



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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COMMISSIONER FOR HUMAN RIGHTS

**POSITIONS ON THE RIGHT TO SEEK AND ENJOY
ASYLUM**

This is a collection of Positions on the right to seek and to enjoy asylum from the Council of Europe Commissioner for Human Rights. It is a short summary of the findings of the Commissioner based on his country-monitoring and thematic reports, issue papers, recommendations, opinions and viewpoints. By collating these findings drawn from the different components of his work, the Commissioner presents a summary of his conclusions and recommendations concerning the right to seek and to enjoy asylum. The Positions will be continuously updated in the further light of the Commissioner's ongoing work.

The right to seek and to enjoy asylum is a fundamental human right

Asylum seekers flee persecution and/or armed conflicts. Many other migrants flee famine, extreme poverty and other forms of serious human insecurity. Many seek economic opportunities and a better life for themselves and their families.

These individuals are not criminals. It should be recalled that the right to apply for asylum in another country is a fundamental right recognised by international law. The “right to seek and to enjoy in other countries asylum from persecution” is a key provision in the Universal Declaration of Human Rights, which was adopted in 1948 by the General Assembly of the United Nations.

Some of those who seek to enter Europe have a well-founded fear of persecution as defined by the UN Refugee Convention and its Protocol. They are under threat because of their ethnicity, religion, nationality, political opinion or membership of a particular social group. Some of them have already suffered serious ill-treatment in their country of origin. They are refugees who have been *forced* to migrate. Their background distinguishes them clearly from other migrants and has made it necessary to provide them with a special protective status under international and domestic law.

Ensuring asylum seekers’ effective access to asylum procedures

States should ensure that all foreign nationals seeking asylum in their countries are in fact able to access asylum procedures and benefit from a thorough, fair, individual examination of their claim. This includes individuals stopped at points of entry, whether air, land or sea borders, as well as those intercepted at sea, found stowed away on boats or stopped while disembarking from an airplane. Furthermore, extra-territorial controls must not be conducted to the detriment of rights guaranteed by the UN Refugee Convention.

On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which they understand, about the procedure to be followed. The practice of *refoulement* “at the arrival gate” is unacceptable.¹

Furthermore, factors such as an individual’s irregular entry to the country or lack of identity documents should in no case affect either their possibility of applying for asylum or the consideration given to their claim. Likewise, formal requirements, such as submitting an application in the national language, are unacceptable reasons for refusing to thoroughly examine an individual’s asylum claim.

European Union countries have drawn up lists of countries of origin considered safe. Applications from these countries are processed through simplified, speedy procedures or in some cases rejected outright. However, even in countries that are considered generally safe, there may well be situations where not all individuals or groups of individuals are safe. For instance, there might be instances of discrimination of such severity as to amount to inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights (ECHR), particularly towards members of minority groups or of the lesbian, gay, bisexual and transgender communities. This is why it is crucial to examine each application individually, taking into account the applicant’s particular circumstances.²

Asylum legislation in line with international standards

¹ See Recommendation on “the rights of aliens wishing to enter a member Council of Europe member State and the enforcement of expulsion orders” CommDH(2001)19, Strasbourg 19 September 2001.

² See also Guideline II, paragraph 2, of *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Council of Europe Committee of Ministers, 01/07/2009.

Countries should enact specific legislation on asylum in line with both the UN Refugee Convention and the ECHR requirements. The legal meaning of 'persecution' should include persecution by non-state agents in situations where the state concerned is incapable of offering protection to the person in danger. In addition, states should seek to extend the legal definition of persecution on account of membership of a particular social group to cover persecution based on gender or sexual orientation.

Humanitarian protection

European states have introduced temporary, humanitarian protection for persons not qualifying for refugee status under the UN Refugee Convention, but whose forced return is nonetheless not possible because this would expose them to certain serious risks in the country of origin. This protection may, for instance, cover individuals fleeing their countries because of civil wars. Such efforts are most commendable, but these measures should not be used as a substitute for the durable status provided by the UN Refugee Convention, or other possible forms of international protection.

Fair procedures - all asylum procedures need to meet international standards of fairness.

Asylum seekers need to be given sufficient time to fill in forms, assemble documents and prepare a coherent account of their reasons for seeking asylum. While a speedy procedure is important, time-limits must not be so short as to jeopardise a foreign national's effective right to seek asylum or other fundamental human rights, in compliance with the principle of *non-refoulement*.

It is also essential that all asylum seekers be systematically given access to legal assistance from the outset of the application process. In addition to improving the legal protection of asylum seekers, such an arrangement would in some instances diminish the number of appeals to courts as it would provide a more solid ground for the initial interviews with the authorities and the subsequent applications. Asylum seekers should be able to benefit equally from this aid whether they are detained or not. Furthermore, lawyers dealing with immigration, and asylum matters should be adequately qualified in this area, and, where necessary, should receive special training.

It is critical that interpretation services be available to asylum seekers whenever needed, including in order to assist them:

- to understand documents given to them or information provided to them;
- to submit forms in a national language;
- during interviews and hearings.

Interpreters should be selected in such a way that it is guaranteed that the accounts of refugees will not be reported to the home authorities. It is also important that interpreters have knowledge both of the language and the situation of the countries concerned so that technical words, acronyms and expressions referring, for example, to a military unit are accurately translated and geographical places properly located. This type of approach is the only way of ensuring that the events described by an asylum seeker are properly understood.

It is of utmost importance that the personal testimony of asylum seekers be heard by those making decisions on admissibility in complex or contested cases and by those deciding on the merits of an asylum claim.

Any officials, interpreters or others carrying out interviews with asylum seekers should receive specific training for recognising and interviewing particularly vulnerable asylum seekers. Such training should also take gender-specific factors into account especially as regards victims of sexual abuse. Interviews with children require special skills. Sometimes children are treated as if they are their parent's belongings, and they are not even interviewed. Children may well have their own reasons for seeking asylum – it is key that their experiences be heard independently.

When asylum seekers are minors, the best interest of the child should always be taken into account in the asylum procedure.

Contradictions in statements by asylum seekers should not be considered of crucial importance when the merits of their applications are examined. Genuine victims of persecution are often in a vulnerable psychological state and have serious problems relating to people in positions of authority. Moreover, nowadays, airport procedures with arrests at the arrival gate and questioning that can last seven or eight hours or even longer, do nothing to inspire serenity and trust; they rather elicit surprise, tension and fear. In such a climate, quite apart from the difficulties that may arise because of the lack of adequate assistance, it is hardly surprising that it should sometimes be difficult to persuade applicants to co-operate. In any event, it seems unreasonable to expect their statements to be totally consistent and perfectly clear.

Decisions handed down on the merits of a case should be motivated, with a legal explanation provided. Decisions so intimately affecting the enjoyment of fundamental human rights, and with potentially irreversible consequences, should be subject to appeal before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence - preferably a court. This authority or body should be empowered to consider all aspects of each case as an arbiter and guarantor of respect for human rights.

Asylum seekers should benefit from sufficient time for preparing their appeals, and should have effective access to legal assistance and representation and interpretation services. Furthermore, where asylum seekers submit an arguable claim that the removal order would lead to a real risk of persecution or the death penalty, torture or inhuman or degrading treatment or punishment, the remedy must be that the removal be suspended.

Non - refoulement

When asylum applications are refused, states must nonetheless ensure that they do not violate the principle of *non-refoulement*, enshrined in Article 33 of the UN Refugee Convention, and the fundamental guarantees set out in Article 3 of the ECHR. These prohibit *in absolute terms* the forced return of a foreign national liable to be subjected to torture, inhuman or degrading treatment or punishment. Numerous examples show that diplomatic assurances do not provide an adequate safeguard against such ill treatment.

Accommodation of asylum seekers

Reception conditions should not lead to the institutionalisation and marginalisation of asylum seekers. Instead, asylum seekers should be able to retain a substantial degree of personal autonomy throughout the process. Long-term residence of asylum seekers in dormitory-styled accommodation centres in shared rooms is not conducive to their well-being. When, in addition, food and clothing are provided in a way which severely restricts personal choice, respect for the privacy of asylum seekers is seriously put into question. Alternative ways of accommodating asylum seekers after their initial stay in the initial reception centres should be developed. For families, separate apartments should be made available. Housing conditions must evidently also meet standards of decency. As for the provision of food and clothing, vouchers or cash allowances are the preferred option. It is also essential that the freedom of movement be fully respected for asylum seekers.

KEY RECOMMENDATIONS ON THE RIGHT TO SEEK AND TO ENJOY ASYLUM

Council of Europe member states urgently need to remedy and prevent the occurrence of violations of the right to seek and to enjoy asylum. This is especially important if the violations have come about through actions aimed at restricting migration flows or streamlining asylum procedures.

All persons seeking asylum in European countries should be able to access quality asylum procedures and benefit from a thorough, fair, individual examination of their claim, regardless of their point of entry into a country and the manner in which they enter or stay.

Asylum applications are to be examined individually, taking into account each applicant's particular circumstances. Even in countries of origin that are considered generally safe, there may well be situations where not all individuals or groups of individuals are safe.

Asylum procedures need to strictly adhere to international standards of fairness. These include, among other things: providing sufficient time for asylum seekers to prepare their claims; ensuring effective access to legal assistance and representation from the outset of the asylum process; making interpretation services available for asylum seekers whenever needed during the process; providing possibilities for asylum seekers to provide personal testimony to those making decisions on merits and on admissibility; an appeal before an independent and impartial authority or body, preferably a court. Where asylum seekers submit an arguable claim that the removal order would lead to a real risk of persecution or the death penalty, torture or inhuman or degrading treatment or punishment, the remedy must be that the removal order be suspended.

When asylum seekers are minors, the best interest of the child should be taken into account in the asylum procedure.

The principle of *non-refoulement* must be effectively respected in all cases; diplomatic assurances do not provide a sufficient guarantee against ill-treatment.

Reception conditions should not lead to the institutionalisation and marginalisation of asylum seekers: they should respect basic standards of decency and asylum seekers should be able to retain a substantial degree of personal autonomy throughout the process.