

EU migration policy: Is it fair?

Editorial



By Pascale Charhon, ENAR Director

As the EU is busy discussing its future migration policy, ENAR is dedicating this edition of ENARgy to the EU's migration policy as well as to issues of concern arising in the context of this policy.

EU member states face a variety of situations with regard to third country nationals and mobile EU nationals.

However, a common theme is that across Europe migrants are often socially excluded and subject to various forms of discrimination with regard to access to rights, employment, education and social services.

Over the last decade, the EU has been developing the foundations of a common immigration policy and a number of specific policy and legislative initiatives have been taken. The EU has also been reflecting on future challenges, and how migration can respond to these. It has recognised that larger migration flows may be needed in the future - as well as the role of economic migration - in the context of demographic ageing in Europe. However, while claiming to pursue a "coherent" and balanced approach, too often the dialogue focuses only on this aspect, with the result that migration is seen as a utilitarian and short-term solution to demographic change whereby migrants will come to Europe for a few years, contribute to the economy, and leave before they become a "burden". This approach, which treats migrants as economic units and not as human beings, is not consistent with European values of respect for human dignity, equality and respect for human rights, including the rights of persons belonging to minorities.

On the other hand, the lack of recognition and value placed on the contribution that is made to Europe's economy, society and culture by migrants is a key feature of the debate. The utilitarian approach recognises the economic necessity of highly skilled migration, but lacks recognition of the broader contribution to European society. The denial of rights to many migrants, including asylum seekers, undocumented migrants, and others, not only has a negative effect on the individuals concerned, but also denies European society the fruits of their participation in civic, political, social, cultural and economic life.

The Hague Programme on freedom, security and justice in the EU is coming to an end in 2010. The European Commission and the French

Presidency of the EU are therefore currently reflecting on a framework for a renewed strategy, notably in relation to migration. In this context, and ahead of ENAR's conference on "Framing a positive approach to migration" in November 2008, the articles in this newsletter critically review the EU's migration policy as a whole and present the range of perspectives on this controversial area, including the view of the European Commission. They also focus more specifically on the directives on employers' sanctions and on the socio-economic rights of third country workers, as two of the key pieces of legislation under discussion at the moment. Finally, they examine the role of the media in relation to immigrants and Roma in Italy and the impact of discriminatory integration practices in the Netherlands.

EU migration policy has been characterised by an overwhelmingly negative dialogue that has led to the stereotyping and stigmatisation of migrants. ENAR strongly believes that the foundation stone for migration policies must be the human rights framework and that migrants' rights should not be dependent on the shifting sands of public opinion, nor should they be traded off in favour of other policy goals. As the EU reflects on its future migration policy, there is a very real opportunity to reframe the "shape of the debate" so that a positive approach to migration is taken.

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Examining the European migration debate:

Elsbeth Guild, Radboud University Nijmegen, Kingsley Napley and the

This article examines how the EU's migration policy has evolved, from the entry into force of the Amsterdam Treaty in May 1999 until now, and provides a critical analysis of these policies.

The French Presidency of the European Union is focusing on making it harder for immigrants to get to Europe through a pact on immigration which the member states will be invited to agree. The objective of the Pact, among other things, is to take common measures against irregular migration.¹

The proposal for the Pact includes speeding up the expulsion of foreigners irregularly on the territory of any member state, new agreements with third countries that they will accept back without question their own citizens but also those persons who crossed their territory on the way to an EU state and were found undocumented in a member state, compulsory integration contracts for immigrants aimed at testing whether immigrants have adopted national and European values in addition to language tests. The collection, retention and use of increasing amounts of biometric data on foreigners is also part of the Pact in order to determine where foreigners are at specific times of control.

Many of these proposals are likely to cause some concern among those civil society organisations which are already troubled by the fragmentation of EU communities along the lines of citizenship - the member states demonstrating less and less solidarity in their legislation towards third country nationals living in the EU or seeking to come to the EU. The main exception to this ever less friendly approach to immigrants from third countries is the category of highly skilled or qualified migrants for whom the stricter rules are unlikely to apply.

In this article I will briefly examine how the EU has come to where it is now - what the road looks like which has brought us to this proposal from the French Presidency which focuses so intently on the exclusion of migrants. The time period over which I will look at this is the past (almost) ten years - from the entry into force of the Amsterdam Treaty in May 1999 until now. This is because it was only in 1999 that the EU gained the power to make laws on immigration and asylum - before that date this was a matter of national competence.

How much legislation has been adopted?

If one divides up the legislation which the EU has adopted in the field of borders, immigration and asylum one finds that there are nine measures which have been adopted in asylum. A further nine measures have been adopted in the field of legal migration. On borders and visas there have been 19 measures (and five proposals are outstanding). As regards irregular migration there are also 19 measures which have been adopted with the so-called

return directive (Directive on common standards for expulsion) provisionally agreed between the European Parliament and the Council and a proposal on employer sanctions on the table. Eleven readmission agreements have been signed with third countries and negotiations have been approved with a further five countries. If the quantity of measures is an indication of the importance which the EU places on the subject, then clearly borders, irregular migration and readmission agreements take a high priority over asylum and legal migration. The picture is one of a very exclusionary EU which is focused on keeping foreigners out, sending them back and ensuring they never come back to the EU rather than an EU which is open to the world.

Nonetheless, according to the European Commission there are in the order of 300 million border crossings into and out of the EU each year, 60 million of these are third country nationals not requiring a visa and 80 million by foreigners who do require a visa to enter the EU. Also according to the Commission about 500,000 foreigners were, in 2006, apprehended in the EU who were designated as irregularly present in the EU. Of these 75% came from countries where visas are mandatory for any entry into the EU. About 40% of those designated as irregularly present are expelled.² The population of the EU is in the region of 400 million persons. The question must then arise: what is the relationship of proportionality between the number of legal measures devoted to this specific group, their size in relation to the EU population and to the numbers of persons entering and leaving the EU each year?

What types of measures have been adopted?

The legislative procedure in the EU can be quite slow and cumbersome. Some proposals for legislation, for instance in the commercial field, can take a decade or more to be adopted. In the field of borders, immigration and asylum, the EU gave itself a deadline of five years to adopt a series of measures. Legislation in this field only really started to be adopted after 2001 but two measures managed to find agreement in 2000 - in the first year that the EU had competence. One of these measures is particularly significant in light of the French Presidency's proposals - the EURODAC Regulation. This measure establishes in the field of asylum a biometric database, so far the only one which the EU has developed, in which the fingerprints of all asylum seekers and persons apprehended irregularly crossing an external frontier are held. Thus the starting place of EU law in the field is by way of a database the purpose of which is to tie the body of an individual to an identity allocated by a member state. The individual's claim to an identity may be betrayed by the individual's own body as captured in the EU database. The principle that an individual is

1 E Vucheva, 'France pushes for hard-nosed EU migration pact', EUObserver, 29.05.2008.

2 European Commission, New Tools for an Integrated European Border Management Strategy - Memo/08/85, 13.02.08.

Added value from the EU or deterioration?

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entitled to an identity which is negotiated between him/her and his/her state of citizenship does not apply to this biometric database. Instead the individual's fingerprints are taken and stored in the EURODAC database to be used to allocate an identity and on the basis of that identity where the individual should be present (in the later legislation this will be the mechanism by which the member states allocate responsibility for determining asylum applications). The German Presidency in 2007 proposed that the database should be opened up to law enforcement authorities. The French Presidency now plans to make the extension of EU control over biometric identities an important feature of its presidency.

A steady stream of measures have been adopted in the field of borders and visas, starting with the list of countries whose nationals must have visas to enter the EU. As the majority of persons who at any given time are designated by the member states as irregularly present on their territory are nationals of states on the visa black list, according to the European Commission, making sure that people who are likely to be designated as irregularly present on the EU territory do not get visas is a matter of some interest. As mentioned above, about 80 million visa nationals enter the EU per year. The average refusal rate for visas is approximately 10% though there are very substantial variations between

EU consulates and depending on which country is examined. For instance, the German consulate in Moscow issued in 2006 244,038 short stay visas and refused 9,488 applications. But the Italian consulate in Moscow issued 275,561 short stay visas and refused only 2,470.³ The nature of the EU border is one where increasingly the member states consider that the important decisions about entry or refusal of entry are not those taken at the physical borders but those taken in the consulates or elsewhere beyond the border of sovereignty.

Some EU physical borders, however, are the sites of very public demonstrations of irregular migration. Both the Mediterranean Sea and the Atlantic coast between Africa and the (Spanish) Canary Islands have been the subject of intense media attention in 2006 and 2007. The EU created and has extended the remit of its external border agency, FRONTEX, which has coordinated important border patrols to prevent persons suspected of being potential irregular migrants from entering the EU. According to the European Commission "53,000 persons, for 2006 and 2007

together, have been apprehended or denied entry at the border during these [FRONTEX coordinated] operations. More than 2,900 false or falsified travel documents have been detected and 58 facilitators of illegal migration arrested."⁴ Over the two year period, nine sea border operations were carried out at an average cost of 2.7 million euros each.⁵ The French Presidency's focus on expulsion and readmission must be viewed in the light of this highly publicised (and expensive) activity.

Currently, agreement has been reached between the European Parliament and the Council on the return directive (referred to above). This will provide for the possible detention of foreigners for periods, to be set by the member states, between six and 18 months maximum pending expulsion. This will be the first serious foray of the EU into the field of detention of foreigners and it will be important to follow. At the moment the persons who find themselves in immigration detention tend to share a number of characteristics, the most important of which is that they are

poor (and not EU nationals). Following this main common characteristic, they often also share the characteristic of being perceived as non-white.

Where is EU migration policy headed?

There are competing and contradictory trends in EU migration policy. On the one

hand, there is an important trend to ever more closed borders, the designation of increasing numbers of persons as irregularly present and their expulsion and the shift of responsibility for unwanted foreigners onto neighbouring countries through readmission agreements. On the other hand, there is increasing recognition of the EU's need to attract qualified workers from outside the EU as the EU's own population begins to age without replacing itself. One thing which seems certain is that EU migration policy will increase its reliance on database information, biometric information about individuals and profiling. The quest to know which foreigners are the right ones to admit to the EU and which the wrong ones, when the definition of who the EU wants to admit and who it wants to exclude is so varied across the member states, seems destined to seek a technological fix in the form of risk management, profiling and the accumulation of personal data.

"IF THE QUANTITY OF MEASURES IS AN INDICATION OF THE IMPORTANCE WHICH THE EU PLACES ON THE SUBJECT, THEN CLEARLY BORDERS, IRREGULAR MIGRATION AND READMISSION AGREEMENTS TAKE A HIGH PRIORITY OVER ASYLUM AND LEGAL MIGRATION"

3 Council Document 10700/07

4 European Commission, *The FRONTEX Agency: evaluation and future development* - MEMO/08/84, 13.02.2008.

5 *Ibid.*

A common European immigration and asylum policy The future built on human rights

Peter Bosch¹, Acting Head of the Immigration and Asylum Unit,

The EU is confronted with increasing immigration and must find a balance between competing interests and demands. On one hand, the EU labour market needs immigration to ensure economic growth and stability. The EU also needs to ensure it will continue its humanitarian traditions, respect the right of migrants and provide asylum and other forms of protection for those in need. On the other hand, the entitlement to come is not granted automatically to everybody, and the risk of illegal migration arises. The EU must stand firm against illegal immigration, which endangers the human rights of migrants, undermines the credibility of a legal immigration policy, weakens social cohesion and brings with it the risk of drifting towards xenophobic and discriminatory attitudes that cannot be tolerated.



Since 2002, the EU has received over 1 million immigrants each year. Immigration has constituted the main element of EU demographic growth since 1992, as Europeans make fewer babies and live longer. Today, immigrants represent around 3.8% of the total population in the EU. On 1 January 2007, there were 18.5 million third-country nationals resident in the EU². By the year 2060, Europe's active population will have decreased by 50 million people, even if immigration flows remain at current levels.

Given the complexity of the question, the EU has no other choice than to act responsibly, by developing a genuinely joint system for managing migration flows, both between member states and between EU and third countries. Fundamental rights are at the heart of this policy. The Commission recently outlined its vision of the future approach to immigration and asylum in the EU in its Communication "A Common Immigration Policy for Europe: Principles, Actions and Tools", which lays the foundation for meeting the challenges associated with the complexity of migration phenomena. This policy is guided by two principles: respect for the individual and solidarity. When developing our migration policies, we must constantly recognise that migrants are individuals. People who enjoy human rights, as a right to dignity or to family life. The EU's immigration policy, and all measures taken within its framework, whether by the EU or the member states, shall promote and ensure respect for fundamental rights of all migrants. It would be important to highlight some of the main elements of this policy.

The fight against all forms of racism and xenophobia

The Race Equality Directive³ provides a model of legal protection that prohibits racial discrimination in both the public and private

¹ The opinions expressed by the author are done on a personal basis and cannot be attributed to the institution he works for.

² The figure of 3.8% refers to the percentage of the EU population who are third-country nationals: it should be noted that the percentage of persons with foreign origin is much higher than 3.8%, as many former TCNs have been naturalised.

³ Council Directive 2000/43/EC.

sphere, e.g. in education or employment. The European Union Agency for Fundamental Rights has a particular responsibility in this area. It supports the full respect for fundamental rights in all measures or courses of action formulated within the EU institutions' respective spheres of competence.

The protection of refugees

This is and will remain a clear priority for the European Union. In recent years the foundations of a common European asylum system have been laid, but there is still a lot of work to be done. The Commission presented in June, together with the Communication on Migration, a Policy Plan to allow Europe to move gradually towards a system of genuinely harmonised standards concerning the right of asylum, leading to a common procedure for the examination of all applications and uniform statuses of protection. There is also an urgent need to improve reception conditions for asylum seekers, as current standards are minimal and sometimes insufficient. However, we cannot content ourselves with the mere convergence of legislation. What is needed is increased practical cooperation between the member states. In this context, a European asylum support office, facilitating cooperation between the member states and common approaches when dealing with asylum applications, will be an invaluable asset. The EU not only provides protection within its borders. Initiatives are being taken to create, together with partner countries outside the EU, Regional Protection Programmes, the aim of which is to deliver direct benefits to refugees as well as contribute to strengthening the protection and human rights standards in the host countries in the region of origin.

Admission policies

The rights of migrants also constitute an integral element of the legislation in the area of legal migration. With respect to the admission and conditions of residence of third country nationals, four directives have been adopted (on admission for family reunification, the admission of students, the admission of researchers and the status of long-term residents). The Commission will continue its efforts to provide a wider EU legal framework to those wanting to come to the EU on the basis of the Commission's 2005 policy plan on legal migration. The Commission considers that a single application procedure, as well as common rules of admission for certain categories of economic migrants, in particular highly skilled migrants and seasonal migrants are needed, also to make Europe more attractive and have clear rules for admission and residence.

Integration

Successful integration policies constitute a crucial element of any immigration strategy. Integration is a two-way process, in which host societies play a key role as facilitators of migrant integration. The successful integration process needs to be supported by the establishment of a secure legal position of the migrant. The

European Commission

Commission takes the view that his rights must be comparable to those enjoyed by the citizens of the host society. To this end the Community rules grant to third country nationals legally residing in a member state for five years the opportunity to acquire a long-term resident status. This status grants a long list of socio-economic rights as well as the right to intra-community mobility.⁴ The EU must ensure that common frameworks to support integration are further developed to meet current and future integration challenges.

Reducing illegal migration

There can be no realistic immigration policy if one does not implement a clear and efficient policy for those who misuse or abuse the system. Still, the efforts aimed at reducing illegal immigration must respect the dignity of people and protect them against inhuman or degrading treatment. Addressing illegal migration also means protecting the victims of traffickers.

Many tragedies occur on a frequent basis due to illegal immigration, particularly affecting migrants that attempt perilous sea crossings to enter the EU. The EU's external borders represent a particular challenge as certain member states are more exposed than others to the influx of irregular immigrants. The challenge is two-fold: to protect European borders while protecting the fundamental rights of those that attempt to reach Europe with a genuine claim for protection or who try to enter illegally. The increase of EU solidarity as regards border management requires, at the same time, an increase in EU monitoring on how national authorities ensure that fundamental rights are respected. The Schengen Borders Code explicitly puts obligation on the border guards, in the performance of their duties, to fully respect human dignity and to not discriminate on grounds of racial or ethnic origin. The European FRONTEX Agency, which facilitates the coordination of the work of the member states' border guards, also accounts for the dimension of individual rights.

Returning illegal migrants

Ensuring that those who do not or no longer have the right to stay legally in the EU will be returned to their country of origin is an important element of the EU's comprehensive approach to migration. Opening up to legal migration will only be possible if guarantees are in place so that those who evade legal gateways face the consequences. This is where instruments such as the Return Directive come into play, providing a common mechanism to be used by all member states to return illegally staying third-country

nationals to their home countries. Rather than reducing the rights afforded to an illegal migrant resident in an EU member state, this Directive harmonises treatment and conditions for these migrants. Through this instrument the rights of an illegal migrant are guaranteed, and equality of treatment across the EU is ensured. Member states will have to implement the Directive ensuring full respect of fundamental rights, including the rights of the child as laid down in the UN Convention on the Rights of the Child. The Return Directive therefore represents the very first example of the debate Europe will need to have on how to address the challenge of illegal migration while respecting the rights of the individual.

Cooperation with third countries

In order to manage global migration in a comprehensive way, it is necessary to work in close partnership with third countries. To this end, the EU launched, in 2005, the Global Approach to Migration, which reflects the EU's ambition to establish an inter-sectoral framework to manage migration in a coherent way through political dialogue and practical cooperation with third countries. The Global Approach is based on genuine partnership with third countries, is fully integrated into the Union's other external policies, and addresses all migration and asylum issues in a comprehensive and balanced manner. Its three main dimensions are the better management of legal migration, migration and development, and fight against illegal migration; and promoting the respect of human rights and democracy is an integral part of EU action in these areas.

"THE EU'S IMMIGRATION POLICY, AND ALL MEASURES TAKEN WITHIN ITS FRAMEWORK, SHALL PROMOTE AND ENSURE RESPECT FOR FUNDAMENTAL RIGHTS OF ALL MIGRANTS"

Conclusion

The European Union must be resolute in moving forward towards common immigration and asylum policies. Respecting the fundamental rights of the individual needs to be an absolute condition for such policies. The model of public authorities capable of addressing migration issues while ensuring full respect for human dignity and other fundamental rights has become a European model. Much has been done, and this must be capitalised upon. Finally, it must be remembered that a common immigration and asylum policy needs to have the support of EU citizens. It is for this reason that the European Commission actively supports the initiative of the French Presidency of the European Union to establish a "European Pact on Immigration and Asylum". It is only through unity and using the now well-established Community method of working together that Europeans will, as always, gain the strength needed to face the challenge of migration. The EU has reached a tipping point in its development; this is the time to define a common vision for the EU, and the decisions made now will have a huge impact on the future of Europe. Fundamental rights are at the centre of the road ahead.

⁴ See Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.

A European Pact on Immigration and Asylum - non-discriminatory migration and asylum

Pierre Barge, Secretary General of the European Association of the

This article looks at the European Pact on Immigration and Asylum proposed by the EU French Presidency and provides a critical analysis of the Pact from a human rights perspective.



The French Presidency of the European Union is proposing a European Pact on Immigration and Asylum - a good idea in itself but not a new one. Several organisations have been calling for a common immigration and asylum policy for some years now. The Tampere European Council conclusions in 1999

and the European Commission's 2001 initiative for a horizontal Directive¹ were along these lines. That particular proposed directive did not receive the support of the member states and the events of 11 September 2001 led to a change in focus from immigration to the fight against terrorism. The Prüm Treaty, adopted in 2005 by seven EU member states², is significantly entitled: "Combating terrorism, cross-border crime and illegal migration" and the European Pact on Immigration and Asylum is very much in the same spirit. While appearing to be all-embracing, it in fact largely consists of a number of proposals for vertical directives which had already been discussed during the Portuguese and Slovenian Presidencies and which are in the process of being debated in the European Parliament.

Away from the media hype excited by its announcement, the European Pact on Immigration and Asylum represents a commitment to the framework set out in The Hague by the heads of state and heads of government in 2005. There has been repeated condemnation of its political direction, which implies a worrying deterioration in conditions for asylum seekers and a securitarian and utilitarian vision in relation to migrants in general. These fears are well-founded if one considers the content of the five objectives set out in the draft Pact.

- **Protecting Europe better by controlling external borders**
This involves introducing the systematic use of biometric visas to monitor foreigners who enter Europe. It is proposed under the pretext of using "modern tools" for the "automatic registration of

arrivals into and departures from the EU territory" and relates to reinforcing the methods of control used at the borders. Although the word "solidarity" is mentioned, it is only with reference to making available to member states the means for ensuring these controls. Thus "good" population flows would be facilitated and undesirable foreigners would be prevented from coming in. Moreover, a "profile" would then be needed of who constitutes an undesirable foreigner, conjuring up images of huge files being created which would undermine the rights of both foreigners and EU citizens, whose passports already contain elements of biometric identification.

- **Organising legal immigration and "ending large-scale regularisations"**

Does this really make sense when hundreds of thousands of migrants have been living and working in the EU for many years without a residence permit and are very often victims of exploitation by traffickers and/or unscrupulous employers and have no way of asserting their rights? Is it not, rather, the case that their rights should be protected? Do we really believe that the problem of shortages of qualified workers can be solved by entering into a competitive, global "brain drain", through a so-called "blue card" process, the only significant advantage of which would be a temporary residence permit and the right to family reunion (this

right being conditional for other categories of employment)? This cannot be the solution. On the contrary, it would create disparities in the rights enjoyed by different workers. This would lead to an unacceptable situation of discrimination between "legal" migrant

workers whose fates would depend on the provisions contained in various different vertical directives. By attempting to introduce a pale imitation of the systems which exist in Canada and the United States, the French Presidency of the European Union is being extremely short-sighted. It is choosing not to see that the green card in the United States does not prevent there being 30 million irregular migrants, the influx of whom has not been stemmed - not even by the erection of barbed wire fortifications on the Mexican border.

- **Organising effective removal from the European Union of illegally residing third country nationals**

The idea is that this should be achieved "by using joint return flights between several member states" and, to this end, developing the operational "capacities" of FRONTEX³ and reinforcing cooperation

"IT IS NOT BY VIOLATING THE MOST FUNDAMENTAL RIGHTS OF MEN, WOMEN AND CHILDREN, BY DEVELOPING A DISCRIMINATORY HUMAN SELECTION POLICY, THAT THE EUROPEAN UNION WILL FIND ANSWERS TO THE QUESTIONS RAISED BY MIGRATION"

¹ A horizontal directive is a directive which covers a particular issue as a whole, for example, a framework directive on immigration. This is the opposite of a vertical directive which covers just one specific aspect, for example, legal immigration for highly qualified workers.

² Austria, Belgium, France, Germany, Netherlands, Luxembourg and Spain.

³ European Agency for the Management of Operational Cooperation at the External Borders.

Asylum, yes, but we must have an open, fair policy, based on equal rights

International Federation for Human Rights

with neighbouring countries. However, issues about the legitimacy of collective expulsions or the level of respect for human rights in these neighbouring countries are not dealt with. It is stated that readmission agreements would have to be obtained “by means of any diplomatic and commercial instruments”. Is this thus implying threats of commercial sanctions against countries which are generally among the very poorest? Finally, one must call to mind the Return Directive which will allow, failing removal, the imprisonment for up to 18 months of the families of migrants, pending a hypothetical return to the country of origin or transit country. In the event of enforced returns, there will be no prior assessment of the risks the individuals concerned would incur in these countries.

• Building a Europe of asylum

The fact that acknowledgement is made of the right to seek asylum, the recognition of refugee status and the implementation of common criteria for the assessment of asylum applications is to be welcomed. However, the Geneva Convention must be rigorously respected and an extension of the admissibility criteria for asylum applications must be considered, to

include criteria such as climatic asylum, as well as violations of human dignity, sexual mutilation or mutilation because of sexual orientation. There is also nothing about a revision of the asylum directive, so-called Dublin II, although there was significant criticism from NGOs in their response to the European Commission’s Green Paper on the future common European asylum system. It is not the proposed “joint teams for the assessment of asylum claims” which will resolve the issue of the concentration of the majority of asylum seekers in EU countries with an external border. One can only view with bewilderment the desire to reinforce the “external dimension of asylum policy” which would involve asylum applications being submitted from outside the EU through the Office of the United Nations High Commissioner for Refugees.

• Promoting co-development

This is to be applauded, but the question must be raised of whether it can really be achieved by offering “possibilities for legal immigration for the purposes of working and studying in exchange for a heightened and effective cooperation in the fight against illegal immigration and trafficking in human beings”. In other words it means “You won’t receive any aid if you don’t prevent your nationals whom we consider undesirable from coming into Europe”. Is this the right message for the French Presidency to be giving on the 60th anniversary of the Universal Declaration of Human Rights - inviting the so-called “partner” countries not to apply Article 13 of the Declaration (on freedom of movement)? Is this advocating of co-development not simply a cover to ensure this restrictive and discriminatory asylum and immigration policy is accepted? Moreover, the Pact does not say what resources will be made

available for this co-development. Is it not, in fact, merely a hypothetical notion, when trade inequality basically remains the rule for the global economy?

The proposed European Pact on Immigration and Asylum, apart from lacking much in the way of innovation, reinforces a discriminatory vision of asylum and immigration focused on security. One aspect of this is illustrated by the Return Directive discussed above. Another example is the proposed employers’ sanctions Directive which, by forcing undocumented workers to return to their country of origin, in fact turns out rather to be an “undocumented workers’ sanctions directive”, whereas the sanctions should be imposed primarily on employers who employ undocumented workers.

What Europe needs is first and foremost a Europe of equal rights for all, including social rights. The rights of all workers, migrant or not, must

be the same and this means combating from the outset the exploitation associated with illegal working both by EU citizens and by legal and irregular migrants. What Europe needs is economic and social cohesion and this cohesion

cannot be built on a foundation of unequal rights, discrimination and exclusion. Of course, the European Union indisputably has the right to control its borders, but neither house arrest nor removal are appropriate ways to counteract the inevitably increasing mobility of people within a globalised economy where goods, services and capital move freely.

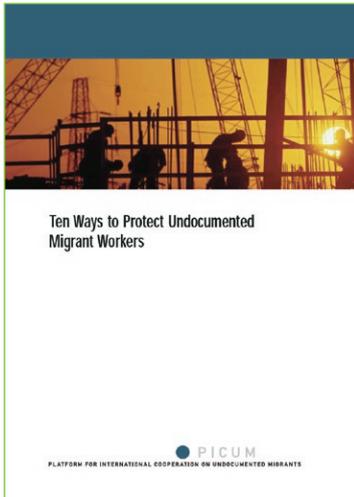
It is not by violating the most fundamental rights of men, women and children, by developing a discriminatory human selection policy, that the European Union will find answers to the questions raised by migration. Quite to the contrary, by stigmatising migrant populations it encourages racism and xenophobia, fuels social tensions and serves as a poor example to the rest of the world. Europe should open up and be welcoming - it needs migrants and its migration policy can only be based on non-discrimination and equal rights.

“THE PROPOSED EUROPEAN PACT ON IMMIGRATION AND ASYLUM REINFORCES A DISCRIMINATORY VISION OF ASYLUM AND IMMIGRATION FOCUSED ON SECURITY”

An analysis of the employer sanctions

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This article analyses the European Commission's proposal for a directive providing for sanctions against employers of irregular third country nationals from the perspective of organisations defending the rights of undocumented migrants.



PICUM publication "Ten ways to protect undocumented migrant workers", 2005

In May 2007, the European Commission adopted a proposal for a directive targeting employers of undocumented workers. The directive aims to fight irregular migration by reducing what is viewed as a major pull factor: the possibility of finding work. It hopes to achieve this objective by introducing a general prohibition on the employment of undocumented workers.

The directive introduces penalties for employers who fail to undertake specified checks or notify a competent national authority when recruiting third country nationals. These penalties include fines and administrative procedures, which would see companies excluded from public funds and contracts, or subject to closure. Member states will also have to ensure that undocumented workers can lodge complaints against employers and that in very specific cases and under specific conditions they will not be deported until unpaid wages, taxes and social security contributions have been received.

An effective mechanism for reducing exploitation as well as undocumented migrants in the EU?

In the explanatory memorandum to the directive, the Commission clearly states that the proposed directive is concerned with immigration policy, not with labour or social policy.¹ The actual basis for the sanctions is the absence of legal residence status of the worker. As the legal status of the worker is the sole criterion on which these sanctions are based, it is presumed that the expected results would be in the field of migration control. However, argumentation in the exploratory memorandum of the directive often goes beyond the scope of migration control, referring to unfair competition with documented workers, or the exploitation faced by undocumented workers.

1 See European Commission, "Proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (COM (2007) 249 final)", 16.5.2007, p. 3, available online at: <http://europa.eu/scadplus/leg/en/lvb/l14566.htm>.

Irregular employment mainly concerns workers who already have a residence permit, including citizens of EU countries. Undocumented migrant workers represent only a fraction of the irregular labour market. When unscrupulous employers hire undocumented workers, they are attracted by their limited bargaining power which makes them easy to exploit. In the absence of undocumented workers, such rogue employers will most likely move on to other groups of vulnerable workers. Therefore, the problem of exploitation is very unlikely to be solved by measures that address undocumented workers' immigration status. Sanctions may also result in other measures being used by employers to circumvent inspection, such as the outsourcing of their responsibility to subcontractors, which can result in increased difficulties in holding employers accountable and further weakening the workers' position.²

The utility of employers' sanctions as a means to reducing the presence of undocumented migrants in the EU was examined in the impact assessment that was carried out concerning the directive. The impact assessment indicates that the preferred policy option combines 1) harmonised employer sanctions and preventive measures for employers to collect and submit documentation (residence and work permit) on the status of prospective employees to the competent national body; and 2) identification and exchange of good practices between member states supported by EU funding.³ The impact assessment underlines that while these two policy options would target the employment pull factor of irregular migration and harmonise member states' policies concerning employer sanctions, "the positive effects of adopting the two policy options would be limited and *none of the objectives would be fully achieved nor the problems eliminated* (our emphasis)."⁴ If employers' sanctions are used in order to reduce the number of undocumented migrants in the EU, they require large investments in control and enforcement, and their effectiveness has not been proven, as the impact assessment clearly shows.

Further marginalisation of large segments of the population

While it has been estimated that there may be from 8 million undocumented migrants in Europe, the latter largely remain invisible in the eyes of policy makers. This situation puts enormous strain on local actors such as NGOs, health care and educational professionals, and local authorities, who often work with limited resources to defend undocumented migrants' fundamental rights, including the right to health care, education and training, housing, and fair working conditions. These local actors are confronted on

2 Studies have shown that employers have resorted to the use of sub-contracting when sanctions were introduced in Germany and in the Netherlands. See "PICUM's Comments on the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals", www.picum.org, pp. 3-4.

3 See GHK, "Impact Assessment on a Community instrument laying down sanctions for employers of third country nationals with no or limited rights to work that are exceeded", 29 April 2007, p. 11.

4 Ibid, p. 12.

directive

ented Workers, Belgium), and Michele LeVoy, Director, PICUM
nts)

a daily basis with situations in which they witness that irregular legal status is an obstacle for a sizeable part of the population in accessing basic social services. Even if undocumented migrants are one of the groups facing the greatest risks of poverty and social exclusion in Europe today, almost no mention of their presence and marginalization has been made in the different National Action Plans (NAPs) on social inclusion within the EU social inclusion/ social protection process.

The social impact of employers' sanctions will most likely be visible in an increase in destitution of a large segment of the population that already lives on the fringes of society. Employers' sanctions will contribute to driving undocumented workers - who are predominantly concentrated in low-wage sectors where they maintain a weak bargaining power due to their irregular status - further underground. Some studies even suggest that limited access to work may even push undocumented migrants to "survival criminality" - resorting to petty theft or other minor crimes if other avenues for survival are restricted.⁵

Weakening of fundamental labour rights

Even if the proposed directive on employers' sanctions has not been designed to primarily tackle exploitation and unfair competition in the labour market, this policy measure may still have an impact on labour conditions or other objectives outside the scope of migration control. If workplace controls and enforcement focus on the residence status of the workers, this can have vast and perverse effects on workers' positions towards their employers.

First and foremost, linking labour rights' enforcement with migration control takes away the possibility for workers to seek protection from the authorities. For most undocumented workers, being deported is the ultimate sanction. Most workers prefer to endure exploitation rather than run the risk of being deported. Many employers capitalise on undocumented workers' fear of authorities by enforcing workers' acceptance of substandard labour conditions.

This intimidating effect of migration control is pervasive. The impact assessment of the directive also recognises this, stating that employers' sanctions can have a negative impact on efforts to combat labour exploitation and human trafficking by pushing workers further underground and by further deteriorating situations

of trafficking.⁶ The directive therefore proposes, along with employers' sanctions, a range of protective measures for undocumented workers, including measures to enforce outstanding wages and possibilities of filing complaints. The case study described in the text box shows that a rights-based approach can have extraordinary results, notably that unscrupulous employers are forced to respect the law and the worker feels very much empowered. But as long as migration controls prevent workers from seeking protection from the relevant authorities and labour inspection services, there is a risk that most undocumented workers will not be impacted by such protective measures.

Increased discrimination of all workers

Another very serious risk of employers' sanctions is the potential increase in discrimination. The European Union has promoted employment as one of the main routes to integration and a crucial factor for social cohesion within EU member states. The current proposal endangers such integration measures. At the most extreme end, the requirements may result in employers deciding it is "too much trouble" to employ third country nationals, resulting in nationality-based discrimination.⁷

Moreover, the directive is likely to create racial discrimination whereby every "foreign" looking worker is placed under suspicion. Studies in the United States have repeatedly shown that widespread

discrimination was one of the results of the introduction of employer sanctions there more than 20 years ago. The impact of the proposal for employers' sanctions on equality for racial and ethnic minorities in the EU has not been assessed.

Conclusion

The employers' sanctions directive constitutes one of the newest elements in the EU's fight against irregular migration, but its potential negative impact in the areas of social inclusion, anti-discrimination, and labour relations must be questioned. In addition, while the directive contains important provisions to respect the rights of undocumented migrants, these and other rights will most likely be undermined by the potential negative impact this directive will have in the above-mentioned areas.

(Continues on page 16)

"THE EMPLOYERS' SANCTIONS DIRECTIVE CONSTITUTES ONE OF THE NEWEST ELEMENTS IN THE EU'S FIGHT AGAINST IRREGULAR MIGRATION, BUT ITS POTENTIAL NEGATIVE IMPACT IN THE AREAS OF SOCIAL INCLUSION, ANTI-DISCRIMINATION, AND LABOUR RELATIONS MUST BE QUESTIONED"

5 See van Meeteren et al. 'Zonder Papieren': Over de positie van irreguliere migrante en de rol van het vreemdelingenbeleid in België. Uitgeverij Acco, Leuven, 2008, pp. 111-112.

6 See GHK, "Impact Assessment on a Community instrument laying down sanctions for employers of third country nationals with no or limited rights to work that are exceeded", 29 April 2007, p. 86.

7 See European Network Against Racism (ENAR), "General Policy Paper Number 3: Equal Treatment of Third Country Nationals", available online at: www.enar-eu.org.

The Rights Directive: Two steps forward,

Séverine Picard, Legal Adviser, European Trade Union Confederation

In May 2007, the Commission presented a draft Directive providing for sanctions against employers of illegally staying third country nationals. In October 2007, the Commission published two draft Directives: on the conditions of entry and residence of third country nationals for the purpose of highly qualified employment (the so called "Blue Card" Directive) and on a single application procedure for a single permit for third country nationals to reside and work in the territory of a member state and on a common set of rights for third country workers legally residing in a member state (the "Rights Directive").



Filipino mariners aboard a Greek cargo boat
© International Labour Organisation/Maillard J.

The Rights Directive is certainly the most important in the package, and is as such highly valued by ETUC. ETUC is indeed arguing in favour of a proactive Community policy in the area of economic migration, geared towards managing and not preventing labour migration as well as promoting integration and social cohesion. This policy must be based on the recognition of fundamental social rights and prevent the

exploitation and recruitment of migrants in precarious working and social protection conditions². ETUC considers that equal treatment is necessary to bring about a European internal labour market and to prevent social dumping.

Whilst regretting the absence of a strong social partners' consultation given the impact of such a text on labour market policies, ETUC nonetheless welcomes the Commission's move as a step forward: the Rights Directive responds to the need for a clear legal framework offering equal treatment to migrant workers. It is therefore particularly important that the remit of the Directive is as wide as possible. But the issue is highly complex and sensitive and ETUC is concerned that by providing for a number of exceptions to the principle of equal treatment, the Directive may not avoid fragmented protection for third country workers.

Background

Recent years have seen efforts to develop a comprehensive immigration policy at EU level. The Commission issued a Policy Plan on Legal Migration in December 2005. This approach aimed on the one hand at laying down admission conditions for specific categories

of migrants in four specific legislative proposals (highly qualified workers, seasonal workers, remunerated trainees and intra corporate transferees) and on the other hand to introduce a general framework for a rights-based approach to labour migration. The proposed Rights Directive intends to meet the latter objective by securing the legal status of already admitted third country workers. This new approach must be understood against the background of the Commission's previous initiative in 2001 to come up with a comprehensive horizontal draft Directive, dealing both with a general framework for admission of migrants and the rights those migrants would enjoy³. This initiative, broadly supported by the European Parliament and ETUC, failed to get support of the member states and was eventually withdrawn by the Commission in 2006.

Two steps forward: equal treatment

The objective of the proposed rights Directive is two-fold. First, to introduce procedural simplifications by providing a single permit to reside and work lawfully in the EU. The single permit does not necessarily imply a right to work and member states will have to indicate in residence permits issued for other purposes (e.g. family reunification) whether the third country national has been given access to the labour market. The proposed Rights Directive must therefore be read in conjunction with other instruments regulating access to the labour market such as the "Blue Card" which will regulate conditions of admission for highly skilled third country nationals.

The second objective of the proposed Rights Directive is to narrow the rights gap between "legally" residing third country workers and EU nationals. The proposal aims to grant rights to legally resident third country nationals by defining the fields where equal treatment with nationals should apply. The rights should in principle be granted from day one, by contrast to the long term resident status which provides for a five-year transition before third country nationals can enjoy equal treatment with nationals.⁴

Article 12 of the proposed Rights Directive lists the basic socio-economic rights which should be granted on an equal footing with member state nationals, including working conditions, freedom of association and affiliation and membership of organisations such as trade unions or employers' organisations, education and vocational training, recognition of qualifications in accordance with national procedures, social security, payment of acquired pension when moving to a third country, tax benefits, and access to goods and services.

Equality before the law is a fundamental right. In particular, ETUC

1 www.etuc.org. The European Trade Union Confederation (ETUC) exists to speak with a single voice, on behalf of the common interests of workers, at European level. Founded in 1973, it now represents 82 trade union organisations in 36 European countries, plus 12 industry-based federations.

2 See ETUC Action plan October 2003, www.etuc.org/IMG/pdf/Congres_Brochure_APS_EN.pdf

3 COM (2001) 386

4 Directive 2003/19/EC concerning the status of third-country nationals who are long-term residents.

one step back

ion (ETUC)¹

strongly supports the promotion of equal working conditions. With a few exceptions⁵, third country workers in the EU are generally subject to the same working conditions as those provided for nationals. It should nonetheless be stressed that few member states have ratified the International Conventions protecting the rights of migrant workers, in particular the ILO Convention, which promotes equality of opportunity and treatment of migrant workers. The right to equal treatment is therefore entirely dependent upon national law, which gives rise to potential legal insecurity for migrants coming to the EU and puts them on an unequal footing with third country nationals whose rights have been explicitly defined in EU law, such as those from countries that have signed multilateral agreements with the EU and its member states (e.g. Turkey). On other aspects, such as recognition of qualifications, social security and access to housing, exceptions to equal treatment can vary significantly from one member state to another. ETUC is therefore satisfied that the Rights Directive will enshrine the principle of equal treatment in EU law and constitute a threshold below which member states will not be allowed to go.

“BY PROVIDING FOR A NUMBER OF EXCEPTIONS TO THE PRINCIPLE OF EQUAL TREATMENT, THE PROPOSED DIRECTIVE MAY NOT AVOID FRAGMENTED PROTECTION FOR THIRD COUNTRY WORKERS”

One step back: a fragmented protection

A comprehensive approach to economic migration, along the lines of the original 2001 draft Directive, would have been preferable to a series of sectoral rules for specific categories of migrants. One important argument against a sectoral approach is that this would increase the divergence in rights for several groups of migrant workers and may contribute to a two tier policy with less or no rights and protection for the lower skilled and low paid migrants. In ETUC's view, European migration legislation should cover all third country nationals, avoiding general preferences or privileges. It is therefore vital that the Rights Directive remains a framework instrument applying to all third country nationals, with limited exceptions.

However, the scope of the proposed Rights Directive leads to a major restriction to the principle of equal treatment, as it excludes for instance seasonal workers who have been admitted for a period not exceeding six months in any twelve-month period. The Commission justifies this exclusion by the specificities and temporary nature of their status. The link to the upcoming proposal for a Directive on seasonal workers must be clarified as it should be expected that this Directive will also contain rights for seasonal workers. Nonetheless, ETUC does not accept an exclusion of this particularly vulnerable category of workers, especially when it comes to direct work-related

issues such as pay and working conditions, in which equal treatment has to be guaranteed regardless of the immigration status.

Another unacceptable restriction is that the proposed Rights Directive allows member states to limit the right to equal treatment in some cases for those who are in actual employment. The reasoning of the Commission is that most of the rights set out in Article 12 are to be exercised by definition in employment. ETUC explicitly denounces the possibility for member states to limit the right to equal treatment with regard to working and freedom of association to workers who are in employment. This limitation is highly questionable from an international fundamental rights perspective and raises several questions for instance about the protection of workers applying for a job and in the recruitment process, or about their protection in, for instance, a dispute about dismissal that takes place after they have already lost their job. ETUC urges the EU institutions to remove this provision from the final text.

Finally, a related element is the issue of the practical application of the rights provided for under this Directive. The proposed text sets out equal treatment as a principle but does not deal with its enforcement. Effective and dissuasive sanctions against an employer or a public authority which has applied less favourable treatment should in particular be considered.

Next steps: towards further watering down?

The proposed Rights Directive is still at an early stage in the legislative process and has to go through what can become a laborious legislative procedure. The EU suffers from an inadequate legislative procedure when it comes to legal migration: unanimity in the Council and mere consultation of the European Parliament. In such controversial areas, achieving consensus amongst all the member states often affects the quality of the legislation and minimum standards of protection can be further watered down. In addition to the inefficient procedure, some member states have the possibility not to “opt in” the Rights Directive (UK and Ireland) or have opted out altogether (Denmark). In this context, one may wonder how successful the current proposal can be. Finally, ETUC stresses that the Rights Directive should be adopted in advance of the specific Directives that will regulate access of specific groups of migrants so that different sets of rights and double standards for different groups of workers are avoided. Unfortunately, whilst the French Presidency has listed the Blue Card as well as the employers' sanctions Directives as priorities, work on the Rights Directive has barely started in the EU institutions...

⁵ Exceptions to the principle of equal treatment exist in some member states with regard to job termination and dismissal. In such situations, some national laws (Bulgaria, Latvia, Lithuania, Slovakia) provide for the automatic withdrawal of work and residence permit. See impact assessment: http://ec.europa.eu/governance/impact/cia_2007_en.htm

The role of the media in relation to the migration debate in Italy

Luciano Scagliotti, ENAR Board Member for Italy

This case study examines the role of the media in Italy in shaping the migration debate and its impact on how public opinion perceives immigrants and Roma.



Cover of 10 July issue of Italian magazine "Panorama" - the headline reads "Born to steal" (Nati per rubare), referring to Roma children

"One third of all crimes are perpetrated by immigrants". It was mid 2007 when such headlines made the front page of the main newspapers and the first place in TV news in Italy. It was a warped interpretation of the annual "Report on crime" presented to the Parliament by the Ministry of Home Affairs. As a matter of fact, while saying that one third of those *denounced* (not even arrested or accused, just denounced) were non-nationals, the report itself warned that the figures "*in no way indicate*

a higher crime rate among immigrants" for a very simple reason: on average over 60% of denounced crimes (a fraction of the committed ones) remain unsolved, with peaks of 95% for thefts and bag-snatchings. In other words, *it was one third of the 5-20% of denounced crimes*. Notwithstanding the correct information provided by the Ministry of Home Affairs and the protests of both NGOs and the Authority on communications, mass media went on consciously manipulating public opinion, depicting the presence of (undocumented) immigrants as a "criminal invasion".

Only a few weeks later, when a case of ethnic profiling targeting the Chinese community in Milan gave rise to a totally peaceful rally against the discriminatory practices of the local police, the media represented it as revolt or riots, urging for "displacement" of Chinese-owned commercial activities from downtown to a former industrial area in the outskirts. A number of investigations and talk-show experts were mobilised to explain the links between the "riot promoters" and both the Chinese mafia and the communist Chinese Government. Urban legends about Chinese traditions and habits as well as defamatory tales on their communities were widespread across the country, aiming at a representation of Chinese immigration as "culturally alien" to Italian society and civilisation.

Italian media played an even worse role in the representation of Roma and Sinti. Segregation and discrimination have always been represented as a fault of the victims; Roma and Sinti are guilty of being poor and socially excluded. "Experts" spent millions of words to give "scientific" dignity to the negative representation of Roma: a people culturally and almost genetically inclined to theft and swindles, exploitation of their own children, and humiliation

of women. Presumed nomadism was presented as a refusal of "our civilised rules" rather than, as it mostly is, a consequence of prejudice, persecution and racism; at the same time it has been used as a justification for the failure of the State to fulfil its obligations to guarantee basic rights to education, housing, health. Main Italian cities - Milan, Rome, Turin, Bologna - have been daily described as "invaded" by Roma and Sinti thieves and beggars, and citizens have been instructed on how to protect their goods and money. An impressive campaign on urban insecurity, using Roma, Sinti and immigrants as scapegoats, led to so-called "Pacts for security" - core measures being the removal of Roma camps - with no alternative housing provision - and "zero tolerance" against undocumented immigrants.

At the end of October 2007, a woman was raped and murdered in Rome. The police arrested almost immediately, *thanks to a Roma woman* who denounced him, the murderer: an immigrant from Romania. Media reaction can hardly be described. A deliberate confusion was spread, and calls for the deportation of all "illegals", including EU citizens - Romanians, "*an ethnic group of criminals*" according to the headline of an important newspaper - and even nationals to Italy, as most Sinti are, were initiated. Mainstream newspapers used hate language ("beasts" was the more common definition); and no particular reaction could be noticed when a representative of the Northern League publicly asked for the use of "Nazi methods" against Roma and Romanians. Almost all the media praised the Government when, 24 hours after the murder, an urgency decree was issued, providing for extraordinary powers to the police and dramatically limiting freedoms and guarantees for nationals of both third countries and EU member states, explicitly targeting Romanian citizens. No media focused on the fact that only the courage of a Roma woman, who had to be put under police protection, allowed identification and arrest of the murderer, or recalled that in 2007 over 70.000 women had been victims of violence in Italy, by Italian men in 90% of cases. The only issue was "Roma/Romanians/immigrants/criminality".

Representations given by mass media transformed the - false but somehow "reasonable" - idea that one third of crimes are committed by foreigners into pure prejudice: regardless of who actually commits crimes, the insecurity of Italian citizens arises from the presence of immigrants and gypsies. Immigrants and gypsies are guilty, even if they're innocent. Their fault is one that can't be cancelled: their ethnic or national belonging. Clearly, only media linked to extreme right political organisations put it as an explicit reasoning; but it was, and still is, implicit in the language and emotions spread by mainstream newspapers and TV news as well as by mainstream political parties. Increasing citizens' fears seem to be the best political strategy both for right- and centre-left-wing parties; media support it. The former President of the

European authorities on data protection, Stefano Rodotà, asked in a worried public declaration, on 4 November 2007, for “zero tolerance against the industry of fear”, but nobody listened to him.

Only a few newspapers, mostly organs of leftist parties, did not join this xenophobic, if not openly racist, campaign. The two most important newspapers, *Repubblica* and *Corriere della sera*, published isolated against-the-stream reports, trying to break the link between crime and ethnicity, but still asking for a stricter control on “illegal” immigrants. The employers’ association recalled, sporadically, the crucial contribution of immigrants to the economy, but always making a distinction between the “good” immigrants (low cost, silent and invisible workers) and the bad ones (Roma, “illegals”). The impact on public opinion has been devastating: every person who seems to be non-national because of her/his aspect, accent, appearance, habits is seen as a threat. In two months there were news reports of at least four cases of alleged kidnapping by Roma women; three times they immediately turned out to be false, in the fourth case there was no evidence, and the witness withdrew his accusations. Nevertheless, the campaign on “Roma stealing our children” goes on - as it did in Nazi Germany and fascist Italy 70 years ago.

“REPRESENTATIONS GIVEN BY MASS MEDIA TRANSFORMED THE - FALSE BUT SOMEHOW ‘REASONABLE’ - IDEA THAT ONE THIRD OF CRIMES ARE COMMITTED BY FOREIGNERS INTO PURE PREJUDICE: REGARDLESS OF WHO ACTUALLY COMMITS CRIMES, THE INSECURITY OF ITALIAN CITIZENS ARISES FROM THE PRESENCE OF IMMIGRANTS AND GYPSIES”

There are reasons for all this. In 2007 Italy was governed by a centre-left coalition, which announced new policies and legislation on immigration, designed to ensure on the one hand more respect of the fundamental rights of immigrants, including the undocumented, and on the other hand to increase the opportunities of legal entry into Italian territory. More open and respectful policies were also announced with regard to Roma and Sinti as well as amendments to the citizenship law in order to facilitate the naturalisation of immigrants. As in most EU countries, immigration is a sensitive issue: elections can be and have been won and lost on it, and restrictive, xenophobic positions can be an easy way to get voters’ support. The then minority centre-right coalition led by Silvio Berlusconi is based on three parties; two of them - the former neo-fascist party *Alleanza Nazionale* and the anti-immigrant party *Northern League* - largely base their appeal on the rhetoric of, respectively, national and regional identity. This coalition has an enormous influence on the media. Three out of four private broadcasting networks are owned by Berlusconi himself; managers appointed by his former Government still lead at least two out of the three

public networks. Three mainstream national newspapers are directly owned by his family, while indirect control on others is guaranteed by both financial participation and journalists who are on his political side. No surprise, then, if the hammering political campaign against immigrants and against Prodi’s immigration policy was so widespread and could so deeply influence public opinion, while independent media have been almost invisible.

Media even increased their role of support to the anti-immigrant campaign in the following months, according to the needs of the centre-right electoral campaign that led to Berlusconi’s victory in the political elections of April 2008. The new Government, and particularly the new Minister of Home Affairs, a member of *Northern League*, has immediately begun to translate xenophobia into laws; but maybe this time it has gone too far. Journalist organisations and trade unions have just signed the so called “Charter of Rome”, establishing minimum standards of respect for diverse communities and immigrants. And the recent proposal of “racial census” of Roma and Sinti, including creating a fingerprint database of Roma children, is giving rise to protests by a large majority of the media not directly owned by the Prime Minister and his family. Representation of immigrants and Roma remains negative, but at least nazi-like measures find some opposition in the media.

The Netherlands: Discrimination in the Netherlands' rights under the Integration Abroad Act

Haleh Chahrokh, Researcher at Human Rights Watch

This article presents a case-study on discriminatory integration practices in the Netherlands and shows that these practices are actually being used to control immigration.



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Over the past several years, the authorities in the Netherlands have introduced a series of new measures with the stated aim of better integrating its migrant population.

These measures were adopted in response to heightened public concern about the impact of migration and the supposed lack of integration of certain migrant groups. The two key measures are integration tests - one administered in the Netherlands and another that must be passed in the country of origin by certain would-be family migrants aged between 16 to 65 years before they can join spouses or family members in the Netherlands.

It is the second policy - the overseas integration test (Inburgeringsexamen Buitenland) under the Integration Abroad Act in force since March 2006 - that raises the greatest human rights concerns.

The overseas integration test does not apply equally to all foreign nationals wishing to join family members or spouses in the Netherlands. Citizens of European Union (EU) and European Economic Area (EEA) states and Switzerland, Australia, Canada, Japan, New Zealand, South Korea, and the United States (US) are not required to take the test. In practice, the overseas integration test targets would-be family migrants from the countries of origin of two of the three largest migrant communities in the Netherlands - Moroccans and Turks - as government documents published when the draft measure was presented to parliament make clear.²

Under this integration test, applicants must demonstrate basic knowledge of the Dutch language and basic concepts of Dutch society before they enter the Netherlands. It is the responsibility of the applicant to prepare for the examination. The test is administered in Dutch by telephone to the applicant sitting at a computer at the Dutch embassy or consulate in the applicant's home country. If the candidate fails the telephone test, the person will have to take the exam again and pay the examination fee of 350 € each time the test is taken. Recently, the government decided to make the overseas integration test harder to pass by raising the pass mark.

¹ Based on the Human Rights Watch briefing paper of the same name, released on 15 May 2008.

² Migrants from the former Dutch colony Suriname, the other large migrant community, are partially exempt from the provisions, if they have completed primary education in Dutch language, as Dutch is the official language and is the teaching language in schools.

High costs related to the exam include not only the examination fee, but also the costs for preparing independently for the test, as well as transportation costs to the Dutch embassy (in some cases located in a neighbouring country). As a result it can be a considerable challenge for some applicants to take the exam.

The test is an additional requirement on top of financial restrictions on family formation and reunification introduced in 2004. The test, coupled with these increased financial requirements for family members or new spouses, in particular those relating to the sponsor's income level and security of employment, also amounts to indirect discrimination against Turkish and Moroccan migrants in the Netherlands, who at present rarely marry outside their community and many of whom bring partners from their country of ethnic origin. These communities suffer higher rates of unemployment, an over-concentration in low wage employment, and low incomes compared to the national average, making it hard for them to meet the financial requirements.

According to the Dutch government, in the first year around 90 percent of applicants successfully passed the integration examination abroad. There has been a significant reduction in the number of applications for family reunification and formation since the introduction of the test, in particular from Turkey and Morocco. The fall in the number of applicants suggests that the high success rate may reflect self-selection on the part of those having to take the test. Current plans by the government to make the overseas integration test harder are likely to delay or discourage applications further.

Governments have the right to control entry to their borders and have a certain margin of appreciation to justify differential treatment compatible with international human rights law. While international human rights law does not prohibit states from differentiating between citizens and non-citizens in immigration policies, states cannot discriminate on the basis of nationality or ethnicity (aside from a narrow exception for EU citizens) even in this sphere. Dutch authorities would need extremely powerful reasons to justify the clear difference in treatment between different nationalities in the application of this test.

The overseas integration test is discriminatory, in that it applies only to family migrants from certain nationalities, namely predominantly "non-western" countries, while citizens from certain other countries are exempt altogether. The legitimate objective of better

"THE OVERSEAS INTEGRATION TEST IS DISCRIMINATORY, IN THAT IT APPLIES ONLY TO FAMILY MIGRANTS FROM CERTAIN NATIONALITIES, NAMELY PREDOMINANTLY 'NON-WESTERN' COUNTRIES"

ame of integration road Act¹

integration of all migrants cannot be met by a test that only some family migrants are required to take. The Dutch authorities have not provided the very high level of evidence they would need to justify such clear difference in treatment of different nationalities. No evidence has been given to show that the level of a country's development is a reliable indicator of the skills, capacity, ability, inclinations, or willingness of a potential individual migrant to integrate, and therefore that migrants from poorer countries need to pass special tests to integrate.

The main argument put forward to explain this distinction in treatment is that the countries exempt from the test are similar to the Netherlands in their socio-economic and political development. The government has argued that exempting western countries would not lead to unwanted immigration and problems with integration in Dutch society.

The language used by the government to justify the exemption of certain nationalities considered as western from having to take the overseas integration test suggests that immigration control, to prevent an increase in numbers of certain communities in the Netherlands, is one of the intended outcomes of the legislation. The government assumed that only those who pass the test have satisfactorily manifested their willingness to integrate. But this assessment fails to take sufficiently into account the practical difficulties in preparing and taking the test before entry to the Netherlands.

Rather than promote integration, the overseas integration test appears to aim at reducing family migration of certain groups, mainly those of Moroccan and Turkish origin. The result is counter-productive since by delaying entry into the Netherlands, it actually delays the process of integration of the immigrant families concerned, runs the risk of alienating them, and gives them the impression that their family members (and hence they) are not welcome in the country. These measures create an impression that they are aimed at keeping certain kinds of people out of the Netherlands.

The overseas integration test should therefore be abolished because it violates the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the UN Convention on the Elimination of all Forms of Racial Discrimination. The criticized measures amount to both direct discrimination on grounds of nationality and indirect discrimination on the basis of ethnic origin.

Pending its abolition, Human Rights Watch urges the Dutch Government to introduce a flat fee so that applicants have to pay only once to take the test, and not for each attempt, to lower the

income requirements for the sponsoring family member, and to introduce flexibility for the self-employed and newly employed sponsors.

There is an increasing tendency by other EU member states to follow the Dutch approach on compulsory integration measures in the country of origin. The Netherlands' recent approach to integration policy, especially of requiring language and other tests before family reunification, has served as a model for similar measures (or proposals) in other EU member states, including Germany, Denmark, France, and the United Kingdom. Similar measures appear also to be included in the Draft Immigration Pact, elaborated by the French Government and to be submitted to its EU partners for adoption during the second half of 2008, when France will assume the presidency of the EU.

Other EU member states should not adopt and implement compulsory conditions of integration abroad based on the "Dutch model", which this article has shown to be discriminatory, serving as an instrument of immigration control, and running counter to its stated purpose of efficiently promoting

integration.

As the Dutch government has pointed out elsewhere, family life can contribute to socio-cultural stability and, consequently, the integration of migrants into Dutch society. Developing an effective approach to integration, that does not discriminate on the basis of nationality, and is fully consistent with international human rights law, would also serve as a positive example for other European states.

"THE LANGUAGE USED BY THE DUTCH GOVERNMENT TO JUSTIFY THE EXEMPTION OF CERTAIN NATIONALITIES CONSIDERED AS WESTERN FROM HAVING TO TAKE THE OVERSEAS INTEGRATION TEST SUGGESTS THAT IMMIGRATION CONTROL IS ONE OF THE INTENDED OUTCOMES OF THE LEGISLATION"

Holding employers accountable using a rights-based approach: an example

Eliana*, an undocumented woman from Brazil, was hired as a domestic worker for a family in Brussels to work from 8:30 a.m. to 9:00 p.m., 5 ½ days per week. Her employer offered her a salary of € 800 per month and accommodation and food. Very often, however, working days lasted until 1 am, but these overtime hours were never paid.

During the year that she worked for the family, Eliana developed a sore shoulder due to the strenuous physical work and long hours. As a result, she had to take 15 days off to seek medical care. Eliana asked her employer to provide financial compensation for the days she missed work due to her work-related injury. She also requested that her employer cover the costs of her health care, since she did not have health insurance because her employer did not pay social security contributions. Her employer refused.

Eliana became very angry and decided to leave her job. But as her employer had withheld hundreds of hours of pay in overtime, she sought assistance in recovering her lost wages. O.R.C.A., a Brussels-based organisation defending undocumented workers' rights, contacted the employer's wife, who subsequently denied Eliana's claims. Since mediation with the employer did not work, Eliana went to the labour inspection service to file a complaint.¹ Eliana provided the labour inspection with a detailed description of her former employer's house and family, which enabled the inspector to make the employer confess about the employment. After denying the length of time of employment, the employer finally agreed to pay Eliana € 5,000 in back wages, which somehow compensated for the unpaid overtime hours. He was also required to pay outstanding social security contributions and taxes.

* not her real name

¹ In Belgium, if an undocumented worker goes independently to the labour inspection service to file a complaint against his or her employer, the labour inspection is not obliged to report the worker's irregular status to the Foreigner's Office. However, if the labour inspection apprehends the worker at the workplace, there is a duty to report the irregular status.

Announcements

- ENAR published its 2007 annual report, available at www.enar-eu.org/Page_Generale.asp?DocID=15293&langue=EN
- ENAR published its Memorandum to the French Presidency of the EU, available at www.enar-eu.org/Page_Generale.asp?DocID=15290&langue=EN
- ENAR issued the report of its ad hoc expert group on anti-discrimination law entitled "Extending EU anti-discrimination law", which is available at www.enar-eu.org/Page.asp?docid=15845&langue=EN
- ENAR issued a common position together with PICUM and Solidar on the proposal for a directive on sanctions against employers of irregular third-country nationals. It is available at www.enar-eu.org/Page_Generale.asp?DocID=15288&langue=EN
- ENAR is organising a conference entitled "Framing a positive approach to migration" on 6-7 November 2008 in Paris, France. More details at: www.enar-eu.org/Page.asp?docid=17184&langue=EN
- The next edition of ENARgy will be published in October 2008. Information on previous editions is available at www.enar-eu.org/Page_Generale.asp?DocID=15292&langue=EN

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ENAR is a network of European NGOs working to combat racism in all EU member states. Its establishment was a major outcome of the 1997 European Year Against Racism. ENAR aims to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national initiatives with European initiatives. ENAR's vision is of a world free from racism.



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