

## RECOMMENDATIONS ON EUROPEAN IMMIGRATION AND ASYLUM LAW FOR THE SPANISH PRESIDENCY OF THE EUROPEAN UNION

On November 26-27 2009, the “*Centre for Migration Law*” (Radboud University, Nijmegen, The Netherlands) and the “*Jean Monnet Chair on European Integration Studies*” (University of Huelva, Spain) organized the “*1st Dutch-Spanish Conference on European Migration and Asylum Law*” held at the University of Huelva.

The objective of the Conference was to bring together leading experts to analyze the content and implementation of the new five-year programme, the so-called “Stockholm Programme”, in the field of Immigration and Asylum Law, as one of the priorities of the Spanish EU Presidency, according to the Guidelines adopted by the Spanish Council of Ministries on January 23, 2009.

After a decade of rapid progress in the area of Justice and Home Affairs, the Conference’s goal was to evaluate the area’s current state of play, highlight the main challenges in this field, as well as to assess whether the adoption of the “Stockholm Programme” actually contributes to the attainment of an authentic area of Freedom, Security and Justice with full recognition of the rights of third country nationals.

On January 1, 2010, Spain takes over the presidency of the European Union. Therefore, it will be during the Spanish presidency that the next five years of immigration and asylum policy will be established. The Presidency has recognized that dealing with immigration is one of the Europe’s greatest challenges (Spanish Presidency 2010: [www.eu2010.es](http://www.eu2010.es)). Taking into account this priority and the traditional commitment of Spain to refugee protection and migrant integration, we believe that this Presidency should make an important contribution in order to strengthening freedom and solidarity for all citizens and third country nationals.

For all these reasons, the participants in the Conference have the pleasure of conveying their Recommendations to the Spanish Presidency:



## RECOMMENDATIONS<sup>1</sup>

### *EU Immigration Law*

1. The Spanish Presidency should closely monitor that the objective formulated by the European Council in Tampere in 1999 and in the Stockholm Programme, **that a more vigorous integration policy should aim at granting third-country nationals rights and obligations comparable to those of EU citizens**, is actually complied with during the negotiations on proposals on legal migration.

This important principle was formulated in the conclusions of the special European Council at Tampere in 1999. Explicit reference is made to this principle in the preambles of Directive 2003/86/EC on the right to family reunification, and of Directive 2003/109/EC on the status of long-term resident third-country nationals. The principle is reaffirmed in par. 6.1.4 of the Stockholm Programme.

It appears that during the negotiations on the proposal for the so-called Framework Directive on admission of third-country nationals for employment (inter-institutional file 2007/0229) in the first half of 2009, this principle was not complied with. The amendments to the proposal and the restriction of its scope will not contribute to the realization of this principle with regard to the large majority of third-country nationals lawfully employed in Member States. The equal treatment clauses in that directive should apply to all lawfully employed workers irrespective of their nationality. This would also be more in line with the obligations of many Member States under the ILO Migrant Workers Convention no. 97 of 1949.

2. The Spanish Presidency should urge the Commission to **amend the legal basis of its proposal to extend the scope of Directive 2003/109/EC on the status of long-term resident third-country nationals to beneficiaries of international protection** in order to comply with the new legislative procedure after the Treaty of Lisbon comes into force, and initiate a request from the Council for a position of the Parliament in order to open the debate between the Parliament and the Council on this proposal.

The Commission's proposal on the extension of the scope of Directive 2003/109/EC to refugees and beneficiaries of subsidiary protections was introduced in 2007 (inter-institutional file 2007/0112). The negotiations on this proposal in the Council had almost resulted in political agreement, but the accord was blocked by one Member State in the second half of 2008 (see Council document 16476/08). The coming into force of the Treaty of Lisbon will allow for the adoption of this important proposal with a qualified majority in the Council and a co-decision of the Parliament.

3. The Spanish Presidency should urge the Commission to open the debate and to introduce a **new proposal to amend the Directive 2003/86/EC on the right to family reunification**. This is also in line with the Stockholm programme and what is laid down in the Directive itself. To change the Directive is of high importance for the right on family reunification in Europe, not only because of the reduced level of harmonization in this field but also in order to fill-in two legal gaps: First, with **the inclusion of subsidiary protection in the scope of the Directive on family reunification in order to ensure an equivalent status of protection in comparison to refugees**; second, with **the abolishment of the discrimination of nationals with regard to family reunification** in order to ensure equal treatment between Union citizens who exercise their right to free movement and those who do not. For both gaps, the Commission included in its first proposal on family reunification (COM (1999) 638) the relevant provisions which were widely accepted. But these provisions have been deleted because of the compulsion to compromise inherent in the previous procedure. For this reason, the negotiations on the proposal about the equal treatment of nationals were blocked by two Member State only in the Council in the course of the summer 2001 (see Council document 5682/01). In consequence, the Commission deleted in its third proposal COM (2002) 225 these provisions – even contrary to the European Parliaments recommendation to (re)include beneficiaries of subsidiary protection in the scope of the Directive (Doc. PE 319.245 of 24 March 2003, A 5 0086/2003 final). The coming into force of the Treaty of Lisbon will allow for the adoption of these important proposals with a qualified majority in the Council and a co-decision of the Parliament.

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<sup>1</sup> The version of Stockholm Programme used dated 25.11.2009.



4. In October 2008, the Commission published a Communication specifically addressing the theme of **global approach** (COM(2008)611). This Global Approach Communication formulates the challenge that a more highly developed common European immigration policy will need to give more thought to ways of **matching jobseekers to vacancies and to allowing labour migrants more flexible access to jobs**. This means that work in areas such as recognition of foreign qualifications, exploring the portability of pension rights and other welfare entitlements, promoting labour market integration at both ends of the migration pathway, social inclusion of migrants and development of intercultural skills need to be stepped up and given much higher priority. In this context, it is recommended that the Spanish Presidency examines how **the portability of acquired social rights to third countries**, notably the payment of pensions, may facilitate mobility.
5. The EU must change its discourse and its practices as regards irregularly residing third country nationals. Calling such persons “illegal” is unhelpful as it brings criminal law sanctions and discourse to bear on social issues which are not normally susceptible to coherent criminal law approaches. **EU mechanisms need to be designed to reduce the irregularity of third country nationals**, such as measures to ensure that third country nationals’ residence does not become irregular exclusively as a result of the processing time which the authorities take to deal with applications; persons in respect of whom there is no reasonable possibility of return need to be given residence permits, albeit temporary stay, and not counted among the ‘illegally residing’ third country nationals. This should be a high priority for the implementation of the Stockholm Programme.
6. As regards Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (so-called Returns Directive), we encourage generous implementation regarding the rights of irregular migrants. Significantly, Art. 4 allows Member States to apply or adopt more favourable provisions, provided they are compatible with the Directive. In turn, Art. 6(4) establishes that Member States may at any moment grant an autonomous residence permit on compassionate, humanitarian or other grounds. Finally, if return is the option adopted, it should take place in a reasonable way. In that sense, it is important that Member States prioritise the voluntary return as provided by the Directive and refrain from imposing a re-entry ban. This is also in line with the Stockholm programme. In order to do that, Member States should limit the cases in which a period for voluntary return is not given and interpret those cases restrictively. Also, Member States have to comply with the obligation laid down in Art. 8(6) of the Directive to provide for “an effective forced-return monitoring system”.

The Spanish Presidency could play a positive role in encouraging Member States to implement the Directive using the less restrictive clauses in the Directive. In fact, the next EU-LAC summit will take place in Madrid on 18 May 2010 and will provide an excellent opportunity for European governments to take the concerns of Latin America into consideration.

It is, therefore, a key challenge to seek to ensure the respect of fundamental rights at frontiers, procedure guarantees on return process as well as a return monitoring mechanism to provide adequate accountability.

### *EU Asylum Law*

1. The Stockholm Programme recalls that the establishment of a Common European Asylum System (CEAS) by 2012 remains a key policy objective for the EU (par. 6). In order to adopt an Action Plan for the implementation of the Stockholm Programme under the Spanish Presidency, we believe that any proposal for amending the current Asylum Package should not be considered without a full evaluation of whether the existing legislation actually co-operates on the main objective of the CEAS: the full application of the Geneva Convention of 28 July 1951 to the Status of Refugees as amended by the New York Protocol of 31 January 1967 (art. 63.1 EC Treaty). At the same time, there is a need for coherence on implementation. We stress the necessity of Member States of being diligent on the transposition of Directives in order to avoid different treatment among beneficiaries and improve consistency in the practice of Member States.



2. As the European Council stressed in the European Pact on Immigration and Asylum, and as the Stockholm Programme recalls, the necessary strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit under them. Nevertheless, ensuring safety access protection in Europe has become one of most pressing challenges of EU asylum law. The obligation of non refoulement, legal principle of International Law now enshrined in art. 19 of the Charter of Fundamental Rights of the EU, which prohibits returning refugees to countries where they may face persecution, does not arise only when a refugee is within or at the borders of a State, but also when a refugee is under its effective or de facto jurisdiction outside its territory, including high seas and other marine spaces. In this respect, the Spanish Presidency could urge the inclusion of protection safeguards in migration control measures, in particular, the development of a border guard training programme, the guarantee of asylum determination in the course of a FRONTEX operation, including a mechanism for transparent accountability of the Agency.

The Stockholm Programme foresees new approaches regarding co-operation with third countries on refugee protection. We urge the Spanish presidency to ensure that actions in third countries do not undermine protection for asylum seekers in the EU. The European Council in Tampere reaffirmed the importance that the Union and Member States attached to absolute respect of the right to seek asylum. It has agreed to work toward establishing a Common European Asylum System based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non refoulement.

3. We urge the Spanish Presidency to seek to make progress to legalize the principle of mutual recognition of positive asylum decisions. The asylum instruments adopted to date do not include any obligation to recognize positive national asylum decisions of other Member States. Only negative decisions hold this extraterritorial effect according to Dublin Regulation. This is an important gap in asylum acquis. We urge the Spanish Presidency to encourage the Commission to adopt legislative measures to promote mutual recognition of positive asylum decisions in order to facilitate the integration of refugees and beneficiaries of subsidiary protection into European societies and their freedom of movement within the EU.
4. The European Council remains committed to the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. Nevertheless, wide disparities still exists between EU Member States concerning the granting of refugee status and subsidiary protection as well as in standards of protection. The Dublin Regulation is premised on the assumption that the quality and procedural safeguards of Member States' asylum systems are comparable, but actually practices differ widely and an individual asylum seeker's chance of finding protection vary considerable from one Member State to another. In the absence of such harmonization, the allocation system is unfair and unlawful, according to international obligations.

At the same time, we remind Member States of their commitment reaffirmed at Tampere in 1999 to ensure that any system of allocating responsibility should guarantee effective access to a procedure for determining refugee status and ensure absolute respect of the right to seek asylum.

If the establishment of a European Asylum Support Office (EASO) aims to raise the quality of asylum procedure and reduce divergences in decisions, we urge the Spanish Presidency to encourage Member States and European institutions to establish an Office to operate in a transparent manner subject to democratic oversight, and which involves NGOs and independent asylum experts.

5. Member States should guarantee the right to work and study for all asylum seekers at least after six months' presence in the territory. In particular, they should have a right to appeal with suspensive effects to an independent body against a negative decision, specially, at border areas. The effectiveness of the remedy should be interpreted in line with European Court of Human Rights jurisprudence (inter alia, Gebremedhin c. Francia, n° 25389/05, 26.04.2007; Muminov c. Rusia, n° 42502/06, 11.12.2008). The guarantee of a fair and effective procedure is a major priority for the establishment of the CEAS. Member States should take measures in order to avoid the application of exceptional categories such as "safe third country", "European safe country" and "safe country of origin" established in Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status.



6. Human Rights / Fundamental Rights. The Stockholm Programme calls for a Human Rights Action Plan which should take into account that “internal and external” aspects of human rights are interlinked. It is critical for the credibility of the EU that any Action Plan aimed at human rights in third countries is accompanied by clear institutional guidance to ensure that all questions relating to fundamental rights’ compliance within the Union are carefully investigated (not only by the Fundamental Rights Agency) and that clear instructions are given to the Commission to commence infringement proceedings, even only on the grounds of failure to comply with fundamental rights applicable in the EU.

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