ECRE

EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

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ECRE's Recommendations to the Justice and Home Affairs Council

on the "Safe Third Country" concept

at its meeting on 22-23 January 2004

ECRE notes that the Justice and Home Affairs informal Council on 22-23 January is expected to discuss the criteria and use of the "safe third country" (STC) concept, including the idea of a so-called "super safe third country" notion for the European Union's neighbouring countries (Articles 27, 28 and 28A of the current draft proposal for a Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status).

I. Criteria and Use of the Safe Third Country concept

ECRE recalls its concerns regarding the STC notion. ECRE has repeatedly expressed that the burden of proof regarding the safety of a third country for a particular asylum seeker lies entirely upon the country of asylum and in any case, the presumption of safety must be *rebuttable* by the applicant in the particular circumstances of his/her case.

In addition to the need to ensure a rebuttable presumption, we also underline the need for very strict criteria for the designation of third countries as safe. In particular, ECRE recalls that for a third country to be considered safe, it should always have ratified and implement the 1951 Geneva Convention and other international human rights treaties, and have an asylum procedure in place leading to the recognition of refugee status. We also would like to reiterate that it is indispensable that the third state has given its explicit consent to (re-)admit the asylum seeker and to provide him/her full access to a fair and efficient determination procedure before any transfer may take place. Furthermore, the applicant must have a close link with the third country, such as family ties. Mere transit through a country does not constitute a meaningful link.

II. The notion of "Super Safe Third Neighbouring" Countries

ECRE argues that **no country can be labelled as a "safe third country" for all asylum seekers**. A decision on the safety of a country for the particular applicant must always be reached within an individual examination on the claim and not on a general presumption of

safety based on country-related criteria. ECRE therefore rejects the notion of "Super Safe Third Neighbouring" countries, as outlined in Article 28A of the draft Directive.

ECRE remains deeply concerned by specific proposals where the STC concept may be used to deny access to the procedure to all asylum seekers arriving from the designated "super safe third neighbouring" countries, without an examination of their particular circumstances and denying the applicant the opportunity to rebut the presumption of safety in the particular circumstances of their cases. Furthermore, this provision would leave the decision-making authorities in these cases outside any legal framework for the control on their performance and on the lawfulness of their decision.

We reiterate that a Member State's international obligations are engaged as soon as an asylum applicant arrives at a border, since s/he actually has at that point already reached the territory; this includes that there be no rejection at frontiers without fair and efficient procedures for determining status and protection needs.[1] In particular, UNHCR EXCOM Conclusion No. 87 (L) – 1999 (j) affirms that the notion of "safe third country" should not lead to the improper denial of access to asylum procedures or, indeed, to violations of the principle of non-*refoulement*.

Human rights and refugee concerns exist not only in EU neighbouring countries, but also in EU Member States themselves, as identified by ECRE and other international organisations, including the EU itself[2] and international human rights monitoring bodies (such as the European Court of Human Rights). The enlarged EU neighbours include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia & Montenegro, Norway, Turkey, Ukraine and Switzerland. Even if the most stringent criteria currently on the table for negotiation[3] were to be applied, ECRE believes that an unrebuttable presumption of safety for all asylum seekers arriving from any of them could result in breaches of international law. Therefore, the system established by Article 28A would not only be unworkable in practice (as no country can be labelled as safe), but it would also breach international law.

Numerous **examples** illustrate the dangers of this approach. For instance, in the case of *Mamatkulov and Abdurasaulovic v. Turkey* (judgment of 6 February 2003), **Turkey** (a Party to the UN Refugee Convention and to the European Convention of Human Rights) extradited the two applicants to Uzbekistan in spite of a European Court of Human Rights request to Turkey to refrain from executing the extradition decisions pending an urgent review by the Court. The case has since been referred to the Grand Chamber where the Court will now consider evidence that the applicants were at risk for torture, may have been tortured and ill-treated upon return, and were subjected to an unfair trial in Uzbekistan.

Another example would be the return of asylum seekers to the **Russian Federation**. Serious refugee protection concerns persist in this country, where asylum seekers are denied access to

[1] This has been repeatedly reaffirmed by UNHCR's Executive Committee (Conclusion No. 81 (XLVIII) – 1997 (h), No. 82 (XLVIII) – 1997 (d) (iii), No. 85 (XLIX) – 1998 (q)).

[2] See, for instance, the European Parliament "Annual Report on human rights in the world in 2002 and European Union's human rights policy" (Doc. A5-0274/2003, of 16 July 2003) and the European Parliament Report 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Doc. A5-0378/2003, of 5 November 2003).

[3] As outlined in Documents 15198/03 and 15198/03 ADD 1, ASILE 66, both partially available from the Council's Register.

the procedure if they enter without the necessary documentation (a breach of Article 31 of the Refugee Convention) or if they don't present their application within the extremely short time limit of 24 hours after having crossed the border. Furthermore, asylum seekers removed to the Russian Federation from EU Member States may be further removed to other third countries that the Russian authorities may consider safe at their own discretion, thus resulting in indirect *refoulement*. Russian legislation does not establish the criteria under which a country may be considered safe. For instance, the migration authorities refuse applications for refugee status from Afghan asylum seekers on the grounds that they had the opportunity to claim asylum in Uzbekistan, through which they arrived into Russia, without taking into account that this country has not signed the Refugee Convention[4].

Refugee protection concerns also exist in the case of candidate countries, as the European Commission has acknowledged in its Regular Reports of November 2003. In the case of **Bulgaria**, the Commission acknowledges the improvements in the asylum system following the entry into force of the new asylum legislation, but it states that points of concern remain.[5] These include the lack of compliance of the exclusion and cessation clauses with the UN Refugee Convention and the fact that the right of protection of certain asylum seekers continues to be jeopardised due to the denial of access to the procedure for applicants who have failed to present their asylum application within the required time limit. Furthermore, the Commission notes that the rights and obligations of recognised refugees and persons granted a humanitarian status are not always applied in practice due to limited financial possibilities.

III. Recommendations to the Justice and Home Affairs Council

1. ECRE urges the JHA Council to ensure that, if the STC concept is to remain (to be considered within an individual examination of the claim in a procedure with minimum safeguards), the criteria and requirements in Articles 27 & 28 are clearly defined and that at a minimum, they include:
    (a) Ratification and implementation of the 1951 Geneva Convention and other international human rights treaties
    (b) Existence of an asylum procedure in place leading to the recognition of refugee status
    (c) Explicit consent by the destination country to (re-)admit the asylum seeker and to provide her full access to a fair and efficient determination procedure before any transfer may take place
    (d) Close link of the applicant with the third country, such as family ties. Mere transit through a country does not constitute a meaningful link
    (e) Rebuttability of the presumption of safety

2. ECRE urges the JHA Council to reject the concept of "Super Safe Third Neighbouring" countries altogether and therefore delete the provision contained in Article 28A from the draft. This system is not only unworkable in practice, but most importantly, it breaches international law and therefore may constitute grounds for the annulment of the Directive by the European Court of Justice in the future.

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[4] For further information, please see the document "The Right to Seek Asylum - The Republic of Belarus, The Russian Federation and Ukraine", available from ECRE upon request.
[5] "2003 Regular Report on Bulgaria's progress towards accession", pp. 104-105, available at: http://europa.eu.int/comm/enlargement/report_2003/pdf/rr_bg_final.pdf

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