

DOES THE EUROPEAN UNION PROVIDE EXPEDITIOUS ACCESSIBILITY TO ASYLUM OR DOES IT ARREST THE SAME?

Anuradha Sinha

Centre for European Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, India

Received: 07 Feb 2019

Accepted: 13 Feb 2019

Published: 22 Feb 2019

ABSTRACT

The European Union is currently facing a crisis, which it was not prepared for with respect to the magnitude of inflow of persons. The complexity of the myriad procedural norms and rules required for identification of third country nationals and asylum seekers often put applicants in a difficult position of causing a breach of law or falling outside the scope of the law. This paper seeks to explore procedural safeguards, guarantees and conditions which acknowledge asylum needs and also the gaps which hinder their accessibility.

Article 14 of the Universal Declaration of Human Rights 1948 recognizes the right to seek and enjoy asylum from persecution in other countries (Nations, 1948). Grounded in it is the Geneva Convention of 1949 and its 1967 Protocol (a post World War II instrument) which were the terminus a quo for consideration of asylum in Europe which have now been largely incorporated in the EU law. The Convention was adopted in 1951 and entered into force in 1964. Non refoulement is a fundamental belief of the Convention and it is also primarily against discrimination and penalisation. The 1967 Protocol of the Convention removed geographic and temporal limits of the Convention (ALNAP). Article 33 of the 1951 Convention provides that, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion” (UNHCR, 2007). Non- refoulement is non-negotiable under international law.

KEYWORDS: *Primarily Against Discrimination and Penalization, Directives and Decisions, Examine Inter-State*

INTRODUCTION

The key European legal instruments that regulate migration are the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (which represents the EU law). The ECHR was adopted in 1950 working on the preservation of the fundamental beliefs of promotion of rule of law, democracy, human rights and social development (Rights E. U., 2015). The European Court of Human Rights (ECtHR) was established under article 19 of the ECHR to ensure that states oblige by the Convention. The EU Law consists of primary EU law, referring to the Treaty on European Union and the Treaty on the Functioning of the European Union, and secondary EU law comprising regulations, directives and decisions of the EU adopted by the EU institutions. Save for some specific provisions, applying before the ECtHR is not conditioned

upon being a citizen or a lawful resident of the Member States. The ECtHR can also examine inter-state cases brought by one member states against another.

Articles 79 and 80 of the Treaty on the Functioning of the European Union (2009) are the legal basis of EU immigration policy. The EU lays down conditions governing entry into and legal residence in a Member State and may provide incentives and support for measures taken by Member States to promote integration of legally resident third country nationals. Irregular immigration could be reduced or prevented by means of an effective return policy consistent with fundamental rights and agreements with third countries for their nationals who do not or no longer fulfil conditions for entry into or presence or residence in a Member State. The EU Charter for Fundamental Rights guarantees the right to asylum (Article 18), thus, those who qualify for asylum have the right to have this status recognised. But in case of genuine improvement of the situation in their country of origin. Persons granted international protection can lose their status

Non-refoulement as a principle is held to be of supreme significance in both EU Law and International Law and thus, rejection at the borders of persons facing the threat or risk to life, persecution and such serious harm is prohibited by EU law, the ECHR and under the 1951 Geneva Convention and its 1967 Protocol. But until an entry has been formally authorised by a Member State, it remains unauthorised. Though willingness is also a concern to factor in while dealing with migration, non-refoulement is not negotiable even under international law.

Article 1 of the ECHR obliges states to secure everyone the rights and freedoms defined by the Convention within their jurisdiction (Rights E. C., European Convention on Human Rights, 1950). This implies that the Convention is to be applied irrespective of race, religion or country of origin and can be extended to sex, age, disability, sexuality, or other prohibited grounds of discrimination (Union, EUR-Lex, 2016)

Although all EU Member States are not bound by all the different EU legislations regarding asylum, border management and immigration, all the member states of the Council of Europe are party to the ECHR or are State Party to the other conventions of the Council of Europe. The Convention is against non-penalisation of asylum seekers since it acknowledges the fact that asylum seeking could lead to the breach of certain immigration rules. Therefore, non-refoulement is a fundamental value to which no derogation can be made. Under Article 2 of the ECHR, the removal by a state is absolutely prohibited if it would expose the individual to a threat to life, or torture or inhuman treatment under article 3; which is examined by the ECtHR (foreseeable consequence). In such, Member States of the EU are liable to take responsibility of asylum seekers but otherwise the action is noticed. The ECHR does not provide a right to asylum, but under its Article 3, which prohibits any subjection to torture, or inhuman or degrading treatment or punishment (Rights E. C., European Convention on Human Rights, 1950), while adhering to it, the turning away of persons either at the border or within a Member States' jurisdiction is prohibited. In extreme cases an extradition, removal or expulsion could also raise questions on Article 2 which protects the right to life. Article 13 of the ECHR provides that everyone whose rights and freedom as set forth by the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity (Rights E. C., European Convention on Human Rights, 1950). But, article 5 (1) (f) of the ECHR permits the lawful arrest or detention of asylum seekers to prevent them from effecting "an unauthorized entry" into the territory of a state or action whom action is being taken with a view to deport or extradite (Rights E. C., European

Convention on Human Rights, 1950)

The right to respect for “private and family life” is guaranteed by Article 8 of the ECHR. The EU Charter of Fundamental Rights enshrines the right to marry and to found a family (Article 9) and the right to respect for family life (Article 7) and also protects the rights of the child (Article 24), particularly the right to maintain contact with both parents (Article 24 (3)). Article 6 (2) of the Family Reunification Directive allows Member States to withdraw or refuse to renew a family member’s residence permit on grounds of public policy, public security or public health. When making a decision on this basis, the Member State must consider the severity or type of offence against public policy or public security committed by the family member, or the dangers emanating from such person.

The persons who are receiving assistance or protection from organs or agencies of the United Nations other than the United Nations Commissioner for Refugees cannot apply for protection or assistance under the ECHR. But on the cessation of the said assistance/ provision without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention (Europe, 2015)

In the conventional operation of sovereignty, individual states control the entry to and stay of persons who are not nationals of the territory, but the EU law imposes certain limitations on the EU Member States on exercising the same. The Member States though have common rules for the issue of visas for a short term. Frontex is the EU agency created to manage external EU borders through operations at land, air or sea was established in 2004. A requesting EUMS can ask Frontex for the deployment of a rapid intervention system known as RABIT when in need of operational assistance for a certain limited period which is rapid in nature for a situation with is exceptional and urgent pressure. RABIT is usually requested to be deployed at the arrival points of the EU’s external borders when a large number of persons tries to enter the EUMS into question, irregularly.

The Schengen Agreement, which was signed in 1985 provides the Schengen acquis which applies a unified system of the EU Member States for maintaining checks and controls at external borders while providing free movement within the Schengen area. Twenty Two (22) EUMS fully implement the Schengen acquis except for Romania, Bulgaria, Croatia and Cyprus (which are seeking to join) and Ireland (maintaining opt-out) and United Kingdom (opt out and impending exit from EU). Although Iceland and Norway are not members of the European Union they are members of the Schengen area and the Schengen system extends beyond the borders extending to Switzerland and Liechtenstein.. The New Member States (NMS) which join the EU do not have the option of opting out and hence are obliged to become part of the Schengen Area. Divided into two parts, the first part of the Schengen acquis includes measures applied from the day of accession viz., checks and external frontiers of the Union, common policy towards third countries in respect of the granting of visas (not the Schengen visa), rules for the crossing of external frontiers, police and customs co-operation, the fight against clandestine immigration. The second part consists of provisions which will allow the abolition of the internal borders of the Schengen area applicable only when all the other member states of Schengen area unanimously believe that the new Member State will effectively implement the provisions (The Schengen "acquis" and the New Member States, 2005). The Schengen Borders Code, Regulation (EC) No. 562/2006 has been amended several times and includes important provisions such as Article 6

which allows entry of third country nationals on grounds of humanitarian, national and international obligations, prohibits trafficking in human beings and combats illegal immigration, Article 7 emphasises on the respect of human dignity which carrying out border checks, thus, prohibiting the application of the code in a way which amounts to refoulement or unlawful discrimination (Union, EUR-Lex, 2016). But directions such as in Article 5 of the SBC indicate a fixed opening hours for entry at the border crossing points, possession of a valid visa, which do not seem welcoming in nature while the exception still asks for possession of permits required by the national law.

A Secondary EU Law that governs asylum and migration policies of the EU come in the form of directives and regulations. Every asylum request applied for in a territory goes through examination. The purpose of the Dublin regulation is to provide quick access to asylum procedures by examination by a clearly determined single EU Member State and to make sure that individuals do not apply for asylum in multiple countries. It is commonly used in the first EU country of entry implying the Member State the individual enters first is responsible for the asylum application of the asylum in question. The determination of the MS of entry of the third country national is done by taking fingerprints of the person upon arrival which is then entered into the Eurodac database (Regulation (EU) no 603/2013 of the European Parliament and of the Council). This database can be accessed by all the states exercising the Dublin Regulations viz., the 28 EUMS, Iceland, Norway and Liechtenstein (Union, EUR-Lex, 2013). Article 3 of the Dublin Regulation (Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013), specifies that the examination of an application for protection lodged by a stateless person or a third country national is supposed to be carried out by a single MS designated through the criteria in the Regulation, the absence of which would then pass the responsibility to the first MS of the lodge of the application. But in cases where the MS responsible is proved to be failing in the provision of humane treatment, on substantial grounds, the determining MS becomes the MS responsible. The right is also held by Member States of sending an applicant to a safe third country. The EU asylum acquis only applies from the moment an individual has arrived at the border, including territorial waters and transit zones. The Regulation contains procedural safeguards for unaccompanied minors (Article 8) who could be re-united with family, sibling, responsible adult and in the absence of the mentioned become the responsibility of the MS at which the application has been lodged at. Articles 9, 10 and 11 deal with provisions that defend family unity. Article 16 deals with safeguards for dependent persons with respect to a new born child, disability, old age. While article 17 (2) specifies the scope of a request to bring together family members under humanitarian clause. Article 7 (3) provides for consideration of any evidence available regarding the presence of family members and relatives of the applicant in another MS.

The Asylum Procedures Directive (2013/32/EU) lays down the procedures for grant and withdrawal of protection in the European Union. Article 6(1) and 6(2) lay down the guidelines for the MS to provide the applicants access to the procedure for protection while article 8 provides that EUMS should provide applicants held in border crossing points and detention facilities with information on the possibility of availing international protection. However, the safeguards do not apply to persons who cannot reach the EU territory, transit zone or the border. Article 24 of the directive identifies applicants who need special procedural guarantees having faced physical, psychological and sexual violence, such as torture, rape and other serious violence and refrains the use of border procedures for them. Article 25 provides unaccompanied minors with a responsible, legal adviser/counsellor/representative free of charge maintaining respect for the dignity of the applicant with

consideration that refusal by the unaccompanied minor to undergo a medical examination for determining their age is not the sole basis for rejection of the application. Although article 26 deals with the grounds of detention, it lacks detailed inspection on the same. The directive in its article 43 specifies safeguards varying from decisions regarding admissibility of the applicant with respect to the substance of the application, to a ceiling on time taken for a decision on an applicant (4 weeks) excess of which necessitates the grant of entry, to a relaxation on the admissibility conditioned upon applications by a large number of applicants (third country nationals and/or stateless persons) who are accommodated near the border or transit zone (Union, EUR-Lex, 2013).

The right to documentation for asylum seekers under EU law is set out in the Reception Conditions Directive (2013/33/EU) laying down the reception standards for the applicants. The Reception Conditions Directive explores the varying conditions of detention and guarantees for the applicants detained. Legal assistance would be provided for free depending on availability of resources with possible time and/or monetary limits. Lack of specialised detention facilities could call for MS to provide prison accommodation (which unaccompanied minors would never be resorted to) with access to open air spaces with communication with legal representatives respecting their privacy. The conditions and provisions for family unity need to be explored in detail (Union, EUR-Lex, 2013)

The Return Directive (2008/115/EC) as the designated name suggests administers return of the third country nationals staying illegally in the EU. Article 6 of the Return Directive obliges EU Member States to issue them with a “return decision”. Article 6 (4), however, also sets out the circumstances excusing states from this obligation. Along with humanitarian or other reasons, another reason to regularise the stay can be pressing reasons of family or private life guaranteed under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the ECHR.

The Qualification Directive assesses the applications for protection sought for protection under the EU Law. While protecting against refoulement, it underlines the different forms of persecution that can take place in the form of violence (physical or mental), violation of human rights, legal or administrative measures such that religious freedom, sexual orientation and political convictions are concealed in order to avoid serious harm. Persecution could also be gender or child specific in nature, suggests the Article 9 of the Directive. It defines the qualifications for the status of a refugee. Article 7 emphasises that the State, state bodies, international organisations controlling the State or part of the state should be willing and able to provide protection which is effective and non temporary in nature (Union, EUR-Lex, 2011). Article 24 and 25 of the Qualification directive regulates the right to documentation by acknowledging the need for residence permits specifying at least 3 years for refugees and one year protection which is subsidiary in nature, and travel documents unless compelled by reasons of public order or national security. This directive recognises the third country nationals or refugees can exercise dignity through access to certain basic minimum needs as individuals such as identification, family unity, access to employment and education and freedom of movement. But the benefits of accommodation, social welfare and healthcare have not been expressly laid out.

Detention is supposed to be a last resort post exhaustion of all alternatives, but the fact that persons fleeing conflict and persecution facing harrowing routes of passage to reach a safe haven while possibly losing family and kin on the journey, more often than not might not be having or carrying documents of identification is a truth that needs to be legitimately accepted

in order to provide them just protection. The national law of many EU Member States provides for short-term deprivation of liberty at the border, which often takes place in the transit area of an airport. The revised Reception Conditions Directive (2013/33/EU) allows, under Article 8 (3) (c), the detention of asylum seekers who arrive at the border to decide on their right to enter the territory(Union, EUR-Lex, 2013).

The European Union has detailed provisions respecting the principle of non-refoulement but its regulations are more inclined towards legal migration and curbing of irregular entry through the borders than in the provision and safeguard of asylum. It is important here to observe that the Dublin II regulations were established to deal with the problems of asylum shopping and refugees in orbit. The purpose of determining the Member State responsible for examining an asylum application was to express solidarity in the EU but often turned into a burden shifting. The purpose of the Dublin regulations of the European Union is to provide quick access to asylum procedure by examination by a clearly determined single EU Member State(where an individual enters first, is responsible for the asylum application of the asylum in question) and to make sure that individuals do not apply for asylum in multiple countries. But when faced with the massive inflow of refugee as in the current refugee crisis in Europe, the Dublin Regulations appears to be unfair and unsustainable. The various directives and regulations of the EU law are the significant mainstay of access to international protection and guarantees in Europe, while they acknowledge most needs and provisions of the applicants and pledge their accessibility at the same time as respecting the dignity of the applicants, expressed and detailed safeguards and guarantees need to be provided in terms of the social security, healthcare, and accommodation such as to provide faster asylum and protection. The EU needs a common asylum policy following its fundamental value of solidarity in complete unity facilitating protection and safeguards of persons so as to stand proud in its dedication to and fulfilment of human rights.

REFERENCES

1. ALNAP. (n.d.). ALNAP. Retrieved from *alnap.org*: <https://www.alnap.org/about>
2. Europe, C. o. (2015). *Handbook on European law relating to asylum, borders and immigration*. Retrieved from ECHR: https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf
3. Nations, U. (1948). *Universal Declaration of Human Rights*. Retrieved from United Nations: <http://www.un.org/en/index.html>
4. Rights, E. C. (1950). *European Convention on Human Rights*. Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf
5. Rights, E. C. (1950). *European Convention on Human Rights*. Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf
6. Rights, E. U. (2015). *European Court of Human Rights*. Retrieved from *echr.coe.int*: https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf
7. *The Schengen "acquis" and the New Member States*. (2005, Feb 10). Retrieved from Euractiv: <https://www.euractiv.com/section/enlargement/opinion/the-schengen-acquis-and-the-new-member-states/>

8. UNHCR. (2007). UNHCR. Retrieved from United Nations High Commissioner for Refugees: <https://www.unhcr.org/4d9486929.pdf>
9. Union, O. J. (2011). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN>
10. Union, O. J. (2013). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1550544008849&uri=CELEX:32013R0603>
11. Union, O. J. (2013). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>
12. Union, O. J. (2013). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>
13. Union, O. J. (2013). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&rid=6>
14. Union, O. J. (2016). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>
15. Union, O. J. (2016). EUR-Lex. Retrieved from EUROPA: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>

