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Lanzarote (25-26 October 2007)

**“Emerging issues of access to justice for vulnerable
groups, in particular:**

- migrants and asylum seekers;**
- children, including children perpetrators of crime”**

TOWARDS IMPROVING THE LEGAL PROTECTION OF MIGRANTS

**Contribution of the European Committee on
Migration (CDMG)**

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TOWARDS IMPROVING THE LEGAL PROTECTION OF MIGRANTS

Contribution of the European Committee on Migration (CDMG) to the 28th Conference of European Ministers of Justice on "Emerging issues of access to justice for vulnerable groups, in particular migrants and asylum seekers, children, including children perpetrators of crime", Lanzarote, 25-26 October 2007

Text approved by CDMG at its 54th meeting

Introduction

1. The European Committee on Migration (CDMG) welcomes with great interest the 28th Conference of European Ministers of Justice, organised under the general theme of “*Emerging issues of access to justice for vulnerable groups, in particular migrants and asylum seekers, children, including children perpetrators of crime*”. This subject is of vital importance for migrants and corresponds to the concerns of CDMG and the focus of some of its recent work aimed at improving the legal situation of migrants.

2. CDMG fully shares the position expressed in the report presented by the Spanish Minister of Justice that migrants are often in a very precarious economic, social and legal situation. However, it wishes to underline that migration affects many social groups in different countries. It concerns both young and older persons, men and women, individuals and whole families, low and highly skilled workers¹. For many of them, migration is a voluntary enterprise to improve their standard of living. For many others, however, it is not a choice; rather, it is a necessity imposed by violence, conflict and, in some cases, environmental change.

3. The task of CDMG is to develop European co-operation on migration, the situation and social integration of populations of migrant origin and refugees, and on community relations. CDMG draws the attention of its member states to the human dimension of migration, striving in this way to ensure respect for human rights and dignity of individuals at every stage of the migration process. At their last conference (Helsinki, September 2002), the European Ministers responsible for migration affairs undertook to develop and implement policies on migration and integration that are founded on the principles of human rights, democracy and the rule of law thus ensuring orderly migration, social cohesion and respect for the individual².

4. The legal status of migrants is one of the 3 poles of the committee's work – the others being migration management and integration of migrant populations/community relations. For CDMG, these three fields of action, migration management, integration of migrants and legal protection of migrants, are closely interconnected. The legal status of migrants and their access to justice are, therefore, integral elements of effective integration policies. Indeed, community relations policies should be based on the following principles: (i) security of residence for lawful migrants, (ii) determined action to bring about real equality of opportunity, (iii) effective measures to combat racism and xenophobia, (iv) fullest possible participation of migrants in the host society, and (v) an attitude of openness to migrants' cultures and customs³.

I. Improving access of migrants to justice

5. Access to justice for migrants requires attention to 3 areas: (i) procedural issues such as the right to be treated according to law, the right to have a fair and proper trial and a right to an impartial hearing before a court or tribunal as well as the availability of legal representation; (ii) substantive laws, particularly in the areas of non-discrimination and combating racism and xenophobia; and (iii) information and awareness, not only amongst migrants themselves, but also amongst the various actors of the legal systems (court officials, lawyers and police in particular).

6. The European Convention on the Legal Status of Migrant Workers (ETS No. 93) and two relatively recent recommendations of the Committee of Ministers and prepared by CDMG already provide a legal framework of member states to improve the access of migrants to justice. The relevant provisions of these texts are briefly described below. Their real impact depends on willingness of member states to incorporate them into their domestic legislation.

¹ See: Stéphane de Tapia, New patterns of irregular migration in Europe, Council of Europe 2004.

² Final Declaration, paragraph 19.

³ Recommendation No. R (92) 12 of the Committee of Ministers to member states on community relations.

European Convention on the Legal Status of Migrant Workers

7. The Convention aims to eliminate the discrimination that may exist in national legislation and to guarantee that migrant workers and members of their families are treated no less favourably than the nationals of the receiving State. Covering the principal areas of importance for migrant workers regarding their working and living conditions, the Convention provides, in Article 26(1), for the right to appeal to the courts and administrative authorities of the receiving State. It states in particular that member states, parties to the convention should “*secure to migrant workers treatment not less favourable than that of its own nationals in respect of legal proceedings. Migrant workers shall be entitled, under the same conditions as nationals, to full legal and judicial protection of their persons and property and of their rights and interests; in particular, they shall have, in the same manner as nationals, the right of access to the competent courts and administrative authorities, in accordance with the law of the receiving State, and the right to obtain the assistance of any person of their choice who is qualified by the law of that State, for instance in disputes with employers, members of their families or third parties*”.

8. Moreover, it sets out that parties to the convention “*shall provide migrant workers with legal assistance on the same conditions as for their own nationals and, in the case of civil or criminal proceedings, the possibility of obtaining the assistance of an interpreter where they cannot understand or speak the language used in court*”.

9. The Convention guarantees the minimum basic rights of migrant workers. It offers a multilateral legal framework to strengthen cooperation and dialogue in the area of labour migration. It has to be underlined that if the number of contracting parties continues to grow, the convention will contribute to the concerted management of migration and help tackle the problem of irregular migration⁴.

Recommendation Rec (2000) 15 concerning the security of residence of long-term migrants⁵

10. This recommendation sets out a series of principles in relation to the acquisition and loss of secure residence status, the acquisition of nationality and, in particular, protection against expulsion. Regarding expulsion proceedings, the recommendation states that ‘*procedural guarantees for a long-term immigrant should in particular include the right to a fair hearing and to be given a reasoned decision*’. Moreover, it sets out that procedural guarantees should ‘*include the right to appeal to, and to be represented for that purpose before, an independent administrative authority or a court competent to review the case on its merits and on the conformity of the decision with the law*’. In case of challenges to expulsion decisions, an important provision concerns the suspension of expulsion. The recommendation stipulates that if ‘*national legislation does not provide for a suspensive effect of the appeal, the request to suspend the execution of any expulsion decision should be duly examined with regard to the necessities of national security*’.

⁴ The convention is only open to the member states of the Council of Europe. To date, it has been ratified by eleven member states, including host countries such as France, Netherlands, Sweden, and Norway, and also by Italy, Portugal, Spain and Turkey which have increasingly become receivers of migrants but which are also countries with an important number of their citizens living abroad. In recent years, the Convention has also been ratified by Moldova (2006), Albania and Ukraine (both in 2007).

⁵ Adopted by the Committee of Ministers on 13 September 2000.

Recommendation Rec (2002) 4 on the legal status of persons admitted for family reunification⁶

11. This recommendation enunciates the principle that family members admitted under family reunification should be granted the same residence status as that held by the principal migrant and, *inter alia*, calls for a right of appeal to be afforded to those family members whose permits are not renewed and/or threatened with expulsion.

II. Obstacles faced by migrants in gaining access to justice

12. Recent reports of CDMG reveal that there are still many obstacles preventing migrants from full enjoyment of their rights⁷. Often, as a result, there are still too many arbitrary decisions concerning migrants and the right to appeal is not always recognised. These obstacles are in many cases derived from a failure to recognise and take into account the specific vulnerability of many migrants. For example:

- Poor knowledge of the language and legal system of the country in question,
- Insufficient financial resources,
- Limited access to information,
- Psychological barriers,
- The difficulties of migrants in accessing higher education.

13. Structural discrimination and social disadvantages continue to affect settled migrants in multi-ethnic societies.⁸ While legislation against discrimination has been put into place in most member states, it is, however, often difficult to apply such anti-discrimination laws effectively. This legislation has to be accompanied by active measures promoting the use of available legal remedies. At the same time, education and information will be of little use if it appears to the general population that the law is indifferent to racism and discrimination.

14. Moreover, the composition of courts often fails to adequately reflect the heterogeneity of the multiethnic society. More generally, migrants and ethnic communities are under-represented in the legal profession and police force.⁹

15. Existing legal systems, for time being, have not yet found a way to adapt to the specific situation of irregular migrants. Viewed as modern 'outlaws' themselves, irregular migrants are often unable to seek justice before the courts. This situation applies to all aspects of their everyday life: work, housing, security, health, etc. The irregularity of their situation weighs heavily on their capacity to take any action. It discourages irregular migrants from reporting to the police, and prevents them from accessing the justice system.

16. A recent review undertaken by CDMG on the access of irregular migrants to minimum social rights includes a series of recommendations to improve their access in the areas of housing, education, social security, health, social and welfare services, employment and residence.¹⁰

⁶ Adopted by the Committee of Ministers on 26 March 2002.

⁷ Claude-Valentin Marie, Preventing Illegal Immigration : Juggling Economic Imperatives, Political Risks and Individual Rights, Council of Europe 2004.

⁸ CDMG Report on 'Framework of integration policies', 2000.

⁹ As underlined in CDMG Report on 'Diversity and cohesion: new challenges for the integration of immigrants and minorities', 2000, 'The various governmental ministries need to be given the necessary human and other resources to address immigrant and minority issues when they design and implement their policies. Ministries acquire the capacity to act effectively on immigrant and minority issues by, among other means, creating task forces, developing expertise, recruiting staff with an immigrant and minority background and co-operating with non-governmental actors'.

¹⁰ Irregular migrants : access to minimum rights, Ryszard Cholewinski, Council of Europe 2005.

III. Proposals

17. CDMG shares the position expressed in the report presented by the Spanish Minister of Justice that one of the crucial means of improving the legal protection of migrants is access to information. As rightly underlined in the report, access to information *'presupposes that individuals are fully informed of their rights and ways to exercise and enforce them'*.

18. In this context, the role of NGOs should be strengthened, and particularly the capacity of migrants' associations to offer information, advice and referrals to appropriately qualified lawyers. For many migrants, their compatriots are often a unique source of information for them. Consequently, the negative experiences with the legal system may be generalised and may play a role in preventing migrants from taking action in the courts. Non-governmental organisations (NGOs) can and do play an important part in integrating migrants and ensuring respect for their rights. Working closely with migrants, they can draw attention to the vulnerability of those at greatest risk, particularly migrants who are illegally present and migrant women and children.

19. Initiatives should be undertaken to improve the capacity of migrants to vindicate their rights. For example, legal aid or subsidised legal services, alternative dispute-resolution mechanisms, citizenship education programmes, court fee waivers and information technology (e.g. electronic databases on regulations). There is also a need to make judges and law enforcement officials more aware of the particular problems encountered by migrants and created in multi-ethnic societies.

20. Finally, proposals for the preparation of guidelines on migrants' access to courts and administrative authorities in receiving member states have been considered by CDMG in 2004. It was, however, decided to postpone such an activity pending the completion of other activities. The proposed activity included a review of national regulations and policies in selected destination countries with a view to assessing the measures that have been taken to assist migrants to access the legal system, with particular attention to their access to legal advisers and to the role of NGOs.

21. CDMG would be willing to take part in any similar activity, should the Committee of Ministers so decide following the recommendations the Conference of European Ministers of Justice in Lanzarote.

