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European Council
on Refugees and Exiles

RELYING ON A FICTION: NEW AMENDMENTS TO THE ASYLUM PROCEDURES REGULATION

A SUMMARY OF ECRE'S COMMENTS ON THE NEW AMENDMENTS TO THE APR IN COM(2020) 611 AND RECOMMENDATIONS FOR THE CO-LEGISLATORS

I. INTRODUCTION

In September 2020, the European Commission (the Commission) presented a New Pact on Migration and Asylum (the Pact), aiming to introduce a "comprehensive approach" covering borders, the asylum system and return policies, the Schengen area of free movement, and international cooperation on asylum and migration. The Pact was presented alongside a set of legislative proposals, including a proposal to amend the 2016 recast Asylum Procedures Regulation (APR) proposal. The amended APR builds on the 2016 proposal, which the Commission believes is still largely relevant, with targeted amendments introduced only where Member States previously could not agree. These mainly concern the use of the border procedure and the conditions under which it should be an obligation for Member States.

New amendments introduce a joint asylum and return border procedure. The Commission believes this will lead to a quick assessment of "abusive" asylum requests and asylum requests made by applicants from countries with low recognition rates. The Commission argues that this procedure (along with the screening process) is an important migration management tool, to be used to prevent unauthorised entry and movement, and to increase deportations, a key part of the Pact. The Commission sees the procedure as easy to implement and flexible, while still respecting fundamental rights.

This is all well and good, but it is predicated on two flawed assumptions: that the majority of people arriving in Europe do not have protection needs, and that assessing asylum claims can be carried out easily and quickly.

Neither are correct. It is known, however, that border procedures and accelerated procedures lead to more detention and fewer people being granted a protection status. As experience in the hot-spots has shown, containment at borders can also cause severe suffering for individuals.

ECRE has serious concerns about the proposed border procedures and the deliberate joining together of asylum and return procedures. ECRE believes it will lead to an increase in detention, to protection gaps and an increased risk of *refoulement* for individuals, as well as increasing the administrative burden on certain Member States. ECRE urges the Commission and co-legislators to withdraw proposals for border procedures and recommends that, instead, Member States invest in regular asylum procedures, to make them fair and efficient, compliant with rights, and adequately resourced.

If the proposal is to be adopted, ECRE includes here a non-exhaustive list of recommendations to bring the proposed legal framework into compliance with fundamental rights. It should be read in conjunction with ECRE's more detailed Comments on the Commission Proposal COM(2020) 611 and the 2016 proposal for a recast APR, COM(2016) 467 and ECRE's policy note: Border procedures: Not a panacea.

II. ANALYSIS

THE PROCEDURE

The amended APR is linked to another legislative proposal from the Commission, the Screening Regulation. The Screening Regulation establishes a pre-entry screening phase, which would precede the border procedure, for those arriving irregularly at the border or apprehended on a Member State's territory, to establish identity, conduct health and security risks, and assess vulnerabilities. After screening, those at the border should be referred to an appropriate procedure: a refusal of entry, an asylum procedure, return procedure or relocation. A debriefing form is issued and should be taken into account when examining the asylum application or launching return procedures. These proposals aim to ensure a "seamless link" between all stages of the asylum procedure, from pre-entry to the outcome of an asylum application and, where relevant, return.

FICTION OF NON-ENTRY

In the updated APR, asylum applications may be assessed without authorising the applicant's entry into the Member State's territory in a twelve-week asylum border procedure, or in a procedure on its territory (which could be an accelerated procedure). The proposals lack the necessary detail on who or at what stage a person will be channelled into a border procedure, but where an asylum border procedure is used and it is determined that the individual is not in need of protection, a return border procedure will follow. It is claimed that individuals will only be allowed to "enter" the territory if there are exemptions that mean the border procedure is not applicable or where the asylum procedure is still in progress by the deadline for concluding it. This "fiction of non-entry" is disingenuous and does not exempt Member States from their obligations under international law. Practice has shown, however, that Member States have used the legal fiction of non-entry to curtail people's rights. This may in certain circumstances undermine the right to asylum and the principle of *non-refoulement*. ECRE therefore recommends the removal of the legal fiction of non-entry, and recommends that applicants are legally considered to have entered the territory of the EU Member States.

TWO-TIER PROCEDURE

A new ground introduces accelerated procedures for individuals coming from third countries for which the average EU-wide protection rate is under 20% at first instance, according to the latest annual Eurostat data. This is a blunt tool that will not reflect changing situations in countries of origin. It will also result in two standards of asylum procedures, largely determined by the country of origin of the individual concerned. This undermines the individual right to asylum and will mean that more people are subject to a second-rate procedure.

DETENTION

The proposal is vague on where – geographically – border procedures apply and whether people will be "kept" or "accommodated"; on restrictions on freedom of movement; and on detention or indeed alternatives to detention. In practice, border procedures usually mean formal or de facto detention. It is hard to imagine how an individual who supposedly has not entered the territory would be allowed to move around it freely. Where the proposal is clearer on detention – in the return border procedure – there are very broad grounds for authorising its uses. ECRE opposes detention of asylum applicants at the border, however if detention of asylum seekers continues to be possible, then it should remain an exceptional measure; vulnerable people and

children should never be detained.

The border location does not release Member States from fundamental rights obligations. An applicant for international protection should not be held in detention for the sole reason that they are seeking international protection, including at the border. Detention can only be imposed based on the legal grounds set out in the Reception Conditions or the Return Directives. Detention should always be a measure of a last resort, on the basis of an individual assessment, and if other less coercive alternative measures cannot be applied effectively. Detention anywhere should comply with requirements of lawfulness, necessity and proportionality, be maintained for the shortest period possible, be subject to review, and be carried out in dedicated facilities. Where Member states impose any restrictions on freedom of movement, a decision in writing should qualify the measures as detention or restrictions on freedom of movement, and the reasons for these restrictions should be stated in fact and in law.

PROTECTION GAPS

The proposal includes the right to an effective remedy before a court or tribunal against a decision rejecting an asylum application as inadmissible, unfounded or implicitly withdrawn as well as against a decision withdrawing international protection or a return decision. However, appeals against return decisions are to be heard before the same court or tribunal, within the same judicial proceedings and with the same time limits as other appeals. This does not take into account that an examination of a return decision goes beyond an examination of whether or not an applicant meets the criteria under the Refugee Convention or qualifies for subsidiary protection. Proposing that Member States should issue an asylum and return decision simultaneously without clearly specifying the requirement that important safeguards related to *non-refoulement*, the best interests of the child and protection of family and private life are assessed, undermines obligations under EU primary and international law.

RIGHT TO AN EFFECTIVE REMEDY

The proposal includes “at least one week” for any appeals to take place. This may not be enough time in practice to enable the applicant to prepare and bring effective action and so may infringe the right to effective remedy. Thirty days would constitute a clearer and fairer time limit for the applicant, particularly where they are being held at a border. There is also only one level of appeal, which the Commission says will streamline the procedure, but which reduces the levels of appeal and provides less access to remedies than is currently the case in several countries. The proposal also restricts the decisions which can be appealed with suspensive effect.

There is no automatic right to stay where there are exclusion grounds, a subsequent application, a decision to reject the application as (manifestly) unfounded, where a safe country of origin has been identified, or in the border procedure. Instead, a court or tribunal shall have the power to decide if the applicant can remain in those cases. The best way of ensuring rights of effective remedy and *non-refoulement* are respected in practice is to provide an applicant with an automatic right to remain on the territory during the period of appeal and pending its outcome. This reduces the risk of violations of the principle of *non-refoulement* and guarantees the effectiveness of the appeal, it also avoids additional burdens on already stretched judicial systems as asylum seekers are not required to launch a separate request to remain on the territory. Applicants should have the right to remain unless a competent authority has taken a decision which rejects a second or further subsequent application as inadmissible.

UNCLEAR EXEMPTION OF VULNERABLE APPLICANTS

Given the problems with border and accelerated procedures, as well as the likelihood of accompanying detention, the reform of the asylum acquis could have been used to exclude the use of accelerated and border procedures for those in need of special procedural and/or reception guarantees. Instead, there is an unclear, mixed bag of exemptions, including for children under the age of 12 and their families (if there are no national security or public order grounds to apply it), where the necessary support cannot be provided to applicants with special needs, or where there are medical reasons. It would be much simpler and more humane to ensure that anyone in need of special procedural guarantees or special reception needs is exempt from border procedures including all children and their family members.

OTHER CONCERNS

Legal assistance is not directly addressed in the targeted amendments to the APR but ECRE remains concerned by the 2016 proposal to deny free legal assistance where the application is considered not to have any “tangible prospect of success” along with the use of “merits tests”. By relying on more systematic

restrictions of movement in border procedures, this proposal will further limit individuals' access to basic services, including legal assistance and representation, especially given that providers struggle to operate at borders. The proposed border procedure also deprives people of the possibility to access residence permits for grounds other than asylum whereas ECRE recommends that Member States retain the discretion to grant other statuses if provided for in national law, given the complexity of protection needs.

IN CONCLUSION

This proposal is yet another attempt to mainstream border procedures as a core instrument of EU common asylum and return policies. The presentation of border procedures as a "solution" is based on unsubstantiated assumptions about their feasibility. EU Member States should instead invest in regular asylum procedures, in order to make them fair and efficient, compliant with rights, and adequately resourced. This would also reduce the administrative burden on Member States and prevent a situation whereby the border areas become a holding pen for people seeking asylum.

III. RECOMMENDATIONS

Consistent with its research and positioning on border procedures, ECRE recommends that the proposal be withdrawn. If the proposal moves forward, co-legislators should amend it as follows:

- The application of the legal fiction of non-entry should be removed from the proposal, and applicants should be considered as having entered the territory of the EU Member State in question.
- The proposal should be clear about detention and restrictions on freedom of movement, as well as alternatives to detention, that will be deployed at the border.
- A decision in writing should qualify any measures as detention or a restriction on freedom of movement, with reasons for the use of such measures stated in fact and law.
- The new grounds for an accelerated procedure, based on average EU-wide recognition rates of less than 20% for particular nationalities, should be withdrawn.
- There should be no obligation on Members States to apply the border procedure. The status quo whereby it is an option should prevail.
- There should be a clear separate assessment related to *non-refoulement*, the best interests of the child and the protection of family and private life in case of a return decision that an individual can appeal. Member States should retain the discretion to grant another status if provided for in national law.
- There should be a minimum of 30 days for appeals, including in cases rejected as inadmissible, explicitly withdrawn or abandoned, or following an accelerated or border procedure. Appeals should have automatic suspensive effect.
- Border procedures should not apply, or should cease to apply at any stage of the procedure, to any applicants identified as in need of special procedural guarantees or special reception needs, where there are medical reasons not to apply it, and for all children and their families.