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European Council
on Refugees and Exiles

A SEAMLESS LINK?

ECRE'S ANALYSIS OF HUMAN RIGHTS RISKS AND BROADER IMPLICATIONS LINKING ASYLUM AND RETURN PROCEDURES

I. INTRODUCTION

The reinforcement of the link between asylum and return procedures has been presented by the European Commission as a tool to increase the numbers of returns, among other measures. The proposal for the recast of the Return Directive (RD) obliges Member States to issue a return decision immediately after the adoption of a decision ending a legal stay, including a decision refusing international protection (Art.8(6), Recital 7). Similarly, the Pact on Migration and Asylum foresees merging border asylum procedures with a proposed border return procedure. According to the revised proposal for the Asylum Procedures Regulation (APR), Member States should issue a return decision as part of or in a separate act but at the same time and together with the decision rejecting the application for international protection in the border procedures (Art.35a, Recital 31a). Both proposals reduce the time period for appealing and limit the suspensive effect of appeal. While the co-legislators are preparing their positions on the legislative proposals, this Policy Note demonstrates that linking asylum and return procedures generates serious human rights concerns while failing to meet its stated objectives. It draws on experience from national practice in Member States where the two procedures are combined. The risk of combining these procedures is even more acute in border procedures due to the reduced safeguards for applicants.

II. ANALYSIS

CURRENT SITUATION

Linking asylum and return procedures is already possible under the RD. Under Art.6(6) RD, states may adopt a decision on ending a legal stay together with a return decision in a single decision or act, without prejudice to the procedural safeguards set out in the RD and other relevant EU and domestic law. From the perspective of subsidiarity, turning what is currently optional into an obligation, thus removing discretion, appears unjustified.

Several states use this option. In AT, CH, DE, DK, EL, FI, HU, MT, NL, and NO, with various national specificities, either a negative decision on an asylum claim triggers a return decision or the two decision are merged in one document. Within the single procedure, in most of these countries, authorities assess broader protection grounds and obstacles to return, such as *non-refoulement* considerations under Art.3 of the European Convention on Human Rights (ECHR), humanitarian reasons, best interests of the child, family life and integration. Conducting a broader assessment of protection needs reflects human rights requirements, as human rights law extends protection from return to a broader range of people than those entitled to international protection under the Qualification Directive (QD).

Yet, in many countries, the broader assessment is carried out superficially; protection and integration-related aspects of the case may be confused; and the threshold for humanitarian or health considerations is disproportionately high. Further, the assessment of family ties is typically followed by a negative decision because the people concerned do not have a chance to provide adequate proof, having originally applied for international protection. Also, authorities competent for the asylum application may be required to issue return decisions without having been provided with the relevant expertise and guidance to assess the bars to return beyond those related to refugee and subsidiary protection status determination.

HUMAN RIGHTS CONCERNS FLOWING FROM LINKING ASYLUM AND RETURN PROCEDURES

Requiring states to merge asylum and return procedures is premised on a misconception that all people refused international protection may be returned. There are at least three categories of people who do not qualify for international protection under the acquis, but for whom return may be unlawful under international and EU human rights law, as well as the current RD. Some states offer statuses, such as “humanitarian protection” status, to people in these categories. Merging procedure removes the assessment as to whether they fall into one of these categories and the related possibilities for providing a status.

A) ***Non-refoulement***: not all persons entitled to the protection from *refoulement* under international human rights law (Art.3 of the ECHR) qualify for international protection (refugee or subsidiary protection status) under the QD. Subsidiary protection is granted to those who do not qualify as a refugee but who would face a real risk of suffering serious harm upon return (and to whom exclusion grounds do not apply). Others at risk are not covered.

First, the notion of serious harm (QD, Art.15) does not cover all violations upon return which might activate the prohibition of *refoulement* under the ECHR, as developed in the jurisprudence of the European Court of Human Rights (ECtHR), such as risk of flagrant denial of justice or flagrant breach of the right to liberty (*Othman (Abu Qatada) v. the UK*, §233) or slavery and forced labour (*V.F. v. FR* (dec); *Ould Barar v. SE* (dec)). Second, the QD allows states to exclude a person from eligibility for subsidiary protection due to a serious crime or being a danger to the community or the security of the state (Art.17). Persons falling under this exclusion clause may still be protected from return under human rights law as found by the ECtHR (e.g. *Chahal v. the UK*, §80-81, *Ahmed v. AT,* §46). Persons whose asylum claim has not been assessed on the merits due to an alleged lack of credibility in relation to country of origin may also fall in this category.

B) ***Health considerations***: according to the CJEU, serious harm does not include inhuman or degrading treatment resulting from unavailability of vital medical treatment in the country of origin for a seriously-ill returnee (*M’Bodj*, §40). Hence, the person would not be entitled to subsidiary protection status under the EU asylum acquis. However, the CJEU has recognised that the removal in such circumstances may exceptionally amount to a violation of the principle of *non-refoulement* under with Art.19(2) of the EU Charter of Fundamental Rights (*Abdida*, §48-49). Strasbourg case law also finds that where the person would face a real risk of being exposed to a serious, rapid, and irreversible decline in their health resulting in intense suffering or to a significant reduction in life expectancy, removal would amount to ill-treatment (ECtHR, *Paposhvili v. BE*, GC, §183).

C) ***Right to family and private life***: return of family and children and others integrated in the host society may be precluded under international human rights law and the RD, irrespective of asylum-related considerations.

The ECtHR balances the person's right to respect for family or private life against the state's interest in removing them. In a number of cases the Court concluded that removal entailing separation of the returnee from their child (*Berrehab v. the NL*, §29; *Ciliz v. the NL*, §71) or of a well-integrated person (*Sisojeva* and *Kaftailova* cases against Latvia) would constitute a disproportionate measure in violation of Art.8. In this proportionality assessment, the Court also considers the best interests of the children involved (*Da Silva v. the NL*, §44).

The RD (Art.5) enshrines protection from return for people in the three categories, as underlined by the CJEU (*Boudjlida*, §48-49; *M.A.*, §32 and 43; *TQ*, §44-56). By imposing an obligation on states to issue a return decision automatically alongside a decision refusing international protection, the recast RD and APR may deprive states of the possibility of carrying out this individualised assessment and issuing a residence permit. The possibility to grant an autonomous residence permit for compassionate, humanitarian or other reasons when the return procedure is already underway (Art.6(4) RD) is not a sufficient safeguard, as the limbo situation of non-returnable (including stateless) people in some countries demonstrates.

The obligation to combine procedures would also exacerbate the flaws observed in states' current practices whereby return decisions are not suspended during appeals against the refusal of international protection, which leaves people without protection from *refoulement* and fails to comply with rules under the APD and RD. The risks are aggravated in border procedures as current practice shows.

COMBINING ASYLUM AND RETURN DECISIONS WILL NOT NECESSARILY MEET ITS OBJECTIVES

According to the Commission, combining asylum and return decisions would help "reduce the risk of absconding and the likelihood of unauthorised secondary movements." The underlying objective of this measure is to increase the return rate (termed the "effectiveness of return" by the Commission) and the overall efficiency of asylum and migration systems (recast RD: Recital 7 and explanatory memorandum, p. 2; APR: Recital 31a and explanatory memorandum, p. 2 and 4). In addition, according to the Commission, "the purpose of the joint asylum and return border procedure is to quickly assess abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union" (explanatory memorandum, p. 4). Analysing the impact of the proposed measures raises questions as to whether the Commission's stated and underlying objectives will be reached.

First, the objective of reducing "abuse" is questionable in itself. The notion of "abuse" is often ill-defined; in addition, people flee and apply for asylum without sufficient knowledge to make the calculations implied. The reference to low recognition rates can be misleading as it refers to first instance decisions which vary and are often overturned on appeal.

Second, it is debatable whether combining the procedures will lead to more efficiency. There may be some efficiency gains, however, in line with the CJEU's ruling in *Gnandi*, a return decision adopted immediately after the first instance negative asylum decision or incorporated into the latter cannot be enforced before a final decision has been reached at the first appeal level (§63). In addition, if broader bars to return are not assessed prior to issuing a return decision, the person would need to appeal the return decision. Ultimately, more decisions and more litigation can be expected, increasing the resources needed from states.

Third, the proposals suggest that in most cases, people will be detained and that detention is the main tool for reducing the risk of absconding, not the combining of procedures. It should be noted that this element of the proposal separately raises serious concerns about fundamental rights (including the right to liberty), proportionality, and even the rule of law. It risks triggering systematic detention, contravening the prohibition of arbitrary detention.

Finally, as it is the case under current rules, issuing a return decision does not mean that the person will actually be returned and there are numerous obstacles to return as described elsewhere. An increased number of return decisions which cannot be enforced due to human rights bars to return is likely to reduce the overall return rate. Further, often it is the lack of cooperation from destination countries which hinders removal. Typically, countries of origin are less inclined to cooperate if their nationals are in detention and enjoy fewer safeguards.

III. RECOMMENDATIONS

Merging standard and border asylum and return procedures poses a risk that broader protection grounds and bars to return are disregarded. Only when an application for international protection is refused and appeal channels are exhausted should authorities consider issuing a return decision. Before adopting the return decision, they should conduct an assessment of at least the prohibition of refoulment, right to private and

family life, best interest of the child, and health-related bars to return. If this assessment shows that the person should not be returned, states should not start a return procedure but rather issue a residence title. The same should be the case if a return decision has been issued but not implemented within a certain time-frame. If the asylum and return procedures are merged under the RD and APR, the asylum procedure would need to be considerably expanded in order to consider elements beyond refugee and subsidiary protection status. This would require adequately trained personnel and more time to carry out this wider assessment. In the case of a rejection of both international protection and protection from return based on wider considerations, the effect of the return decision would need to be suspended during the time for appealing and when appeal authorities consider the appeal.

Against this background, **ECRE recommends that**:

Member States:

» Under the current RD rules do not use the possibility under Art.6(6) of the RD but rather assess international protection grounds separately from other protection grounds and bars to return;

» Under the current rules of the RD, assess the risk of *refoulement*, private and family life considerations, state of health and the best interests of the child, as laid down in Art.5 of the RD, before adopting a return decision;

» Irrespective of whether the asylum and return procedures are combined, offer the person a residence permit pursuant to Art. 6(4) of the RD if their return would violate the principle of *non-refoulement*, the right to private and family life, and best interests of the child;

» If the asylum and return procedures are merged by the recast RD and/or APR, assess broader protection bars to return, namely the principle of *non-refoulement*, the right to family and private life, state of health, and the best interests of the child. Do not enforce return until a final decision has been reached at the first appeal level.

European Commission DG Home:

» Cease equating the refusal of international protection with lack of a need for protection from *refoulement*;

» Monitor practice of the Member States when combining asylum and return procedure to verify whether it ensures the prohibition of *refoulement*, the right to family and private life, the best interests of the child, and the right to an effective remedy.

European Parliament LIBE Committee:

» Table an amendment to the Commission's proposal for the recast of the RD to delete Art. 8(6) and Recital 7, linking regular asylum and return procedures;

» Table an amendment to Art.6(6) of the RD to clarify that the return decision be suspended during the period when the person can appeal refusal of international protection and the appeal body considers the appeal;

» Table an amendment to the Commission's proposal for the APR to delete Art.35a and Recital 31a, linking border asylum and return procedures.

Council of the EU:

» Adopt a position on the proposal for the APR deleting Art.35a and Recital 31a;

» In the upcoming trilogues with the Parliament on the recast RD, accept deleting Art.8(6) and Recital 7.