

BORDER PROCEDURES: NOT A PANACEA

ECRE'S ASSESSMENT OF PROPOSALS FOR INCREASING OR MANDATORY USE OF BORDER PROCEDURES

I. INTRODUCTION

The use of border procedures to determine whether a person requires international protection, while permitted under European Union (EU) asylum legislation provided certain conditions are met, is highly controversial. Conducted in situations of formal or de facto detention in border areas which are generally difficult to access by legal assistance providers, border procedures are not conducive to a fair and effective examination of international protection claims.

Being optional under the existing recast Asylum Procedures Directive, Member States' practice as regards border procedures is highly divergent, with a majority of States not formally applying border procedures until recently. Member States located at the EU's external land and sea borders have come under pressure from other EU Member States and institutions to introduce such procedures in domestic legislation or, where they already existed, to apply them more rigorously in practice. This includes current discussions on a non-binding disembarkation arrangement involving relocation to a coalition of willing Member States, which risk being derailed by attempts to force the use of border procedures.

Meanwhile, controversy over mandatory border procedures also dominates the discussions on legislative reform of the EU asylum acquis, the fate of which is highly uncertain due to the deadlock over the reform of the Dublin system, as well as the Return Directive. Border procedures are seen as a panacea for the many challenges of the EU's asylum and migration policy by some Member States, but fiercely opposed by others, thus blocking the adoption of a Council position on both proposals.

In this policy note, ECRE warns against mainstreaming border procedures as a core instrument of the EU's common asylum and return policies. Their presentation as a "solution" is based on unsubstantiated assumptions about their feasibility. The policy note highlights fundamental rights and efficiency concerns with such an approach. It concludes with recommendations to States applying border procedures to ensure effective access to asylum, as well as to EU co-legislators on the definition and role of border procedures in the future EU's legal framework on asylum and return.

II. ANALYSIS

BORDER PROCEDURES AS THE BACKBONE OF THE EU'S ASYLUM AND MIGRATION POLICY?

In current debates at EU level, border procedures are presented as indispensable for the proper functioning of the CEAS and the EU's integrated border management, both within and outside the context of legislative reform. This is partly due to an oversimplified analysis of the key problems of the current system. Unwillingness of Member States located at external borders of the EU to register new arrivals and to enforce returns, for instance, is invariably cited by main destination countries as the source of secondary movements, including of asylum seekers with manifestly unfounded applications. Consequently, mandatory border procedures and containment in the countries of first arrival, combined with vague and selective forms of solidarity, are promoted as the solution. However, the problem analysis is not accurate.

BORDER PROCEDURES IN CURRENT EU DEBATES

Border procedures are most prominent in Council debates on the Commission proposals for an Asylum Procedures Regulation (APR) and the recast of the Return Directive (RD). Article 22 establishes an ever closer nexus between the EU asylum and return legal regimes. The proposed fast-track return border procedure is to be applied to asylum seekers rejected in an asylum border procedure, and has been severely criticised, including by the Fundamental Rights Agency for substantially undermining the fundamental rights of migrants. Based on the misguided assumption that all non refoulement risks are by definition thoroughly assessed in the preceding asylum border procedure – quod non as discussed above – Article 22 implies appeal deadlines as short as 48 hours without suspensive effect in most cases, while individuals concerned can be subjected to a four-month additional maximum period of detention. For the time being, the discussion on the fate of the provision is merely postponed by both co-legislators. The EP draft report proposes to delete the problematic provision but it is still under negotiation. The Council was unable to include it in its recently adopted partial general approach solely because a Council position on the corresponding provision in the proposed APR is still pending. This latter discussion is no less worrying.

THE COUNCIL DISCUSSIONS

Opposite views on the need for mandatory border procedures as part of the future Asylum Procedures Regulation have resulted in “creative thinking” within the Council. In order to accommodate the concerns of southern Member States in particular, the option of a partially mandatory provision after a transition period is being considered. After such period, the application of a border procedure prior to an applicant's entry to the territory would be mandatory for all States but only with regard to certain inadmissibility and three acceleration grounds relating to the absence of reasons related to international protection and public security. Beyond those specific grounds, the application of a border procedure would remain optional for States.

At the same time, deadlines for decision-making on asylum applications in both mandatory and optional border procedures are significantly extended. The time period for taking a decision, after which access to the territory must be granted would be extended from 4 weeks after making under the current Directive to 6 weeks after lodging the application. Moreover, where an appeal is lodged, entry would not have to be granted before 12 weeks after the application is lodged, in case no decision is taken by the court within that time. The latter would even be extended to 16 weeks if failure to conclude the procedure within the said time-limit is due to applicants' actions to frustrate speedy conclusion of such procedure or, conversely, if compliance with such time limits would infringe their right to an effective remedy.

EVER INCREASING DETENTION

If adopted, such proposals would further undermine applicants' access to a fair and efficient asylum procedure by significantly expanding the temporal scope of border procedures and consequently legitimising systematic deprivation of liberty of asylum seekers at the border. Blaming the applicant for the failure of first instance authorities and courts to take decisions within a reasonable time may have become a common thread in the reform of the EU asylum legislation. However, where used as an additional ground for deprivation of liberty it is incompatible with the presumption against the detention of asylum seekers and refugees laid down in international human rights law. Moreover, justifying prolonged detention of asylum seekers at the border by the need to secure their right to an effective remedy is simply perverse. The right to an effective remedy is best served by granting asylum seekers access to a fair and efficient procedure on the territory, not by prolonging their ordeal in truncated procedures in conditions which may amount to inhuman and degrading treatment. This is an approach which epitomises the mainstreaming of detention as a measure of first and not

of last resort. It confronts applicants, lawyers and judges alike with a trade-off between upholding the right to an effective remedy and the right to liberty. It should have no place in the EU's legal framework.

Beyond legislative processes, border procedures are instrumentalized in EU discussions on temporary arrangements for the disembarkation of persons rescued at sea. Some Member States apparently hinted at future engagement in relocation of such persons being contingent on the systematic application of a border procedure by states of disembarkation, as an insurance policy against secondary movements as the CEAS reform seems to be going nowhere. While disregarding the protection gaps this may entail for the individuals concerned, such an approach is not likely to rebuild the trust necessary to restore a rights compliant and functioning CEAS.

BORDER PROCEDURES IN ACTION

Comparative research conducted in the framework of the Asylum Information Database (AIDA), reveals great disparity among EU Member States in transposition and implementation of this provision, indicating that many are not convinced of its value. Currently, **Bulgaria, Cyprus, Ireland, Malta, Poland, Sweden, Turkey** and the **United Kingdom** do not provide for a border procedure in national legislation, although a draft law introducing a border procedure is awaiting final adoption in **Poland**, while the application of the border procedure provision in **Hungarian** legislation is suspended since March 2017. In other countries, such as **Italy, Slovenia, Croatia** and **Serbia**, legislation transposing or clearly inspired by the APD remains dead letter for the time being pending the adoption of additional regulations or because of purely practical reasons. Moreover, only 10 AIDA countries, i.e. **Austria, Belgium, Germany, Spain, France, Greece, the Netherlands, Portugal, Romania** and **Switzerland** examine the merits of applications in a border procedure.

Most strikingly, EASO's recent analysis on the use of border procedures reveals a substantially lower recognition rate at first instance in 2018 of 12% for applications processed in border procedures in EU Member States compared to the 34% recognition rate in regular procedures, a trend also identified for the other special procedures (admissibility and accelerated procedures) under the APD. AIDA research in Germany pointed to a similar finding with regard to the airport procedure conducted in Frankfurt, where out of a total 475 applications, the BAMF rejected 214 as manifestly unfounded in 2018, whereas the main nationalities applying at airports were the same as for applicants on the territory. The significantly higher recognition rates for asylum seekers who applied on the territory in 2018 may be indicative of a stricter application of eligibility criteria in the airport procedure than in other procedures carried out on the territory.

PROTECTION AND EFFICIENCY GAPS

The more restrictive approach to protection claims in border procedures compared to similar caseloads examined in regular procedures points at the arbitrary and discriminatory nature of such procedures. Reduced procedural safeguards for applicants are an important factor contributing to this protection gap at the border.

While Member States are required to implement border procedures in accordance with the basic principles and guarantees applicable to all types of procedure under the recast Asylum Procedures Directive (APD), in the vast majority of States applying border procedures this is not the case in practice. Whether applied at land, sea or air borders, such procedures are invariably characterised by short deadlines for decision-making as well as lodging appeals, lack of information to applicants or potential applicants and reduced accessibility for NGOs and legal aid providers due to the locations where procedures are conducted and applicants (de facto) detained. Moreover, AIDA research on border procedures in **France** and **Germany** reveals a substantially lower quality of decision-making compared to regular procedures, resulting from superficial assessment of claims, undue emphasis on travel routes and inconsistencies, and poor conduct of interviews. The use of videoconferencing and phone interviews in such procedures often proves to be particularly problematic for both caseworkers and applicants in this regard.

Furthermore, the APD is fraught with ambiguity with regard to the application of border procedures to vulnerable asylum seekers. The directive does not provide for a clear-cut exemption of vulnerable applicants, including torture victims and unaccompanied children, from the border procedure but makes it contingent on the State's capacity to provide adequate support to applicants subject to such a procedure. In the absence of a clear definition of what constitutes adequate support, practice in Member States applying border procedures is highly divergent. Whereas countries such as **Belgium, Croatia, Greece** and the **Netherlands**, for instance, do not subject unaccompanied children to a border procedure, this is allowed according under the national legislation of **France, Spain** and **Germany**. Overall, effective mechanisms to identify applicants with special needs at the border beyond visible vulnerability factors are scarce, rendering any special procedural safeguards laid down in EU law meaningless in practice.

The support of EU agencies to national authorities in rolling out border procedures is not a guarantee of fairness and effectiveness either, as the example of Greece shows. First, in terms of efficiency, the deployment of significant numbers of EASO caseworkers (both locally recruited and Member State officials) in the fast-track border procedure on the Greek islands, has not prevented an average seven-month duration of the procedure between full registration and the issuance of a first instance decision. This is far beyond the two weeks envisaged in the law. Second, despite the involvement of EASO caseworkers, quality of decision-making remains questionable in the experience of legal practitioners, with an overemphasis on inconsistencies in the applicant's statements and gaps in timely identification of vulnerability. Finally, the nationality-based examination of either admissibility, merits or both of applications lodged in this "exceptional" procedure, typifies an approach based on prevention of migration rather than protection.

Therefore, the resistance of Member States located at the EU's southern external borders to mandatory border procedures is not surprising. In the absence of any perspective of a fair responsibility-sharing mechanism as part of a fundamentally reformed Dublin system, use of border procedures serves to contain people at the EU's external borders. As the situation on the Greek islands illustrates, expanding such an approach across the EU is likely to become a recipe for disaster rather than the panacea for a troubled system.

III. RECOMMENDATIONS

Rather than mainstreaming highly problematic border procedures into (future) EU asylum and return policies, EU Member States should invest in regular asylum procedures, to make them fair and efficient, compliant with rights, and well-resourced. In parallel, the Commission should focus on in-depth monitoring of the implementation of the current asylum and return acquis, launching infringement procedures as necessary.

In view of current practice and debates at EU level, ECRE makes the following specific recommendations:

- » States should refrain from applying border procedures. They are ill-suited to ensuring a fair or efficient examination of an applicant's need for international protection. Applications made at the border should be processed in a procedure conducted on the territory with the range of procedural guarantees required under EU and international law.
- » Where border procedures are in place, applicants in need of special procedural or reception needs should be exempt as a matter of law. States must establish systematic screening of all applicants arriving at the border to identify vulnerable persons.
- » States should not detain asylum seekers at the border. Any detention measure taken at the border must be based on an individual assessment of its necessity and proportionality. They should be used only where alternatives to detention cannot be applied effectively and be subject to speedy judicial review in line with States' obligations under EU and international law.
- » If further pursued, EU co-legislators should firmly resist rendering Article 41 of the proposed Asylum Procedures Regulation mandatory and provide for an unequivocal exemption of vulnerable applicants from border procedures. Relatedly, EU co-legislators should delete Article 22 of the Commission proposal recasting the Return Directive.

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