ECRE

EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

Comments from the European Council on Refugees and Exiles
on the
Commission Green Paper on a Community Return Policy on illegal residents

(Brussels, 10.04.2002, COM(2002)175 final)

Introduction

The European Council on Refugees and Exiles (ECRE) is a network of some 70 non-governmental refugee-assisting organisations in 28 European countries. ECRE welcomes this opportunity to comment on the Green Paper on a Community Return Policy on illegal residents presented by the Commission in April 2002.

Summary of Views

The Commission Green Paper examines the issue of return of "illegal residents" in the EU and makes suggestions for a co-ordinated policy based on common principles and standards.

Our comments are limited to three types of persons: first, those who are failed asylum seekers; second, those whose protection status has ceased; and third, those whose temporary protection has ended after they have had effective access to the asylum system. In reference to these three groups we believe the use of the term "illegal residents" is inappropriate; instead we propose that they are defined as "people who no longer have a legal basis for remaining in the EU" as this describes more accurately their specific circumstances. We would argue that these groups are distinct from the others to whom the Green Paper applies in that they might face the risk of *refoulement* if returned to their country of origin. Treating all groups alike overlooks this significant difference.

First and foremost a common return policy in the EU must provide safeguards against *refoulement*. This must be the guiding principle; we welcome the Commission's recognition of this fact. At present, as fair and effective asylum procedures and the application of a full and inclusive definition of a refugee cannot be guaranteed across the EU, there is a risk that returns without consent may lead to *refoulement*. Individuals must also not be returned to face the risk of violations of their human rights under international human rights law, in particular, Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the UN Convention Against Torture (CAT), and Article 7 of the International Convention on Civil and Political Rights (ICCPR).

Safety is not the only condition for return; other conditions are necessary to make return possible. We would argue that all returns must take place in 'safety and dignity' and, further, in compliance with UNHCR ExCom Conclusion 65 XLII: "without harassment, arbitrary

detention or physical threats during or after return". Returns must also comply with the Council of Europe Committee of Ministers Recommendation on the return of rejected asylum seekers.[1] This states that mandatory return should take place in a humane manner with full respect for fundamental human rights including, the principle of family unity, and without excessive use of force.

ECRE is in agreement with the Commission that "a return policy is needed in order to safeguard the integrity of the legal and humanitarian admission systems" (Introduction, para 5). We welcome the Commission's attempt to put forward common principles and standards "respectful of human rights and human dignity", this along with *non-refoulement* should form minimum standards to be guaranteed within a common return policy.

We note the Commission's assertion that "priority should be given to voluntary return" (2.3, para 3). We consider this to be partly misleading given that the paper only deals with *mandatory return*: return in the context of limited options for example when an asylum application has been rejected or protection status has ceased. Return can only be classified as voluntary when an individual has chosen to leave and has given genuine consent to do so. Although individuals may consent to mandatory return within the context of limited options available to persons who no longer have a legal basis for remaining in the EU, this is likely to be rare particularly in the case of failed asylum seekers. *Assisted return* and *forced return* are therefore more likely to be the norm in these circumstances.

We believe the Commission rightly acknowledges that "improvement of the efficiency and quality of the asylum procedure and of the assessment of protection needs is a prerequisite" to a common returns policy (2.3, para 2). Until effective asylum procedures with fair access to protection can be guaranteed across the EU, the risk of *refoulement* remains. We also welcome the Commission's acknowledgement of the international human rights framework applicable to a policy on return (2.4).

We endorse the suggestion that specific solutions or gradual approaches may be necessary in host Member States, and in countries of origin, "such as postponing the implementation of the removal decisions, allowing exploratory visits or stays, drawing up assistance packages…" (2.3, para 5). Such solutions may help to ensure that returns are more sustainable; whereas non-gradual returns might create or exacerbate unstable conditions and therefore lead to a greater risk of human rights violations and internal displacement.

We agree that "forced return is a very significant encroachment of the freedom and the wishes of the individual concerned" (3.1, para 1). We are in support of common standards relating to expulsion, detention and removal that ensure individual human rights are safeguarded during the return process. We would argue in favour of setting high standards and urge that a common return policy with harmonised standards on expulsion, detention and renewal should not lead to the lowest common denominator among Member States' practices.

Although the Green Paper highlights issues which we believe are central to a common return programme, we have a number of concerns. These are summarised below.

- We consider that, not only is "improvement" of asylum procedures and protection needs' assessment prerequisites to a common return policy (2.3, para 2) but - harmonised asylum procedures and a common definition of a refugee - are also a

[1] Recommendation No. R(99)12.

necessity. Until a common asylum system is in place a common return policy cannot be implemented.

- The Commission states that forced returns may give "a signal effect both on illegal residents in the Member States and on potential illegal migrants outside the EU" (2.2, para 4). We believe that deterrence should not be a major aim of a return policy; the focus should be to maintain the integrity of the asylum and legal migration system.

- We welcome the provision of "adequate effective possibilities for appeal against return decisions": these should include at a minimum a right to appeal with mandatory suspensive effect. ECRE considers that a right of appeal is not effective without the provision of basic socio-economic rights during the appeal period.

- We are concerned that the Commission appears to treat forced return and efficient return as one and the same thing (2.2, para 4). Forced return is not the most efficient type of return; returns with the consent of the individual are a more sustainable and efficient alternative, with fewer economic and social cost implications for the returning state.

Comments on the Green Paper are presented in greater detail below. They follow the order of the paper and address the questions posed by the Commission.

2.3 Asylum and return

We welcome the Commission's acknowledgement that applicants rejected under the 1951 Geneva Convention might still be in need of protection for other reasons and that "putting in place an appropriate subsidiary protection scheme is therefore crucial". It is necessary in the interests of fairness, efficiency and clarity that any proposal adequately reflects Member States obligations under international human rights law.

The Commission states that forced return may be a necessary last resort. We recognise that this may be the case but argue that it can only be contemplated when individuals have benefited from a fair and effective asylum procedure and where it has been established that there are no grounds under international human rights law for them to stay in the EU. For those whose international protection needs have ceased to exist the guidance in the UNHCR Handbook on procedures and criteria for determining refugee status should be followed.[2] This should take place within the context of examination of qualification for refugee status though and not in relation to return.

In order for people whose complementary forms of protection have ceased to be included in a common return programme, it is essential that the conditions and safeguards for cessation are harmonised for both complementary forms of protection and refugee status. [3]

[2] The Handbook states that the cessation clauses in the 1951 Geneva Convention, Article 1(C) are negative in character and exhaustive, they should be interpreted restrictively with no other reasons used to justify the withdrawal of refugee status (para, 116). In relation to circumstantial changes the Handbook states that such circumstances must be "fundamental changes, which can be assumed to remove the basis of the fear of persecution"(para, 135). It also proposes that exceptions should be made for refugees who are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country of nationality (para 136, UNHCR Handbook)

[3] see also Comments from the European Council on Refugees and Exiles On the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, detailed comments to Article 16, page 9 http://www.ecre.org/statements/statuscom.doc

The Commission states that refugees shall not be expelled from the EU except on grounds of national security or public order (2.3, para 3). For refugees whom Member States intend to expel on these grounds, the safeguards within Article 32(2) and (3) of the 1951 Geneva Convention must be guaranteed (see below 3.1.2.1). At present, differing and wide interpretations of what constitutes 'national security' and 'public order' may mean that Member States attempt to expel people who in principle should not be removed. Member States must interpret these terms in accordance with international human rights and refugee law and within the parameters of existing jurisprudence of the European Court of Justice (ECJ).[4]

The concept of 'public order' defined by the ECJ should be the starting point in this context despite having in the past been applied mainly to freedom of movement of EU citizens. With regard to the scope of "public security", the ECJ has found that this cannot be determined unilaterally without the control of the institutions of the Community,[5] and must be subject to strict scrutiny in accordance with the ECHR. Measures adopted must be in accordance with the principle of proportionality, and in relation to long-term residents a stricter burden of proof is required.[6]

2.5 Co-operation with Countries of Origin and Transit on Return and Readmission

The Commission states that when a person no longer has lawful grounds for remaining in the EU, they must return to their country of origin, or "where appropriate, of transit" (2.3, para 1). Priority should be given to return to the country of origin. There is no international legal obligation on transit countries to receive people who no longer have a legal basis for remaining in the EU, or to allow them to settle. Returns to transit countries may place an undue burden on areas where resources may already be limited, exacerbating instability. Strict safeguards therefore need to be in place that guarantee transit countries' compliance with international human right law and prevent *refoulement* of returnees to countries of origin.

The Commission suggests negotiating readmission agreements at the political level when countries are reluctant to readmit returnees (2.5, para 2). Readmission agreements must not lead to the systematic return of groups of people to countries of origin or third countries. Safeguards such as the right of suspensive appeal against a decision to return, and access to independent legal advice must in all circumstances be upheld, including when political agreements have been reached for countries of origin to receive large groups of people. All safeguards must be applied on an individual basis.[7]

We welcome the Commission's recognition that "returns have significant implications for countries of origin and transit" (2.5, para 2) and that avoiding negative effects on these areas should be considered. It is in the best interests of both individuals concerned and the EU that returns are sustainable. Support may therefore be necessary on return; it should be integrated with the aid provided to local communities, so that it may benefit both the country of origin and the individual.

[4] Commission Communication to the Council and the European Parliament on the special measures concerning the movements and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, Directive 64/221/EEC.
[5] Case 36/75 *Rutili*, as cited by the Commission in the above paper.
[6] Commission Communication, para 3.4.1.
[7] *Conka v Belgium*, (No 51564/99), 5 February 2002.

3.1 Common Standards

ECRE believes that as well as in relation to expulsion, detention and removal, common standards must also be set for incentives and support to be provided to returnees. Common practice in these areas is necessary for the effective harmonisation of asylum and return systems in the EU.

3.1.1 Definitions

The Commission has proposed a number of definitions in Annex I of the Green Paper. We have certain concerns in relation to these definitions. As stated in our summary of views return can only be classified as voluntary when an individual has chosen to leave and has given genuine consent to do so. Although individuals may consent to mandatory return within the context of limited options, this is likely to be rare, especially for failed asylum seekers.

Within this context we propose that the Commission acknowledges three categories of *mandatory return* for persons who no longer have a legal basis for remaining in the EU. First, *mandatory return with consent*, where the person chooses to return voluntarily to his/her country of origin or transit instead of staying illegally in the EU or being forcibly removed. Second, *assisted return*, where the individual has not freely consented to leave but has been induced to do so, by means of incentives in order to avoid the use of force. Third, *forced return*, where there is no genuine consent of the individual to return and force, in the form of restraints, is used to remove them from the country.

The Commission defines repatriation as "return to the country of origin, in both voluntary or forced return situations". In the interest of clarity, we believe it is more helpful to use the term repatriation only in relation to Convention refugees and others with legal protection status, who freely choose to exercise their right to return within the context of UNHCR's three durable solutions.[8]

3.1.2.1 Preconditions for Expulsion Decisions

Expulsion must be in compliance with international human rights law, in particular Article 3, ECHR.[9] The expulsion of persons who no longer have a legal basis for remaining in the EU must not be implemented on a collective basis but should involve a "reasonable and objective examination of the particular circumstances" of each individual.[10]

In relation to preconditions for expulsion decisions, we welcome the Commission's recognition that refugees and persons under other forms of international protection may require special protection during expulsion decisions. This is in line with the preamble to EU Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals, which declares that decisions on expulsion must be adopted in accordance with the ECHR, and the 1951 Geneva Convention.

[8] Executive Committee Conclusions on Voluntary Repatriation: No 18(XXXI) 1980, No 40(XXXVI) 1985, No 41(XXXVII) 1986, No 46(XXXVIII) 1987, No 55(XL) 1989, No 74(XLV) 1994.
[9] *Soering v UK*, A161 (1989).
[10] *Conka v Belgium*, (No 51564/99), 5 February 2002, where the European Court of Human Rights found a violation of Protocol 4, Article 4 when seventy-four Roma were collectively expelled from a Member State.

The Commission states that persons under international protection "may only be deported for grave reasons of public security and public order". ECRE would argue that preconditions for expulsion must fully reflect the safeguards of Article 32(2) and (3) of the 1951 Geneva Convention. Article 32(2) requires that a decision is reached in accordance with due process of law; the refugee is allowed to submit evidence to clear himself and is allowed to appeal and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority. Article 32 (3) requires that refugees are allowed a reasonable period of time to seek legal admission into another country.

Expulsion orders, against people who face a violation of their rights under Article 3, ECHR and other parallel provisions in international law cannot be issued regardless of whether they have committed crimes, or are a threat to national or public security.[11] Article 3 is of an absolute nature and therefore cannot be subject to qualification.

The Commission mentions a number of groups requiring special protection against expulsion, including refugees and persons under other forms of international protection. Within these categories, vulnerable groups that require special protection include: children, women, the elderly, victims of torture, people with disabilities or serious health conditions.

3.1.3 Detention Pending Removal

We welcome the Commission's recognition that "all coercive measures are a significant encroachment on the personal liberty of those concerned" and the proposal for minimum standards for detention orders, in particular "defining the competence of responsible authorities and preconditions for detention".

ECRE would welcome common binding standards on detention. These must require compliance with international human rights law, in particular Article 5 ECHR and Article 9, ICCPR and stress that detention may only be used as a last resort. We would propose that ExCom Conclusion No 44 should apply. This states that detention should normally be avoided and should only be resorted to in limited circumstances,.[12] We would argue that detention can only be an option if, following a fair and efficient refugee determination procedure, there is a failure by the rejected asylum seeker or person whose protection status has ceased, to comply with an order to leave the territory and there are no humanitarian grounds to grant a permit to stay.[13].

In a number of Member States detention prior to removal is unregulated and is not subject to effective review. We would welcome indications to Member States on the "regular and maximum duration of detention for removal purposes". Detention pending removal for indefinite and prolonged periods, where proceedings are not being conducted with due diligence, is unacceptable and does not comply with Article 5, ECHR.[14] We believe the duration of detention should be for the minimum period necessary which should be determined on a case-by-case basis.

ECRE welcomes the recommendation that 'technical or legal' alternatives to detention should be assessed (3.1.3, para 4). These alternatives should include: bail or guarantee systems and

[11] *Chahal v UK* (1997) 23 EHRR 413.
[12] Executive Committee Conclusions – Detention of Refugees and Asylum Seekers – No 44 XXXVII-1986.
[13] Position on the Detention of Asylum Seekers, ECRE, April 1996, para 12(c), http://www.ecre.org/positions/detain.shtml.
[14] *Quinn v France* [1997] EHRLR 167.

supervision systems, whereby individuals are supervised by an NGO, and a system of incentives and penalties that are used to ensure co-operation. Restrictions on freedom of movement or place of residence, with reporting requirements could also be considered provided that individuals' human rights are not violated by forcing them to reside in isolated areas.[15]

3.1.4 Removal

We support the final safeguard proposed by the Commission, which is to protect against *refoulement* and would urge that there is a necessity to include it in a future Directive on Minimum Standards for Return Procedures. We would also recommend as a further safeguard that a return policy must be consistent with all EU instruments on asylum and immigration.

The use of restraints to affect returns must comply with Member States international human rights obligations and ensure that individuals are treated with respect and dignity. In particular, it is essential that the removal process does not lead to violations of Article 3, ECHR. In some states across the EU, practices used to facilitate returns may be found to amount to inhuman or degrading treatment; within this context we would recommend that human rights observers are present throughout the removal process to prevent human rights violations and medical experts are also available. An Ombudsman, appointed at national level could report on compliance with human rights standards during removals taking into account the individual reports from human rights observers.

The Commission proposes a mechanism to streamline Member States' return practices to specific countries of origin (3.1.4, para 5). We believe that more research is required in order for returns to be streamlined in this manner. We would welcome consultation with UNHCR, and recommend that NGOs and development agencies are also involved in this type of research. Common assessment of returns to specific countries may be a useful tool in preventing removals to unsafe conditions.

3.1.5 Mutual Recognition of Return Decisions

We endorse the Commission's acknowledgement that a proposal for a binding framework on mutual recognition of return decisions would have to take "the necessary progress of harmonisation in the field of asylum duly into account". At present in the absence of harmonised asylum procedures and a common definition of a refugee, mutual recognition of return decisions would be inadvisable.

3.5 Return Programmes

We agree with the Commission that it is important for return projects to have a follow-up component in the country of origin. Follow-up monitoring and access to embassies and refugee assisting NGOs, may be necessary to ensure that individuals are not at risk of persecution. Information elicited can then be taken into account when assessing the possibility of future returns to particular countries.

Return programmes should be in full accordance with the principle of family unity; families should not be separated prior to or during any return. In deciding upon the timing for returns, priority should be given to education, especially for minors, which should not be unnecessarily interrupted.

[15] Research Paper on Alternatives to Detention: Practical alternatives to the administrative detention of asylum seekers and rejected asylum seekers, ECRE, September 1997, http://www.ecre.org/research/alterns.doc.

The transfer of savings, returns on taxes or pensions should also be guaranteed on return.

3.5.2 Consideration of a European Return Programme

ECRE would welcome a European Return Programme, in conjunction with a common European asylum system. Any programme must make a clear distinction between different types of mandatory return and be in full compliance with international law.

We would urge that the process of establishing a European Return Programme is transparent and that there is effective consultation with UNHCR, NGOs and other interested organisations. We look forward to participating further in this consultation process.

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