

# ECRE

EUROPEAN COUNCIL  
ON REFUGEES AND  
EXILES



To: Mr Antonio Vitorino - Member of the  
European Commission

CC: Mr Michael McDowell – Irish Presidency of the  
EU

22 March 2004

## RE: Call for withdrawal of the Asylum Procedures Directive

Dear Mr Vitorino,

As you are aware, the European Council on Refugees and Exiles\* and the undersigning organisations have closely followed the negotiations on the Commission's proposal for a *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* throughout the last four years. We have regarded this initiative as a key element of European Union attempts to set minimum standards for asylum legislation in accordance with the Amsterdam Treaty. We have also appreciated the Commission's extensive efforts to facilitate an agreement between Member States, amid disparate and often inflexible national positions.

We are aware that negotiations have not been finalised yet. However, in the last stage of this lengthy negotiation process, we note that the gaps between this draft Directive and international law have grown even wider and that the recommendations repeatedly issued by the United Nations High Commissioner for Refugees, Mr Ruud Lubbers, and by civil society organisations have not been duly taken into account. We note with deep regret that the most contentious provisions are all intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU. We are concerned about the effect that this abdication from international law obligations will have on refugee protection within the EU and elsewhere, as well as on the EU's credibility in the international refugee and human rights debate. We are now unable

to further regard this initiative as credible and therefore, we are compelled to call on you to withdraw this proposal, as it remains in breach of the EU's own commitments as set out in the Charter of Fundamental Rights, which is to become part of the EU Constitution, as well as individual Member States' responsibilities under international refugee and human rights law.

This joint letter intends to highlight the main (but not exclusive) concerns of our organisations regarding provisions on safe countries of origin, safe third countries (including 'super safe third countries'), and the appeal system. While the scope of the letter is restricted to these key issues, our organisations also deplore the fact that the Directive will mostly be reduced to a catalogue of optional provisions, leaving critical issues such as detention and the right to legal assistance to Member States' discretion.

The current proposal foresees the possibility of using the **safe country of origin** concept to restrict access to the regular asylum procedure. While the individual may rebut the presumption of safety, s/he may be required to do so in an accelerated procedure with only limited safeguards and with the burden of proof lying exclusively with him/her. Furthermore, the proposal foresees a common list of safe countries of origin binding on all Member States, as a result of which, Member States will be forced to use this concept. In light of recent practice in some Member States, we are very concerned that the safe country of origin concept may be implemented by Member States in a way which amounts to discrimination among refugees in violation of Article 3 of the 1951 Refugee Convention, Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights.

We are also concerned about the use of the **safe third country** concept in the proposal, which does not conform with Member States' obligations under international law. The proposal allows Member States to shift responsibility to third countries, regardless of whether the applicant has meaningful links with such countries and whether durable solutions exist there, including protection against *refoulement* as established by international law and access to a fair and efficient asylum procedure resulting in the recognition of refugee status. Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. A transfer of such responsibility can only be envisaged where a meaningful link exists between an asylum applicant and a third country which makes a transfer reasonable and where the third country is determined safe in the individual circumstances of the applicant. Moreover, a transfer can only take place if the third State gives its consent to admit or readmit the asylum applicant and to provide him/her with full access to a fair and efficient determination procedure. The burden of proof regarding the safety of the third country for the particular applicant lies entirely with the country of asylum and the presumption of safety must be rebuttable by the applicant. The proposal in its current form, however, does not guarantee sufficiently the right of the asylum applicant to rebut the presumption of safety, as it may even allow Member States to reject the claim without considering the particular circumstances of the applicant, and does not contain sufficiently strict criteria for the designation of countries as safe.

Furthermore, we are particularly concerned by the **exceptional application of the safe third country** concept to countries in the European region, as it appears in the proposal. No country

can be labelled as a safe third country for *all* asylum seekers; a decision on a country's safety for a particular applicant must always be the outcome of an individual examination of the claim, as opposed to a general presumption based on country-related criteria. The exceptional application of the safe third country concept, however, allows Member States to deny access to the procedure to all asylum seekers "illegally" arriving from designated countries in the European region and strips them of any rights to rebut this presumption. Hence, under the current proposal, a border guard without knowledge of international refugee law or national asylum provisions could be given the sole power to decide on the removal of an asylum applicant to a country even before the competent authority has had the chance to look into the claim. In practice, this would leave the decision-making authority outside any legal framework of accountability for their decisions and could result in a serious risk that Member States may violate their international obligations to guarantee an effective remedy and to protect against *refoulement*, as enshrined in Article 33 of the 1951 Refugee Convention; Articles 3 and 13 of the European Convention on Human Rights; Article 3 of the Convention Against Torture; Article 7 of the International Covenant on Civil and Political Rights; and Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union. Given that the proposal does not require that Member States obtain agreement from countries under the exceptional application of the safe third country concept to process the asylum claim before removing the applicant, the implementation of such a concept may lead to refugees-in-orbit situations, and to chain-*refoulement*, which are in breach of the European Convention of Human Rights, as it has been repeatedly confirmed by the jurisprudence developed by its Court<sup>1</sup>.

We also believe that the proposal does not contain adequate **appeal safeguards** for asylum seekers. The right to an effective remedy before a court or tribunal is embodied in EC law, in Article 47 of the Charter of Fundamental Rights of the European Union and in Article 13 of the European Convention on Human Rights. As held by the European Court of Human Rights, it implies the right to remain in the territory of the Member State until a final decision on the application has been taken.<sup>2</sup> Thus, the right of asylum applicants to remain pending a final decision on their cases is essential for Member States to comply with their non-*refoulement* obligations and international law provisions related to the right to an effective remedy. The proposal, however, does not contain an explicit right of all asylum seekers to remain or request for leave to remain in the asylum country.

In light of the above and as organisations committed to promoting international law and fundamental humanitarian values, we find the proposal on asylum procedures, in its current form, unacceptable as a legal basis for minimum standards in the European Union. Therefore, we are forced to call upon the Commission to withdraw its proposal for a *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*.

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<sup>1</sup> See *Cruz Varas vs. Sweden*, judgement of 20 March 1991. ECHR, request 7612/76, *Manitu Giama vs. Belgium*, 17 July 1980.

<sup>2</sup> See *Conka vs. Belgium*, Judgment of 5 February 2002, stating as regards the deportation of asylum seekers: "it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention".

Yours sincerely,

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Executive Director of ILGA Europe -  
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Joint Representative of QCEA -  
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\* ECRE represents 76 refugee assisting NGOs in 30 countries: **Austria:** Asylkoordination, Hebrew Immigration Aid Society (HIAS); **Belgium:** Belgisch Comité voor Hulp aan Vluchtelingen / Comité Belge d'Aide aux Réfugiés, Churches' Commission for Migrants in Europe, Jesuit Refugee Service – Europe, Overlegcentrum voor Integratie van Vluchtelingen (OCIV); **Bosnia-Herzegovina:** BOSPO; **Bulgaria:** Bulgarian Helsinki Committee, Bulgarian Red Cross; **Czech Republic:** Counselling Centre for Integration (Poradna pro integraci), Czech Helsinki Committee, Organisation for Aid to Refugees (OPU), Sdruzen Obcanu Zabrajicij se Emigranty (SOZE); **Denmark:** Danish Refugee Council; **Finland:** Finnish Red Cross, Finnish Refugee Advice Centre; **France:** CIMADE, Forum Réfugiés, France Terre d'Asile, Secours Catholique; **Germany:** Arbeiterwohlfahrt, Der Paritätische Wohlfahrtsverband Gesamtverband, Deutscher Caritasverband, Diakonisches Werk der EKD, Informationsverbund Asyl / ZDWF e.V., Pro Asyl, Deutsches Rotes Kreuz; **Greece:** Greek Council for Refugees; **Hungary:** Association for Migration – Menedek, Hungarian Helsinki Committee; **Ireland:** Irish Refugee Council; **Italy:** Italian Consortium of Solidarity, Italian Council for Refugees (CIR); **Lithuania:** Lithuanian Red Cross; **Luxembourg:** Caritas Luxembourg; **Macedonia:** ADI (Association for Democratic Initiatives); **Netherlands:** Pharos, University Assistance Fund (UAF), VluchtelingenWerk Nederland (Dutch Refugee Council); **Norway:** NOAS - Norwegian Organisation for Asylum Seekers, Norwegian Refugee Council; **Poland:** Polish Humanitarian Organisation; **Portugal:** Portuguese Refugee Council; **Romania:** CNRR (Romanian National Council for Refugees), Romanian Forum for Refugees and Migrants (ARCA); **Russia:** Memorial Human Rights Centre; **Serbia and Montenegro:** Alter Modus, Group 484, Serbia & Montenegro Red Cross Society; **Slovakia:** Slovak Humanitarian Council; **Slovenia:** Foundation Gea 2000; **Spain:** Asociación Comisión Católica Española de Migración (ACCEM), Comisión Española de Ayuda al Refugiado (CEAR), Comité Internacional de Rescate; **Sweden:** Caritas Sweden, Radda Barnen Sweden (Save the Children), Swedish Red Cross, Swedish Refugee Aid; **Switzerland:** ICMC - International Catholic Migration Commission, International Federation of Red Cross & Red Crescent Societies, Lutheran World Federation, OSAR/SFH - Schweizerische Flüchtlingshilfe, Swiss Red Cross; **United Kingdom:** Amnesty International, Education Action International, Immigration Advisory Service, Immigration Law Practitioners' Association (ILPA), International Rescue Committee U.K., Oxfam GB, Refugee Action, Refugee Council, Refugee Legal Centre, Refugee Studies Centre, Save the Children UK, Scottish Refugee Council; **United States of America:** Human Rights First.