Meijers Committee
standing committee of experts on international immigration,
refugee and criminal law

CM2014 Meijers Committee Comments on the Migration Pact – Asylum Procedures Regulation

November 2020

In this document, the Meijers Committee presents its comments on the amended proposal for an asylum procedures regulation.[1]

The proposal amends the earlier proposal for replacing the asylum procedures directive with a regulation. New elements are the scope and functioning of the asylum border procedure, a new border procedure for carrying out return and stricter rules for subsequent applications.

Below, we express a number of concerns and recommendations concerning

1. The asylum border procedure.
2. The right to an effective remedy.
3. The return procedure.

1. Asylum border procedure

Wide scope of applicability

The proposal introduces the mandatory application of an asylum border procedure in situations covering a wide range of applications for international protection (Article 41(3)). It includes the situation that the authorities are of the view that an applicant has misled them by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision.

The Meijers Committee has multiple concerns about the mandatory nature of the borders procedure. It is important to stress that the ECtHR has consistently held that "owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof".[2] Asylum-seekers often travel without valid identity papers. It should be clarified that the mere absence of identity or travel documents is not sufficient for referring asylum-seekers to a border procedure.

Our Committee is also concerned that the new ground linked to a recognition rate of 20% or lower for application of the border procedure will lead to a negative bias about the protection needs of applicants from certain countries with huge consequences for the individual. The fact that the

[1] Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final.

[2] ECtHR R.C. v. Sweden, 9 March 2010, 41827/07, par. 50; also see ECtHR M.A. v. Switzerland, 18 November 2014, 52589/13 para 55.

recognition rate is low for certain third country nationals does not signify that the application of a specific applicant is also likely to be rejected.

Decisions that can be made during this procedure include decisions on the merits of the application in an accelerated procedure (Article 41 (2)). The application of the accelerated procedure is also compulsory in a number of situations, again including that the applicant is of a nationality with a recognition rate of 20% or lower (Article 40 (1) (i)). Recital 39(a) prescribes that the procedure shall not be accelerated when the situation has changed or when the applicant belongs to a specific group for whom the low recognition rate cannot be considered as representative of their protection needs due to a specific persecution ground. It is doubtful whether this offers sufficient safeguards against discrimination of applicants from certain countries of origin and thus against *refoulement*. The CJEU has held that, "in order to avoid any discrimination between applicants for asylum from a specific third country whose applications might be the subject of a prioritised examination procedure and nationals of other third countries whose applications are subject to the normal procedure, that prioritised procedure must not deprive applicants in the first category of certain guarantees. Thus the applicant must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin."[3] This implies that each asylum seeker, independent of the recognition rate of his nationality, should be provided the necessary guarantees and safeguards to ensure a fair and effective examination of his asylum application.

In view of the large category of asylum seekers who must or may be referred to the border procedure and the short time limits of the procedure, the risk of applicants having insufficient time to substantiate their application and the determination authorities becoming overburdened is real.

Children above the age of 12

Our Committee finds it troubling that children above the age of 12 travelling with their families are also subjected to the mandatory asylum border procedure. The UN Convention on the Rights of the Child (CRC) defines a child as every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. No distinction can thus be made between children above and below the age of 12 when it comes to the safeguards provided to them as minors. Children are among the most vulnerable persons in society.[4] Where children seek asylum their vulnerability is heightened.[5] In accordance with the CRC and Article 24 of the EU Charter on Fundamental Rights, the best interests of the child must be a primary consideration in all actions concerning children. Our Committee considers the demarcation of 12 years poorly motivated as there is barely an assessment of the proposal's consequences in terms of numbers of children who may be affected and the potential risks for children in terms of detention and the curtailment of their procedural rights.

[3] CJEU, Case C-175/11, H.I.D and B.A. v. Refugee Applications Commissioner and Others, 31 January 2013, paras 74-75.

[4] ECtHR Rahimi v. Greece, no. 8687/080, 5 July 2011, para. 87.

[5] ECtHR Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, 12 October 2006, para. 55; ECtHR Popov v. France, nos. 39472/07 and 39474/07, 19 April 2012, para. 91;

Short time limits

The application of the asylum border procedure in a wide range of situations may seriously hamper access to a fair and effective procedure and thus applicants' ability to effectively gather and present the necessary material to support their application. This is all the more concerning as the determining authorities may be incentivized to reject the application (as inadmissible) within the prescribed time limits.

Although the maximum duration of the asylum border procedure is extended from the current 4 weeks to the maximum of 12 weeks, this new maximum period would include the appeal stage. This will inevitably lead to short time limits. This is confirmed by Article 41 (11) specifying that the procedure must be as short as possible. Moreover, it is clear that when the border procedure is used because recourse has been taken to the accelerated procedure this will necessarily entail short time limits. Such short time limits may make it impossible for the applicant to substantiate his asylum application and for the authorities to conduct an appropriate examination of the application. The obligation to follow an accelerated procedure in these situations may lead the determining authority to refrain from a rigorous examination of the application. The ECtHR has held that the speed of the procedure cannot undermine the effectiveness of the procedural guarantees which aims to protect the applicant against arbitrary refoulement.[6] The CJEU has also recognised in its case law that short time limits may impede the effective exercise of EU procedural rights, such as the right to be heard.[7]

The widening of the situations in which the accelerated procedure and thus the asylum border procedure can be used may ultimately jeopardize the quality of decision-making and applicants being returned to a situation contrary to Article 3 ECHR. These concerns are affirmed in the impact assessment of the proposal that was recently published by the European Parliamentary Research Service.[8]

Increased use of detention

Although the asylum border procedure does not necessarily entail detention, applicants subject to the asylum border procedure are not authorised to enter the Member State's territory (Article 41(6)). Member States are thus allowed to detain applicants during the border procedure in accordance with the provisions of the Reception Conditions Directive (40f recital; see current Art. 8(2)(c) Directive 2013/33/EU). In effect, the proposal increases the situations in which Member States may detain asylum-seekers. This will in all probability lead to a considerable increase in the use of detention of applicants for international protection, including the detention of minors. Our Committee finds the justification and human rights aspects of this part of the proposal insufficiently studied and motivated.

[6] ECtHR, I.M. v. France, Appl. no. 9152/09, 2 February 2012, para 147, ECtHR, A.C. and others v Spain, Appl. No. 6528/11, 22 April 2014, para 100.

[7] CJEU, Case C-349/07, Sopropé − Organizações de Calçado Lda v. Fazenda Pública, 18 December 2008 and CJEC, Case C-462/98P, Mediocurso - Estabelecimento de Ensino Particular Ld.ª v. Commission, 21 September 2000, para 38.

[8] See https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)654201

There is no impact assessment about the effects for asylum seekers and the required capacity of Member States in terms of finances and personnel.

Our Committee further observes that restrictions on the liberty of asylum seekers are mostly not conducive to the quality of the asylum procedure. It restricts asylum seekers in accessing information and expertise. Moreover, it will often create feelings of anxiety and mistrust on the part of asylum seekers. This is one of the reasons why it is important that, in the context of asylum, detention is only used as a measure of last resort. It should be based on an individual assessment, in accordance with the conditions set in the Reception Conditions Directive. This means that recourse to detention must be necessary and proportionate and should be based on a reasoned decision containing an individual assessment – also in the context of a border procedure.

Recommendations

- Delete the mandatory use of the asylum border procedure in Article 41 (3).
- Amend Article 41 (5) in order to exempt all minors travelling with their families from the border procedure.
- Delete the ground that the applicant is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is 20 percent or below (Article 41 (3) jo Article 40 (1) point (i)).
- Ensure that, if the border procedure is applied, detention is based on an individual assessment taking account of its necessity and proportionality.

2. Right to an effective remedy

Article 47 of the Charter of Fundamental Rights stipulates that any person whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. This includes free legal aid when this is necessary to ensure effective access to justice.[9]

Time limits

The proposal obliges Member States to set specific time limits for lodging an appeal. These time limits shall start to run from the date the decision of the determining authority is notified to the applicant or her legal representative. This notification should be considered insufficient to enable applicants to make effective use of their right to lodge an appeal when short time limits are used. Applicants for international protection can only effectively lodge an appeal with the help of a legal representative. The maximum period of two months should therefore only start to run from the moment the legal representative of the applicant has been notified of the decision. This is especially true when the appeal doesn't have automatic suspensive effect. In the case of a Sudanese national, the ECtHR concluded that a five day time limit for lodging the application for international protection and a 48 hour time limit to lodge an appeal were too short and rendered the remedy ineffective in breach of

[9] CJEU, Case C-199/11, Europese Gemeenschap v. Otis NV, 6 November 2012, para 49 and CJEU, Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, 22 December 2010, para 60.

Articles 3 and 13 ECHR. In this regard the ECtHR attached significant weight to the fact that the applicant was detained.[10]

Suspensive effect

Article 54 (3) (a) of the proposal refers to Article 40 (1) to describe situations in which the suspensive effect of an appeal is lifted. This includes the situation in which an applicant has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection, has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information as well as the situation that a third country may be considered as a safe country of origin for the applicant. Moreover, it also includes an appeal in the asylum border procedure. In such situations the applicant may still have an arguable claim that his or her return will lead to *refoulement*. To avoid such a risk from materialising, our Committee is of the view that all appeals against first decisions on applications for international protection should have automatic suspensive effect.

It is of importance to note that the ECtHR has held that in view of the importance of Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises in cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect.[11]

Subsequent applications

With a view to discourage abuse, the European Commission proposes stricter rules concerning the right to remain in the case of subsequent applications, including during appeals.

The new Article 54(6) provides for the possibility not to grant a right to remain in case of an appeal against a decision rejecting a subsequent application "if the appeal has been made merely in order to delay or frustrate" enforcement of a return decision. While the Meijers Committee appreciates concerns about abusive or last minute appeals, especially in the case of subsequent applications, there must likewise be guarantees against arbitrary decisions on the part of authorities. According to the proposed text, there does not seem to be a possibility to effectively challenge an assertion that the appeal was merely brought to frustrate return. This could lead to abuse on the part of authorities in applying this provision, as there is no effective check by courts. Puzzling, further, is that the proposed provision would only apply to cases in which it is "immediately clear to the court that no new elements have been presented". This suggests that a court will first have to establish that no new elements have been presented. This supports the argument that an effective remedy will in all cases require the possibility for a court to, at least, order an injunction with the effect of suspending return. This should be clarified in the text.

[10] I.M. v. France, Appl. no. 9152/09, 2 February 2012.

[11] Gebremedhin v. France, no. 25389/05, § 66, 26 April 2007.

Recommendations

- Amend Article 53 (8) to ensure that time limits only start to run once the legal representative has been notified of the decision.
- Amend Article 54 (3) to ensure that all decisions on first applications for international protection have automatic suspensive effect.
- Amend Article 54 (6) to guarantee, in the case of subsequent applications, that courts can effectively check assertions that appeals are merely abusive.

3. Return procedure (Article 41a)

The Meijers Committee cannot but observe the proposal's inconsistency between, on the one hand, the aim to create "a more European return system" mentioned in the Explanatory Memorandum and, on the other hand, the freedom of Member States to choose not to apply the Returns Directive to asylum seekers whose application is rejected in a border procedure (Article 41a(8)). In view of the larger number of situations for using the border procedure created by the proposal, this could result in less return procedures being covered by the Return Directive instead of more. The proposal vaguely stipulates that Member States which do not apply the Return Directive must still ensure that the treatment and protection of third-country nationals is "equivalent" to that of the Return Directive. This is a further curtailment of procedural rights guaranteed by EU law for asylum-seekers who have been processed in a border procedure – possibly incentivizing Member States to effectuate returns in ways contrary to human rights.

Recommendation

- Delete Article 41a(8) to ensure the Return Directive shall be applied in all returns procedures of rejected asylum seekers.