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THE RECENT BRITISH PROPOSALS ON ASYLUM POLICY: A CRITICAL EVALUATION

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The New British Proposals

The UK has sought to take a bold lead in Europe with its proposals for new international approaches to asylum processing and protection[1]. The proposal, as outlined in a document made public in March 2003, has two strands:

- the establishment of 'transit processing centres' (TPCs) in third countries, close to the external border of the European Union, to which those arriving in EU Member States, and claiming asylum, could be transferred to have their claims processed.
- the establishment of 'regional protection areas' (RPAs) close to refugee-producing countries for those fleeing conflicts or natural disasters. It is suggested that RPAs could eventually be used for removals of asylum seekers from Europe (in the same way as transit centres), for temporary protection or on a return route, if adequate protection – at a level that could satisfy Member States' domestic courts - can be provided in the region. At the very least, RPAs could be used for the return from Europe of failed asylum seekers who can not be immediately returned to their country of origin.

NGOs in the UK have strongly criticised these proposals and the premises upon which they are based. They are, firstly, based on concerns about costs. While there is no disagreement with the observation that financial support for refugees is badly distributed, it has been argued that poor distribution of support is invariably due to the lack of funding given by developed countries to UNHCR and to governments who bear the main burden of refugees in the regions of origin. The point has also been made that in considering the financial burden of asylum seekers on the UK, or indeed other EU

[1] The UK government's 'new vision for refugees' was first outlined in the restricted joint Cabinet-Home Office document leaked to the press in February 2003. An amended, considerably polished, version was made public by the Home Office on 27 March 2003. See Home Office, *New International Approaches to Asylum Processing and Protection,* March 2003.

countries, the actual amount spent on refugees rather than on processes and mechanisms to keep asylum seekers away should be calculated. Costs are further escalated by poor quality administrative decision-making and the increasing use of detention during the asylum process.

The second argument underpinning the UK proposals is that the current system is failing because it requires illegal migration and favours human trafficking and smuggling. JUSTICE and other NGOs, who have responded to the UK proposals, have objected that asylum seekers' illegal entry and reliance on the services of human traffickers and smugglers is a direct consequence of strict pre-entry policies and border controls regimes of EU countries. Illegality of asylum seekers is rather a function of their increased criminalisation and desire to create barriers to their entry.

The third argument on which the UK proposals on asylum are based is that the majority of asylum seekers in the EU do not meet the criteria for refugee or subsidiary protection status.

Are the Arguments Valid?

JUSTICE disagrees with this assertion in so far as it tends to suggest that failure to qualify for protection under the refugee convention is per se evidence of abuse. In the UK, 1 in 5 decisions refusing an asylum or human rights claim are overturned on appeal – a figure that is not accounted for in official statistics on positive status determination. But figures are also kept low by an increasingly narrow interpretation of who is a refugee or otherwise qualifies for subsidiary protection. The latter is shown, for example, by a dramatic drop in those who were granted Exceptional Leave to Remain (the UK subsidiary protection category, since April 2003 renamed Humanitarian Protection or Discretionary Leave) in the 1st and 2nd quarter of this year: 19% in January-March compared to 7% in April-June.

And, finally, the argument goes that those found not to be in need of international protection are not removed: the real crux of the issue.

The UK government had previously suggested to withdraw from the ECHR and the Refugee Convention to provide a solution to what is seen as the major issue in the domestic asylum debate: the fact that the UK cannot deport or return as many failed asylum seekers at it considers desirable to maintain the integrity of the asylum system. But in reality it acknowledges that the failure to return them may be due to difficulties with documentation; to prevailing conditions in the country of origin; to lack of readmission arrangements with countries concerned; to the fact that in some circumstances there is no effective government with which such agreements could be negotiated or because there is no safe route through which asylum seekers could be returned.

It is, we believe, in the light of these difficulties that the UK proposals should be examined.

The Home Office has for the time being backed down from pursuing its proposals, which did not receive unanimous support from its EU partners. A toned down pilot is being worked out, which is likely to be concerned primarily with the return of failed asylum seekers to regional protection areas.

However, the core elements of the UK vision are creeping up in other areas, both domestic and European. There is evidence, for instance, of a shift of emphasis in EU on policies designed to place responsibility for processing claims and providing protection on countries of origin or transit. The UK has suggested, for instance, amendments to the provisions in the asylum chapter of the draft European Constitution to the effect that the Common European Asylum System (CEAS) should not be concerned with common rules, but rather have the objective, amongst others, to ''managing efficiently mixed flows of persons in need of international protection and persons migrating for other reasons, reducing secondary movements within the European Union and, ensuring that asylum procedures are not open to misuse.'' Measures to facilitate this objective would include ''partnership and co-operation with third countries, and in particular the provision of protection in the region of origin where appropriate.''[2] The current draft EU constitutional treaty contains a provision which, unless its meaning is clarified, would appear to have the same purpose[3].

We are concerned that these amendments to the draft EU constitution would, in line with the UK proposals, gear the CEAS towards processing and protecting in the region of origin or transit rather than within the EU, thus introducing a paradigm shift in EU asylum and immigration policies.

The UK is simultaneously ensuring that its proposals are reflected in some of the key instruments for the development of the CEAS, by attempts to secure a broad interpretation of the 'safe third country' concept, which allows the transfer of responsibility for the determination of asylum claims. JUSTICE is particularly concerned at proposals to expand the application of the 'safe third country' concept to include countries to which the applicant does not necessarily have a link and has not even transited through but where he or she "*would have an opportunity"* to seek protection and would be "*admitted"*.[4] Such a concept of 'safe third country' would arguably enable member states to turn around any asylum seeker who arrives to the UK (or the EU) to third countries listed as 'safe', in line with the core idea behind the UK proposals.

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[2] Suggestion for amendment of Article III-162 by Mr Hain.

[3] Article III-167(2)(g) providing for ''partnership and co-operation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection''.

[4] See the additional UNHCR comments on the amended proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status (July 2003).

On the domestic front, new legislative measures on asylum have just been announced which amongst others intend to "deal with situations where it is decided that a country other than the United Kingdom is best placed to consider someone's asylum or human rights claim substantively'[5]. The UK will legislate so that a person will not be able to challenge their removal to certain safe third countries on the bases of the way they will be treated. The designated countries will be those where we are satisfied that an individual will be neither persecuted nor subjected to treatment contrary to Article 3 ECHR. This has a familiar ring to the UK's proposals. The immediate effect of the proposed legislation has been to stall negotiations around the asylum procedures directive.

[5] Home Office/Department for Constitutional Affairs, *New legislative proposals on asylum reform,* 27 October 2003.