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Warsaw, 21 September 2007

d.Dz, 3370/07

Immigration and Asylum Unit – "Green Paper on Asylum"
Directorate General Justice, Freedom and Security
European Commission
B-1049 Brussels

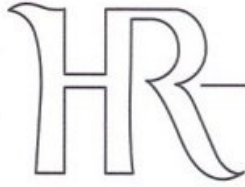
Dear Sir/Madam,

Please find enclosed the opinion on the Green Paper on the future Common European Asylum System (COM(2007) 301) prepared by lawyers of the Helsinki Foundation Programme of Legal Assistance to Refugees and Migrants.

Yours faithfully,

Danuta Przywara
Vice-President of the Board





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The Helsinki Foundation for Human Rights, based in Warsaw, is a leading Polish human rights NGO. The Programme of Legal Assistance to Refugees and Migrants was established in 1992, in order to provide, free of charge, legal assistance to all foreigners in need and represent them in front of the asylum and migration authorities, as well as the Regional Administrative Court. The Helsinki Foundation lawyers take part in monitoring activities and educational campaigns, international projects, and also play an important role during the legislative process by preparing opinions and taking part in discussions on amendments to legal acts.

The Helsinki Foundation welcomes the publication of the Green Paper on the future Common European Asylum System (COM(2007) 301) presented by the Commission and would like to use this opportunity to take part in the debate on the second stage of forming the CEAS.

In our opinion, the common asylum system can be achieved by identifying common features of the refugee status determination procedures in all EU member states, such as the type of procedure used, the system adopted by administrative authorities, appeal procedures, judicial control of the decisions and the introduction of a mandatory single procedure. Another important aspect is the unification of the rights granted to asylum seekers awaiting a decision and to all categories of persons granted international protection after the procedure is finished. The third fundamental issue is sharing the responsibility between member states as far as the reception and processing of asylum applications is concerned. We believe that the member states facing big refugee flows should receive financial support in order to be able to provide efficient assistance and dignified treatment to all foreigners in need of protection.

We would like to focus on some questions presented by the Commission for the public debate, concentrating on the issues which are in our field of expertise.

(1) How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?

The right to international protection should be a fundamental element of the asylum procedure. Therefore, we propose that every foreigner applying for international protection should have the right to individual and thorough asylum procedures. Financial, institutional and technical resources should be provided, in order to guarantee proper access to such procedures for asylum seekers¹. Thorough case investigation undertaken in the first instance by the authorities will affect the number of appeals lodged by foreigners, and at the same time, the length of the procedure as well as the costs of the foreigners' stay in reception centres.

We also believe that the maximum time for proceeding with applications should be clearly defined. The length of the procedure differs in different member states, rising in some cases to up to 5 years. In our opinion, the negative consequences of prolonged procedures, such as the constant state of uncertainty or disadvantageous influence on integration into society, should be eliminated. Taking this into consideration we propose that the right to reside should be granted automatically when the procedure lasts longer than 3 years.

We would also like to propose abandoning the use of the accelerated procedure in the first instance. It raises concerns from the point of view of the 1951 Refugee Convention. We believe that the accelerated procedure should be applied only when the case is dealt with by the higher authorities. The conditions for applying this procedure should reflect UNHCR recommendations² and relate only to cases manifestly unfounded (not relating to the criteria of granting refugee status from the 1951 Refugee Convention) or clearly fraudulent.

The accelerated procedure should only be applied by the first instance authorities in cases of vulnerable applicants, whose state of health requires prompt consideration over manifestly well-founded applications.

Additionally, each appeal arising from the first decision should have a suspensive effect. We consider this condition as one of the most essential guarantees within the procedure of granting international protection.

We also propose changes in the Qualification Directive which sets the conditions of refusal of international protection due to security issues. Such regulation is inconsistent with the 1951 Refugee Convention's obligations and with the European Convention on Human Rights. In every case, refugees should have guaranteed absolute protection against deportation on the basis of articles 2 and 3 of the European Convention.

We believe that every foreigner applying for international protection should have guaranteed basic rights within this procedure: the right to free legal aid; the right to contact the UNHCR and

¹ ECRE, *Towards Fair and Efficient Asylum Systems In Europe*, <http://www.ecre.org/files/ECRE%20WF%20Systems%20Sept05.pdf>

² UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, <http://www.unhcr.org/excom/EXCOM/3ae68c6118.html>

non-governmental organizations; the assistance of qualified and independent translator; the right to individual status interview and the right to appeal with suspensive effect. These rights should not be limited under any circumstances, even in cases of accelerated procedure.

(2) How might the effectiveness of access to the asylum procedure be further enhanced? More generally, what aspects of the asylum process as currently regulated should be improved, in terms of both efficiency and protection guarantees?

The right to apply for protection against persecution constitutes a basic human right, therefore we believe that effective access to the procedures should be guaranteed by granting every asylum seeker the right to enter the territory of the European Union.

Firstly, every foreigner should have the right to lodge an application for refugee status to the asylum or migration authorities, and such applications should not be examined by border police but by specialized personnel. We consider the airport and border procedures as being inconsistent with obligations emerging from the 1951 Refugee Convention. Border protection authorities can only be responsible for the formal acceptance of applications and should be obliged to transfer them immediately to the appropriate authorities. We also believe, that detention of foreigners in transit zones of international airports should always be a matter for judicial control.

Secondly, asylum seekers should not be punished for not possessing the appropriate documents allowing them to enter EU territory, such as a passport or visa. Otherwise, it is inconsistent with article 31 of the 1951 Refugee Convention. Lack of such documents, or possession even of illegal ones, should not influence in any way the right to apply for asylum.

Thirdly, we would like to suggest taking into further consideration changes in the definitions of 'safe third country' and 'safe country of origin' concepts. We propose that applications from countries considered as safe should not be automatically qualified as manifestly unfounded. By contrast, citizens of other EU member states should equally have the right to apply for refugee status.

We would like to draw attention to the necessity of regulating the rules regarding the estimation of the ages of foreigners in such a way that minors would be guaranteed effective protection. In such cases when an estimation using teeth or wrist bone does not precisely indicate the age of the asylum seeker, presumption of a lower age estimate should prevail.

(3) Which, if any, existing notions and procedural devices should be reconsidered?

(4) How should a mandatory single procedure be designed?

(5) What might be possible models for the joint processing of asylum applications? Under what circumstances could a mechanism for joint processing be used by Member States?

Reception conditions for asylum seekers

(6) In what areas should the current wide margin of discretion allowed by the Directive's provisions be limited in order to achieve a meaningful level-playing field, at an appropriate standard of treatment?

In relation to the conditions of reception of asylum seekers, we believe that high uniformity in this respect will not help to avoid secondary movements of foreigners.

We can mention two fundamental reasons for such secondary movements of asylum seekers:

- presence of family members/representatives of the ethnic group in another country;
- economic inequalities in member states and, as a result, differences in standard of living, salaries, welfare assistance and access to medical services.

This issue is very difficult and needs further consideration. Even if standards of reception are regulated at the European level, assistance to asylum seekers will depend on the general economic situation in the country, and level of social assistance guaranteed to citizens. Therefore, taking into consideration the financial resources of member states, setting uniform reception conditions could be too demanding.

We also believe that every foreigner should have a guaranteed right to welfare assistance during the refugee procedure and appropriate living conditions in reception country. Unification of reception standards could be processed only with financial assistance from the European Refugee Fund resources.

(7) In particular, should the form and the level of the material reception conditions granted to asylum seekers be further harmonised?

We believe that the form and level of the material reception conditions granted to asylum seekers should be harmonised. See above paragraph.

(8) Should national rules on access to the labour market be further approximated? If yes, in which aspects?

In our opinion, the right to work should be considered as one of the most fundamental elements of the reception of asylum seekers and the most effective integration tool. Therefore, the right to work should be granted if the refugee procedure lasts longer than 6 months. We also believe that asylum seekers should have the right to work guaranteed without the need to obtain a work permit.

(9) Should the grounds for detention, in compliance with the jurisprudence of the European Court of Human Rights, be clarified and the related conditions and its length be more precisely regulated?

In the opinion of the Helsinki Foundation, unification of legal regulations relating to detention is necessary. We believe that foreigners applying for asylum or refugee status should not be, as a rule, detained in isolation institutions. Every decision on the detention of an asylum seeker should be in accordance with the standards set by the European Court of Human Rights. We see the need to specify the conditions for detention also in accordance with the 1951 Refugee Convention and the UNHCR recommendations³. Detention conditions, length of detention and issues of criminal

³ UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999, <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>

responsibility of foreigners illegally crossing borders should be unified. We believe that crossing the border illegally should not be punishable. On the other hand, knowing that, *inter alia*, many asylum seekers are trafficked into Europe, the EU member states should concentrate their efforts on fighting criminal organisations dealing with human trafficking.

Detention for migration reasons, in particular with the purpose of deportation, should not last longer than 6 months. We believe that minors and their guardians should never be detained.

Granting of Protection

(10) In what areas should further law approximation be pursued or standards raised regarding

– the criteria for granting protection

– the rights and benefits attached to protection status(es)?

We believe that further unification of the criteria for granting protection will have limited influence on the content of asylum decisions. Decisions are also influenced by international policies of member states and the interpretation of the definition of a refugee in individual cases by officials or judges. On the other hand introducing more detailed interpretation criteria, described by UNHCR and the doctrine, will lead them to become binding for the decision makers and will influence the content of decisions. This issue requires further consideration.

Secondly, we opt for unified status for foreigners fulfilling the criteria for refugee status and subsidiary protection, including: the right to the same integration program, unlimited access to the labour market and the possibility to start and conduct economic activity, access to education, medical assistance and social benefits on the same basis as the citizens of the country providing protection. Unification of this status at the Community level should lead to its recognition in other EU countries. This is especially important if the current rules for determining the responsibility for processing refugee applications are maintained. We believe that in such a situation rights granted to refugees on the basis of the 1951 Refugee Convention should not be limited.

The right to obtain travel documents by foreigners granted a subsidiary form of protection should also be taken into consideration. In our opinion such foreigners should have the right to a uniform "European" travel document, respected by other countries, which would give them the right to travel throughout the European Union on the same basis as recognised refugees.

(11) What models could be envisaged for the creation of a "uniform status"? Might one uniform status for refugees and another for beneficiaries of subsidiary protection be envisaged? How might they be designed?

(12) Could a single uniform status for all persons eligible for international protection be envisaged? How might it be designed?

(13) Should further categories of non-removable persons be brought within the scope of Community legislation? Under what conditions?

In our opinion the status of persons whose deportation to a third country must not be carried out, as it would lead to violations of rights guaranteed by binding international human rights instruments (above all the European Convention on Human Rights), should be established at the EU level. This unified form of protection should be granted to those foreigners who do not qualify for international protection, but there are obstacles to their deportation i.e. because of poor health, in extradition cases, or in cases of unaccompanied minors. We also propose granting the right for such protection to foreigners whose deportation would violate the right to private and family life within the meaning of the European Convention on Human Rights and/or children's rights within the meaning of the Convention on the rights of a child. The situation of unaccompanied minors who become 18 while awaiting expulsion has also be taken into account.

These people should have the right to residence, the right to medical insurance and welfare benefits, as well as the right to work. Consideration of the conditions for granting such protection in the single procedure should be obligatory, and issuance of the decision on deportation shall not be a precondition for issuing such a decision (e.g. in Polish legal system a decision on granting a "tolerated stay permit" has to be preceded by a decision on expulsion).

We also believe that regulation of the status of foreigners who cannot be deported because of technical reasons should be guaranteed. This issue, however, falls within the scope of migration and not asylum policy and shall therefore be considered when the migration legislation is concerned.

(14) Should an EU mechanism be established for the mutual recognition of national asylum decisions and the possibility of transfer of responsibility for protection? Under what conditions might it be a viable option? How might it operate?

We opt for establishing the mechanism for mutual recognition of national asylum decisions and the possibility of transfer of the responsibility for protection, in cases when foreigners change their place of residence. Transfer of such protection could be done automatically, together with granting a foreigner the right to reside in the territory of the other member state.

Cross-cutting issues

(15) How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum seekers be improved and become more tailored to their real needs? In what areas should standards be further developed?

Taking into consideration the fact that many foreigners arrive in Europe from areas of armed conflicts or natural catastrophes, many of them suffer from serious physical and mental health problems. Therefore we believe that a more effective system of identification of victims of torture, human trafficking and other vulnerable groups should be introduced.

In this respect, the preparation and implementation of a training system for wide categories of professionals working or having contact with refugees in all stages of the asylum procedure should be organised. We propose using an interdisciplinary attitude and design training programmes adapted to the local conditions. We also opt for common engagement in the training offered by EU agencies and social welfare partners.

As a result of such activities, persons from the vulnerable groups should be identified at the very beginning of the asylum procedure, which would enable them to use their right to take part in the procedure in a way that reflects their state of health.

Secondly, taking into account that access to psychological assistance for asylum seekers in some member states is still insufficient, we propose taking into consideration the necessity of designing measures aimed at establishing effective common standards. For instance, determining the number of psychologists for a certain group of asylum seekers might guarantee asylum seekers better access to psychological assistance.

(16) What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?

We also propose tailoring the laws on asylum in accordance with the UNHCR recommendations relating to the RSD interview and interpretation of the definition of refugee (*i.e.* in relation to gender based persecution). If entered into force, such recommendations are to be more broadly and effectively used.

(17) What further legal measures could be taken to further enhance the integration of asylum seekers and beneficiaries of international protection, including their integration into the labour market?

We believe that integration programmes should take into consideration the specific and individual needs of foreigners and guarantee them a full set of rights enabling their integration into society.

We strongly support the proposition of the Commission to grant all persons enjoying international protection the right to apply for the EC long-term resident's status. Exclusion from such a possibility amounts to unjustified unequal treatment and has a negative impact on the integration process.

In our opinion, all foreigners granted international protection should be encouraged to enter the official labour market by being granted the right to work without the need to possess a work permit. This is one of the key factors in successful integration.

Because obtaining employment depends on the ability to document qualifications, we believe that a system of mutual recognition of qualifications in EU member states should be introduced.

Integration can be made efficient only by taking into consideration the situation of foreigners during the asylum procedure. We believe that it is necessary to introduce adequate steps, such as language courses, vocational training and the right to work at the pre-integration stage. (p 2.2).

(18) In what further areas would harmonization be useful or necessary with a view to achieving a truly comprehensive approach towards the asylum process and its outcomes?

We consider it essential to establish, at the EU level, the minimum standard of rights guaranteed to all foreigners who were granted international protection, including:

- housing,
- social assistance ensuring a minimum living standard until they start working.

Achieving harmonization of integration conditions in case of some countries, for instance Poland, where social housing is scarce, would be only possible with the support of the European Refugee Fund.

Implementation – accompanying measures

(19) In what other areas could practical cooperation activities be usefully expanded and how could their impact be maximised? How could more stakeholders be usefully involved? How could innovation and good practice in the area of practical cooperation be diffused and mainstreamed?

(20) In particular, how might practical cooperation help to develop common approaches to issues such as the concepts of gender- or child-specific persecution, the application of exclusion clauses or the prevention of fraud?

We do not find it necessary to introduce common approaches to the application of exclusion clauses or the notion of prevention of fraud. Interpretation of the clauses should be in line with the Geneva Convention and the UNHCR guidelines only; whether some of the latter shall become binding is an issue for consideration.

(21) What options could be envisaged to provide structural support for a wide range of practical cooperation activities and ensure their sustainability? Would the creation of a European support office be a valid option? If so, what tasks could be assigned to it?

(22) What would be the most appropriate operational and institutional design for such an office to successfully carry out its tasks?

In our opinion it is advisable to create a European support office, which would be responsible for training and monitoring activities, taking common actions in cases of mass influx of persons in need of protection to particular member states, as well as implementation of Regional Protection Programmes. Expanding the office's tasks in the future would need further consideration, based on the assessment of its work during the first months or years of its functioning.

Sharing responsibility

(23) Should the Dublin system be complemented by measures enhancing a fair sharing of burden?

(24) What other mechanisms could be devised to provide for a more equitable distribution of asylum seekers and/or beneficiaries of international protection between Member States?

We believe it is necessary to introduce major changes to the Dublin II Regulation, in particular by introducing the right to choose a country where asylum seekers want to apply for international protection, as well as with regard to the definition of a family member. In our opinion, apart from the groups of persons enumerated in the Regulation, family members should also be considered: unmarried partners (including persons who have not registered their marriage, but were married according to their religious traditions or local customs, partners who established a family life by living together for a certain period of time, or persons having children), siblings, and, under certain conditions, adult children and dependants (e.g. elderly parents).

We know from experience that the integration process for foreigners is much easier and faster in a country where they have a family, friends, or where there is a big and well-organised ethnic community. Therefore we do not support the introduction of “corrective” burden-sharing mechanisms and the intra-EU resettlement of asylum seekers, but we are in favour of such burden-sharing that would guarantee the flow of financial means depending on the number of asylum seekers who applied for international protection in every member state.

Additionally, we believe it is necessary to introduce changes concerning the right to family reunification under Article 7 of the Dublin II Regulation by adding further categories of foreigners who might be joined by their family members, such as persons granted subsidiary protection, foreigners staying legally on the territory of a member state (possessing a residence permit or a visa), as well as the family members in every stage of the asylum procedure. We also suggest more generous interpretation and application of the humanitarian clause⁴.

Financial solidarity

(25) How might the ERF's effectiveness, complementarity with national resources and its multiplier effect be enhanced? Would the creation of information-sharing mechanisms such as those mentioned above be an appropriate means? What other means could be envisaged?

We consider it necessary to increase the flexibility of the European Refugee Fund mechanisms in order to provide efficient functioning of both asylum procedures and the NGOs' activities. Generally speaking, the main task of the ERF is to support the unification of standards of assistance provided to asylum seekers and persons enjoying international protection. (questions 6 and 18)

Besides this, we support the idea of creating an information sharing mechanism in order to increase access to information on good practices, successful projects and approaches in different member states.

(26) Are there any specific financing needs which are not adequately addressed by the existing funds?

Implementation of the Asylum Procedures Directive in all member states might result in lowering the standards of legal assistance to asylum seekers. There is a risk that the minimum level of state-sponsored legal assistance will not be sufficient and as a result will be unable to meet their needs. This gap might be filled by the ERF means.

Supporting third countries to strengthen protection

(27) If evaluated necessary, how might the effectiveness and sustainability of Regional Protection Programmes be enhanced? Should the concept of Regional Protection Programmes be further developed and, if so, how?

(28) How might the EU best support third countries to deal with asylum and refugees issues more effectively?

⁴ Dublin Regulation: Ten Recommendation for Reform
http://www.ecre.org/files/ECRE_10_Dublin_Recommendations.pdf

(29) How might the Community's overall strategies vis-à-vis third countries be made more consistent in the fields of refugee assistance and be enhanced?

Resettlement

(30) How might a substantial and sustained EU commitment to resettlement be attained?

In our opinion, the European Union should introduce an effective system of resettlement for foreigners in need of international protection. In particular, a common, uniform resettlement scheme should be developed. Application of such a scheme should not have a negative impact on the right of foreigners from the resettlement areas to apply for asylum on the basis of individual RSD procedures⁵.

(31) What avenues could be explored to achieve a coordinated approach to resettlement at EU level? What would be required at financial, operational and institutional level?

(32) In what other situations could a common EU resettlement commitment be envisaged? Under what conditions?

Addressing mixed flows at the external borders

(33) What further measures could be taken to ensure that protection obligations arising out of the EU *acquis* and international refugee and human rights law form an integral part of external border management? In particular, what further measures could be taken to ensure that the implementation in practice of measures aimed at combating illegal migration does not affect the access of asylum seekers to protection?

We believe that combating illegal migration cannot in any way restrict the right to apply for asylum, which is the fundament of international protection system based on the 1951 Geneva Convention.

(34) How might national capacities to establish effective protection-sensitive entry management systems be increased, in particular in cases of mass arrivals at the borders?

(35) How could European asylum policy develop into a policy shared by the EU Member States to address refugee issues at the international level?

What models could the EU use to develop into a global player in refugee issues?

Prof. Irena Rzeplińska
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Magdalena Kmak
Ewa Ostaszewska
Grzegorz Sikora

⁵ <http://www.ecre.org/files/resettlement.pdf>