

Memorandum to the Slovenian Presidency

Ensuring access to protection, effective integration and proper safeguards for return



AD6/12/2007/EXT/CN

Slovenia will take over the Presidency of the European Union at a critical point in the establishment of a Common European Asylum System. Following the Green Paper consultations during 2007, a blueprint will now be developed outlining necessary next steps to finalise the EU's project of creating a common asylum system by 2010. Given current huge and widely publicised disparities in recognition rates across the Union, it is imperative that next steps focus on improving quality and ensuring good practice. EU asylum law and policies must be fully in compliance with international refugee and human rights law. Another goal of a common system must be to ensure that no person who would be recognised as in need of protection in one part of the Union would face *refoulement* in another. However, having fair and efficient asylum systems alone renders protection illusory if not accompanied by measures to ensure that refugees can access them. The plight of those seeking entry to the EU via sea, airport or land borders will continue unabated unless a dramatic shift is achieved in the response of EU Member States to mixed migration flows. As a starting point they must show far greater willingness to share responsibility with each other and with the rest of the world.

ECRE has published its response to the Green Paper¹ and therein outlined its detailed recommendations on the wide range of issues relevant to finalising the Common European Asylum System over the coming years. In this Memorandum it is intended to focus on some of the key issues that stand to be addressed during the Slovenian Presidency.

1. Access to protection
2. Improving asylum systems through practical cooperation
3. Re-designing the Dublin System
4. Integration and Long Term Residence
5. Safe, dignified and sustainable return
6. Ensuring stability in the Western Balkans

1. Access to protection

Slovenia takes over the EU Presidency at a historic time of full expansion of the Schengen zone to nine of the new Member States and the beginning of the newly established EU External Borders Fund. Slovenia is at the forefront of exploring new models of independent border monitoring mechanisms, as demonstrated through a recent pilot

¹ Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the future Common European Asylum System (COM (2007) 301), September 2007.

project implemented between the government, UNHCR and an NGO the Slovenian Peace Institute which has proved successful and a good basis for developing more long-term mechanisms. Good practices also exist in other countries such as Hungary, Poland and Slovak Republic². Similar approaches should be adopted by other EU states, and the EU External Borders Fund should be used to support and sustain such activities.

An evaluation of FRONTEX is due to be undertaken and published during the Slovenian Presidency of the EU. In a paper released this month³ ECRE has identified a number of concerns with regard to the framework within which FRONTEX operates, as well as its operations, and hopes these will be taken into account during the evaluation process. ECRE primarily stresses the importance that the workings of the agency encompass consideration of the impact of FRONTEX operations on refugees and Member States' international protection obligations. One major concern is that currently operations are taking place in the waters of non-EU countries, such as Senegal and Mauritania, without a properly defined legal basis. Such operations must stop and cooperation with third countries should only be developed if certain guarantees regarding the treatment of refugees and respect for human rights are in place. Necessary improvements identified by ECRE include clarification of the allocation of responsibilities between the agency and Member States, increased transparency, independent monitoring of operations, training on refugee and human rights obligations and the development of structured cooperation with asylum experts such as UNHCR and NGOs. While FRONTEX is now ready to deploy RABITs, as of yet there is no visible progress on the establishment of Asylum Expert Teams as proposed by the European Commission in 2006, despite the 18 Sept Justice and Home Affairs Council's call for progress to be made. Such teams would complement the work of RABITs and other FRONTEX operations e.g. by helping to identify potential refugees within the migrant populations caught by interception activities.

The EU must also find a way to address southern coastal states' reluctance to allow ships carrying migrants to disembark on their territory and take responsibility for them, including those seeking protection. This continues to put people's lives at serious risk. In the course of rescue and interception operations the safety of people on board must be the priority, which will usually require transfer to a safe place, on dry land. The forthcoming guidelines from the European Commission on rescue and disembarkation will present the Council with a crucial opportunity to increase cooperation and thus better prevent the tragedies in the Mediterranean which continue to shock and appal Europe's citizens. The EU must find a way not only of sharing the burden of patrolling Europe's external borders but also the duty to save human lives and the responsibility for refugee protection.

- *ECRE urges the Slovenian government to take the opportunity of its Presidency to share with all EU Member States good practices of independent border monitoring involving UNHCR and NGOs, such as those undertaken in Slovenia. It should ensure that the maintenance and expansion of such monitoring activities is supported by EU funding mechanisms, including the External Borders Fund coming into force on 1 January 2008.*
- *The Slovenian Presidency should ensure that the planned evaluation of FRONTEX examines the adequacy of the agency's activities in relation to how they may or may not support Member States in respecting their international protection and human rights obligations. It should ensure the evaluation also addresses issues of transparency, legal mandate, the need for independent monitoring and increased training, and the urgent need for increased cooperation with asylum experts.*
- *ECRE calls on the Slovenian Presidency to lead discussions within the Council on urgently establishing Asylum Expert Teams with a view to having them operational and supporting FRONTEX as soon as possible, and at the latest by the end of June 2007.*
- *ECRE calls on the Slovenian Presidency to play a leading role in helping EU Member States clearly identify and better share the responsibility to save human lives at sea and protect refugees by ensuring they are safely disembarked and receive a full and fair consideration of their protection claims.*

² ECRE, *Defending Refugees' Access to Protection in Europe*, December 2007, p48.

³ ECRE, *Defending Refugees' Access to Protection in Europe*, December 2007, available at www.ecre.org.

2. Improving asylum systems through practical cooperation

ECRE welcomes the interest of the Slovenian Presidency in practical cooperation measures to improve the quality and efficiency of asylum systems. The Commission's Communication on strengthened cooperation among Member State' asylum services, on which the European Parliament has adopted a resolution⁴, provides a useful platform on which to build for future initiatives. ECRE has for some time argued⁵ that States, UNHCR, NGOs and other independent experts should work together by sharing expertise, information and resources. Good practice guidelines should be developed in relation to the training and accreditation of decision-makers, the treatment of unaccompanied minors and other vulnerable groups such as torture survivors, and country of origin information (COI). The common provision of reliable and accurate country information, open to scrutiny by academic and other experts, is an important component of achieving consistency and quality of decision-making across Europe. But good information is not enough, if it is ignored or improperly used by decision-makers. Independent monitoring mechanisms should be set up to identify flaws and gaps in decision-making and highlight the appropriate training and extra resources required. By adopting a policy of frontloading - investing and sharing resources in order to get decisions right first time – states can avoid unnecessary appeals and 'repeat' applications thereby cutting costs and delays while increasing public confidence in their management of asylum systems.

The coming months will also likely see discussion of next steps in developing an independent EU Asylum Support Office (EASO) as part of efforts to facilitate a truly common and unified approach to asylum across the Union. ECRE supports the creation of such a structure to carry out functions such as commissioning, monitoring and evaluating practical cooperation projects; coordinating Expert Support Teams; servicing networks such as Contact Committees on specific instruments; and hosting the common portal and/or future EU Country of Origin Information services. The EASO could also usefully have a monitoring and regulatory function by analysing statistics and other data to identify decision-making not consistent with EU standards; assigning Quality Monitoring Teams to assist states to improve their asylum procedures; producing common guidelines (e.g. on gender); and, developing the embryonic European Asylum Curriculum combined with setting future common accreditation standards for decision-makers. However, it will be crucial that the EASO and linked functions are operated in a transparent manner, with public terms of reference and proper reporting functions. This should include democratic oversight by the European Parliament.

- *The Slovenian Presidency should ensure that any measures to enhance cooperation between member states' asylum systems improve the quality of decision-making and focus on sharing good practice. This should involve UNHCR and other independent experts.*
- *Any new structures created under the practical cooperation programme must ensure that democratic accountability and transparency govern all developments leading up to and including the creation of an EU Support Office.*

3. Re-designing the Dublin System

During 2008 the Commission will propose amendments to the Dublin Regulation This follows the Commission's evaluation of the Dublin system published in June 2007 which supported a number of the findings made by ECRE⁶ and UNHCR⁷ in 2006 on the operation of the Dublin Regulation⁸. While welcoming recognition of some of the

⁴ European Parliament resolution of 21 June 2007 on asylum: practical cooperation, quality of decision-making in the common European asylum system (2006/2184(INI))

⁵ *The Way Forward: Europe's role in the global refugee protection system. Towards Fair and Efficient Asylum Systems in Europe*, ECRE, September 2005.

⁶ *Summary Report on the Application of the Dublin II Regulation in Europe*, ECRE/ELENA, March 2006 is available at www.ecre.org

⁷ *The Dublin II Regulation, a UNHCR Discussion Paper*, UNHCR, April 2006

⁸ Concerns recognised by the Commission include the need for a proper examination of cases transferred, use of the sovereignty clause for humanitarian reasons (and only subject to the applicant's consent), greater and improved use of the humanitarian clause, a better conciliation procedure, full respect for the principle of the best interests of the child in cases

problems identified, ECRE believes that a wider range of urgent short-term reforms are required given the scale and scope of current injustices caused by the operation of the Dublin system, including massive disparities in standards between Member States which make claiming asylum in Europe a dangerous lottery.⁹ Of paramount importance is that individuals are afforded a full suspensive right of appeal against transfer. In addition, and in the absence of a fully harmonised or common asylum system across EU Member States, ECRE believes that Article 10 of the Dublin Regulation (the irregular entry criterion) should be suspended. Individuals should not be forcibly transferred back to a state which does not offer a comparable prospect of protection or which lacks adequate reception facilities. In parallel to these measures, a far greater and targeted input of financial resources is required to improve protection standards in certain states. The safeguard of suspending Article 10 could then be reviewed at a specified time in the light of comprehensive and objective evaluation of progress in establishing equality of protection in the future CEAS.

In the longer term the solution lies in re-designing the Dublin system to ensure genuine responsibility-sharing, guarantee full access to protection in which ever state a claim is lodged, and support the EU's wider integration objectives. This should form an integral part of thinking on the policy plan drafted by the Commission following the Green Paper consultations. Any alternative system for allocating responsibility would need to be complemented by a burden-sharing instrument that would support those Member States that received higher numbers of asylum claims based on the real costs of hosting asylum seekers, determining claims and funding for integration and returns. If given the choice, refugees would live in the country where they have the best chance of integrating, whether due to the presence of family members, social networks, employment opportunities or to cultural or linguistic ties. A system that delivers quick, efficient and fair status determination, wherever a claim is lodged, followed by an opportunity for recognised refugees to relocate within the EU would provide an incentive to asylum seekers to claim asylum immediately upon entry into the Union and would facilitate the integration of successful claimants. Both asylum seekers and Member States would benefit from a system where asylum seekers have an incentive to register with the authorities rather than transit or reside irregularly, and which maximises refugees' potential to integrate into the EU. ECRE will shortly be publishing a policy paper to address these and related issues.

ECRE is also concerned about the planned amendment of the Eurodac Regulation, to enable Member State's police and law enforcement authorities as well as Europol to have access to Eurodac in the course of their duties in relation to the prevention, detection and investigation of terrorist offences and other serious criminal offences. Proposed amendments risk breaching fundamental rights and could violate the principle of equity and non-discrimination on the basis of nationality and ethnic origin, the right to protection of personal data as well as endanger and/or stigmatise refugees.

- *Urgent steps should be taken to amend the Dublin II Regulation and related legislation, in order to meet the protection gaps identified by the European Commission, UNHCR and ECRE.*
- *In response to the Green Paper consultations, the Council should consider devising a new system for allocating responsibility for asylum claims that takes full account of Europe's integration objectives.*

4. Long Term Residence and Integration

As ECRE has observed in memoranda to past Presidencies, it is profoundly unjust that refugees and beneficiaries of subsidiary protection currently have fewer rights under EC law than other long-term resident third country nationals. The Commission's long-awaited proposal to broaden the scope of the Long Term Residents Directive is

involving children, the extension of family reunification to beneficiaries of subsidiary protection, and that detention should only be used as a final resort when all other non custodial measures are not expected to bring satisfactory results. ECRE welcomes this recognition and calls for future amendments, both proposed and adopted, to fully address these problems.

⁹ *The Dublin Regulation: Twenty Voices – Twenty Reasons for Change*, ECRE, March 2007 and *The Dublin Regulation: Ten Recommendations for Reform*, ECRE, March 2007. Both available at www.ecre.org

therefore to be welcomed as an interim measure pending longer-term reforms facilitating the eventual mutual recognition of protection status and free movement for all beneficiaries of protection within the Union.

The current proposal from the Commission would provide beneficiaries of protection with the same rights as other legally resident third country nationals who meet the five year qualification period. These include free movement and residence rights in other EU states and entitlements to work, to receive education and training, and to have their professional qualifications recognised. Granting a secure and durable legal status is crucial in order to allow refugees and beneficiaries of subsidiary protection to gain the stability to proceed with their lives, become fully integrated and contribute to their host communities. ECRE therefore supports the early adoption of the Commission's proposal and it is particularly important that this covers beneficiaries of subsidiary protection as well as refugees. It will also be necessary to ensure that the proposal does not undermine the principle of non-refoulement. Since the issue of transfer of protection status is outside the scope of the proposal, the safeguards that prevent violation of the principle of non-refoulement should afford beneficiaries of protection the level of protection that is de facto equal to the level of protection they would have if they could take their protection status with them to another Member State. In ECRE's view this is not the case under the current proposal and therefore during its negotiations the Slovenian Presidency should facilitate necessary amendments accordingly. Furthermore, the requirements to have stable and regular resources should be lowered, since beneficiaries of protection do not have the same opportunities to acquire such resources in the five years following their application as would other third country nationals arriving in the EU.

- *ECRE urges the Slovenian Presidency to ensure the quick adoption of the proposed amendment to the Long Term Residence Directive extending its scope to both refugees and beneficiaries of subsidiary protection. Safeguards against refoulement should be strengthened and the requirements with regard to stable and regular resources lowered for beneficiaries of international protection.*

The Slovenian Presidency will also have other opportunities to positively promote more effective integration. Member States currently often seem reluctant to offer integration assistance to asylum seekers for fear of creating pull factors. However, a significant proportion of Europe's asylum seekers will become future citizens. Policies aimed at deterrence alone are short sighted and inhumane. Far from undermining (voluntary) return, integration measures such as vocational and language training, empower people, giving them new skills which are beneficial for both possible outcomes: return or integration. Exclusion from the labour market and the increased use of detention, on the other hand, foster dependency, depression and other mental health problems.

- *ECRE urges the EU Presidency to initiate a re-examination of the Common European Asylum System in light of the recognition that future citizens should have a positive integration experience from the moment of arrival in order to foster a sense of belonging and loyalty to the receiving state. Such a review should point to necessary reforms such as lifting restrictions on access to the labour market for asylum seekers (through amendments to the Reception Directive), reducing the use of detention and revising the Dublin system.*

Currently there are considerable differences between European states in their citizenship and naturalization criteria and procedures. Although some countries are clear as to the criteria that have to be met to become a citizen and have a good record of allowing refugees access to citizenship, many states make citizenship increasingly difficult, which has a negative impact on their integration. Access to citizenship will be one of the topics at the next meeting of Ministers responsible for Integration in France in 2008. In preparation of this meeting, ECRE asks the Slovene Presidency to promote the following recommendations:

- *To speed up citizenship for refugees, it is important to take into account the total period of residence of a person in a country of asylum, including periods under temporary protection or registered as an asylum seeker.*
- *To allow people to continue holding their original nationality where possible.*
- *To enable refugee children to obtain at birth the nationality of the country in which they were born.*

5. Safe, dignified and sustainable return

While Member States continue to develop greater co-operation with each other and with third countries on border management issues and return operations, there seems still to be insufficient consensus amongst Member States within the Council to reach a position on the proposal for an EU Returns Directive to establish common rules on return procedures. This directive has the potential to create better standards and safeguards on the fundamental rights of persons being returned from all EU countries. ECRE urges the Slovenian Presidency to strive for the conclusion of the first reading of EU Returns Directive as soon as possible so as to continue the discussions between the Council and Parliament on their key differences of view without further delay. The Council's conclusions should maintain key safeguards proposed such as individuals' access to effective judicial remedies.

However, it should also be noted that a glaring omission from the proposed EU Returns Directive, as currently drafted, is that it does not deal with people who cannot be returned for reasons beyond their control. In order to avoid people being left destitute in a state of limbo, any person with a right not to be removed should be entitled to subsidiary protection. Voluntary return should be prioritised and all returns should be safe, dignified and sustainable. The rights of returnees will best be served where a number of appropriate actors are involved in monitoring.

- *ECRE calls on the Slovenian Presidency to take an active role in the process of developing EU rules on return procedures on the basis of the European Commission's 2005 draft proposal and drawing on ECRE's recommendations¹⁰ in order to ensure that persons whose asylum applications have been rejected are treated humanely, returned in safety and dignity and in a manner which supports the sustainability of their return.*
- *There should be follow-up and monitoring of returned asylum seekers whose applications have been rejected to identify whether return policies prove to be effective and safe. This would help ensure the safety of returnees and act as a check on states' fulfilment of their obligations under international law to protect individuals from refoulement. It would also help evaluate the success of (re-) integration efforts and the sustainability of return. It is also important for UNHCR, NGOs and Civil Society to play a major role in this monitoring.*
- *In the case of persons whose asylum applications have been finally rejected but who cannot be returned for 'technical or other reasons', an official decision should be taken not to enforce removal and such persons should be granted a legal status which affords them their human rights and a dignified standard of living. Such a legal status could be temporary but should be granted as soon as possible.*

6. Ensuring stability in the Western Balkans

Western Balkan countries continue to face formidable economic and political challenges. Poverty and unemployment remain key problems. In some areas affected by conflict, basic infrastructure is still lacking. The process of housing reconstruction has yet to be fully completed. With regard to economic reconstruction, there remains a need for investment of a scale that effectively addresses the development challenges facing the region. Investment in building institutional capacity to ensure good governance and the rule of law is also a priority.

The successful reintegration of refugees and internally displaced persons (IDPS) in places of origin or former residence is a key factor for return sustainability. Access to financial and other resources, opportunities and basic services on the basis of equality and non-discrimination represent essential preconditions for the establishment of sustainable livelihoods for returnee populations. Of particular relevance are measures to ensure that returnees are protected from threats, harassment, persecution or discrimination; effective property restitution and compensation

¹⁰ See ECRE's comments on the proposed Directive on common standards and procedures in Member States for returning illegally staying third country national, May 2006, available at www.ecre.org

mechanisms, recognition of the civil status of returnees and changes thereto and recognition of educational, professional and vocational qualifications acquired while in exile.

- *The EU Presidency should use its influence to put pressure on governments in the Western Balkans to resolve outstanding problems as they relate to the return of displaced populations in the region. ECRE calls for the full implementation of Annex G of the 2004 Vienna Agreement on Succession Issues and of the 2005 Sarajevo Declaration on Returns. Governments in the region should urgently conclude the process of developing National Action Plans and a Joint Implementation Matrix under the Sarajevo Declaration. Addressing outstanding concerns in a just and timely way with regard to occupancy and tenancy rights and the convalidation of employment and other social rights should remain key priorities.*
- *ECRE and its partners urge EU Member States and Western Balkan countries to closely cooperate in the context of mandatory returns of persons from the region who have no legal basis for remaining in the EU. Co-operation should take place in a spirit of solidarity and should also include the provision of financial assistance to facilitate the reintegration of returnees from Western Europe. ECRE also urges EU Member States to refrain from forcibly returning ethnic minorities at risk in Kosovo to other areas of Serbia on the basis of the internal flight or relocation alternative.*

ECRE, December 2007

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