

REPORT

Workshop on Criminalisation of Assistance to Undocumented Migrants Antwerp, Belgium - 2001

EU Initiatives

We witness two developments with regard to those seeking asylum and/or a residence permit in West-European countries: restrictive measures are being intensified, and there is a continuing pressure for departure from countries of origin.

As a result these migrants make use of networks of support, bribery and other irregular means in order to arrive in a West-European host country. This in turn, has led to the criminalisation of networks that deal with trafficking and smuggling of immigrants. International and EU policies are now focusing on combating these networks referring to their criminal character. In fact, these policies aim at preventing unwanted immigration.

At EU level there are two initiatives in this field:

A. The so-called "French Initiatives", i.e. initiatives of the French Government intended for the Council of Ministers of Justice and Home Affairs (JHA Council) originally dated 4.9.2000, published as OJ C 253, consisting of:

- a Draft Council Framework Decision[1] on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence; and
- a Draft Council Directive[2] defining the facilitation of unauthorised entry, movement and residence.

The Framework Decision is aimed at harmonising the penalties for smuggling of (undocumented) migrants. The purpose of the Directive is to render the implementation of the Framework Decision more effective by defining the offences to be penalised under the Framework Decision. It replaces para. 1 of Article 27 of the 1990 Schengen Convention.

B. An initiative by the Commission consisting of:

- a Proposal for a Council Framework Decision on combating trafficking in human beings (see: Communication from the Commission to the Council and the European Parliament dated 21.12.2000, doc. COM(2000) 854 final).

In the latter document the Commission indicates that the French initiatives are related to smuggling of migrants, whereas the Commission's initiative relates to trafficking in human beings. Smuggling of migrants "could be said to constitute a crime against the state and often involves a mutual interest between the smuggler and the smuggled" while trafficking in human beings "constitutes a crime against a person and involves an exploitative purpose". Therefore 'the two initiatives complement each other'.

As trafficking implies involuntary movement the pursuit of financial gain is not a condition for penalisation and there is no escape clause for humanitarian assistance. In both proposals victims are given protection. Comments have been made by Human Rights Watch and Anti-Slavery International jointly[3]. It is less likely that 'our' NGOs will be involved in this trafficking.

Further comments on the "French initiatives"

Special attention should be given to the wording of art. 1 of the Draft Directive, its latest version reading as follows:

1. Each Member State shall impose appropriate sanctions on:

- any person who intentionally assists or tries to assist a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens
- any person who for financial gain intentionally assists or tries to assist a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions in regard:

- of the behaviour defined in paragraph 1a) for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned
- Facilitating the entry and transit are dealt with under art. 1a. Here the exception of 'financial gain' is not mentioned, but par. 2 gives Member States the right not to impose sanctions if the aim is 'to provide humanitarian assistance'. There is no consensus as yet about the wording of this 'humanitarian clause' which has been added at the request of several ministers.

It should be noted that without this clause any individual lawyer or NGO providing humanitarian assistance to the entering or transit of undocumented immigrants will be penalised ('criminalisation of humanitarian assistance'). In par. 1b dealing with assistance to an undocumented migrant during his residence in the host country the pursuit of financial gain is required for penalisation. However, there is as yet no full agreement on this exception.

Again, if this exception were not accepted, any doctor, pastor or lawyer, and any NGO, church or non-church organisation could be punished for giving this assistance. A further point of attention is the fact that the proposals fail to mention refugee protection and the obligations of States under refugee law.

Concerns

Amnesty International [4], ECRE [5] and UNHCR [6] have issued statements [7] drawing attention to these points. PICUM has attempted lobby activities in several EU countries.

The present situation is as follows:

- The Finnish Government has requested that in the 'recitals' (texts preceding the articles of the Directive) be clarified that this proposal is aimed against facilitation of illegal entry rather than against trafficking in human beings.
- The following Governments have made general reservations: Finland, Netherlands (see below), Belgium, Germany, Denmark, Greece, the United Kingdom and Norway. The UK delegation thought in particular that the expression 'to provide humanitarian assistance to the person concerned' in Article 1(2) might be too broad (!)
- The Commission has made a reservation as to the legal basis of the proposal. Certain delegations have made reservations in respect of the legal basis as well.
- The Dutch Government is satisfied with the humanitarian clause as worded above (see file 23490 doc. 185 of 28.2.2001)
- European Parliament rejected the (original text of) the initiatives in its Opinion dated 15.2.2001, doc. PE 300.204. However, this Opinion has no binding effect as the ministers of Justice and Home Affairs consider the matter as coming under Pillar 3. Unanimity of the ministers is required. So far this has not been obtained, but it could be reached at the next JHA session on 15-16 March. The matter will be dealt with by the Mixed Committee on Ministerial Level.

Discussion

Everybody present at the meeting agreed on the importance and pernicious effect of the French proposals. It was also agreed that we should closely monitor the negotiations between governments on the humanitarian clause and the exception 'no pursuit of personal gain', while attempting to obtain the best possible wording.