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REPORT

of the Committee on Civil Liberties and Internal Affairs

on the harmonization within the European Communities of
Asylum Law and Policies

Rapporteur: Mr Patrick COONEY

PART B: EXPLANATORY STATEMENT

* Consultation procedure requiring a single reading
** I Cooperation procedure (first reading)

PE 201.540/B/fin.
or EN
** I Cooperation procedure (second reading) requiring the votes of a majority of the current Members of Parliament
*** Parliamentary assent requiring the votes of a majority of the current Members of Parliament

B.
EXPLANATORY STATEMENT

INTRODUCTION

Since the middle of the 1980's there has been an unprecedented rise in Member States in the number of persons seeking asylum.

The recent large influx of refugees into the Community has dramatically put the spotlight on the Member States' asylum laws and procedures and has underlined the urgency of the need to harmonize them. The need for harmonization of the obligations arising under the Geneva Convention was politically acknowledged at the Luxembourg Council in 1991¹ and was reiterated by the Declaration on Asylum attached to the Maastricht Treaty which envisaged a harmonised approach by the Member States to be in place by the beginning of 1993. Even if the present unprecedented influx had not occurred the advent of the Single Market and the abolition of internal frontiers with the consequent importance of a common external frontier, meant that the Member States laws and procedures in this area have to be harmonised. In order to progress matters, the Luxembourg Council of June 1991 had asked the Commission to communicate with the Council and the European Parliament on Asylum and Immigration. Institutionally speaking, this was quite a significant development because of the involvement of the Commission and the recognition that the European Parliament has a voice and a role in this area which is juridically intergovernmental. Of course the European Parliament had already addressed this subject of Asylum and refugees in general terms in a number of Reports² and the logical sequence is that the Parliament should now address the current topic of harmonization, particularly because it is the voice of the people of the Community. In this democratic role it must be involved as the vindicator of the asylum seeker as an individual whose need of protection must always take precedence over the expedient needs of state policy. In truth there should be no conflict because the Member States, prosperous and well organised, the contemporary trustees of the values of European civilisation, will surely want to welcome, protect and assimilate the asylum seeker in discharge of their humanitarian as well as their legal obligations.

This explanatory memorandum discusses the main aspects of harmonization which are addressed in the Motion for resolution to be put to Parliament.

THE LEGAL BASE

The Geneva Convention of 1951 and its attendant Protocol of 1967 constitute the legal base for the Member States' Laws and Procedures. All the Community countries have ratified this Convention and by doing so they have accepted the obligations of it. These obligations are specific and humanitarian and must not be lost sight of when they tend, as at present, to be obscured by the logistical difficulties of dealing with a large influx. Consequently, it is important that the Member States through the European Council at Edinburgh will publicly and formally reiterate the obligations arising from their

¹ General conclusions of the Council 28/29 June 1991 - 14/S/91

² (1) Vetter Report A2-227/86 (2) Malangre Report A3-199/91

adhering to the Convention, thereby giving witness to the human face of the Community. It is also important to recognise publicly that the UNHCR has a central role to play in all Asylum matters and that there is an obligation in International law to honour that role.³ Even if there were no such legal obligation it would be in the interests of the Member States to involve the UNHCR as heavily as possible because of the expertise that their body has built up through close involvement with the problem of refugees over many decades. The UNHCR with that experience and its great corpus of knowledge is an invaluable asset to aid the Member States in their search for harmonization and in the subsequent implementation of the harmonized procedures. "A strong presence of the UNHCR in European countries will therefore always be necessary and desirable".⁴

With the huge influx of refugees it is essential that there be clarity in defining those entitled to refugee status under the Geneva Convention and thereby acquiring further rights. The Convention applies to any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality and membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country ...".

The interpretation of this Article has given rise to difficulties, in particular because the terms "well-founded" and "persecution" can mean many things. It is important, moreover, that the interpretation within the Member States be as consistent as possible, for consistency in this regard has to be fundamental to any process of harmonization. We just simply could not have harmonization unless there was a consistent interpretation of qualifications for refugee status. It is recommended that in order to achieve this consistency Member States should have recourse to the UNHCR Handbook on Procedures and Criteria which deals comprehensively with this very difficult point. In addition, of course, new cases will arise which do not come within any of the existing definitions and in order to deal with these as they arise the Community should have a body with members from the Council, the Commission, the UNHCR and possibly assisted by legal experts (nominated by the European Court of Justice ?) available to meet on an ad hoc basis to consider cases not falling within the accepted norms and their decisions could over time be built into a body of precedents to be used in conjunction with the UNHCR Handbook. In addition this body could be charged with giving rulings on points of difficulty in the administration or interpretation of the rules and procedures relating to harmonisation and could possibly acquire a quasi judicial status as a half way house to the time when asylum will be a full Treaty matter with consequent jurisdiction for the European Court of Justice.

DE FACTO REFUGEES

The entitlement to asylum arising under the Geneva Convention is quite limited in its scope and it does not extend to many, possibly the majority of those currently seeking refuge. They are fleeing from civil unrest, actual civil war and consequently of course, have a humanitarian claim to be afforded refuge. In the context of harmonization of the Community's laws on the

³ Geneva Convention 1951 Article 35

⁴ Declaration by Caritas Europa on the Harmonization of the Right of Asylum in Europe 1992

subject of asylum two questions arise in relation to these de facto refugees, the legal and the practical.

De facto refugees do not have a claim under the Geneva Convention and to bring them under it would involve amending the Convention. There is an understandable hesitancy in wanting to tamper with an international legal instrument because of the administrative complexities and the long time delay involved and there is also the fear that other changes might be sought in the existing instruments which could be controversial or divisive. This view, however, leaves the de facto refugee without an obvious and specific legal base but it can be contended that as a matter of international law, de facto refugees by virtue of their human rights entitlement have a legal right to be afforded refuge in a Member State, all of which are adherents to the European Convention on Human Rights.⁵ No Member State will deny its humanitarian obligations in this regard and should any doubt arise as to the status of persons seeking de facto refuge one simple criterion is available, viz. are the persons in question of concern to UNHCR and, if so, they must be deemed to fall into this de facto category. The problem is too immediate, too urgent to delay in seeking other criteria, to provide a legal base for de facto refugees will be lengthy and difficult. Consideration however should be given to drawing up a Convention on refuge to cover those in need of protection but not covered by the Geneva Convention.

The problem of the de facto refugee is currently a major one for the Member States. In practical terms what is required is cooperation and solidarity between them so that the burden of receiving the refugees does not fall unfairly on any one Member but is shared. The sharing should be both financial and should include a willingness to disperse the numbers. This obligation arises from the solidarity that is part and parcel of membership of the European Community.

The ultimate solution of the problem of de facto refugees however, requires the re-establishing of political stability in the areas producing the refugees, otherwise Europe will be faced with what the High Commissioner described "as an open-ended relief programme and a massive permanent refugee problem".⁶ While it is easy to be wise after the event, the disintegration in the Balkans should have been foreseen and provides a horrific reason for early and sensitive action to prevent the like happening elsewhere.

LEGAL CODE AND PROCEDURES

Comparative studies of the legal systems of the Member States show wide disparities both of substance of law and procedures.⁷ Indeed, in several Member States there are no constitutional or statutory provisions enshrining

⁵ Vide ICJ Review June 1992 No.48

⁶ Speech by United Nations High Commissioner for refugees Mrs. OGATA at Geneva 29 July 1992

⁷ Survey of the Right to Asylum in the Community Member States as of 1 October 1991 - PE 200.603/Ann

Comparative Study on the Provision of Publicly Funded Legal Services for Asylum Seekers in the Twelve Member States by the Immigration Law Practitioners Association

the obligations of the Geneva Convention and access to the Asylum procedure is informal and the fate of the asylum seeker is very much in the hands of individual officers not amenable to public scrutiny. Harmonization requires that there be broadly similar procedures in each Member State, procedures which first of all are founded on a positive legal instrument in that State establishing the right to refuge under the Geneva Convention, guaranteed access to the admission process with humane and comprehensive examination of the application by officials trained to a common standard, provision for appeal on an administrative level and where necessary to a judicial tribunal. There should also be as a matter of course in each Member State ancillary supports in the form of legal aid and interpretation when required. The system should also provide as a matter of course for calling in aid, by either the receiving country or the applicant, of the services of UNHCR. The right to asylum is age old ("I was a stranger and you took me in" Matthew 25V35) but fragile and as a consequence must have such a system to protect it.

CARRIER SANCTIONS

It is a truism to say that an applicant for asylum must be able to make his application and his right to do this must be unfettered. If the asylum-seeker is prevented from having access to the system by any Member State then that State is automatically in breach of its obligations under the Geneva Convention. Carrier sanctions have the potential to preclude access to the system. Their legality having regard to the Chicago Convention on International Civil Aviation is at least questionable.⁸

Transport companies, generally airlines, can find themselves prohibited, under pain of severe penalty, from carrying and landing persons not in possession of valid admission documentation. Personnel of the transport company at the point of embarkation have their obligation to their employers and to their own jobs and, understandably, will not embark persons who cannot comply with the rules to be found at the point of disembarkation. Asylum seekers, having regard to the definition in the Geneva Convention, are very likely to be persons unable to procure proper documentation either because of the hostility of their own government to them or because they have had to flee hurriedly. Fear of sanctions means that such people will be refused passage. Carrier sanctions therefore are a direct impediment between these people and their rights under the Geneva Convention. There can be no argument but that a Member State which imposes carrier sanctions is in breach of its obligation. It is not sufficient for such Member States to argue that the absence of carrier sanctions would open the doors to an influx of economic immigrants posing as asylum seekers, because that problem can be dealt with by enhanced procedures which can reject the unfounded while admitting the genuine. Undoubtedly, this would be more troublesome and probably more expensive for the State concerned but it is a price that has to be paid in order to honour the obligations imposed by adhering to the Geneva Convention. Likewise, the creation by some Member States of so-called international zones⁹ at airports where would-be asylum seekers can be detained and returned without being permitted access to the system on the grounds that they were in an international zone and had never entered the territory of the nation concerned

⁸ Vide "The effects of Carrier Sanctions on the Asylum System" published September 1991 by Danish Refugee Council and ECRE

⁹ "The Effects of Carrier Sanctions on the Asylum System" op cit

is a spurious stratagem and where that practice exists it should be terminated.

MANIFESTLY UNFOUNDED APPLICATIONS

There is of course a great and understandable temptation for would-be economic immigrants to avail of the asylum procedure with the object of getting their toe in the door. Such applications can clog the process to the prejudice of the genuine asylum seeker. They can also antagonise public opinion with the risk of a hostile political backlash which does not discriminate between the genuine application and the unfounded.

"Distinction between genuine and manifestly unfounded asylum claims is a very delicate one, though necessary if the asylum structure is to survive"¹⁰

Nevertheless they have to be dealt with and speedily. In an effort to meet this difficulty accelerated admission procedures have been devised. The danger of having an accelerated procedure is that the genuine case of complexity or difficulty may not be teased out as it deserves and as a result asylum would be refused.

A safer solution to the problem is to have more personnel available. The number required, depending on the influx might be substantial and it would be unrealistic to expect any Member State to maintain such a corps of officials in anticipation of a demand that might not materialise. However in the context of harmonised laws and procedures among the Twelve it should be possible to deploy personnel between the Member States as required. Language difficulties would not be such a problem as might at first sight appear, because interpretation facilities are going to have to be in place in any event. Standardised training programmes devised with the help of UNHCR could ensure a common approach by the personnel in question.

The normal right of appeal, if it were to be available in these cases would pose a real difficulty. It has to be assumed that it would be widely availed of, if for no other reason than to keep the toe in the door. If it were to be available unfettered, the system would quickly become clogged and the benefits of streamlining at the initial stage would be vitiated. It must therefore be conceded that in the case of manifestly unfounded applications a special and simplified review procedure to be supervised by UNHCR should be devised.

DETENTION

The question of the detention of asylum seekers is emotive and difficult.¹¹ It is emotive because it infringes adversely on that most basic human right, the right to be free, the very need that almost certainly inspired the asylum application. The difficulty arises from having to decide if detention is necessary to protect the asylum system itself from abuse and if so to what extent.

¹⁰ Submission of Mr. Van Arnim, Office of UNHCR to Committee
PE 200.615

¹¹ Vide Working Document of UNHCR Regional Office for the European
Institutions - March 1992

It must be obvious that there is a temptation for an applicant either during the initial application or when awaiting the determination of an appeal, doubtful or ignorant about the validity of his case, to go underground with the possibility, because of the dismantling of internal frontiers, to travel on the to other Community countries. If this were to happen on any significant scale, there would undoubtedly be an adverse public reaction which would damage the whole system because it depends for its efficacy not just on its formal acceptance by the State but more importantly it must be underpinned by as much public goodwill as possible. Detention to counter this must be available as an option.

It should however be applied sparingly, be as short as possible, be non penal in nature and as a minimum comply with the United Nations Body of Principle for the Protection of Persons under Imprisonment or Detention. It would be useful too, if Member States were to issue an annual report on how they operated detention.

Safe Country of Origin or First Asylum:

Among those working in the area of asylum there are mixed views about the concept of a "safe country" whether it be of origin or first asylum. The latter is sometimes called the first port country meaning a country where the asylum seeker did or could have sought refuge before arriving in another country to make a new application.

There is a view that there is no such legal concept as a safe country and to introduce it is to permit a geographical restriction to the Geneva Convention.¹²

Member States as a matter of practicality take a pragmatic view and feel there is no option in practice to observing that in certain circumstances countries exist to which the term can be safely applied.

The crux of the matter is to determine when the concept can be "safely" applied. To assist in this, various criteria have been identified with the overall objective of ensuring that no injustice can be done to the asylum seeker in the sense of thwarting his entitlement to asylum or terminating prematurely a right to asylum when granted.

The debate continues and the subject is archetypically one where the Member States must take guidance from the UNHCR which has the unique capacity to form a global overview of this sensitive question.

Article K.9 of the Maastricht Treaty

Having opted, as stated in the introductory section, to harmonize their asylum laws and procedures by the beginning of 1993, the Member States must be presumed to want the new regime to operate as efficaciously as possible. They must know that this is not easily attained on an intergovernmental basis which is the method envisaged. Indeed they implicitly acknowledged this by adopting the Declaration on Asylum attached to the Maastricht Treaty and which foresees invoking by the end of 1993 article K.9 so as to apply Article 100c of the

¹² Vide Submission by Mr. Philip Rudge ECRE to the Committee
PE 201.532

Treaty to asylum matters. The legal base and the jurisdiction given by Article 100c is the best way of achieving the common ambition of an effective efficient and humane asylum regime.

One must hope that the Maastricht Treaty will soon be ratified and early signals given that the Declaration will be honoured.