

IN THE MATTER OF
THE PROPOSAL BY THE UNITED KINGDOM TO ESTABLISH
TRANSIT PROCESSING CENTRES IN THIRD COUNTRIES AND
THE COMPATIBILITY OF THIS PROPOSAL WITH THE UNITED
KINGDOM'S OBLIGATIONS UNDER THE 1951 REFUGEE CONVENTION
AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

OPINION

1. I am asked to consider the legality of the United Kingdom's proposal to set up Transit Processing Centres in a country or countries outside the European Union in terms of the United Kingdom's obligations under the 1951 Convention on the Status of Refugees (the "Refugee Convention") and its 1967 Protocol and under the European Convention on Human Rights (the "ECHR").

FACTUAL BACKGROUND

2. On 10th March 2003 the Prime Minister wrote to the Prime Minister of Greece making a number of proposals designed to deal with what he saw as the deficiencies in the present asylum processing system at a global level and asked that they be discussed at the forthcoming Brussels European Council. . He attached a document entitled *New International Approaches to Asylum*

Processing and Protection to his letter. One of the proposals contained in the document was the establishment of Transit Processing Centres (“TPCs”) just outside the European Union. Asylum seekers who arrived in the European Union to claim asylum or who claimed after their arrival would be sent immediately to a TPC where their application would be considered. The TPCs would be managed by the International Organisation for Migration and UNHCR would be expected to assist by providing a screening system. Asylum seekers would be detained for the period during which their applications were being considered. Those accepted to be refugees would then be resettled within the European Union on a burden sharing basis and those deemed not to be refugees would be returned to their countries of origin. No right of appeal to any judicial body was proposed.

3. A subsequent statement made by the Home Secretary¹ made it clear that this radical proposal would create a new system for dealing with asylum seekers and not merely complement the system created by the European Union directives on Minimum Standards for the Reception of Asylum Seekers in Member States and Temporary Protection and the EURODAC regulation.
4. The United Kingdom’s proposal was first discussed by the Justice and Home Affairs Ministers in March 2003² Justice and Home Affairs Commissioner Vittorino introduced the issue at their meeting in June³. The European Commission has considered the United Kingdom’s proposal but has stated that

¹ *Home Secretary Statement on Zones of Protection* 27th March 2003 STAT 010/2003

² The Justice and Home Affairs Council meeting in Veria, Greece, 27/28 March 2003

³ The Justice and Home Affairs Council meeting in Luxembourg, 5/6 June 2003

it cannot take any position on TPCs until various legal, financial and practical questions have been resolved.⁴

5. The UNHCR does not support TPCs situated outside the European Union but has proposals of its own for a pilot scheme where closed reception facilities which complied with the Reception Facilities Directive in one or more selected locations within the European Union. It would be used to process asylum applications from nationals of countries not deemed to give rise to the need for surrogate international protection and, therefore, to be manifestly unfounded.

6. The EU Summit in Thessaloniki did not give its backing to the proposal but the Home Minister, Beverley Hughes announced on 20th June 2003 that the United Kingdom government would still continue with its proposals for a pilot TPC scheme in consultation with the UNHCR and other member states.

SUMMARY OF OPINION

7. It is our opinion that :

(1) Automatic removal of asylum seekers to a location outside of the European Union before substantive consideration of their application for asylum would not conform with internationally recognised human rights and refugee protection standards and is likely

⁴ *Towards more accessible, equitable and managed asylum systems* Communication from the

to be in breach of the United Kingdom's international obligations under the Refugee Convention..

- (2) Removal of asylum seekers to a TPC is likely to give rise to a serious possibility of a breach of the European Convention on Human Rights.

THE REFUGEE CONVENTION

8. The United Kingdom government asserted in *New International Approaches to Asylum Processing and Protection* that it was not obliged by the terms of the Refugee Convention to process an asylum seekers application within its own geographical jurisdiction.
9. That is true to a limited extent. The Refugee Convention does not impose an obligation on a state to grant asylum to someone who is a refugee within the Convention definition but Article 33 obliges it to not return any refugee to the frontiers of territories where his life or freedom would be threatened for any of the convention reasons set out in Article 1. In practice this means that an asylum seeker may be sent to a "safe" third country without the receiving state considering the substantive merits of his or her application but they do have to consider the safety of removal to the "safe" country. Secondly, there are situations, as in the European Union, where a group of countries enter into Treaty obligations to determine which of those countries has the first responsibility to consider the merits of the asylum application. In all other

cases, in our opinion, the receiving state is under an obligation to consider and determine the refugee claim.

10. We speak of an obligation to consider. What gives rise to this obligation ?
Firstly, individuals have a right to seek asylum in another country. The preamble to the Refugee Convention refers to the Universal Declaration of Human Rights and Article 14(1) of the UDHR specifically states that :
“Everyone has the right to seek and to enjoy in other countries asylum from persecution”. The right to seek asylum in another country is at least implicit in the terms of the Refugee Convention, when read together with Article 14. .
No-one can be a refugee under Article 1, unless he or she is outside their country of nationality (or in the case of a stateless person of the country of his habitual residence). Thus the very definition of a refugee is posited on a person who is outside their own country and who is exercising a right to seek asylum in another country. That it is a right and not a mere privilege is derived from Article 14 of the UDHR.

11. If there is a right to seek asylum in another country recognised under international law, there is, in our opinion, a corresponding duty on that country at least to consider that application and in doing so to act fairly and consistently as between one asylum seeker and another. The duty to consider has given rise to internationally applied practices and procedures, the key element of which can be found in the UNHCR Handbook (see dicta in Court of Appeal in *Robinson v Secretary of State for the Home Department* [1997])

Imm AR 568, quoted in Macdonald's *Immigration Law and Practice* 5th Edition at 12.14

12. Regionally agreed treaties may determine which of a number of alternative states has first responsibility to consider an asylum application, as in the case of the Dublin Treaties, to which the United Kingdom is a signatory. Responsibility, however, is always that of the state.
12. The present proposal would remove that responsibility from the United Kingdom as if an asylum seekers application is accepted he or she will not be entitled to asylum in the United Kingdom but merely to some form of resettlement within the European Union.
13. In our opinion, the effect of the obligation to consider all asylum applications implies a further obligation which is to require the state in which asylum seekers claim asylum to offer them at the very least temporary admission until the state has assured itself that their return to a third country or to their country of origin would not be in breach of Article 33.
14. This is certainly the advice given by the UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status⁵ where it is noted that the Executive Committee of the High Commissioner's Programme has recommended that one of the essential requirements of a safe asylum processing procedure is that :

⁵ Paragraph 192 (vii) of the Handbook

“The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority...unless it has been established by the authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending”.

15. It is also the approach, which has been universally adopted, in the absence of additional regional conventions or agreements.
 16. In contrast to this internationally accepted approach there is now the United Kingdom government’s bald assertion that it is not obliged to give an asylum seeker temporary admission and is not even obliged to give individual consideration to his or her application for asylum. In our opinion, the proposed TPC scheme does not conform with internationally recognised refugee standards and would breach the United Kingdom’s international obligations, as outline above.
 18. In our opinion, the United Kingdom’s proposal would in effect repudiate the essential relationship between asylum seeker and signatory state and off load any responsibility onto the UNHCR and IOM.
 19. This would in turn have two additional consequences, which are relevant to the requirement to interpret an international treaty in good faith. Although,
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the UNHCR would be properly accountable through the United Nations for any decisions it may make it has neither the necessary structure nor the massive resources necessary to take on responsibility for all refugees seeking to enter the European Union.

20. In contrast, the IOM could be resourced to manage such centres but it would not be accountable to the UN General Assembly for its actions. It is an intergovernmental organization which is accountable to its member states. It has previously stated that it is not bound by any international human rights treaties and is exempt from its member states' international legal obligations, including the prohibition against refoulement⁶.

22. Furthermore, the TPCs will not be located in countries with which there is any such further international treaty or even any track record for protecting the human rights of its own citizens. It has been suggested that TPCs may be located in Albania, Croatia, Iran, Morocco, Romania, Russia, Northern Somalia, Turkey and Ukraine. As Human Rights Watch noted in its recent commentary on the United Kingdom's proposal in all of these states serious questions have been raised about their own compliance with international human rights norms⁷.

23. United Kingdom may rely on the fact that there will be a contractual relationship between the countries using TPCs and those running them.

⁶ IOM Legal Services *IOM and Effective Respect for Migrant Rights* November 1997

⁷ *An Unjust "Vision" for Europe's Refugees* Human Rights Watch Commentary on the UK's "New Vision" Proposal for the Establishment of Refugee Processing Centres Abroad June 17 2003

However, in my opinion, the “good faith” requirement would mean that the United Kingdom government would have to show that it had a realistic belief that the organisations involved in the TPCs were capable of providing the necessary surrogate protection during the determination process. The very proposed locations of the TPCs in countries who themselves have public order problems and where internationally accepted human rights norms are not universally accepted or applied would call this into doubt.

24. In addition, the present proposals for the manner in which asylum applications would be processed within these centres falls very far short of the Minimum Standards Directive to be applied in Europe and of the procedures recommended by the UNHCR in its Handbook.

27. We are fortified in our view about the legality of the proposed TPC scheme by the views on it expressed by the UNHCR. The special competence of the UNHCR to interpret the developing meaning of the Refugee Convention as a result of its on-going involvement with its interpretation internationally must also be given due weight (see Macdonald, *op cit*, at paragraph 12.14). The UNHCR does not accept that processing outside the European Union would be in conformity with the Refugee Convention and neither does it accept that inside the European Union it is a suitable procedure for any but manifestly unfounded claims. One of the key aims of their recent *Agenda for Protection* was the improvement of national asylum processing systems. It has also made a commitment to developing *Guidelines on the Reception of Asylum-Seekers* to be used by individual countries. Its commitment to maintaining the key

principles of refugee protection is in sharp contrast to the United Kingdom scheme, which by eroding those very principles, risks undermining the entire protection regime, contrary to its international obligations.

31. Furthermore, we would also agree with Human Rights Watch⁸ that holding asylum seekers in closed detention centres automatically and without consideration of any individual's circumstances (unless they are an unaccompanied minor or suffering from a disability) is likely to be a breach of Article 31 of the Refugee Convention as it amounts to an arbitrary penalty arising from the mere fact of applying for asylum. Since these persons are being so detained at the behest of the UK government, there may also be a breach of the European Convention on Human Rights, to which we now turn.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

32. It is difficult at this stage to predetermine the likely conditions of detention, the conditions in the country of detention, or the extent to which these centres will become prey to the attentions of criminal gangs of human traffickers. Any advice, must, therefore, be somewhat provisional. In our opinion, breaches of Article 3 of the ECHR are likely to occur in two separate ways as a result of the proposed TPCs. Firstly, as a result of the conditions of detention of the asylum seekers in the centres themselves, and, secondly as a result of the inadequacies in the procedures to be adopted to determine protection needs.

⁸ See footnote 9 above

33. In relation to the conditions of detention, there must also be a serious possibility that the removal of an asylum seeker to a TPC would give rise to the sort of intense mental suffering, diminution of human dignity or arousal of feelings of fear, anguish or inferiority that would amount to a breach of Article 3 of the European Convention on Human Rights⁹.
34. The breach would arise in the context of asylum seekers being swiftly removed to a country with which they are likely to have no connection, where they will be detained in a closed camp and where they will not be able to have contact with family or friends who may have already reached the country of initial refuge. In the TPCs, they will not be guaranteed the right to any legal representation or access to a court of law and will have neither the time nor the facilities to make the necessary preparations to support their applications for asylum.
35. There has been no indication that the standards¹⁰ accepted in the United Kingdom in relation to conditions of detention for immigration detainees will be met or that UNHCR standards will be applied¹¹.
36. Secondly, there would appear to be no provision for any assessment of whether an asylum seeker is entitled to protection for other humanitarian reasons or in order to comply with other international human rights obligations. The obvious consequence of this is that some failed asylum

⁹ *Pretty v United Kingdom* E Ct HR 29th April 2002

¹⁰ Draft Operating Standards being developed by the Immigration and Nationality Department

seekers will be returned to their countries of origin and face torture and death as a result of persecution arising from non Refugee Convention reasons in clear breach of Article 3 of the ECHR.

37. The fact that the detention experienced would be arbitrary and would arise from the mere act of claiming asylum would further create the necessary conditions for a breach of Article 3. It should be noted that the UNHCR does not accept that in principle asylum seekers should be held in detention¹². The United Nations Human Rights Committee defines detention as arbitrary where there is no basis in law and where confinement is characterised by inappropriateness, injustice and disregard for the due process of law¹³.
38. There will also be a large number of asylum seekers who if not granted refugee status and resettled in Europe will remain indefinitely in the TPCs as they will not be returnable to their countries of origin for different practical or legal reasons. In such cases, prolonged detention would clearly be in breach of common law standards accepted in the courts here.

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¹¹ *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* UNHCR February 1999

¹² UNHCR Revised guidelines see footnote 14

¹³ *Woman Mukong v Cameroon* Communication No. 458/1991