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Statewatch European Documentation &
Monitoring Centre on justice and home
affairs in the European Union

PO Box 1516, London N16 0EW, UK
tel: 0181 802 1882 (00 44 181 802 1882)
fax: 0181 880 1727 (00 44 181 880 1727)

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NOTE

from :	Danish delegation
to :	Migration Working Party (Expulsion)
Subject :	Readmission Agreements concerning third-country nationals

Background

On 13 July 1998, the then Austrian Presidency submitted a draft Readmission Agreement between the EU Member States, of the one part, and third countries, of the other part.

The Migration Working Party (Expulsion) has since been examining that draft in detail.

For our purposes a third-country national is taken to mean a stateless person or a person who is not a national of the Community or of the country with which the Community is concluding a Readmission Agreement (see the definition in Article 1(1)).

At the meetings on 23 October 1998 and 8 March 1999, the Danish delegation said that a discussion of principle was wanted on the question of which third-country nationals were to be covered by the readmission obligation in Article 3 of the draft. The German Presidency therefore asked delegations at the meeting on 8 March 1999 to examine the matter with a view to an

in-depth discussion at the Working Party's meeting on 28 April 1999.

The Danish delegation has therefore drawn up this note in order to explain Denmark's position.

There is a basis in international law for an obligation to take back one's own nationals and this is not affected by the conclusion of a Readmission Agreement. The same obligation cannot, however, be assumed to apply in the case of third-country nationals.

It is therefore in principle necessary to consider carefully which third-country nationals should be covered by the draft agreement, since this may well be the first legally binding instrument imposing an obligation to take back third-country nationals. It is also necessary to consider the problem of reciprocity, i.e. the fact that the Community must be prepared to readmit third-country nationals on the same terms as the Contracting State. It should be noted here that those countries with which it may be of interest to conclude agreements would not in theory have any problems with expulsions to the Community.

Contents of Article 3 of the multilateral Readmission Agreement

Article 3(1) of the draft states that the EU and the Contracting State must readmit without any further formalities third-country nationals who do not, or who no longer, fulfil the conditions in force for entry to or residence on the territory of the requesting State provided that it is proved or may be validly assumed that such persons entered the territory of the requesting State after residing in the territory of the requested State.

Present regulations and earlier discussions concerning the obligation to readmit third-country nationals

Within the EU

On 30 November 1994, the Council adopted a position on a standard draft for bilateral Readmission Agreements between a Member State and a third country. The position stipulated inter alia that the Member States should as from 1 January 1995 use the draft as a basis for negotiations with third countries for the conclusion of Readmission Agreements. It should be noted that the standard draft does not contain any provisions on the readmission of third-country nationals.

Within Schengen

In November 1997 a draft was submitted in a Schengen context for a standard Readmission Agreement between a Schengen State and a third country; that draft does contain provisions on the readmission of third-country nationals.

In the autumn of 1998, it was decided that the discussions should be continued in an EU context.

In other fora

In a Nordic context, an NSHF Working Party on expulsion problems has just completed a study of Readmission Agreements. A report was issued entitled "Analysis by the Institute of Readmission Agreements – including an assessment of whether it is advisable to conclude such agreements and whether there are other ways of encouraging the country of origin to readmit third-country

and its own nationals". That report was sent for information to the Migration Working Party on 11 March 1999.

In the Intergovernmental Consultations (IGC) background paper on Readmission Agreements of September 1998, Readmission Agreements/arrangements are defined as also – in certain circumstances – covering third-country nationals who have passed through the requested State's territory or have been granted a residence permit there.

After a first reading in January 1999 of the Protocols on illegal immigration and traffic in women and children, the UN's ad hoc Committee on transfrontier crime considered proposals for provisions obliging the Contracting States to readmit both their own and third-country nationals who have been victims of treatment covered by the Protocols and had the right when entering the host State to residence in the first State (i.e. the requested State).

Readmission of third-country nationals

The abovementioned report from the NSHF Working Party concerning expulsion problems concludes that there cannot in the case of third-country nationals be assumed to be a readmission obligation under international law, but if the third-country national has been residing in another country, the period of residence – and the longer it has been – may result in an obligation to readmit that person. If Readmission Agreements dealing with third-country nationals are entered into, such an obligation will then be specified in the agreement.

Danish views and experiences

It should be stressed by way of introduction that Denmark is in favour of the Readmission Agreement including provisions on the readmission of certain third-country nationals. The problem is also an important one at present within the Community, e.g. as a result of the Association Agreement with Egypt where long drawn-out negotiations have shown that the specific issue of the readmission of third-country nationals causes difficulties.

Denmark is in favour of the idea of a multilateral Readmission Agreement with the Community of the one part and a third country of the other part as the Community can bring up readmission as one problem among others in the course of negotiations and will be able to do so more forcefully than would be possible for any single country.

Denmark does not see any reason itself to conclude Readmission Agreements with all countries. In some cases this is not regarded as useful, e.g. where de facto readmission exists or only a limited number of people are involved.

Denmark has positive experience of using the standard draft and this has for example formed the basis of negotiations on Readmission Agreements with Bulgaria and Romania. Experience in this connection has shown that the standard draft provided valuable guidance during negotiations.

Denmark has an obligation to readmit certain third-country nationals under Readmission Agreements with the following countries: Romania, Bulgaria, Slovenia, Estonia, Latvia and Lithuania.

Basis for discussion

In the draft Article 3(1), the criterion for application of a readmission obligation is that it is proved or may be validly assumed that the third-country national concerned has resided in the territory of the requested State.

At first glance the criterion of "residence" does not seem to be sufficient in itself. This could in principle mean that all third-country nationals who have ever passed through a Member State must be readmitted. There is for example no requirement regarding the legality of residence, its duration, the condition that the person must have travelled directly from the requested to the requesting State or any other connection. It would *inter alia* seem important to make clear how far there should be an obligation to readmit a person who has been allowed to reside for the purpose of court proceedings.

Denmark is of course aware that additional criteria would make it more difficult for the Member States to expel third-country nationals. The Community must be prepared to accept that a Readmission Agreement will normally form part of a broader context and that the Contracting State will usually have no problems with expulsion to the Community. Consideration could therefore be given to some other way of formulating this reciprocity.

Denmark thinks that it should continue to be possible to take decisions on the first country of asylum where importance can be attached *inter alia* to the question of the country with which the applicant has the closest ties. Denmark also thinks that a distinction should be made between provisions on readmission and provisions on return. A Readmission Agreement should not include rules on return. One of the reasons for this is that too many aspects would be covered and the agreement would become unnecessarily complicated.

Since it can be assumed that this is the first time an obligation to readmit third-country nationals will be laid down in an international legal basis, the way the text is formulated may influence other similar agreements. Denmark's experience also shows that the standard draft can play a significant role in negotiations on Readmission Agreements. Denmark therefore thinks it important that the right criteria should be chosen for determining when a readmission obligation should exist.

Proposal

Denmark feels that, if an obligation to readmit third-country nationals is to be laid down, consideration should be given to the question of which country is the most appropriate to assume responsibility for the person concerned.

This principle is already partly expressed in Article 3(3), which states that the readmission obligation pursuant to paragraph 1 shall not apply in respect of a person who was in possession of a valid visa and/or other residence permit when entering the territory of the requesting State or who was issued with a visa and/or residence permit after entering its territory.

It is therefore Denmark's view that legal residence is sufficient to determine a readmission obligation, i.e. that this should be one of the criteria for determining a readmission obligation where the third-country national concerned is or has been in possession of a valid visa and/or other residence permit in the requested State.

Denmark does not however think this is sufficient, since there may be other cases which should be covered, e.g. if the person concerned was born and grew up in the State in question, but has since become Stateless through no fault of his own.