

Memorandum to the Irish Presidency

Countdown for the Amsterdam Treaty deadline: ECRE's Recommendations for an EU Asylum Policy

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The European Council on Refugees and Exiles (ECRE) represents 78 refugee assisting NGOs working in more than 30 European countries towards humane and fair asylum policies and practice.

ECRE notes that the transitional period of five years established by the Amsterdam Treaty for the adoption of the first set of EC legislation in the field of asylum and migration will expire on 1 May. However, two of the core instruments for refugee protection, namely the definition and status of refugees and other persons in need of complementary protection, as well as the procedures for their determination are still outstanding.

The role of the Presidency will be to seek compromise and reach agreements, but agreement, should not be found at the expense of adequate protection for refugees and other persons in need of international protection. European legislation in the field of asylum must never fall short of the obligations of Member States under international refugee and human rights law. We urge the Presidency to ensure that the proposals currently on the table don't follow the example of other instruments that have been adopted despite of their lack of compliance with international law and standards, such as the Directive 2003/86/EC on the right to family reunification which has been taken before the European Court of Justice by the European Parliament on the grounds that it may breach international human rights law.

This paper aims at summarising ECRE's main recommendations to the Irish Presidency of the European Union¹. ECRE believes that a future common EU asylum system should be protection-centred, firmly committed to the safeguarding of human rights and orientated at existing best State practice. ECRE calls on the Irish Presidency to lead the European Union towards a harmonised asylum system that includes the following core elements:

Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

1. Access to fair and efficient asylum procedures must be ensured to all asylum seekers

¹ ECRE has set out its views on the various proposals leading to the establishment of a common European asylum system on numerous occasions. Full commentaries on these proposals are available at: http://www.ecre.org/policy/eu_developments.shtml

Due to its lack of effective safeguards for persons forced to flee their countries for protection-related reasons, ECRE strongly rejected this draft Directive in early October and called on EU JHA Ministers to address the appalling flaws in it. ECRE further stated that should its concerns be ignored, it would have to call for the withdrawal of the proposal. Two months later, on the occasion of the last JHA Council during the Italian Presidency, ECRE restated that most of its concerns on this instrument, as well as those repeatedly expressed by UNHCR and other NGOs, are still valid. ECRE believes that the Directive in its current form still does not ensure that Member States will fulfil their obligation to guarantee a fair and efficient procedure to all asylum-seekers to determine whether they are in need of protection, as promised by the European Council in Tampere. We therefore urge the Justice and Home Affairs Council to take the following recommendations into account.

2. The “safe third country” concept must comply with international law

ECRE is seriously concerned that some EU Member States are attempting to abdicate from their responsibilities under international refugee law by negotiating an EC Directive on asylum procedures that would provide them with the widest possible legal grounds to send asylum applicants to third countries outside the Union’s territory even if the applicant has no links with the country or has never been to that country. In line with the principle of *non-refoulement* as well as international human rights law, Member States need to ensure that applicants won’t be exposed to harm and danger as a result of the application of the “safe third country” rule. ECRE therefore urges that the rule be only applied where it has been determined in the individual case that the applicant will be able to avail him/herself of the protection of that country and where s/he has meaningful links to it. Additionally, the applicant must be able to rebut the presumption of safety in his/her particular circumstances and the application of the rule should be subject to independent review.

3. The “super safe third country” concept must be rejected

Furthermore, ECRE is concerned that Member States may agree on a so-called “super safe third country” concept applicable to countries that have borders with the enlarged EU, allowing them to remove asylum-seekers to some of these countries without any individual assessment of their cases. We strongly reject any application of the safe third country rule that is based on particular countries as opposed to the individual circumstances of the applicant. The enlarged EU’s neighbours include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia & Montenegro, Norway, Turkey, Ukraine and Switzerland. Not only have several international organisations, including the European Commission, identified fundamental protection concerns regarding these countries, but even EU Member States themselves have been questioned before international human rights monitoring bodies for breaches of the *non-refoulement* principle. ECRE therefore considers the inclusion of the concept of “super safe countries” without any individual examination of the case as flawed from the outset and urges Member States to delete it.

4. The right to an effective remedy must be safeguarded

ECRE would like to re-emphasise the importance of recognising asylum applicants the right to remain in the territory of Member States until a final decision on their applications has been taken, in order to ensure Member States’ compliance with the principle of *non-refoulement* and other international human rights provisions. To this end, ECRE urges Member States to ensure that, in cases where there is no automatic suspensive effect of appeals, the Directive guarantee an explicit

right to all applicants to request leave to remain to a Court or tribunal and that no expulsions shall take place before a decision has been reached on this request.

~~Albania (land border with Greece)~~

~~* Belarus (land borders with Lithuania, Latvia and Poland)~~

~~* Bulgaria (land border with Greece)~~

~~* Croatia (land borders with Slovenia and Hungary)~~

~~* Macedonia (land border with Greece)~~

~~* Norway (land borders with Sweden and Finland)~~

~~* Romania (land border with Hungary)~~

~~* Russian Federation (land borders with Finland, Estonia, Latvia, Lithuania and Poland)~~

~~* Serbia & Montenegro (land border with Hungary)~~

~~* Switzerland (land borders with Germany, France, Italy and Austria)~~

~~* Turkey (land border with Greece)~~

~~* Ukraine (land borders with Poland, Slovakia and Hungary)~~

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

5. A harmonised definition of persons in need of international protection is a key priority

ECRE has long advocated that a harmonised interpretation of the Refugee Convention should be dealt with sooner rather than later. Member States, and in particular the Presidency should use all the means at their disposal to ensure that the Directive on the definition and status of refugees and other persons in need of international protection (which found provisional agreement by the JHA Council in June, pending the lifting of some reservations) is agreed reflecting the international legal obligations of States on this crucial aspect of refugee protection.

6. Persons in need of international protection who don't fall under the Refugee Convention definition must be adequately protected

An EU agreement on a complementary status will in itself be a recognition of Member States obligations under human rights law to provide international protection to persons falling outside a full and inclusive interpretation of the Refugee Convention. In particular, we believe that protection against persecution by non-state actors must be accorded not only to refugees under the UN Refugee Convention, but also to individuals who, while not fulfilling the requirements in the 1951 UN Refugee Convention, qualify for complementary protection in application of international human rights law obligations.

ECRE also believes that persons granted complementary protection status should receive the same level of rights as refugees, in particular in relation to the principle of family unity, residence permits, access to employment, education, social welfare and health care. Both categories of persons have similar needs and should be given the same chance of successful integration in the host country.

European Refugee Fund

7. Size and allocation of funds

Developments over the past three years show that needs in the Member States to support refugees are increasing rather than diminishing, and the ERF budget allocation has proven insufficient to meet these demands. ECRE therefore recommends that the second phase of the ERF should be granted a significantly larger budget than that available during the first phase, especially taking into account the increased number of Member States and the less developed status of asylum systems in many of these new Member States. In order to allocate adequate resources to the Member States that have less developed asylum systems, ECRE proposes that the fixed amount of the ERF's annual allocation to Member States is increased in the countries benefiting from the Cohesion Funds, to address the problem of continued uneven capacity across the EU.

8. Scope of the fund & multi-annual projects

ECRE is of the opinion that the bulk of the ERF should go towards increasing reception and integration capacities in the Member States. ECRE suggests that the support to expand and establish resettlement programmes of refugees to the EU be included in the scope of the Fund. With regards to return, given that the European Commission is currently working on a financial instrument for mandatory returns, ECRE argues that the return strand in the ERF should solely finance activities on voluntary repatriation of refugees and of persons with complementary and temporary forms of protection.

One of the main problems of the current ERF programme is that the maximum project duration of 12 months is too short a period realistically to undertake projects. ECRE therefore suggests that the new ERF partly allows for multi-annual projects for a maximum period of three years, and partly allows for shorter 12-months projects of innovative nature. This would enable project promoters to build some continuity into their activities and would improve the chances of innovative projects being mainstreamed and transformed into regular activities. This model would also ensure that new projects can be submitted, and that the multi-annual projects do not bar new organisations/projects from applying for ERF funds.

9. Increased European added value

To increase the European added value to the ERF, we propose that the Community Actions part of the Fund be increased to a minimum of 10%. This would make the budget available for the much needed pan-European projects more realistic and allow for real comparative studies on asylum issues, projects aimed at developing operational guidelines for implementing EC asylum legislation, and conferences to exchange experiences and examples of good practice. In addition, ECRE suggests building in small-scale trans-national partners in projects funded by national ERF resources, such as the EQUAL development partnership model.

Proposal for a Directive on Minimum Standards for Returns

10. Mutual recognition of return decisions

ECRE would urge Member States not to agree to the mutual recognition of return decisions prior to an EU agreement on harmonised asylum procedures, a common definition of a refugee

and a complementary status for persons in need of protection who fall outside the Refugee Convention.

11. All returnee categories should not be treated alike

In order to ensure the adequate protection of persons who might be at risk of *refoulement*, ECRE recommends that a distinction should be made between persons who no longer have the right to remain in a country for protection-related reasons and persons who are subject to return as a result of changes to their (non-protection related) immigration status or because following irregular entry, they never sought any form of legal status. Expulsion decisions for individuals whose protection status has ceased must be subject to the right of appeal with suspensive effect.

ECRE also recommends that the return of people whose protection status has ceased should be supported. Although this category of persons would no longer have a legal right to remain in a Member State, they may have legally resided there for a number of years and should therefore be entitled to adequate support to enable them to return to their country of origin in safety and dignity.

12. Return in safety and dignity

ECRE recommends that the minimum standards for returns should include the right to family unity prior to and during return; the use of detention prior to return only as a last resort and subject to effective review in a manner compatible with Article 5 of ECHR; and procedures to ensure that the physical integrity of returnees is maintained during removal proceedings and that the use of force is justified by a returnees' own behaviour and no more than absolutely necessary.

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