants and beneficiaries of international protection, and a number of sanctions are proposed to enforce compliance with the obligation to apply and stay in the first Member State of entry or the Member State that granted protection. These include the application of accelerated procedures, the refusal of reception conditions, and additional obstacles to access Long Term Residence. Furthermore, confusion remains regarding the scope of mutual recognition and how refugees and subsidiary protection holders can transfer their status from one Member State to another.

II. ANALYSIS

The essence of mutual recognition is the recognition of national standards and decisions made in one Member State by another Member State. In order for mutual recognition to succeed, mutual trust is needed between Member States. Mutual trust requires that Member States trust other Member States' legal systems and decisions. It obliges them to accept and/or enforce a decision handed down by another Member State and attach the same legal effects to similar national judicial decisions, even if they were made by a different judiciary.

Mutual recognition of positive asylum decisions, based upon harmonised legal standards and practice, has been described as an important step in the further development of the CEAS. The Lisbon Treaty also foresees a closer union. Article 78 (1) provides that the Union will develop a common policy on asylum, subsidiary protection and temporary protection in accordance with the 1951 Refugee Convention and its Protocol. In order to achieve this, measures should be adopted that would enable a "uniform status of asylum for nationals of third countries, valid throughout the Union" and a uniform status of subsidiary protection for nationals of third countries.

I. MUTUAL RECOGNITION AND THE TRANSFER OF PROTECTION UNDER INTERNATIONAL LAW

International refugee law provides for the recognition and enforcement of refugee rights across borders and in States other than those which have initially granted status. During the drafting of the 1951 Refugee Convention, consideration was given to whether the definition of the term "refugee" should be of wide or narrow scope. It was concluded that a narrow definition should be adopted in order for it to be acceptable to all governments and to avoid the situation where a person would be considered a refugee in one State but not in another. As a result, refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the Convention.

Under the 1951 Refugee Convention, States are obliged to issue Convention Travel Documents, which must be recognised by other Contracting Parties for the purpose of admitting refugees, illustrating the extraterritorial nature of refugee status. It also foresees that refugees may move and take up lawful residence in another State. Article 28 (1) of the Convention and Schedule 11 of the Convention enables States to issue a travel document to refugees on their territory who are unable to obtain a travel document from their country of lawful residence or who have started living legally on their territory. Allowing States to issue travel documents to persons who were not subject to a fresh status determination also supports the extraterritorial nature of refugee status.

The Council of Europe in 1980 adopted a European Agreement on Transfer of Responsibility for Refugees in order to determine which State is to assume the responsibility for a refugee, in particular in connection with the issue of travel documents. While the Convention does not provide a right for refugees to move to another State, it regulates some aspects of their legal position if they are granted a right to reside by a State other than that which granted them protection. The agreement foresees that responsibility for the refugee shall be considered to be transferred after two years of legal and continuous stay in the second State with the agreement of its authorities.

The use and scope of the agreement varies between the participating States. To date only 11 EU Member

States have signed it and it only applies to refugees. Nevertheless, those Member States expressed a wish that any future regulation adopted by Member States should be based on the criterion as stipulated in the 1980 Agreement.

II. MUTUAL RECOGNITION IN EU ASYLUM LAW

Mutual recognition is also present in other areas of EU asylum law. The Dublin Regulation operates on the basis of mutual trust, the key ingredient needed in order for mutual recognition to work. Under the recast Asylum Procedures Directive and the proposed Asylum Procedures Regulation, Member States are allowed to consider an application inadmissible if another Member State granted international protection to the applicant. A Member State applies this provision on the basis of another Member State's positive asylum decision; it does not question the validity of the status and as such is recognising it.

Under the amended Long Term Residence Directive and under the proposed Blue Card Directive, the second Member State in which the beneficiary is now residing, has the ability to revoke their residence permit. Both instruments provide that where a Member State withdraws or does not renew an EU Blue Card or a Long Term Residence Permit issued to a beneficiary of international protection, it shall request the first Member State to confirm whether the person concerned is still a beneficiary of international protection in the first Member State. If so, the person concerned will be "expelled to that Member State".

However, the second Member State that adopted the non-renewal / revocation decision, shall retain the right to remove the third country national to a country other than the Member State which granted international protection where the person fulfils the conditions specified in Article 21(2) of the recast Qualification Directive (that being the person is deemed to be a danger to the security of the Member State or, having been convicted of a particularly serious crime, constitutes a danger to the community of that Member State). The second Member State is still bound by the principle of non-refoulement as well as its obligations under EU law and the ECHR. The application of these provisions implies the mutual recognition of the first Member State's positive status determination decision. Finally, under the Returns Directive and the Schengen Information System, Member States mutually recognise other Member States' return decisions, when accompanied with an entry ban.

III. CONSEQUENCES OF MUTUAL RECOGNITION

The Commission has noted that a uniform status of asylum, as unequivocally required by the Treaties, should entail rights for refugees to move and settle in another Member State, and consequently, issues of transfer of protection, among others, should be examined. However, it is unclear what rights and entitlements are attached to the status should the applicant move to another Member State.

In theory, mutual recognition, when read in conjunction with Article 78 of the Lisbon Treaty, provides for a uniform status that is valid throughout the Union. In order for it to be truly valid, it must comprise of all the rights and entitlements that are attached to the status. Furthermore, under the 1951 Refugee Convention, refugees must be treated as the most favoured foreigner in terms of wage earning employment, which in the case of the EU is fellow EU citizens who have the right to work and travel in other Member States should they meet some basic criteria.

However, in practice, beneficiaries of international protection do not have the same free movement rights as EU citizens and there is no consensus as to the effect of another Member State's positive asylum decision. In the case of *M.C. v Bulgaria*, the European Court of Human Rights (ECtHR) noted that the CEAS does not expressly provide for a mechanism to mutually recognise asylum decisions made by the respective national authorities in another Member State. The applicant, having fled Russia, was granted refugee status in Poland and humanitarian status in Germany. Russia issued a warrant for his arrest and he was subsequently intercepted by the Bulgarian authorities on the Bulgarian-Romanian border. The Bulgarian public prosecutor ordered his extradition to Russia which was only stopped after a rule 39 was issued by the ECtHR. It goes against the very aim of a CEAS to have a system in place whereby a Member State is free to extradite or expel to a third country a third-country national who has obtained refugee status in another Member State and, as a result of the expulsion, is at risk of refoulement or onward refoulement. It also goes against a Member State's own obligations to uphold the principle of non-refoulement.

IV. CURRENT POSSIBILITIES FOR BENEFICIARIES TO MOVE TO ANOTHER MEMBER STATE

Currently, the main avenues used by beneficiaries of international protection to move to another Member State are through national immigration schemes, under the amended Long Term Residence Directive, through family reunification or irregularly. Some also re-claim asylum in another Member State. Beneficiaries of international protection in the future may also be able to move under the Blue Card Directive that is currently being amended. The Commission proposes to broaden its scope whereby beneficiaries of international protection would be able to apply for an EU Blue Card like any other third-country national, and after one year, could apply to move to another EU Member State. They would retain all the rights they enjoy as beneficiaries of international protection, but their status would stay in the Member State which granted them protection.

Persons who move under the amended Long Term Residence Directive are treated like any other third country national. The Directive explicitly states that the “transfer of responsibility for protection of beneficiaries of international protection is outside the scope of this Directive”. Furthermore, except for the second Member State’s obligations to comply with the principle of non-refoulement, the rights and obligations flowing from their status remain between the original grantee State and the beneficiary of international protection.

While it is welcome that beneficiaries can access from long term residence, and in the future possibly the EU Blue Card, the numbers who can benefit from these instruments remain limited. It also raises many questions, including whether it makes sense for the Member State who granted that status to remain the primary country responsible for the beneficiary, even if the beneficiary is living in another Member State for an extended period of time. Further complications arise if cessation or revocation of status procedures commence and serious legal questions arise whereby a second Member State can apply the grounds to refoule a beneficiary of international protection under the recast Qualification Directive without having other positive obligations towards the beneficiary.

At a time when more beneficiaries will continue to move using the various channels, it is clear that a more comprehensive system needs to be put in place to deal with the various challenges that will inevitably arise.

III. RECOMMENDATIONS

1. The asylum acquis proposals should move away from a punitive approach to preventing secondary movements and instead place more emphasis on an incentive based approach. This would also reflect the Commission’s own announcement in its Communication on the Reform of the Common European Asylum System, that “further initiatives could be taken in the longer term to develop the mutual recognition of the protection granted in the different Member States which could be the basis for a framework for transfers of protection”.
2. In order to uphold the principle of non-refoulement, there should be an express provision that mutually recognises a positive asylum decision made by the respective national authorities in another Member State.
3. In order to give credence to the Lisbon Treaty which provides for a “uniform status of asylum” that shall be “valid throughout the Union”, a comprehensive system is needed which stipulates whether and what rights accompany the recognition of another Member State’s positive asylum decision.
4. A status that is “valid throughout the Union” inevitably entails rights to beneficiaries to move and settle in another Member State. Ultimately, beneficiaries of international protection should be given the same free movement rights as EU citizens upon receipt of their status.
5. An EU legal instrument should be adopted whereby there can be a full transfer of protection status to another Member State. This needs to cover both refugees and beneficiaries of subsidiary protection.
6. This instrument should also clarify when a transfer can take place, aspects of the protection claim covered, and address any data protection concerns that may arise in respect of such a transfer.