Statewatch Analysis

Killing me softly? "Improving access to durable solutions": doublespeak and the dismantling of refugee protection in the EU

Introduction

Away from the European elections, enlargement and agreement on the EU constitution, it has been business as usual in the Commission's justice and home affairs Directorate which has been churning out communications on a host of controversial issues. Its Communication on asylum, "Improving access to durable solutions" (released on 4 June 2004), is based on New Labour's "new vision for refugees" which was informally proposed to EU member states in 2003.

Inspired by the Australian government's "Pacific Solution" for refugees, the Blair government proposed the "external processing" of all asylum claims and "protection in the region" for the vast majority of the world's refugees – in short, the creation or expansion of refugee camps in eastern Europe, Africa, Turkey and the Middle East. The proposals were roundly condemned by refugee legal groups and human rights organisations as incompatible with the refugee Convention and the (supposedly) fundamental right to seek asylum in the EU. Although the Commission has taken up the UK proposals, to read its communication you might be forgiven for thinking that the drafters of the text are actually calling for more refugees to be given asylum in the EU. The full title of the communication is:

> *Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: "Improving Access to Durable Solutions"*

The first clue is in "regions of origin", which appears 22 times in the 21 page document. But where the UK government proposed "external processing centres" and "safe havens", the Commission uses even more abstract terms, referring to "determination procedures in a third country" and "regional

protection programmes". The Commission proposals also build on the so-called "Convention Plus" initiative from the UNHCR (United Nations High Commission on Refugees) whose endorsement of the UK proposals subject to a few provisos has surprised and angered refugee groups in equal measure.

The justification: "access to the asylum procedure"

The backbone of the Commission's argument is that most refugees around the world are unable to access the "international protection regime" without recourse to "human traffickers", undermining that regime. At the same time, continuing falls in the number of approved asylum applications indicate that the system is being abused by "economic migrants". There is a need, therefore,

> *to reform the international protection regime to make it more accessible, better managed and first and foremost more equitable*

What the Commission is actually proposing is that those who wish to seek asylum in an EU member state should make their applications, at as yet unspecified locations, as close to their country of origin as possible. This is consistent with earlier EU immigration and asylum policy in that refugees can not lawfully enter the EU in order to claim asylum (they must be in possession of visa even though it is logically impossible for them to obtain one). It also reflects a particularly unpleasant principle long advocated by officials in EU policy-making circles: that "intercontinental movements are seldom necessary for protection" – a phrase coined during the 'Trevi' period (the *ad hoc* intergovernmental cooperation that led to the creation of the EU's Third Pillar on justice and home affairs).

The logic of the Commission's argument on access to the asylum procedure is highly selective. It ignores the fact that by failing to provide a right of admission for refugees, EU policy has contributed significantly to the expansion of the "human trafficking" industry. It also ignores the factor which is driving down the number of asylum applications that are approved by EU states: ever more restrictive rules and procedures (which are likely to become more restrictive still under EU law and the draft asylum procedures Directive in particular). There is no mention either of the increasing number of successful appeals in cases that are refused – at present in the UK over twenty per cent of initial refusals are overturned on appeal (this in turn raises questions about the quality of first instance decisions).

The Commission has even ruled out proposals to improve access to the asylum procedure recommended by a feasibility study it commissioned and advocated by the UNHCR. "Protected entry procedures" allow refugees to submit their asylum applications at embassies or diplomatic representations in third countries. If the application is accepted (or subject to a positive preliminary

decision) the host state issues an entry permit. Five of the EU member states already have PEPs: Austria, France, the Netherlands, Spain and the UK (Denmark abolished its PEP scheme in 2002). The 296 page feasibility study on PEPs by the *Danish Human Rights Centre*, produced in 2002, recommended the use of PEPs to complement existing territorial asylum systems. While the Commission still intends to process asylum applications outside the EU, it cites a lack of "perspective and confidence among the member states" as its reason for not suggesting "an EU [PEP] mechanism as a self standing policy proposal".

Processing asylum applications outside the EU

Like the UK, the Commission proposes processing "requests for protection" (by which it means asylum applicants) in the region of origin. But the Commission offers no further explanation as to how this will work in practice. The UK government proposed mandatory external processing for *all* applicants – even those who first applied on the territory of a member state – in UNHCR administered facilities outside the EU. Asylum-seekers would be entitled to six months temporary protection while their asylum applications were being processed. Legal opinion suggests that removing asylum-seekers from the EU before determination of their claims would obviously breach the Geneva and European human rights Conventions. The Commission is at pains to stress that external processing would be "complementary" and "without prejudice" to the proper treatment of individual requests for asylum expressed by spontaneous arrivals in the EU.

Looking at the UK and UNHCR proposals, however, the principle of external processing seems to be *designed as an alternative* to "spontaneous arrivals" by refugees. The UNHCR, which has hitherto opposed to the designation of "safe third countries", proposes that this principle should be the basis for "special EU-based mechanism" to:

> *target caseloads of asylum seekers that are composed primarily of economic migrants and to reinforce returns of persons not in need of international protection*

Under the UNHCR proposals, all asylum seekers from "designated countries of origin" would be "immediately transferred" to "closed reception facilities" where their claims would be determined by a "consortium of national asylum officers and second instance decision-makers, who would determine international protection needs… in a single procedure that follows international standards". The UNHCR, like the UK, suggests that:

> *The centres could be located within one or possibly more States close to the external borders of the EU, probably of the enlarged EU of 2004.*

The issue that worries refugee groups and others in civil society is that once external processing procedures in third countries are established, they will become the *preferred*, and in time the *only* mechanism for refugees to seek asylum in Europe.

EU "regional protection programmes": "safe havens" in disguise

Following new Labour's "new vision for refugees", the Commission proposes "protection in the region", another principle endorsed by the UNHCR. This is based on the controversial argument cited in the introduction: that there is no need for refugees from the Third World to come to Europe when they could just as easily seek protection in neighbouring countries or elsewhere in the region. The UK Home Office had suggested that successful development policies would mean that in future there would be "no need to flee", but the Commission appears to have concluded that in the absence of a credible development policy, this argument does not hold sway. So instead it proposes financial and managerial assistance to states in refugees' regions of origin to help them become "robust providers of effective protection". What this means is funding immigration controls and asylum systems in third countries on the basis of EU *minimum* standards. A country will then be seen to offer "effective protection" for refugees, and safe for return, if it meets five "benchmarks":

> *(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
>
> *(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;*
>
> *(c) the right to freedom from torture and cruel, inhuman or degrading treatment is respected as well as the prohibition of removal to such treatment;*
>
> *(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention;*
>
> *(e) the possibility exists to live a safe and dignified life taking into consideration the relevant socio-economic conditions prevailing in the host country.*

"Principles" and "possibilities" are all very well on paper, but potentially meaningless in practice. Many states around the world claim to respect minimum human rights standards and do offer the *possibility* of refugee protection, but the reality on the ground maybe very different. EU member states were satisfied last year, for example, that Afghanistan was safe for the

return of refugees despite reports to the contrary from NGOs on the ground, ongoing military action and serious questions over public safety. Does the EU simply intend to designate zones or countries in Africa, the Middle East, the Americas and Asia as offering "effective protection"? The Communication is silent on this issue, though this was the main objective of the UK proposals for the creation of "safe havens".

The UNHCR at least proposes "Development Assistance for Refugees" (direct payments to displaced people to enable their local integration) and "substantial financial and material investment" in host countries. The Commission, however, refers only to existing EU development programmes and the recently agreed "AENEAS" programme (on providing financial and technical assistance from the EU to third states for the purposes of migration management).

EU "Resettlement" programmes: "cherry-picking" refugees

Though "protection in the region" is the preferred outcome of external processing, the EU will continue to take in some refugees. But where the UNHCR proposes that "persons found to be in need of international protection would be distributed fairly amongst Member States"; the Commission proposes an "ad hoc", "flexible" EU resettlement programme. With its "safe havens" scheme, the UK government had proposed that "resettlement cannot be a right" and the definition of refugee should be "at its narrowest". The Commission is less explicit, though does drop several hints as to who might benefit from "resettlement":

> *There are two issues to be considered in deciding whether or not a person is suitable for resettlement under a possible EU scheme. Do they qualify for international protection? Are they part of the target group deemed suitable for selection?[…]*
>
> *The setting up of tailor made integration programmes for specific categories of refugees would also be much more easily devised, if a country knew in advance who was arriving on its territory to stay. Resettling and allowing physical access to the territory of the EU of persons whose identity and history has been screened in advance would also be preferable from a security perspective*

Apparently, the Commission believes that stable personal histories and risk profiling, should supplement (a restrictive interpretation of) the Geneva Convention's principle of protection for *all* fleeing persecution or oppressive regimes. Moreover, what, exactly, does the Commission mean by "specific categories of refugees"? Ethnic groups, specific nationalities, men, women, children; or perhaps workers with certain skill-sets? Any kind of discrimination or "cherry-picking" of refugees is incompatible with the refugee Convention

(not to say the principle of non-discrimination!) and, if based on ethnicity, overtly racist. The possible equation of refugee protection with the labour needs of EU member states would represent neo-colonialism of the highest order.

Bringing expulsion in: towards mandatory external processing?

The Commission does its best to give the impression that its Communication is about offering refugees protection in EU member states:

> *facilitating the arrival of refugees on the territory of the Member States through a resettlement scheme [offers] rapid access to protection without refugees being at the mercy of illegal immigration or smuggling gangs or having to wait years for recognition of their status*

This is all very well, but the reality of EU expulsion policy means that far more refugees are likely to be removed from the EU than are allowed in (not to mention the ever stricter immigration and asylum regime which means that more entrants *will* be at the mercy of the traffickers).

The likely targets and take-up and of an *ad hoc*, flexible EU resettlement programme is dwarfed by the ambitious expulsion targets of the member states. These targets include rejected asylum-seekers, applicants whose claims are "manifestly unfounded", "illegal immigrants" and recognised refugees whose temporary protection has expired. "Repatriation", "readmission", "removal" and "return" have all found their way to the heart of EU immigration and asylum law and EU Action Plans to improve cooperation on expulsion (using joint charter flights etc.). "Return" has also found its way into the Commission communication on improving access to durable solutions:

> *Return could be aimed at the third country's own nationals, as well as other third country nationals for whom the third country has been or could have been a country of first asylum, if this country offers effective protection.*

The unaccountable IOM (International Organisation for Migration) will facilitate the return of migrants to countries of first asylum. The Commission also proposes that "the transport of those selected for resettlement in the EU could be organized by IOM" and that "there may be a role for NGOs in this process". But is the Commission's inclusion of return in a Communication on protection in the region and resettlement a step towards the UK goal of mandatory external processing?

Registration of asylum seekers and refugees: Eurodac to go global?

Another important issue in the Communication is the systematic "registration and documentation" of asylum applicants, which the Commission argues are "important aspects of refugee protection". This is not quite true. Registration does nothing to protect refugees – it is instead an important aspect of policing refugees. Documentation arguably contributes to refugee protection, but often means in practice that asylum-seekers are often treated as second-class citizens. What is proposed is "comprehensive and systematic registration and documentation of refugees and asylum-seekers including standards on exchange of information" – a *de facto* extension of the Eurodac Convention across the world:

> *The UNHCR registration scheme "Profile", which will ultimately utilise biometric technology [fingerprints], constitutes a fundamental protection tool to better manage who requires protection in a third country. Such a scheme could also prove invaluable in terms of evaluating the effects of the action taken under the EU Regional Protection Programmes.*

Next steps

The Commission's communication contains no formal legislative proposals, so no consultation of national or the European Parliaments at this stage – though the EP, and the member states in the EU Council, are requested to "endorse" Regional Protection Programmes, the principle of "effective protection" and an EU resettlement scheme. The Commission then:

> *envisages taking charge of the drawing-up of a pilot EU Regional Protection Programme in relation to a protracted refugee situation identified by the Commission in close cooperation with UNHCR and consulting the relevant Council groups with a plan of action by July 2005 and a fully fledged EU Regional Protection Programme by December 2005.*

The cooperation of third states in regional protection programmes will be solicited during reviews of the EU's "regional and country strategy papers" which cover relations with developing countries in all policy areas. In this way, the "sticks" and carrots" of aid and trade can be used to impose the EU's policy agenda on third states. EU resettlement legislation will be proposed in July 2005.

Observations on the policy process

When the UK government first presented its "new vision for refugees", or rather deliberately leaked it to the right-wing press in an attempt to calm

tabloid hysteria over asylum-seekers, *Amnesty International*, like many others, pointed out that:

> *The real goal behind the UK proposal appears to be to reduce the numbers of spontaneous arrivals in the UK and other EU states by denying access to territory and shifting asylum-seekers to zones outside the EU where refugee protection would be weak and unclear.*

Fifteen months later, and the essence of the UK proposals have been incorporated into EU policy. How has this happened? The "normal" procedure for new EU policy areas is that the Commission produces a "Green paper", setting out policy options and consulting parliaments, interest groups and NGOs. This should be followed by a Communication on the Commission's intentions, and then formal legislative proposals to be agreed by the Council and the EP under a legal basis in the EU treaties.

In this case, however, the Commission has taken-up the UK proposals, apparently only consulted third parties with an interest in implementing these proposals, and begun working on an *ad hoc* operational project using EU funds to undertake actions in third countries. It clearly did not consult the same expert opinion as the UK House of Lords, whose recent report: *"Handling EU asylum claims: new approaches examined"* (published on 30 April 2004) identified "a number of drawbacks" in the UK and UNHCR proposals, and recommended instead that "better quality decision-making in the Member States [is] the key to an effective determination process".

The Commission has also done its best to confuse readers of its Communication as to the content and purpose of the actions it proposes. There is no clear legal base for these activities in the EU Treaties, though the Constitution will arguably provide one, and the only instance of formal decision-making was the creation of the EU budget line to fund immigration systems in third states. All the decisions have been taken by officials. A "mandate" for the Commission's Communication from the EU Council (member states) can be found in "Conclusion 26" of the 19/20 June 2003 Thessaloniki European summit. Another "conclusion" can be expected to be nodded through by EU justice ministers at their next meeting and will give the Commission its "endorsement" to put the policy into practice. Deciding policy in this way means that there will be no meaningful consultation of parliaments on the decisions to develop these policies and precious little in the way of accountability as far as operational matters are concerned. It is even expressly proposed that the EP be excluded from the decision on which regions and "protracted refugee situation" to select for protection in the region and resettlement programmes.

Conclusion

The Commission is developing two of three significant proposals in the UK government's controversial "new vision": protection in the region and resettlement. In practice this will mean the denial of refugee protection in western Europe to more and more refugees, and the "cherry-picking" of those refugees who are allowed in. The incorporation of "return" to safe third countries and "regional protection" zones is a step toward the third key UK proposal: the processing of all asylum applications outside the EU.

The EU has already exported its responsibility for countless refugees through the development of buffer-states and readmission agreements. By funding "protection in the region", border controls and "migration management" in developing countries it will export responsibility for countless more. It has, of course, been pointed out by development NGOs that by tying aid and trade to migration management obligations the international development agenda is undermined. And what does dictating the affairs of third states and forcing them to take the people that the EU does not want say about the supposed "democratization" agenda? As Raekha Prasad commented in *The Guardian* (10.2.03) on the UK proposals:

> *For decades, from sub-Saharan Africa to Sri Lanka, more than 6 million of the 10 million refugees in UNHCR care have been trapped in exile, unable to return home or settle in their country of asylum. Sending more people back to poor nations will only add to the burden on developing countries, which already cope with 72% of the world's refugees.*
>
> *In all but name, Britain is proposing a new network of refugee camps - designated areas where those inside have different rights from those outside. To envisage such a plan is to imagine ghettoes created by the world's most peaceful and richest countries in some of the world's poorest and most unstable regions.*

References

1. Commission Communication on "Improving access to durable solutions", COM (2004) 410, 4 June 2004

2. House of Lords Select Committee on the EU report: "Handling EU asylum claims: new approaches examined", 30 April 2004:
http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/74/74.pdf

3. EC Regulation 491/2004 on financial and technical assistance to third countries in the area of migration and asylum ("AENEAS"), OJ 2004 L 80/1:
http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&LANGUAGE=en&SERVICE=eurlex&COLLECTION=oj&DOCID=2004l080p00010005

4. UNHCR “Convention plus” proposals:
http://www.statewatch.org/news/2003/jun/unhcr.pdf

5. Letter from Blair to Greek Presidency proposing "safe havens":
http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf

6. Legal opinion on removing asylum-seekers from the EU before their claims have been considered (Ian McDonald and Nadine Finch):
http://www.statewatch.org/news/2003/jun/25asylopinion.html

7. “Study on The Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure” [actually only covers “Protected Entry Procedures”], Danish Human Rights Centre/European Commission:
http://europa.eu.int/comm/justice_home/doc_centre/asylum/common/asylumstudy_dchr_2002_en.pdf

Statewatch coverage

1. EU buffer states and UNHCR “processing” centres and “safe havens”:
http://www.statewatch.org/news/2003/jun/07eubuffer.htm

2. UK asylum plan for “safe havens”: full-text of proposal and reactions:
http://www.statewatch.org/news/2003/apr/10safe.htm

3. Asylum in the EU: the beginning of the end?:
http://www.statewatch.org/news/2003/mar/25asylum.htm

4. Migration, development and the EU security agenda:
http://www.statewatch.org/news/2003/sep/bhtb.pdf

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