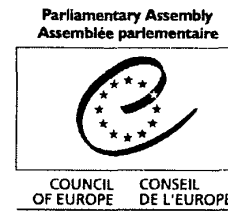


## Parliamentary Assembly Assemblée parlementaire



Doc. 10741  
15 November 2005

### Policy of return for failed asylum seekers in the Netherlands

Report  
Committee on Migration, Refugees and Population  
Rapporteur: Mrs Rosmarie Zapfl-Helbling, Switzerland, Group of the European People's Party

#### *Summary*

In February 2004, the Dutch Parliament approved a new policy on asylum which set up rules for implementing the return of approximately 26,000 asylum seekers who had applied for asylum before 1 April 2001 and whose applications had been rejected. A public outcry immediately followed the adoption of this policy, which continues, albeit at a lower level, even today.

Opposition to the policy has focussed on the risk of returning people to countries which are politically unstable and have a poor human rights record and the impact that returns would have on the persons concerned in view of their long stay in the Netherlands and their integration into the local society.

To date, a significant number of persons amongst the 26,000 asylum seekers have been given a permit to remain in the Netherlands or have returned voluntarily. A large number have, however, disappeared. For those that remain there still exists a high level of anxiety and distress about the future.

The Netherlands is not the only country that has had to face the difficult task of adopting a returns policy for failed asylum seekers. It is, however, one amongst many European countries that has adopted a firmer approach to this issue.

The aim of this report is to examine some of the issues arising from the adoption of the policy of return for failed asylum seekers in the Netherlands and in the process examine the situation in two other countries, namely Switzerland and the United Kingdom. The aim is also to highlight a number of issues relevant not only for the Netherlands but also for other countries which find themselves in a similar situation.

Some of the issues covered in this report include the use of amnesties, regularisation procedures or discretionary powers to allow failed asylum seekers residence, the use of voluntary returns rather than forced returns or detention for failed asylum seekers, the limits on withdrawal or reduction of housing, social benefits and health care for failed asylum seekers and the need to ensure that failed asylum seekers do not disappear in the margins of society or are not forced into a situation of transit between countries of Europe.

**I. Draft resolution**

1. The Parliamentary Assembly takes note of the recent policy on asylum seekers proposed by the Dutch Government and approved by the Parliament in February 2004 which sets up rules for implementing the return of asylum seekers who applied for asylum before 1 April 2001 and whose application has been rejected (hereafter referred to as "failed asylum seekers").
2. The recent Dutch policy aims at expediting the return of a number of members of this group of 26,000 people, once they have exhausted all legal remedies against the refusal of their asylum application and provided that they are not granted a residence permit on asylum or other grounds. The persons concerned are allowed to make representations to the Dutch authorities to draw attention to any special circumstances of their case. The return plan is also accompanied by an amnesty for asylum seekers who have not received a decision on their first asylum application within five years. 2,097 people have benefited from this amnesty.
3. The Assembly believes that the effective return of failed asylum seekers who have exhausted all legal remedies against the refusal of their claim, and do not have any right to stay in a Council of Europe member state on other grounds, is necessary to ensure the integrity of the institution of asylum and the credibility of the asylum system both to citizens and to people in need of protection.
4. Previous recommendations of the Assembly are relevant to the return of failed asylum seekers and in particular Recommendation 1237 (1994) on the situation of asylum-seekers whose asylum applications have been rejected, Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, Recommendation 1624 (2003) on common policy on migration and asylum, and Recommendation 1703 (2005) on Protection and assistance for separated children seeking asylum.
5. The Assembly also recalls Recommendation No. R(99)12 of the Committee of Ministers to member states on the return of rejected asylum seekers, the Twenty guidelines of the Committee of Ministers of the Council of Europe on forced return (CM(2005)40), as well as Recommendation (2001)1 of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders.
6. Similarly, the European Convention on Human Rights and its Protocols, as well as the jurisprudence of the Court, have relevance for the implementation of return measures from Council of Europe member states, in particular Article 3 on the prohibition of torture and inhuman and degrading treatment, Article 5 on personal liberty and security, Article 8 on the protection of privacy and family life, Article 13 on an effective remedy, Article 14 on non-discrimination and Article 4 of Protocol 4 on the prohibition of collective expulsion.
7. The Assembly reiterates that Council of Europe member states should promote the voluntary return of failed asylum seekers and that forced return should be considered only as a last resort. Where forced return is inevitable, it should be implemented in a humane and transparent manner in compliance with human rights and with respect for the safety and dignity of the person concerned.
8. The recently revised Dutch policy on asylum seekers broadly complies with the recommendations on return made by Council of Europe bodies. Some features of this policy, however, raise concerns which are also relevant for other Council of Europe member states applying similar return policies. Switzerland and the United Kingdom are, *inter alia*, countries with similar return policies.
9. In particular, the Assembly believes that special consideration, through a procedure laid down by law, should be given to those failed asylum seekers who have established strong family, community or other links with the Netherlands, such as children who were born or brought there, or failed asylum seekers who have lived in the country for a long time and have integrated there.

10. Furthermore, the Assembly is concerned that, in pursuing the legitimate objective of expediting the return of foreigners who do not have a legal title to remain in the country, the Netherlands may return people to a situation where they might be at risk of serious human rights violations or their safety would be in danger because of the circumstances prevailing in the country or region of origin.

11. In addition, the Assembly fears that, under the recently revised Dutch policy, detention could be for an unlimited duration and resorted to as a punitive measure to sanction those who do not co-operate, or who cannot prove that they co-operate, towards facilitating their own return and regrets that this policy does not foresee any clear exemptions from detention for specific categories of failed asylum seekers such as children, the elderly, people suffering from trauma or mental illness and people with disabilities.

12. Reiterating its position expressed in Recommendation 1624 (2003) on common policy on migration and asylum, the Assembly believes that those who cannot be returned due to objective circumstances or due to a lack of co-operation from the country of origin should be given a residence permit to stay in the host country.

13. The Assembly agrees with the principle that failed asylum seekers who do not have the right to stay in the country should co-operate with the authorities to facilitate their own return, as stated by the Committee of Ministers in Recommendation No. R(99)12 on the return of rejected asylum seekers. The Assembly, however, is aware of the practical difficulties that failed asylum seekers may encounter while trying to obtain travel documents from the relevant authorities, or in proving that they have tried to do so. Failed asylum seekers should therefore be given a reasonable time to organise their voluntary return.

14. Finally, the Assembly believes that the recently revised Dutch policy should be modified insofar as it allows, in some cases, for certain persons to be protected from expulsion where it is impossible to return them, whilst simultaneously depriving them of all access to housing, social benefits and health care. The withdrawal of access to housing, social benefits and health care is a particularly worrying development, especially regarding children in the light of the rights under the Convention on the Rights of the child. It represents one of a series of measures increasingly used in a number of member states of the Council of Europe as a means of exerting pressure on failed asylum seekers to return to their countries of origin.

15. The Assembly, therefore, calls on the Government of the Netherlands and on other Council of Europe member states having similar policies to:

15.1. consider the possible use of amnesties, regularisation procedures or discretionary powers to regulate the situation of asylum seekers awaiting a decision on their asylum application for a long period of time;

15.2. while considering applications to remain in the country from failed asylum seekers, give special attention to the length of time the person concerned has lived in the country, family, community or other links, as well as his/her level of integration;

15.3. take into account the best interest of the child, before, during and after decisions are taken concerning the family and not only after a decision has been taken concerning the main applicant;

15.4. postpone the return of failed asylum seekers to countries or regions of conflict or where the humanitarian situation is volatile, pending improvement of the situation;

15.5. take all necessary steps to ensure that the principle of family unity is respected;

15.6. promote fully the use of voluntary return programmes, including advice and assistance on return, in preference to detention and forced returns;

15.7. provide a reasonable time to organise for voluntary returns;

15.8. refrain from introducing any policies which lead to excluding from the community or compelling to orbit around European states, failed asylum seekers who cannot be returned due to objective circumstances or due to lack of co-operation from their country of origin;

15.9. use detention only as a last resort and provide for a maximum period of detention. Where detention is considered, limit the period of detention and the use of detention to cases where there is a clear and objective risk that the person concerned would abscond to avoid return, on the basis of an individual assessment of each case;

15.10. provide for an automatic and regular review of all detention decisions as well as the right of failed asylum seekers in detention to apply to a judicial authority which would decide promptly on the lawfulness of their detention;

15.11. avoid in all circumstances detaining children, the elderly, people suffering from trauma or mental illness and people with disabilities;

15.12. demand a reasonable level of proof for failed asylum seekers to demonstrate that they have tried to co-operate towards their return and afford them the benefit of the doubt;

15.13. grant a residence permit that provides for the right to work and healthcare to failed asylum seekers who cannot be returned due to objective circumstances or to the lack of co-operation of the country of origin. This should translate into a permanent permit if there is no likelihood of return within a reasonable time-frame;

15.14. ensure an appropriate level of access to housing, social benefits and health care for all failed asylum seekers up to the time of their departure from the country;

15.15. promote public understanding of the situation of refugees in Europe and take measures to ensure that the media and politicians do not distort information on the situation of failed asylum seekers in such a way as to create hostility or intolerance towards persons belonging to this group.

## II. Explanatory memorandum, by Mrs Zapfl-Helbling

### 1. The return of failed asylum seekers: a controversial government proposal

1. *'A just and equitable asylum policy depends on an effective strategy for the departure of failed asylum-seekers'*.<sup>1</sup> With these words Rita Verdonk, Minister for Immigration and Integration of the Netherlands, concluded her open letter rebutting criticism of the new Dutch policy on the return of failed asylum seekers.

2. In the weeks following the adoption of the recent Dutch policy, international media ran sensationalist headlines such as: 'Dutch Parliament passes strong measure on expulsion of immigrants', 'Dutch plan to expel refugees passes test. 26,000 may be forced to leave the country within next 3 years', 'Dutch pass law to expel failed asylum seekers. Thousands of people face return to conflict zones'.

3. Despite the dramatic urgency with which the media broke the news, return policy is not a new issue in the asylum debate in the Netherlands: the second Kok government had already submitted a memorandum on this subject to the House of Representatives; besides, implementation of an effective return policy was one of the core elements in the manifesto of the Christian Democrats during the last election campaign.

4. The proposal, which was approved by the House of Representatives in February 2004, has been opposed by large sections of the Dutch population and civil society as well as by opposition parties, mainly on three grounds: it risks returning people to countries which are politically unstable and have a poor human rights record; it may disrupt strong links that these people have developed with the Netherlands during their stay, which has amounted in some cases to many years; and it risks affecting the human dignity of a significant number of people who become ineligible for social assistance if they do not elect to return to their country of origin.

5. As a sign of the opposition of the Dutch society at large to the government proposal, on 10 April 2004, thousands of people held a protest march in Amsterdam; and opinion polls carried out in February 2004 showed that the majority of those questioned were in favour of granting amnesty to failed asylum seekers who had been in the Netherlands for more than five years. Several failed asylum seekers threatened to go on hunger strike, whilst one of them, of Iranian nationality, sewed up his eyes and mouth in protest. In April 2005 more than 200,000 people petitioned the Queen calling for a "royal gesture" to permit the 26,000 asylum seekers the right to remain in the Netherlands. There was also a project called "26,000 faces" in which small film documentaries were broadcast on television in order to give the group of asylum seekers a face.

6. Strong criticism of the government proposal has also been expressed by the Dutch Refugee Council, the Dutch Council of Churches and the international NGO Human Rights Watch (HRW), which warned against the return of failed asylum seekers to unsafe countries or regions such as Afghanistan, Somalia and Chechnya and called for special attention to be devoted to certain groups of failed asylum seekers, including children born in the Netherlands.

7. All countries expel failed asylum seekers, but the scale of the planned expulsions from the Netherlands is such as to attract great attention from the media and the general public and to raise concerns about compliance with human rights standards. Your Rapporteur wishes to start the present report by describing the main features of this controversial policy, and also to redress some aspects that have been inaccurately reported in the press.

8. Your Rapporteur has also considered it relevant to examine the situation in her own country Switzerland as well as the situation in the United Kingdom, in order to draw some form of comparison at a European level with the situation in other countries in Europe.

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<sup>1</sup> The Financial Times, 10 March 2004.

## 2. Who is affected?

9. The government proposal concerns asylum seekers who applied for asylum in the Netherlands before 1 April 2001, date of the entry into force of the latest Aliens Act (*Vreemdelingenwet*), and have received or will receive a negative decision on their claim.

10. At the outset it was estimated that the number of foreigners who applied for asylum under the previous legislation and were still in the country, having received a negative decision or no decision on their case, amounted to 26,000. From figures provided by the Ministry of Justice in February 2005 it would appear that out of the 26,000 persons in the original group, a total of 9,000 have been processed and about 3,000 have been given a residence permit. A significant number of voluntary returns (1,400) have been made under favourable conditions. There have also been a number of hardship cases accepted through the application of a Ministerial discretion (applying to approximately 400 people).

11. In an overview provided to the Dutch Parliament at the start of the return project, the main groups of asylum seekers amongst the 26,000 persons concerned were Iraqis, persons from former Yugoslavia, Azeris, Iranians, Somalis, Syrians, Angolans, Armenians, Sudanese, and Afghans.

12. The policy affects a number of children who were born in the Netherlands to failed asylum seekers and have always lived in the country.

13. The government plan includes an amnesty for asylum seekers who have applied for asylum (for the first time) on or before 27 May 1998 and they have not received a final decision on that application by 27 May 2003. In other words, persons who have been in the Netherlands for 5 years and who have not received a decision on their asylum application. 2,097 persons met the criteria of the amnesty.

14. No amnesty, however, is foreseen for failed asylum seekers, including particular categories such as *separated children/unaccompanied minors, children born in the Netherlands, or failed asylum seekers* having been in the country for a considerable number of years. The Minister of Immigration and Integration has however made use of her discretionary power to issue special residence permits to failed asylum seekers on compassionate grounds, for those who have serious reasons not to be returned, on the basis of an individual assessment of the case.<sup>2</sup> From statistics (already mentioned above) provided by the Minister of Immigration and Integration, approximately 400 persons have benefited from this discretionary power. There are no given criteria for the application of this discretionary power, although it would appear that old age, disability, (mental) illness, separation from children, presence of other family members in the Netherlands and level of integration would all appear to have a relevance.

## 3. Failed asylum seekers responsible for their own return

15. In general terms, the effective implementation of an expulsion order depends on the willingness of the host country to enforce this measure as well as on the co-operation of the person to be returned, and the cooperation of the country of origin. The inability of host countries to enforce expulsion measures is, in practice, often due to the refusal of the person concerned to disclose his/her real identity and/or nationality and the subsequent refusal of the country of origin to issue relevant travel documents.

16. The principle that failed asylum seekers have primary responsibility for their own return inspires the entire new Dutch policy. In a nutshell, voluntary return is the main objective; those who cooperate towards a voluntary - yet mandatory - return but cannot be returned despite their best efforts will be entitled to stay; those who refuse to cooperate will be forcibly returned, and if this proves to be impossible, they will be detained. Between 1 April 2004 and 15 April 2005, 30 permits were granted to persons who could not return. Most of these permits (28) were granted to stateless persons.

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<sup>2</sup> The legal basis of such power is Section 14(1) of the Aliens Act 2000 on the powers of the Minister of Justice in issuing residence permits.

17. The return process is expected to be completed within a short time-frame. People concerned by the policy will be called for an appointment with immigration officers, during which the return process will be explained. They will be given 4-8 weeks from the date of this appointment to organise their return voluntarily, including by obtaining a valid travel document from their country of origin. During this period they will continue to be accommodated in reception centres and will be given counselling by immigration experts, so as to be better prepared for return. The Dutch government is willing to pay for the airline ticket and to provide some money to help the returnees settle and build a new future in their country.

18. If they have not returned within 8 weeks, they will be transferred to a 'departure centre', from where they are supposed to continue their efforts to organise their voluntary departure. As in the reception centres, they will be given individual guidance to prepare for return and their maximum stay will not exceed 8 or 14 weeks. In total the two phases will always last 16 weeks.

19. After these two eight-week periods, anyone who can demonstrate objectively that they cannot return to their country of origin, without any fault of their own, should be given a residence permit. The others will be forcibly returned.

20. In the possible event that failed asylum seekers do not want to cooperate towards their return and their countries of origin refuse to take them back by providing valid travel documents, the persons concerned will be detained while the government tries to take the necessary measure to enforce return. Detention can be authorised under Article 59 of the Aliens Act. There is no legal maximum detention. After 28 days the Immigration and Naturalisation Service (IND) will notify the district court of the detention if the person concerned has not already appealed against the decision him or herself. The detained person can appeal against the prolongation of the detention at any time. After 6 months the Court will assess the continuation of the detention. After this period the interest of the detained person normally becomes more important than the interest of the Minister to detain the person. Continuation of detention is to a large extent a reflection of the extent of co-operation of the detainee. If return is impossible, the persons concerned will be released, but they will not have any right to accommodation in reception centres, social benefits, health insurance, etc. In a limited number of cases the persons concerned will be granted residence (as noted above 30 permits were granted between 1 April 2004 and 15 April 2005).

#### **4. The Netherlands: less and less a country of asylum**

21. The new government proposal should be seen in context: the Netherlands, which is traditionally a major country of asylum, has become less and less so in the last few years, a trend which started well before the entry into power of the current government.

22. The number of asylum applicants has been constantly decreasing, bringing the Netherlands from 4<sup>th</sup> place in 2000 to 12<sup>th</sup> place in 2004 in the ranking of European countries of destination: in all, 9,782 people sought asylum in the Netherlands in 2004, down from 13,400 in 2003, 18,670 in 2002, 32,580 in 2001 and 43,900 in 2000.<sup>3</sup>

23. A similar drop can be noticed in refugee recognition rates: in the first instance, 896 people were granted refugee status in 2000, 244 in 2001 and 198 in 2002. As far as humanitarian/complementary status is concerned, 5,968 people received this in 2000, 5,161 in 2001 and 3,359 in 2002. After an administrative review of the case, 912 people were granted refugee status in 2000, 644 in 2001 and 618 in 2002, while 1,950 were granted humanitarian/complementary status in 2000, 2,696 in 2001 and 4,435 in 2002.<sup>4</sup>

<sup>3</sup> UNHCR, *Asylum levels and trends: Europe and non-industrialised countries*, 2004.

<sup>4</sup> UNHCR, *Asylum decisions in Europe, 2000-2002*.

24. At the same time, statistics show that the return of asylum seekers reached a peak in 2002 with a total of 21,255 persons returning, falling to 14,929 in 2004<sup>5</sup>. These statistics however concern mostly "administrative returns" meaning that the asylum seeker had abandoned the place of reception and been registered as "left with unknown destiny".

25. A specific feature of the asylum seeking population in the Netherlands is the very high proportion of separated children (in Dutch referred to by the acronym *ama's*): in 2000, 6,705 requested asylum in the Netherlands, amounting to 15 percent of the total number of asylum seekers. This number fell to 3,233 in 2002.<sup>6</sup> The figure fell further in 2003 to 1,216 and to 594 in 2004<sup>7</sup>.

26. This reduction in the number of asylum applications and the drop in refugee recognition rates is due to the interaction of various policy measures intended to make the Netherlands a less attractive country for asylum seekers, such as:

- i. a higher number of asylum applications being processed under an accelerated asylum procedure so restrictive as to have been defined by some of its opponents as 'an expulsion factory'<sup>8</sup>;
- ii. the withdrawal of the 'three-year policy', according to which asylum seekers obtained a residence permit if they had been staying in the country for three years and return was not possible;
- iii. the introduction of a new policy on separated children seeking asylum, focussed on rapid decision-making and – in case of a negative decision – return, research into relief possibilities in the country of origin and prevention of human trafficking<sup>9</sup>.
- iv. a reluctance to institute a general protection policy for individual countries, although a number of general policies do still remain.

27. To have a more complete picture of the situation, the Dutch asylum policy should be considered in the context of a tougher policy on immigration in general: the prices of residence documents have been raised, there has been a crack-down on undeclared labour, compulsory language and citizenship courses have been introduced, and more restrictive conditions have been set for legal immigrants to be joined by spouses.

28. Having said that, the Netherlands still remains an important immigration country: first or second-generation immigrants represent 19 percent of the 16 million population (with 10% of the total population considered non-western migrants and 9% considered western migrants). Cities like Rotterdam are one-third immigrant, and this figure may rise to 50 percent by 2017. This should however be put in the context of a negative migration flow (with 23,000 more people emigrating than immigrating) in the Netherlands, a trend which is foreseen to continue for the next five years.

## 5. The new Dutch policy in the context of an EU return policy

29. The implementation of an effective return policy for illegal residents is considered as a priority also within the European Union. The Conclusions of the European Council of Tampere had already mentioned the importance of promoting voluntary return along with readmission agreements with countries of origin<sup>10</sup>. A few years ago the Commission relaunched the discussion, with a Green paper on a community return policy on illegal residents<sup>11</sup>.

<sup>5</sup> Statistics provided by the Ministry of Justice.

<sup>6</sup> Ministry of Justice, Fact sheet: Repatriation is central to policy on solitary underage asylum seekers, January 2003.

<sup>7</sup> IND, Rapportage Vreemdelingenketen september t/m december 2004, tevens jaarrapportage 2004

<sup>8</sup> Stefan Kok, international policy adviser at the Dutch Refugee Council, quoted by AP WorldStream English, 25 March 2004.

<sup>9</sup> Ministry of Justice, Fact sheet: Repatriation is central to policy on solitary underage asylum seekers, January 2003.

<sup>10</sup> Points 26 and 27 of the Conclusions.

<sup>11</sup> COM (2002) 175 final, 10.04.2002



30. The Commission was concerned with improving the efficiency of the management of migratory flows, at all stages. Return was seen as an integral part of a comprehensive community immigration and asylum policy and should therefore be based on common standards and measures. In the Commission's opinion a common EU return policy should – as far as possible – give priority to voluntary return; forced return should be a last resort and should be implemented in compliance with international protection obligations and the human rights of returnees; in case of detention pending return, the principle of judicial control should always be respected. As far as special groups were concerned, the Commission recalled that *'the rights of the child deserve special consideration (...); in all actions related to children, the child's best interest must be a primary consideration'*.<sup>12</sup> It also mentioned respect of family life under Article 8 of the European Convention on Human Rights<sup>13</sup>.

31. The importance of establishing an EU return policy saw a rapid development: the Seville European Council called on the Council and the Commission, within their respective spheres of competence, to attach 'top priority' to the adoption of the components of a repatriation programme based on the Commission Green Paper; a few weeks later the Danish Presidency tabled a proposal for a Return Action Programme, with a view to enhancing operational co-operation on return issues among member states<sup>14</sup>. The Italian Presidency continued to pursue this objective: in November 2003, the Home Affairs Council reached political agreement on the proposal to use joint charter flights to return illegal immigrants to their countries of origin<sup>15</sup> as well as on a draft decision for a settlement system between member states for sharing the financial burden of the mutual recognition of expulsion orders<sup>16</sup>. On 1 September 2005 a proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals was published<sup>17</sup>.

## 6. Restatement of principles elaborated within the Council of Europe

32. Over the years, the Council of Europe has adopted a number of instruments which have relevance to the elaboration of return policies by Council of Europe member states. The most recent of these has been Twenty guidelines on forced returns adopted by the Committee of Ministers in May 2005.<sup>18</sup> Your Rapporteur wishes to provide a brief review of such instruments, in order to remind the Assembly of what should be considered as an *acquis*:

### 6.1. *Obligation to enforce return measures*

33. The Assembly has clearly called on Council of Europe member states *'to introduce effective measures to ensure the expulsion of foreigners who are not in need of international protection and who do not have any legal entitlement to stay in the country'*<sup>19</sup>.

34. The Committee of Ministers has explicitly linked the preservation of the institution of asylum with the effective *'return of persons who have sought international protection but were found by the competent authorities not to be in need of it'*<sup>20</sup>.

<sup>12</sup> Commission Green Paper, *cit.*, page 10.

<sup>13</sup> *Ibidem*

<sup>14</sup> Council of the European Union, Proposal for a Return Action Programme, 14673/03, 25 November 2002.

<sup>15</sup> Council of the European Union, Draft Initiative of the Italian Republic for a Council Decision on the shared organisation of joint flights for group removals of third-country nationals illegally present in the territory of two or more Member States, 10910/03, 3 July 2003.

<sup>16</sup> Proposal for a Council Decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of the Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals, COM (2003) 49 final, 3 February 2003.

<sup>17</sup> Reference: COM\_SEC(2005) 1057

<sup>18</sup> See document CM(2005)40

<sup>19</sup> Recommendation 1624 (2003) on common policy on migration and asylum.

<sup>20</sup> Explanatory memorandum to Recommendation No. R (99) 12 of the Committee of Ministers to member states on the return of rejected asylum seekers.

6.2. *Preference for voluntary return, forced return as a last resort*

35. This principle is expressed in a number of instruments of the Assembly and the Committee of Ministers. Above all, your Rapporteur wishes to recall Recommendation No. R (99) 12 of the Committee of Ministers to member states on the return of rejected asylum seekers, which states that: *'the country hosting the person to be returned [should] ensure that whereas voluntary return is preferable, when nevertheless the resorting to mandatory return is necessary, it takes place in a humane manner with full respect for fundamental human rights and without the use of excessive force'*.

36. As to the modalities of the implementation of return, your Rapporteur would like to recall also Assembly Recommendation 1547 (2002) on Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

6.3. *co-operation of failed asylum seekers towards their return*

37. This principle is expressed in the above-mentioned Recommendation No. R (99) 12 of the Committee of Ministers on the return of rejected asylum seekers. The explanatory memorandum clarifies that: *'Rejected asylum seekers who do not have the right to stay in the host country are expected to co-operate with the respective authorities to facilitate their return. (...) If rejected asylum seekers deliberately hamper the implementation of return, reduction of social benefits according to law may be applied by the host country. Nevertheless, the fundamental human rights of rejected asylum seekers must also be fully observed in such situations'*.

6.4. *Limited and exceptional use of detention*

38. Your Rapporteur wishes to draw the Assembly's attention to the fact that Recommendation (2003) 5 of the Committee of Ministers to member states on measures of detention of asylum seekers does not apply to rejected asylum seekers who are detained pending their removal from the host country. A reference to this group, however, is found in the explanatory memorandum to the above mentioned recommendation of the Committee of Ministers on the return of failed asylum seekers: *'if detention is resorted to, it should not be applied as a sanction but as a specific, temporary and non-arbitrary administrative measure, it shall be implemented under conditions which are in accordance with law and correspond to standards established by the relevant international instruments and by the case law of the European Court of Human Rights'*.

39. Assembly Recommendation 1547 (2002) on Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity adds that alternatives such as compulsory residence orders or reporting obligations should always be preferred to detention. Besides, member states should guarantee the strict necessity and proportionality of the recourse to and/or continuation of detention pending return.

40. The Assembly has also affirmed that *'States should refrain from detaining minors exclusively on immigration grounds'*<sup>21</sup>.

6.5. *Treatment of specific groups: children born in the host country and separated children*

41. The Assembly has warned against the expulsion of children born or brought up in the host country, but only with reference to long-term immigrants<sup>22</sup>.

42. As far as separated children are concerned, a number of Council of Europe instruments aim at ensuring that member states afford them special attention and consideration. Above all, your Rapporteur wishes to recall Recommendation 1596 (2003) on Situation of young migrants in Europe, which spells out

<sup>21</sup> Recommendation 1596 (2003) on Situation of young migrants in Europe. In the same sense, Recommendation 1624 (2003) on common policy on migration and asylum

<sup>22</sup> Recommendation 1504 (2001) on Non-expulsion of long-term immigrants.

precise safeguards by which member states should abide when enforcing return measures against separated children. Your Rapporteur would also like to refer to Recommendation 1703 (2005) on Protection and assistance for separated children seeking asylum.

**7. A comparative analysis with the situation in other European Countries, using Switzerland and the United Kingdom as examples**

43. The situation in the Netherlands is not unique and neither is the way in which the authorities have sought to tackle some of the issues arising from the return of failed asylum seekers.

44. It is for this reason that your Rapporteur has chosen to examine the situation in Switzerland and the United Kingdom in order to have a point of comparison and to examine a number of issues of common concern in the countries concerned.

45. Switzerland is a country which hosts a high proportion of immigrants (approximately 20% of the population of 7,320,000 inhabitants is made up of foreigners, due in part to the restrictive citizenship legislation). It is also a country in which the political climate reflects a hardening stance on asylum and immigration and where a number of recent laws adopted or proposed have been met with a high level of criticism from those working with refugees and asylum seekers<sup>23</sup>.

46. These criticisms need to be seen against the backdrop of Switzerland's reputation as a strong supporter for human rights, refugee protection and humanitarian assistance, with many of the most important institutions dealing with these issues being based in Geneva.

47. Statistics show that asylum claims in Switzerland have been falling from 26,130 in 2002 to 20,810 in 2003 to 14,250 in 2004<sup>24</sup>. This is however a general trend across Europe where asylum application levels decreased by 21% from 396,800 in 2003 to 314,300 in 2004<sup>25</sup>. Stricter measures adopted by many countries, including by Switzerland, undoubtedly contribute to these falling rates

48. The United Kingdom is a country which has traditionally hosted a large number of migrants and asylum seekers. Out of a population of around 60 million the stock of foreign population stands at approximately 4%. The reasons for this are many and include, *inter alia*, traditional links with the country, widespread knowledge of the English language, a tradition of multiculturalism, tolerance and openness towards asylum seekers and migrants and, in recent years, a vibrant economy.

49. The United Kingdom is also a country which is relatively easy to enter. Furthermore once in the country, there is no system of identity cards, which makes it easier for irregular migrants to remain without being identified by the authorities.

50. The United Kingdom has, in recent years, adopted an increasingly tough stance on immigration and the processing of asylum seekers. The Government in its policy aims to be "firmer, faster and fairer" and has been particularly sensitive to counter what may be considered "pull factors", which influence asylum seekers in their choice of the United Kingdom as a country of destination. Asylum claims have been falling steadily in the United Kingdom. In 2002 the figure was 84,130 and in 2003 the figure fell to 49,405. In 2004 the figure dropped further to 33,930<sup>26</sup>.

51. Your Rapporteur proposes to examine a number of issues arising in the context of Switzerland's and the United Kingdom's asylum policies where a comparison can be drawn with the situation in the Netherlands. These issues include:

<sup>23</sup> Reference is also made in this respect to the Report of Mr Alvaro Gil Robles, Commissioner for Human Rights, on his visit to Switzerland, 29 November – 3 December 2004 (CommDH(2005)7) which contains a number of important comments on the Asylum process in Switzerland

<sup>24</sup> Asylum levels and trends in Industrialized Countries, 2004, p. 8, UNHCR

<sup>25</sup> Asylum levels and trends in Industrialized Countries, 2004, p. 3, UNHCR

<sup>26</sup> Home Office Asylum statistics: 1<sup>st</sup> Quarter 2005 United Kingdom

- the use of amnesties, regularisation programmes or discretionary powers
- the use of voluntary return programmes
- the use of detention
- the situation of those in an irregular situation
- access to social assistance
- the use of accelerated procedures
- the situation of asylum seekers, migrants and refugees in the press and in the political arena

7.1. *The use of amnesties regularisation programmes or discretionary*

52. While it is not possible to make a direct comparison in Switzerland with the group of 26,000 failed asylum seekers in the Netherlands, it can be noted that there is a large group of persons made up of immigrants, seasonal workers, failed asylum seekers or others who find themselves in an irregular situation in the country. The number of these people has been estimated at between 150,000 and 300,000 although recent figures published by the Federal Office of Migration, referring to a study carried out on the subject, put the number much lower at between 80,000 and 100,000<sup>27</sup>. The difference in figures can in part be explained by different categorisations of the groups to be included in the figures, with the latter figure primarily concentrating on those without papers normally working on the black.

53. In the past, in view of the large number of persons in an irregular situation, taking into account their level of integration into society and also that in certain cases their situation was not due to any fault of their own, provisional admission was granted to approximately 16,000 persons under a programme entitled "Humanitarian Action 2000" (l'Action humanitaire 2000). This type of regularisations programme has not however been repeated since 2000.

54. There are special provisions for severe cases ("cas de détresse personnelle grave") which allow, *inter alia*, asylum seekers who have been waiting in the country for over 4 years for a final decision, or after a final decision, and who are in a situation of extreme gravity and personal distress, to be given provisional admission.<sup>28</sup>

55. Another possibility, through the procedure governed by the "Metzler Circular", promulgated on 21 December 2001, allowed failed asylum seekers who had been present in the country for 5 years and had become particularly well integrated, the possibility of having their situation regularised through a request by their Canton to the Federal authorities. According to statistics published in a "report on illegal migration"<sup>29</sup> certain Cantons used this possibility widely, others did not. The Canton of Vaud, for example, put forward 1,784 requests whilst the Canton of Zurich put forward only one request during the same period<sup>30</sup>.

56. These different methods have, in the past, allowed some flexibility in the system in Switzerland. It is to be regretted that this flexibility has been somewhat limited by the withdrawal of the "Metzler Circular" and the lack of prospects for a further regularisation programme similar to "Humanitarian Action 2000".

57. Recent figures released by the Home Office in the United Kingdom indicate a large number of irregular migrants in the United Kingdom. The central estimate figure given is 430,000 persons<sup>31</sup>. It is partly against this backdrop that the United Kingdom Government has introduced what it terms as a "tipping target" which is to remove from the country more failed asylum seekers than the number of new asylum applicants expected to be unsuccessful.

<sup>27</sup> Federal Office of Migration (ODM) Communiqué de presse, 26 April 2005 referring to a study prepared by Forschungsinstitut gfs.bern.

<sup>28</sup> A similar policy was in place in the Netherlands, known as the "3 year policy". It was abolished in January 2003, although it still applies for some applicants from before 1 April 2001.

<sup>29</sup> Source: web-site [http://www.bfm.admin.ch/fileadmin/user\\_upload/Aktuell/Pressemitteilungen\\_franz/IMES/2004/illegale1\\_f.pdf](http://www.bfm.admin.ch/fileadmin/user_upload/Aktuell/Pressemitteilungen_franz/IMES/2004/illegale1_f.pdf)

<sup>30</sup> Source: OSAR web-site: <http://www.osar.ch/2005/03/07/wo-steht-die-asylgesetz?appendLang=fr>

<sup>31</sup> Sizing the unauthorised (illegal) migrant population in the United Kingdom in 2001, Home Office Online Report 29/05.

58. The United Kingdom has in the past found itself in a similar position to the Netherlands, where it has had to deal with a backlog of asylum applicants and persons who have been in the asylum process for a significant period of time. In order to deal with this situation the Government has undertaken two regularisation programmes as well as increased the levels of initial decisions and appeal determinations significantly in order to reduce the numbers of cases in the system. It has also taken a range of measures to cut the level of new applications and significantly increased the levels of returns.

59. The first regularisation programme undertaken by the United Kingdom, referred to as a backlog clearance exercise, related to two groups of persons. The first group of persons (numbering approximately 10,000) were those who had made asylum applications before 1 July 1993 where the delay in itself was considered so serious as to justify, as a matter of fairness, the granting of indefinite leave to remain. The second group of persons (approximately 20,000), those who had made applications between 1 July 1993 and 31 December 1995, would only be granted leave to remain or enter if there were specific compassionate or other exceptional factors present. The delay itself was not sufficient for the grant of leave to enter or remain.

60. The second regularisation programme known as the Family Indefinite Leave Exercise, allows certain asylum-seeking families who have been in the United Kingdom for four or more years the possibility of obtaining indefinite leave to remain in the country. To qualify, the main applicant of the family unit must have applied for asylum before 2 October 2000 and must have had at least one dependent aged under 18 (other than a spouse) in the United Kingdom on 2 October 2000 or 24 October 2003. 10,800 main applicants have so far been granted indefinite leave to remain and 32,370 applicants are awaiting an initial examination or a decision<sup>32</sup>.

61. There is therefore some similarity in the situation in the Netherlands, Switzerland and the United Kingdom, with all three countries needing to deal with persons who may have been in the asylum process for a long period of time. The challenge faced by all three countries has been to deal with the persons concerned in a humane fashion, whether through the use of an amnesty or some form of regularisation programme or discretion. The use by all three countries of such measures would appear to indicate not only that there is a need for such measures but also that such measures can not be considered as exceptional. States should therefore continue to give consideration to such measures in the future in order to deal with the particular problems arising in relation to persons who may have been in the country for significant periods of time, whether due to the asylum process or other reasons.

## 7.2. *The use of voluntary return programmes*

62. An active voluntary return programme is in operation in Switzerland with the assistance of the International Organization of Migration (IOM). In 2002, according to statistics from IOM, 2,870 persons returned voluntarily. In 2003 the figure was 2,983 persons<sup>33</sup>. Your Rapporteur is however concerned that for those persons that have received a decision under the accelerated procedure "decisions de non entrée en matière" (NEM), there is not yet a legal basis for assisted voluntary return. Your Rapporteur understands that a pilot project is underway for such returns and hopes that this may lead to the adoption of a legal basis for such returns in the future.

63. In the United Kingdom, according to the Home Office published figures, there were 2,705 returns under their Voluntary Assisted Return and Reintegration Programme. Limited financial incentives were offered (for example for Afghans), although reintegration assistance was more widely available and took the form of education, training and the establishment of small businesses in the home country.

64. Your Rapporteur is encouraged that the Netherlands, Switzerland and the United Kingdom all invest in voluntary return programmes in co-operation with the International Organization of Migration. It is however clear that there remains scope for using these programmes further and expanding the incentives

<sup>32</sup> Home Office, Asylum Statistics: 1st Quarter 2005

<sup>33</sup> Return Migration. Policies and Practices in Europe, IOM page 379.

offered in certain circumstances. Your Rapporteur is however aware that there is a thin dividing line between voluntary returns and forced returns in certain circumstances and encourages States to ensure that voluntary returns are indeed voluntary.

### 7.3. *The use of detention*

65. In Switzerland, preliminary detention (before a decision on refugee status is given) can last up to 3 months. Detention of up to 9 months in preparation for expulsion may then take place. This leads to a possible detention period of 1 year. There are currently controversial plans to raise this total period to two years, which includes a possible period of 18 months detention for those who do not co-operate with the authorities in the process of return.

66. Your Rapporteur is aware of a large number of criticisms concerning detention of asylum seekers and failed asylum seekers in the United Kingdom. In this respect your Rapporteur refers to a recent report by Amnesty International on this subject<sup>34</sup> and a Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom.<sup>35</sup>

67. Of particular concern to your Rapporteur is the fact that detention for asylum seekers and failed asylum seekers in the United Kingdom can be for an unlimited period, although it should be noted that the majority of those detained are detained for less than a month. Your Rapporteur is however also concerned about other aspects of the detention policy in the United Kingdom, ranging from what would appear to be the wide-spread use of detention (2,700 beds available, with Amnesty International calculating approximately 25,000 people being detained in 2004 for some period of time), the lack of authorisation of detention by a judge and also the lack of a prompt and automatic judicial oversight of the decision to detain and the lack of automatic judicial reviews for the continuation of detention.

68. Other matters also linked to detention which are of concern to your Rapporteur include an apparent lack of knowledge of certain detainees of the reasons for their detention and the mechanisms for challenging detention, as well as the changes in funding arrangements for legal aid which have a particular impact on those in detention.

69. Your Rapporteur while noting that a number of issues arise in terms of detention of asylum seekers and failed asylum seekers would like to highlight a particular concern which is the possible length of detention in the three countries examined. In both the Netherlands and the United Kingdom, there is no limit to the length of possible detention and in Switzerland there are plans to lengthen the maximum period of detention.

70. Your Rapporteur is concerned that detention should not be motivated by the desire to find a deterrent for asylum seekers considering entering the country or as a means of forcing people to co-operate with the authorities on the issue of their return after their applications have been rejected. Your Rapporteur is concerned that detention of asylum seekers and failed asylum seekers as currently practiced may raise issues under Article 5 (right to liberty and security of person) of the European Convention on Human Rights, in particular if the proceedings are lengthy and not prosecuted with due diligence<sup>36</sup>, or if motivated simply as a means for forcing people to co-operate on the issue of return. Your Rapporteur considers that there should be a presumption against detention and that detention should be used as a measure of last resort and for a minimal period, while respecting fully the human rights and dignity of the persons concerned.

<sup>34</sup> United Kingdom Seeking asylum is not a crime: detention of people who have sought asylum, 20 June 2005, (AI Index: EUR 45/015/2005)

<sup>35</sup> See Report on visit to the United Kingdom, 4<sup>th</sup>- 12<sup>th</sup> November 2004 (CommDH(2005)6)

<sup>36</sup> European Court of Human Rights, Judgment *Chahal v. United Kingdom*, 15 November 1996, para. 113 "The Court recalls, however, that any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f) (art. 5-1-f)"

#### 7.4. *The situation of those in an irregular situation*

71. As has been noted earlier, it is difficult to be certain of the exact number of persons living in an irregular situation in Switzerland with figures mentioned ranging from 80,000 to 300,000 depending on the definition given to persons in an irregular situation and the source of estimates.

72. Similarly, as noted earlier in relation to the United Kingdom, it has been estimated that there are approximately 430,000 irregular migrants, although the estimates range from 310,000 persons to 570,000 persons.

73. A situation of uncertainty exists in the Netherlands where a large, but unknown number of persons live in an irregular situation.

74. The consequences of living in an irregular situation can be dramatic in terms of social exclusion and in terms of being forced to work in the shadow economy without adequate safeguards. There are other consequences as well in terms of lack of access to social benefits and even the lack of access to emergency aid. Indeed, a fear of detention may deter persons from claiming emergency aid or taking other steps which might put the authorities on notice as to their whereabouts, such as putting their children into schools.

75. It is a worrying phenomenon in Europe that such a significant group of people should become virtually invisible at the fringe of society. Your Rapporteur is concerned that a culmination of measures impacting harshly on irregular migrants, including failed asylum seekers, may lead to a situation of inhuman treatment of those persons concerned.

76. Your Rapporteur is particularly concerned about steps to withdraw access to social assistance (see below) from rejected asylum seekers as this will further contribute to the growth in the number of persons moving from country to country, living in the shadow economy in an irregular situation.

#### 7.5. *Access to social assistance*

77. Your Rapporteur is concerned about the growing tendency across Europe to restrict social assistance or deny social assistance as a means of dissuading asylum seekers or failed asylum seekers from entering European countries or forcing them to return or move on to other countries in order to find some form of subsistence.

78. In Switzerland Article 12 of the Constitution guarantees the right to primary aid for persons in distress and the right to receive the means that are indispensable for leading a life in human dignity.

79. Notwithstanding this provision, your Rapporteur is concerned by the procedure by which persons affected by a decision of "non-entrée en matière" (a form of accelerated procedure) no longer have an entitlement to social assistance and although primary aid may still be available, the aid offered may differ from one Canton to another. Your Rapporteur is also concerned that there are proposals that primary aid should not be given to persons in an irregular situation who do not co-operate in the return process. Your Rapporteur welcomes that the Federal Tribunal in a Judgment dated 18 March 2005 has been clear in its position that there is a necessity to provide primary aid for all persons in need. Your Rapporteur notes in this respect the particular needs of those that are the most vulnerable, including un-accompanied minors, families with children, the old and the sick.

80. Your Rapporteur also notes that the withdrawal of social benefits has the effect of putting additional pressure on civil society to provide assistance to irregular migrants. In Switzerland, the provision of such assistance to persons in an irregular situation could give rise to a criminal prosecution. While your Rapporteur understands that this provision in the criminal law has not been used, she is concerned by the prospects that such a provision could be used against an organisation or an individual providing humanitarian assistance.

81. In the United Kingdom, asylum seekers are not allowed to work and have to rely on state support set at 30% below normal income benefit. There have been a number of measures introduced to make the social benefits entitlement even less attractive to asylum seekers. Two of these are raised by Mr Gil Robles the Commissioner for Human Rights in his report on the United Kingdom<sup>37</sup>. The first concerns the withholding of assistance<sup>38</sup> in the form of housing and benefits from those deemed not to have made their applications as soon as reasonably practical on entering the country. Your Rapporteur notes that the Court of Appeal<sup>39</sup> in May 2004 found that the denial of such support could breach Article 3 of the European Convention on Human Rights and that the authorities, pending an appeal on this matter have relaxed the application of this provision. Your Rapporteur considers that the Government must carefully consider whether there would be a breach of a person's human rights in each case where a decision is made to withdraw support from a family. The Government should desist from withdrawing support where this might conflict with rights, including under Article 3 of the European Convention on Human Rights.

82. The second issue concerns the withholding of basic assistance from failed asylum seekers whom the Home Secretary has certified that they have failed, without reasonable excuse, to leave the United Kingdom voluntarily or to place themselves in a position in which they are able to leave the United Kingdom voluntarily<sup>40</sup>. Your Rapporteur notes that this provision has the effect of forcing persons into a situation of destitution and that this may also raise issues under Article 3 of the European Convention on Human Rights.

83. To the two points raised by Mr Gil Robles, the Commissioner for Human Rights, your Rapporteur would add the following concerns. The first is that legislation does not allow for the payment of money to failed asylum seekers who do however receive food, toiletries and accommodation. Where support in full-board accommodation is unavailable a system of vouchers is used, which brings with it a range of problems. Notwithstanding efforts by the authorities to solve these, recipients have problems redeeming vouchers for the products that they need (vouchers are only redeemable at certain shops, for certain goods, etc.).

84. A second concern is the introduction of a provision<sup>41</sup> which can require the participation or performance of failed asylum seekers in certain community activities. Such participation or performance is linked to the continued provision of accommodation. Your Rapporteur has reservations about this provision and possible ramifications under Article 4 of the European Convention on Human Rights relating to the prohibition of forced labour.

85. Your Rapporteur is thus concerned by the increasingly harsh measures being applied by states across Europe allowing for the withdrawal or reduction of access to social benefits in certain circumstances. Part of the motivation for this is undoubtedly to deter asylum seekers from entering the country or force those in an irregular situation to leave the country. Your Rapporteur has serious concerns about the reduction of aid to a point where persons are forced to live in inhumane and unacceptable conditions which may be contrary, *inter alia*, to Article 3 of the European Convention on Human Rights. Your Rapporteur welcomes however that Courts in Switzerland and the United Kingdom have taken a robust stand on this issue and trust that the Governments concerned will take full account of the position of the courts in adapting their policies to ensure full compliance with human rights standards.

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<sup>37</sup> Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom, 4<sup>th</sup> – 12<sup>th</sup> November 2004, CommDH(2005)6, page 24

<sup>38</sup> Section 55 of the 2002 Nationality, Immigration and Asylum Act

<sup>39</sup> Court of Appeal, *SSHD v. Limbeuala*, 21 May 2004

<sup>40</sup> Section 9 of the Asylum and Immigration (treatment of Claimants, etc.) Act 2004

<sup>41</sup> The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, paragraph 4.



### 7.6. *The use of accelerated procedures*

86. It is clear that across Europe increasing use is being made of accelerated procedures to deal with requests for asylum and returns. While the issue of accelerated asylum procedures is the subject of a separate report by the Committee on Migration, Refugees and Population (Rapporteur, Mr P. Agramunt, Spain (EPP/CD)), it is useful to make reference to the procedure adopted in the Netherlands, Switzerland and the United Kingdom.

87. In the Netherlands the system of accelerated procedures has been criticised for, *inter alia*, its speed (48 working hours), its widespread use, its limitations on access to legal counsel due to time pressure and withdrawal of social assistance in the appeal stage.<sup>42</sup>

88. In Switzerland, decisions of "non-entrée en matière" (NEM) can be considered as accelerated procedures. Certain comments and criticisms have already been made in this report about these decisions, including on the issue of restrictions on access to social assistance and the lack of availability of assisted voluntary returns. There are however a number of other consequences and issues which flow from these decisions, including, *inter alia*, the use of detention, reduced periods of appeal and issues linked to effective access to legal advice.

89. In the United Kingdom an increasing number of cases are decided under accelerated procedures and four out of five cases are decided within two months. There are however a number of concerns that go hand in hand with the use of accelerated procedures and your Rapporteur would like to highlight a number of these. The first is that while 9 out of 10 asylum applications are initially refused, 20% of cases that go to appeal<sup>43</sup> are successful and that this figure is much higher for certain groups. This raises issues about the quality of decisions at first instance and raises the question of whether speed is being given priority over fairness. Your Rapporteur welcomes that the Home Office is working with the UNHCR on seeking to improve the quality of first instance decisions and encourages them to continue in this work.

90. Your Rapporteur is also concerned about the requirement that appeals, from persons coming from designated countries, which are considered as clearly unfounded, can only be lodged from abroad<sup>44</sup>. Your Rapporteur understands that Judicial Review is available before removal, but remains concerned that there exist cases where persons are forced to return and later accepted on appeal, which would appear to run counter to the basic principle of *non-refoulement*.

91. Your Rapporteur while accepting that asylum procedures should be prompt and efficient, is concerned that speed should not be favoured over fairness and that some of the implications of the accelerated asylum procedures introduced have the capacity to undermine the rights of asylum seekers.

### 7.7. *Situation of asylum seekers, migrants and refugees in the press and in the political arena*

92. The policy of return of migrants has become an increasingly mediatic and political issue in many countries throughout Europe. The decline in numbers of asylum seekers and the increase in severity of measures against failed asylum seekers does not appear to have dampened the appetite of certain media and politicians to fuel fears of migrant and asylum seekers flooding into the country and remaining.

93. Your Rapporteur is concerned about the scare-mongering and negative perception given in certain media and political circles. One recent example of this in Switzerland has been a poster during the political campaign on naturalisation which featured different coloured hands grasping at Swiss passports. By comparison, in the United Kingdom a poster campaign in the recent run-up to elections was run by one of the political parties with the words "Are you thinking what we're thinking?" and then "It's not racist to impose limits on immigration".

<sup>42</sup> See for example "Fleeting Refuge: the triumph of efficiency over protection in Dutch Asylum Policy", Human Rights Watch, Vol. 15, No. 3 (D) – April 2003.

<sup>43</sup> It can be noted however that a significant proportion (25%) of cases refused at initial decision are not appealed against.

<sup>44</sup> Issue also raised by the Commissioner for Human Rights, see paragraph 67 of Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom (CommDH(2005)6).

94. As return policies are closely linked to public and political perception of the issue of asylum and migration, your Rapporteur has particular concerns over the power of the media and politicians to distort the situation of asylum seekers and irregular migrants. This may be in terms of their numbers, their impact on the job-market, their incidence on crime levels, their impact on resources, etc. She considers that the media and politicians have a particular responsibility to ensure that the situation of persons belonging to this group is not distorted for political or other purposes or gains. Asylum seekers, refugees and migrants should not become part of what has been described in one country as a "bidding war" between the main parties to see who could be the nastiest to persons belonging to this group. Your Rapporteur notes that now the number of asylum seekers is falling across Europe, the press and politicians are increasingly focussing on the issue of returns and removals, and attacking those at the end of the process. Your Rapporteur reiterates the importance for the press and politicians to show responsibility, and where relevant courage, when dealing with the issue of refugees, asylum seekers and migrants.

## 8. Conclusions and recommendations

95. All Council of Europe member states should have a system in place to ensure effectively the return of those who do not have any legal entitlement to remain in their territories. This should apply also to failed asylum seekers, once they have exhausted legal remedies against a negative decision to stay in the country and provided that they do not have any right to remain on other grounds. In this respect, the Dutch policy on the return of failed asylum seekers is, *prima facie*, neither exceptional nor objectionable. The issues raised in relation to the Dutch case, as well as those raised in the country comparison with Switzerland and the United Kingdom, should encourage other Council of Europe member states to reflect on the effectiveness of their own return policies.

96. Your Rapporteur believes that the effective return of those who are not in need of international protection and have no other right to reside in a Council of Europe member state is an integral part of asylum policy: The failure to implement return in these cases poses a serious threat to the integrity of the asylum institution and to the credibility of the asylum system.

97. With these considerations in mind, your Rapporteur wishes to recall that the recently revised Dutch policy on asylum seekers to a large extent complies with Council of Europe standards: returnees have received an individual assessment of their asylum claim; they have had the possibility of having their case reviewed; they have or will be given the opportunity to make representations on particular issues which should, in their opinion, be sufficient grounds to remain in the Netherlands; forced returns will be implemented as a last resort while voluntary returns will be favoured; failed asylum seekers themselves should co-operate towards their return; detention will be subject to judicial oversight. In addition, the Dutch government has decided to support the returnees, through counselling and financial assistance.

98. On the other hand, some aspects of the recently revised Dutch policy do give rise to concerns as do some of the aspects of returns featuring in Switzerland, the United Kingdom and other countries. Your Rapporteur acknowledges that an amnesty or regularisation programme accompanies the return plan and that some failed asylum seekers will be given, through a discretionary power of the Minister of Immigration and Integration, the right to remain in the Netherlands due to the special circumstances of their case. Your Rapporteur, however, is concerned that:

- i. the amnesty or regularisation programme does not refer to any special category of failed asylum seekers, such as those having a strong link with the Netherlands (for example failed asylum seekers who have been in the country for a long period of time, or those who were born in the Netherlands, have lived in the country for some years, have been to school there and have never been to the country of origin of their parents). While the Minister of Immigration and Integration retains a discretion for acceptance of individual cases where there are special circumstances, this discretion is only applied in a limited number of cases;

ii. the policy does not provide for stronger safeguards for failed asylum seekers coming from countries or regions where there are conflicts (such as Chechnya) or no state authority (such as Somalia) or where the humanitarian situation is volatile (such as Afghanistan and Iraq);

iii. there are no sufficient indications that detention will not be resorted to as a punitive measure to sanction those who do not co-operate or who cannot prove that they co-operate sufficiently in order to facilitate their own return; some categories of failed asylum seekers should not be detained, especially children; detention should be used only when it is necessary – for instance because there is a real risk that the person concerned will abscond to avoid return – and on the basis of an individual assessment of each case; a clear commitment should be made from the part of the government not to prolong detention beyond a reasonable time taking full account of the requirements of Article 5 of the European Convention on Human Rights in relation to liberty of the person;

iv. for some categories of failed asylum seekers who cannot be returned, it should not be possible to deprive them completely of access to housing, social benefits and health care, even when the impossibility of return can be attributed to a deliberate behaviour of the persons concerned. In these cases, however, on the basis of an individual assessment, the authorities may decide a reduction of social benefits, in compliance with Recommendation No. R (99) 12 of the Committee of Ministers on the return of rejected asylum seekers but not to a point where it impacts on their human dignity;

v. while acknowledging the positive steps in supporting voluntary return programmes by the authorities, for example through return aid and return counselling, further support should be given to these programmes in preference to detention and forced returns;

vi. accelerated procedures are being increasingly used across Europe, and not just in the Netherlands, to deal with asylum seekers in a large number and variety of cases. This heightens the risk that speed takes preference to fairness in the asylum process;

vii. the media and politicians are sometimes responsible for distorting information on the situation in relation to refugees and migrants and the threat they may pose for society;

viii. increasingly strict measures are, in general, being taken against failed asylum seekers and irregular migrants with the result that these persons risk greater marginalisation at the edge of society and in certain circumstances find themselves being “shunted” from one country to another.

99. On this basis, your Rapporteur has drafted a Preliminary draft Resolution containing recommendations to the Government of the Netherlands. These recommendations also have relevance for other Council of Europe member states whose return policies present similar features.

*Reporting Committee:* Committee on Migration, Refugees and Population

*Reference to Committee:* Doc. 10173, Reference 2967 of 30 April 2004

*Draft resolution* unanimously adopted by the Committee on 6 October 2005

*Members of the Committee:* Mr Mevlüt **Çavuşoğlu** (Chairperson), Mrs Tana **de Zulueta** (1<sup>st</sup> Vice-Chairperson), Mr Doros **Christodoulides** (2<sup>nd</sup> Vice-Chairperson), Mr Jean-Guy **Branger** (3<sup>rd</sup> Vice-Chairperson), Mr Pedro **Agramunt**, Mrs Lale Akgün, Mr Gulamhuseyn Alibeyli (alternate: Mr Bakhtiyar **Aliyev**), Mr Akhmed Bilalov, Mrs Oksana Bilozir, Mrs Mimount **Bousakla**, Mr Paul Bradford, Mr Ivan **Brajović**, Mr Márton **Braun**, Mr Christopher **Chope**, Mr Dessislav **Chukolov**, Mr Boriss **Cilevičs**, Mrs Minodora Cliveti, Mrs Elvira **Cortajarena**, Mr Franco Danieli, Mr Joseph Debono Grech, Mr Taulant Dedja, Mr Nikolaos **Dendias**, Mr Abilio Dias Fernandes, Mr Karl Donabauer, Mrs Lydie Err, Mr Mats **Einarsson**, Mr Valeriy Fedorov, Mrs Daniela Filipiová (alternate: Mr Tomáš **Jirsa**), Mr Karl Theodor Freiherr von und zu Guttenberg, Mrs Margaret Frimannsdóttir, Mr John **Greenway**, Mr Andrzej **Grzesik**, Mr Andrzej **Grzyb**, Mr Ali Riza **Gülçiçek**, Mr Michael **Hagberg**, Mr Doug **Henderson**, Mrs Jelena **Hoffmann**, Mr Ilie **Ilaşcu**, Mr Tadeusz **Iwiński**, Mrs Corien W.A. Jonker (alternate: Mr Ed van **Thijn**), Mr Oleksandr Karpov, Mrs Eleonora Katseli, Mr Tibor Kékesi, Mr Dimitrij **Kovačić**, Mr André **Kvakkestad**, Mr Petr **Lachnit**, Mr Geert **Lambert**, Mr Jean-Marie Le Guen (alternate: Mr Denis **Jacquat**), Mr Tito Masi, Mr Jean-Pierre Masseret, Mrs Ana Catarina **Mendonça**, Mr Morten **Messerschmidt**, Mr Xhevdet Nasufi, Mr Giuseppe Naro, Mr Gebhard **Negele**, Mr Pasquale **Nessa**, Mr Kalevi Olin, Mr Ibrahim **Özal**, Mr Gheorghe Popa, Mr Cezar Florin Preda, Mr Alojz **Přidal**, Mr Gabino Puche (alternate: Mr Adolfo **Fernández Aguilar**), Mr Milorad Pupovac, Mr Martin Raguž, Mr Anatolij Rakhansky, Mr Marc **Reymann**, Mr Branko Ružić, Mrs Katrin Saks, Mrs Naira **Shakhtakhtinskaya**, Mr Luzi Stamm (alternate: Mrs Rosmarie **Zapfl-Helbling**), Mrs Terezija Stoisits (alternate: Mr Ewald **Lindinger**), Mr Michael Stübgen, Mrs Elene Tevdoradze, Mr Tigran **Torosyan**, Mrs Iliana Yotova, Mrs Ruth-Gaby **Vermot-Mangold**, Mr Arno Visser (alternate: Mr Leo **Platvoet**), Mr Akhmar Zavgayev, Mr Emanuelis **Zingeris**, Mr Vladimir Zhirinovskiy (alternate: Mrs Vera **Oskina**).

N.B.: The names of the members who took part in the meeting are printed in bold

*Secretariat of the Committee:* Mr Halvor Lervik, Mr Mark Neville, Ms Dana Karanjac and Ms Géraldine Grenet