Draft Readmission Agreement between the member States of the European Union and a Third Country.

The Immigration Law Practitioners' Association ("ILPA") has been asked to provide to the Sub-Committee its views on the Draft Readmission Agreement between the Member States of the European Union and a Third Country.

Comments:

This proposal is for a draft Readmission Agreement between the Member States of the EU, and third countries. It follows the specimen bi-lateral Readmission Agreements for use by EU Member States when concluding readmission agreements with third countries and many of the provisions are the same or similar. It appears to be designed for use both with non-EU states bordering the EU (e.g Poland) and also with countries further away from which many persons migrate to the EU (e.g Sri Lanka, India).

The proposed Draft Readmission Agreement aims to facilitate the removal of persons who either never did or no longer fulfill the legal requirements for residence in the ratifying states. Such persons could include; illegal entrants, over stayers and importantly asylum seekers, many of whom, of necessity, arrive in countries of refuge without or without validly complying with immigration requirements. Article 1 of the Draft Readmission Agreement makes clear that persons with temporary admission, often granted to asylum seekers in the UK, would not be considered to satisfy the legal requirements for residence.

The Agreement should be read in conjunction with developments in Community law and the possible enlargement of the EU.

Summary of the Draft Readmission Agreement

The parties to the Draft Readmission Agreement are the Member States of the EU on the one part and a third, non-EU, state on the other. The Agreement aims to facilitate removals in four main situations:

1. Readmission of own nationals: Ratifying States are to readmit their own nationals, at the request of the other party to the Agreement, without formalities, and to issue any necessary travel documents without delay (Art 2)

2. Readmission of third country nationals: Ratifying States are to readmit nationals of third countries (i.e neither of the parties to the Readmission Agreement) who have lived in their territory prior to moving to the territory of another ratifying state where they do not or no longer fulfill the conditions for entry or residence (e.g a Sri Lankan who lived in Poland and then moved legally to the UK, but then became an 'overstayer') (Art 3).

3. Readmission of third country nationals: Ratifying States are to admit nationals of third countries (i.e neither of the parties to the Readmission Agreement) who hold a valid visa/residence permit issued by them, but who arrive in the territory of one of the other

ILPA • Lindsey House • 40/42 Charterhouse Street • London EC1M 6JN • Tel: 0171-251 8383 • Fax: 0171-251 8384
EMail: ilpa@mcr1.poptel.org.uk

ratifying States in respect of which they never or no longer fulfil the criteria for entry or residence (e.g a Sri Lankan who holds a visa to enter Poland, but arrives in the UK without a visa and claims asylum) (Art 4).

4. Removal of third country nationals from a ratifying Party to a third country by transiting through the other ratifying Party - contracting parties are to allow citizens to transit through their territory without a visa if admission to the destination state and any other transit state is assured (e.g transit of a Russian citizen from Germany through Poland) (Art 5)

The position of the UK

The UK appears to have a choice as to whether to enter into a particular readmission Agreement with a particular country since the Draft Readmission Agreement provides for 'rolling ratification' in Art 12. It should be noted that as a multi-lateral international treaty the Draft Readmission Agreement would not be directly effective in the UK courts if the UK does ratify it. After the Treaty of Amsterdam brings immigration and asylum matters within Community competence, it will be possible for the Community itself to conclude treaties with other states and might be preferable if any multilateral readmission treaty included the EC as a party since the terms of a treaty concluded by the EC (or jointly by the EC and member states) will be directly effective in domestic courts if they are clear, precise and unconditional (see *Demirel* Case 12/86 30 September 1987 ECJ Judgment, *Sevince* Case C-192/89 20 September 1990 ECJ Judgment). The UK opt in/out will preserve, however, the UK's choice of whether to enter into such commitments or not.

Enlargement of the EU

New members of the EU will automatically be bound by the Agreement, although existing EU member states may not be (Art 17, Art 12).

Data protection

The Draft Readmission Agreement does not allow for the provision of any information from one Contracting Party to another as to whether an asylum application has been made; thus where an unsuccessful asylum seeker is returned via a transit state to e.g, Sri Lanka, the transit state will not be informed that an asylum claim has been made. This is an improvement on the bi-lateral specimen agreement. However it may be that such information will be provided through different channels - the Agreement has a new provision that fingerprints and photographs may be communicated between ratifying Parties (see Art 9(6)). Thus information as to whether an asylum claim has been made, or other details, may be accessed through a central database of fingerprints such as Eurodac. A vital question will therefore be which States, and in what circumstances, will have access to information stored on such a database otherwise persons' lives and safety may be placed at risk - this may be particularly so in relation to asylum seekers. The Strategy Paper of the Austrian Presidency referred to the necessity of an 'international exchange of data on the identity of facilitators, rejected asylum seekers and illegal immigrants' (paragraph 70) and states that countries 'with a particularly high potential of illegal emigrants must be induced to set up effective fingerprint files' (paragraph 69).

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Concerns in relation to persons affected by the Draft Readmission Agreement

The Draft Readmission Agreement builds on the bi-lateral specimen Readmission Agreements which were subject to much criticism.

In relation to Article 2 (Readmission of Own Nationals) the Draft Readmission Agreement refers to readmission of person who may be proved to possess or 'may be validly assumed' to possess the nationality of a state. It leaves unclear how or by whom the 'valid assumption' as to nationality is to be made - this is left to be determined in a later Protocol (see Art 8). The concern is that, less developed, non-EU states may be put under pressure to admit persons who are not in fact nationals of that country.

In relation to Article 3 (Readmission of third-country nationals) the Draft Readmission Agreement is unclear as to whether a person can be removed to a country in which they previously lived illegally. It is also unclear whether a person who entered legally, but no longer satisfies the legal residence requirements is affected. In any event this article would appear to facilitate the removal of persons, in breach of their rights to a family and private life, who have lived in the country for many years, possibly with children who were born or grown up in that country, to countries in which they resided very briefly and have no family, language or other connections.

The major concern in relation to this Agreement are in relation to asylum seekers. The specimen bi-lateral Readmission Agreement which this Draft Multilateral Readmission Agreement succeeds was subject to criticism in this regard. UNHCR issued a press release in December 1994 criticising the specimen Readmission Agreement as follows:

- the agreement permits the return of asylum applicants to third countries where they are not able to seek and enjoy effective protection;

- such agreements may lead to situations of persecution and other violations of basic human rights;

- such agreements should contain a specific provision requiring the substantive consideration of asylum applications;

- they should include information regarding the ground of the removal decision (i.e. there is a safe third country which can consider the asylum application) to avoid summary rejection of asylum applications.

The Draft Readmission Agreement fails to ensure that persons will not be removed to countries where their human rights will be jeopardised. The transit provision in Article 5 do appear to recognise the problem of 'chain *refoulement*' (i.e asylum seekers being returned from one country to another and finally being removed to the country in which they fear persecution) and provide that transit should not be applied for or may be refused where there is a risk that the person being removed will have their human rights infringed or will face the death penalty. Unfortunately these protections do not apply to the Draft Readmission Agreement as a whole.

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There is no obligation in the Draft Readmission Agreement that all State parties be signatories to the Geneva Convention on the Status of Refugees 1951 and the 1967 Protocol, nor that they be signatories to other international human rights instruments (including not just the European Convention of Human Rights - which will only apply to Council of Europe states, but to other international provisions) nor that they abide by them. This is a failing and should be altered. As drafted, Readmission Agreements could be entered into with countries widely recognised as failing to protect human rights of citizens, but in respect of which there are many immigrants in Europe - for example Pakistan.

In relation to asylum seekers there is no requirement that an asylum seeker's claim be examined before removal - indeed holding temporary admission status for the purpose of having an asylum claim examined is specifically said not to prevent a person being classed as without a residence permit.

ILPA would recommend that the protection of human rights in a particular country be subject to independent assessment prior to EU Member States entering into a Readmission Agreement with that country and that ratification and effective implementation of the Geneva Convention, as amended, be a pre-requisite for being party to such a Readmission Agreement.

Moreover, ILPA also recommends that human rights protections need to be subject to frequent review - while the Draft Readmission Agreement allows for the suspension of transit provisions where there are human rights difficulties, the Readmission Agreements may, and should, allow for termination or suspension of all the readmission provisions in relation to a Party to the Readmission Agreement in which changes of circumstances have led to human rights being jeopardised in that country. Since 1991 the European Community has made all bilateral trade, partnership or association agreements subordinate to the protection of human rights. Recent agreements have 'essential elements' clauses specifying that the treaty can be suspended for violation of as essential element, and stating respect of human rights to be an essential element. In *Portugal v Council* (Case C-268/94, [1996]ECR 1-6177) the European Court of Justice ruled that the European Community could include such clauses in its development policy agreements and that the clauses may be important to possibly exercising a right to suspend an agreement. The Advocate General even argued that development policy treaties might be invalid if they did not include such clauses. It is therefore inappropriate for the Community's decision to include human rights conditionality clauses in all third country agreements to be disregarded in this instance. As compatibilty with the European Convention on Human Rights is a prerequisite to all Community acts (see Opinion 2/94), a specific provision confirming compatibilty with the collective human rights obligations of the contracting Member State and third country must be included in each Agreement.

Final Comments

In general, ILPA has concerns about readmission agreements:

1. In respect of own nationals of the non-Community contracting state, the Agreemeents will bring inappropriate pressure to bear on third countries to accept for the purposes of the Agreements persons who are not in fact nationals or who dispute their nationality;

2. In respect of third country nationals previously resident in another state who have been resident in the third country, the Agreements will force the third country to accept back,

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after even long periods of time, third country nationals whose stay, albeit lawful, was of shorter duration in the third country than in the Member Stat. This in effect displaces the cost of returning the individual to his or her country of origin onto the almost inevitably poorer third country party;

3. In respect of third country nationals issued a visa by a third country but arriving in a Member State again the Agreemenrt appears to be designed to place the cost of ultimate repatriation on the third country whose only error was the issue of a visa to someone who never took up the option of using that visa but went elsewhere;

4. In respect of asylum seekers:

   All the criticisms made by UNHCR in 1994 still apply: there is no protection for the asylum seeker against chain refoulement; there is no protection for the asylum seeker as regards a duty for his or her application to be considered in accordance with a procedure which meets the requirements of the EU's own Resolution on minimum procedures and appeal rights for asylum seekers or indeed considered at all; finally the effect of the exercise of such a power to send asylum seekers to third countries is to push the cost of reception of asylum seekers and determination of their claims onto poorer countries with less capacity to absorb the costs.

   In general, this draft readmission agreement gives insufficient weight to human rights considerations and places very heavy economic burdens on third countries least able to support them.

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