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The status of persons who have been denied refugee status

NOTE

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EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The status of persons who have been denied refugee status and who cannot be returned to their country of origin

NOTE

Summary:
This briefing paper aims to provide information on the reasons why the denial of refugee status i.e. international protection does not necessarily mean return and change to the status of deportable alien. The paper looks at the major reasons for the unfeasibility to return persons in particular the provisions of the European Convention on Human Rights and the case-law of the European Court of Human Rights. It addresses the question of the legal status of non-returnable persons and it makes recommendations to establish some common rules and practices on "post-asylum procedures".

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1. INTRODUCTION

It is assumed that the briefing paper is to include subsidiary protection in addition to refugee status. Under the present rules an application for asylum means an application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention.[1] In the Commission's proposal on the amended Procedures Directive (COM (2009) 554/4) and the amended Qualification Directive (COM (2009) 551) the term "application for asylum" will be replaced by the term "application for international protection" meaning a request for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of the Qualification Directive, that can be applied for separately. The following remarks, therefore, are based upon the concept of "international protection" as defined by the amended proposals.

The denial of refugee status (international protection) does not necessarily mean return and change to the status of a deportable alien. Although usually, according to national law, final decisions rejecting an asylum application will be connected with an order to leave. There is, however, a variety of "post-asylum procedures", before authorities will actually enforce a deportation order, ranging from

- Follow-up asylum claims,
- Applications for regular residence permits (cf. family reunion),
- Applications for temporary humanitarian human residence permits,
- Applications for stay of execution due to factual or legal barriers to deportation,
- Applications for toleration or temporary residence permits based on deportation stop programmes, recommendations of "hardship commissions", legalization programmes etc.

The period of time spent in the "intermediate period" until either deportation or a renewable residence permit is granted, may be considerably larger than the asylum procedure proper.

The number of persons "immigrating" by way of subsequent procedures is most likely considerably higher than the number of refugees receiving some kind of international protection. The legal status of persons who have been denied refugee status in the intermediate period is primarily determined by national law". The Directive 2008/115 on common standards and procedures for returning illegally staying third-country nationals is destined to provide some guidelines for effective removal and repatriation policy. It does not, however, make rules for the legal status of rejected applicants, the access to legal or quasi-legal residence titles and the rights connected with such titles, except that there are legal safeguards contained in the Directive on decisions relating to return such as

- Member States must take into account the best interests of the child, family life, state of health etc.,
- Member States must respect the principle of non-refoulement,

[1] Art. 2 (b) of the Asylum Procedures Directive.

- an appropriate and extendable period of time for voluntary departure must be given (Art. 7),
- postponement of removal is required for legal or technical reasons (Art. 9),
- conditions for removal of unaccompanied minors must be fulfilled (Art. 10),
- no suspension has been ordered or prescribed by law in an appeal procedure (Art. 13).

In addition, Art. 13 of the Return Directive provides that legal assistance and representation must also be granted to persons filing a remedy against a return order; not included are conditions on employment and social benefits. Follow-up applications for substantial protection are regulated by the Procedures Directive (see also p. 9).

2. MAJOR REASONS FOR IMPOSSIBILITY TO RETURN PERSONS

Reasons for non-return of rejected applicants may be of a legal or legal policy nature or of a factual nature. Frequently some kind of a residence or quasi-legal residence may be obtained on national or international law-based grounds. A decision to deny international protection does not necessarily preclude an entitlement to a regular or humanitarian residence permit based upon other humanitarian grounds described either by obligatory or discretionary rules of national law and/or international law requirements (frequently also determined as complementary protection). It is argued that the definition on subsidiary protection as is presently defined by Art. 15 Qualification Directive ("serious harm"), which embraces

- death penalty or execution, or
- torture or inhuman or degrading treatment or punishment, or
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict,

does not fully cover the public international law dimension of "international protection". The argument is raised within a controversial discussion to what extent other provisions than Art. 3 ECHR and Art. 33 of the Geneva Convention provide protection against refoulement. The argument is, for instance, made with respect to the right to personal liberty and security (Art. 5 ECHR) and the right to a fair trial (Art. 6 ECHR). The European Court of Human Rights has indicated that in particular circumstances a serious risk of violations of other human rights which are in effect comparable to a violation of rights under Art. 3 ECHR may give rise to protection against refoulement. Occasional references to other ECHR provisions such as in the Soering-case[2] have not led to an established jurisprudence. Therefore, as yet, the precise content of this and other human rights guarantees in international treaties, such as the UN Convention on the right of children, has remained controversial.

In addition to the controversy on the scope of the "international protection" scheme there is agreement that rejected applicants may rely on humanitarian grounds and – provided

[2] Judgment of 7.7.1989, EuGRZ 1989, 314, No. 14038/88.

certain conditions are met – upon national entitlements to regular residence permits for instance for the purpose of family reunification. Such grounds are basically regulated by national law, but they may well be substantially influenced by public international law requirements such as Art.8 ECHR on protection of private life and family. It has to be noted that the concept of Art.8 ECHR has been considerably expanded by the European Court of Human Rights recently by the concept of protection of private life (regardless of family connections) for persons who have established close links with the country of actual residence and whose return may on balance constitute therefore a violation of Art. 8 ECHR.

The European Court of Human Rights has recently applied its jurisprudence on the private life implications even for persons who are not in possession of a residence permit.[3] An occasionally drawn conclusion that this brings "illegal aliens" and thus rejected asylum seekers into the scope of application of Art.8 ECHR, provided that they have managed to achieve a certain degree of integration into their host country, rests, however, upon legally questionable grounds since the decisions of the European Court of Human Rights were dealing with very particular situations with regard to the legal situation of residents in successor states of the former Soviet Union.

A report by ECRE[4] identifies **four major grounds** based on international obligations which according to ECRE are based on the states' obligations under international and European human rights law to grant protection. Most of these grounds are relating to family unity, health and the rights of children. Frequently, states do not precisely identify to what extent a residence permit or a "quasi" legal residence is based upon international law considerations or national law or national humanitarian policy. A primary ground of granting either a residence permit or toleration is the **protection of family life and private life**. Frequently rejected refugees entering into a family relationship may not be deported, particularly if a family relationship has been established with small children and/or persons who are dependent upon a rejected applicant.[5] Some countries have adopted special rules related to family matters which are also applicable to rejected applicants.[6] In some other countries, family reunion is included under the term "humanitarian considerations" or covered by the term "exceptional circumstances".

Another category of persons receiving generally some kind of complementary protection concerns **unaccompanied minors**. The ECRE report refers to international and regional human rights instruments imposing legal obligations concerning the treatment of children which may give rise to some kind of residence right in spite of a rejection of an asylum application.[7] Some Member States have made provision for granting humanitarian residence permits "on grounds of exceptionally distressing situations" (Sweden). According to the UK legislation children who do not qualify for international protection should be granted discretionary leave if there are inadequate reception arrangements in the country of origin.[8] Similarly Denmark provides for protection of unaccompanied minors if they would be placed in an "emergency situation" if returned.

[3] See for instance European Court of Human Rights of 15.1.2007, No. 60654/00, Sisojeva/Lithuania, at No. 90; of 9.10.2003, No. 48321/099, Slivenko/Lithuania.
[4] Complementary Protection in Europe, July 2009.
[5] cf. Helene Lambert, The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion, International Journal of Refugee Law 1999, p. 427-450.
[6] See ECRE Report at p. 6.
[7] ECRE Report, at p. 7; see also MacAdam, Complementary Protection in International Refugee Law 2007, p. 177.
[8] ECRE Report, at No. 2.1.4.

A further category concerns **persons suffering from serious illness** which under certain circumstances may be protected by Art.3 ECHR. Most EU Member States do not make special provision for health or medical reasons, but refer generally to discretionary possibilities to grant toleration. In the United Kingdom the official instructions of the Home Office include the requirement of a "serious medical condition" for granting discretionary leave. In Germany, health reasons may usually give rise to toleration under the general provision to suspend deportation "for reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany".[9]

A reason why rejected applicants cannot be deported is the application of blanket clauses providing the administration with a largely discretionary authority to grant suspension of deportation. Frequently, Member States apply general clauses whereby execution of return orders may be suspended due to the situation in the country of origin or particular individual circumstances such as poor living condition, victims of human trafficking, persons fleeing from environmental disasters (Finland) and other reasons making return impossible or unacceptable.

Another category of persons enjoys protection against return under political admission programmes for humanitarian or public policy reasons. This category refers to administrative rules or practices whereby persons whose application for international protection has been rejected receive some kind of temporary residence permit or protection against deportation for humanitarian or public policy reasons. Such programmes were set up in various EU Member States for instance in the context of refugees from former Yugoslavia. Sometimes, such arrangements have been in force for quite some time to accommodate the particular needs of certain categories of unsuccessful asylum seekers who are considered as deserving further protection against deportation either due to particularly adverse living conditions in their home countries or due to considerations of the unreasonableness of forceful return after a lengthy asylum procedure and integration into their host country. Some Member States have also adopted regularization programmes based primarily on the length of time spent in the host country and some additional requirements like ordinary employment and absence of criminal persecution.[10]

In addition to the legal reasons based upon national law or on international considerations there is a wide variety of **factual reasons** why persons denied international protection cannot be returned. In principle one can identify the following categories: Persons who cannot be forcefully returned due to factual circumstances in the country of destination, like refusal to accept a person as a national, lack of travel documents, lack of documents proving identity, particular circumstances of a deportation, absence of reasonable travel or arrival facilities in the country of origin.

[9] Cf. Sec. 60 a German Residence Act of 2004.
[10] For a survey see de Bruycker (ed.), Regularization of Illegal Immigrants in the European Union, Brussels 2000.

3. LEGAL STATUS OF NON-RETURNABLE PERSONS

The categories identified do not describe clearly defined groups of persons in the EU Member States' legal systems. Similar protection reasons may be dealt with under different legal headings in different EU Member States and give rise to different types of protection (residence permit, suspension of execution, de facto toleration etc.). As to the legal status obtained one may identify the following types of status:

1. Regular or humanitarian temporary or permanent residence permit,
2. "toleration" or "discretionary leave" (United Kingdom) or "suspension of execution",
3. de facto toleration ranging from simple non-enforcement to a policy to tolerate illegal foreigners, sometimes in connection with an envisaged legalization programme or other forms of announced admission programmes.

All three categories have some features in common. Firstly, they are – with exceptions – primarily regulated by national rules and administrative instructions although such rules may be influenced by international law requirements, such as Art. 8 ECHR. However, even in case of international law implications there are in general no precise requirements regulating the conditions which have to be fulfilled to obtain some kind of alternative residence status. In addition, the residential status is usually precarious. Frequently, no right of access or only limited access to social benefits or employment is granted unless a regular residence permit, for instance for the purpose of family reunion, is given, although in practice the access to some kind of social benefits and the labour market will be granted to a varying degree at least in case of impossibility to deport for an unknown period of time.

Whether a person is entitled to one of the three categories mentioned depends frequently on the reasons for the impossibility of involuntary return and/or voluntary return (both are not identical since it may be impossible to forcefully return a person who does not sign a declaration that he/she is voluntarily leaving the country of residence while it may well be possible to voluntary return). Thus, the law of many Member States, as for instance the German legislation on humanitarian residence permits, will distinguish with regard to the access to category 1 residence titles, whether a person can be held responsible for non-return or not. Forceful resistance, destruction of travel documents and lack of cooperation will usually exclude a residence permit although deportation is for factual or legal reasons impossible.

The question to what extent persons who have been denied international protection have access to administrative and judicial proceedings aiming at a humanitarian residence permit or "toleration" (irrespective of an entitlement under national law), and what legal consequences derive from such proceedings (right to remain for the duration of proceedings; suspensive effect of appeals etc.?) is in principle a matter of national law subject to principles like the right of effective judicial protection in case of claimed violation of fundamental rights etc. Some Member States try to exclude resort to national immigration law by preventing access at least to regular residence permits unless an application is filed abroad; other EU Member States will accept a "shift" from failed asylum seeker status to regular immigration procedures under certain conditions (most notably family reunion taking place after final determination of asylum claims). With regard to

family relations respectively marriage of a rejected asylum seeker with a Union citizen a change to a legal residence is guaranteed by EU-law under the Metock jurisprudence of the European Court.[11]

Applicants may also resort to subsequent international protection claims based upon new facts or new evidence. Under the Asylum Procedures Directive, a subsequent application requires a Member State to examine the case in a specific procedure after a previous application has been withdrawn or abandoned or after a decision has been taken on the previous application. In this case, a preliminary examination takes place whether new elements or findings relating to the examination of whether a person qualifies as a refugee, or as a person eligible to international protection, have arisen or have been presented by the applicant. If such new elements can be identified which significantly add to the likelihood of the applicant qualifying for the protection status (or optionally for other reasons to reopen the procedure) a new asylum procedure starts and the rejected asylum seeker is back to his/her previous status as an applicant for international protection. While previously the Procedure Directive did not contain a rule on the effect of further asylum applications, it is foreseen in Art. 35 (8) (COM (2009) 554/4) that in case of a final decision to reject a subsequent application Member States may make an exception "to the right to remain in the territory" provided that the determining authority is satisfied that the decision will not lead to direct or indirect refoulement.

Alternatively, applicants may resort to national law provisions providing for humanitarian protection beyond the scope of application of the Qualification Directive. Sometimes, these additional humanitarian possibilities are examined in a single asylum procedure, sometimes they are subject to separate subsequent administrative and judicial procedures. Sometimes, such rules may not even provide any entitlement but granted on an exclusively discretionary (political) basis. Thus, for instance German law provides that "by way of derogation from the prerequisites for the issuance and extension of residence titles", the Länder may, on petition from a hardship commission, order a residence permit to be issued to a foreigner who is unappealably obliged to leave the federal territory.

4. CHARACTER OF A "TOLERATION" OR" DISCRETIONARY LEAVE" OR "SUSPENSION OF EXECUTION"

The common characteristic of this type of status is the absence of a legal right of residence by way of a national right to a residence permit while at the same time execution of a deportation order is excluded by law for a specified period of time, usually for a limited time period of some months (toleration). Toleration may be renewed and sometimes last for several years. The status obtained is "quasi-legal" which means

- that the obligation to leave as a consequence of a lack of a residence title remains,
- that punishment for unlawful residence is excluded,
- that execution of a deportation order is suspended,
- that actual residence in the territory of a Member State as a rule will not be counted as "lawful residence" for other purposes (naturalization etc.).

[11] Judgment of 25.7.2008, case C-127/08.

Discretionary leave in the United Kingdom grants a somewhat different legal status. It applies where a person does not qualify for asylum and humanitarian protection, but neither an enforced nor a voluntary return is possible without prejudice to protected rights. Somewhat different to the German "toleration" the discretionary leave does grant a right to residence although it is a somewhat minor status in terms of duration ranging from six months to three years or shorter periods if the circumstances leading to the granting of discretionary leave will be short-lived.[12]

5. NEED FOR MODIFICATION?

The proposals of the Commission are based upon the assumption that progress in the harmonisation of rules with regard to the asylum procedure and recognition standards will substantially contribute to prevent irregular movements and remove pull-effects for illegal immigration. In the absence of reliable data it cannot be ascertained whether these assumptions are correct. It is, however, doubtful whether the assumption that common asylum procedures and the reduction of Member States' options will automatically create higher efficiency in returning persons who do not qualify for international protection. The disparity between the number of persons denied international protection status and the number of persons voluntarily returning or deported to their countries of origin indicates that with the acceleration of asylum proceedings the problem may not be solved but shifted to "post-asylum procedures". The acceleration of asylum procedures proper (the Commission itself has assumed an average length of procedure of six months) may not be the real issue. The variety of additional procedures and chances to some kind of humanitarian residence permit, toleration or quasi-residence rights may play a substantially larger role as a pull-effect than is generally acknowledged in the official debate.

In addition, there may be an EU-regulatory gap in the legal status of persons denied protection status that cannot be returned if this category of persons in terms of duration, economic importance and integration constitute a significant de facto portion of the EU refugee population.

Therefore, in order to tackle on a EU level with the intermediate period between a common European asylum procedure and execution of return decisions with all its problems arising in relations with countries of origin, efforts should be undertaken to establish some common rules on "post-asylum procedures" and the reasons for granting a status and rights attached to a status. This does not necessarily mean an extension of the concept of international protection. It should as well not jeopardize the efficient implementation of the principle that third-country nationals who have been denied international protection should preferably voluntarily return to their countries of origin or be deported.

At the outset Member States must keep flexibility and political discretion as to granting humanitarian residence permits or quasi-legal residence rights. It is, on the other hand, obvious that the variety of legal instruments and practices available may turn out to be a more important pull-factor than the asylum procedure proper. In short, the expectation to muddle through a highly complex system at least for such a length of time as to provide a sufficient amortization of the capital spent for organized smuggling may be more important than specific rules on accelerated proceedings, legal assistance etc.

[12] For information see ECRE Report, Complementary Protection in Europe, July 2009.

At present, no exact data are available to my knowledge as to the

- number and duration of post-asylum proceedings,
- the reasons on which residence permits, humanitarian titles, suspensions of execution, toleration etc., are granted.

To identify the problem and to explore the potential for harmonisation it would be necessary to have more precise data.

It should be noted that an obligatory single asylum procedure will not solve the problem since the single procedure concept will only cover international protection. Whether other protection grounds are covered depends exclusively on the national law.

Harmonisation efforts respectively increased cooperation for common practices (EASO) could be envisaged in the following areas:

- rules on what basis rejected asylum seekers who cannot be returned should receive a temporary status,
- reduction of the possibilities of Member States to grant “at any time” an autonomous residence permit or other authorization for compassionate, humanitarian or other reasons to illegal aliens (cf. Art. 6 para. 4 Return Directive),
- rules under what conditions rejected asylum seekers may shift to “regular” procedures for applying for a residence permit,
- harmonisation of access to employment and social benefits.

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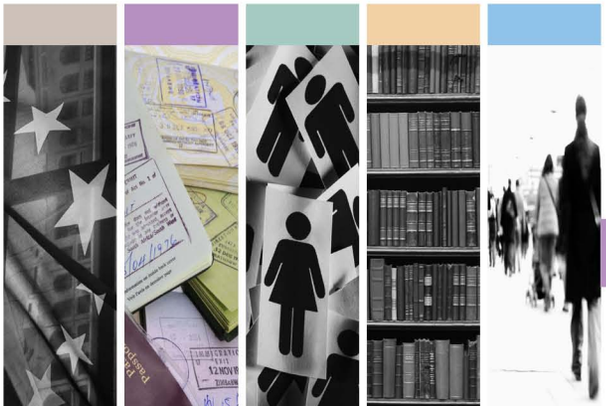

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