

## SUMMARY IN ENGLISH

# Beyond the horizon of 'Amsterdam'

*Report on European policy on asylum, labour and family migration after 1 May 2004, for the purposes of the Dutch Presidency*

## Introduction

Migration policy is a major item on the European Union agenda. The number of migrants seeking asylum has fluctuated in recent years between 360,000 and over 400,000 annually. The number of labour migrants is unknown, but is estimated at some hundreds of thousands per year. Large numbers enter the EU for the purposes of family reunification, including family formation. These figures form the background to this ACVZ report on Europe and migration.

The obvious course to follow is further cooperation in this field within the EU, but this does not mean that complete harmonisation at European level of the rules applying to migration would solve every single problem. The desired degree of harmonisation depends on the question of whether the emphasis lies on the interests of the state or on the rights and interests of the individual alien. The ACVZ has developed a framework of criteria to assess this. Applying these criteria leads to a differentiated approach to the policy field, according to which asylum rules must be further harmonised, but rules applying to labour and family migration not - or at least not yet. The ACVZ would advise the government to opt for such an approach during the forthcoming Presidency.

This report has been published with a view to the Dutch Presidency of the EU in the second half of 2004, but the proposals it contains extend beyond that horizon.

## Criteria: emphasis on the member state or the migrant?

Admitting aliens can have far-reaching economic, social and cultural consequences for the society they come to reside in. The government's duty of care vis-à-vis that society obliges it therefore to set conditions for admission and residence. In order to fulfil this task, the state must be able to pursue its own national policy. From this perspective, the emphasis lies on the nation state. However, if human rights are at issue, measures to safeguard those rights must be shielded from national policy considerations. Human rights instruments offer a framework for such protection. Nevertheless, they allow their signatories a considerable margin for national interpretation and balancing of interests. Harmonising legislation and policy principles at high level can prevent the legal position of individuals becoming overly dependent on the political climate, the state of the economy and so on. Here the emphasis lies on the rights of the individual. It is somewhere between these extremes that the balance has to be found which will determine the necessary degree of harmonisation.

The ACVZ proposes the following basic criteria.

1. The weaker the position of the person concerned or the more his/her human rights are at stake, the more the emphasis must lie on a high level of harmonisation.
2. The greater the social consequences of the admission of third-country nationals to the member state, the broader the member states' margin for pursuing national policy must be.

3. The longer a third-country national belongs to a particular society, the stronger his/her claim on equality of rights with EU citizens and the greater the need for harmonisation.
4. The more consequences rights granted to third-country nationals by a member state have for other member states, the greater the need for a relatively high level of harmonisation.
5. The more the interest at issue is a common one that can be better pursued if the member states do not operate independently, the more justification there is for rules set at EU level.

The application of these criteria, viewed in relation to each other, leads to the following standpoint.

## Asylum policy

The reception and integration of asylum seekers and those entitled to asylum entails substantial costs for the receiving state. In principle, therefore, the state has a legitimate interest in pursuing its own policy. What is more, such national policy is so detailed and subject to change that full harmonisation is impossible. On the other hand, human rights play a crucial role and the asylum seeker is in a vulnerable position. Without a considerable degree of harmonisation negative policy competition will continue to exist. Partly on the basis of the figures available, we must assume that there is a 'water-bed effect' in operation, caused by restrictive measures taken by the member states. The importance of uniform application of human rights instruments and the need for a just and effective asylum system require a high level of harmonisation. The common European asylum system at present under construction is an excellent first step, but achieves insufficient harmonisation. The ACVZ therefore strongly urges the Netherlands to undertake initiatives during and after the Presidency that will lead to greater degree of substantive and procedural harmonisation than at present envisaged in the draft asylum directives.

Initiatives aiming at reception and selection in the region can be of value. The risks they entail are no justification for failing to explore the options. The ACVZ considers that the necessity for a Community approach is ultimately inevitable, to prevent the flow of asylum seekers being channelled towards those member states that do not pursue a policy of reception and selection in the region. Furthermore, the ACVZ would stress the fact that states that are party to the Geneva Convention on Refugees will always be expected to meet their treaty obligations in full. Guarantees of protection are therefore essential.

## Labour migration

Human rights play no major role in labour migration, mainly because there is no right to admission in order to work. The policy of one member state has in principle little influence on that of another. Only once labour migrants can migrate without restrictions to another member state does the receiving state experience the consequences of the first state's admissions policy. Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents confers the right to free movement only after five years and enables member states to set certain conditions. In addition, the experience of the last five decades shows that only around 2% of the European labour force migrates within the Union. National interests may be at issue in terms of the labour market

and socio-economic consequences (social security system, pensions, integration). Consequently, there is no need now or in the near future for a high level of harmonisation. The differences between the situations in the various member states are too marked for that. It is however an opportune moment to monitor best practices in labour migration policy in the different member states.

## Knowledge migrants

The ACVZ does advocate further harmonisation of legislation on the admission of knowledge migrants who, as experience shows, make a substantial contribution to the development of the economy and the knowledge economy. Such harmonisation is in line with the EU's plans for a European knowledge-based economy (the Lisbon strategy). In the view of the ACVZ, the European Union as a whole must improve its competitive position in relation to other economic power blocs, particularly the United States. In this context the ACVZ advocates the creation of a European employment and residence permit to facilitate the migration of this category of migrants from one country of the European Union to another. Member states would retain the power to pursue their own supplementary policy to attract knowledge migrants within the framework of the Lisbon strategy (positive policy competition).

Position of third-country nationals who are long-term residents

The ACVZ takes the view that if aliens reside for a long period in the Union, their position must to a large extent be made equal to that of EU citizens. Nevertheless, it does not consider it desirable to take measures to achieve this in the short term. The consequences for migration of the present major enlargement of the European Union and the possible impact of the right to free movement of aliens on labour mobility within the EU cannot as yet be clearly predicted. For these reasons, the ACVZ recommends that one of the central themes on the agenda for the Dutch Presidency should be the monitoring and analysis of these effects. The outcome of such a study could form the basis, if appropriate, for new policy.

## Illegal immigration

The ACVZ sees the presence in Europe of a large group of illegal aliens as a serious and intractable problem. Community solidarity, particularly in the financial sense, is recommended in terms of measures on the external borders and common efforts to make illegal employment unattractive to employers.

## Family reunification policy

Alongside asylum and labour migration, family migration is the most important legal migration channel. This policy area is dominated by the right to respect for 'family life' as laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The article allows for restrictions on the basis of national interest. An analysis of the case law of the European Court of Human Rights (ECtHR) produces the following picture.

1. A general obligation to respect choice of domicile or to accept the settlement of marriage partners who are foreign nationals does not exist.

2. An obligation to grant admission or not to expel calls for a balancing the interests of the national community and the right to family life.
3. In weighing up those interests it is important to ascertain whether the persons concerned have a genuine option of exercising their right to family life elsewhere.
4. The state's margin of discretion regarding the admission of family members depends on whether family ties have already been established in the country of origin.
5. An obligation to grant an alien admission in the context of family reunification has been accepted by the ECtHR in only a single case.

The ACVZ thus concludes that the following is necessary:

- a high level of harmonisation in the matter of family reunification for asylum migrants (in such cases there is usually no choice available regarding the country where family life can be pursued);
- a basic level of harmonisation in relation to the other forms of family reunification.

European family reunification policy as laid down in the current directive on the right to family reunification establishes an acceptable balance between the interest of the state in being able to pursue (to a degree) its own policy, and the interests of aliens who invoke the fundamental right to family life. The ACVZ therefore recommends that current policy should remain unchanged.

## European Court of Justice

The risk of overloading the European Court of Justice in relation to European asylum and migration policy must not, in the ACVZ's view, be seen as unacceptably high at the present moment. This estimate is based on the knowledge that the number of cases in a comparable area (i.e. the free movement of EU citizens), where there are already no restrictions on proceedings, remains limited. Furthermore, there are only grounds for requesting a preliminary ruling in the case of obscure legislation in specific cases where there is a risk that rules will be applied that fall short of EU legislation. The preliminary mechanism allows national courts to put questions to the Court of Justice regarding the interpretation and application of European legislation. The Court cannot assess the facts or circumstances of individual cases in the light of human rights norms.

The ACVZ notes, however, that the present mechanism is too time-consuming (taking on average over two years). This can lead to serious problems in the field of migration since the answer to a preliminary reference may be decisive for the disposal of an individual case. For these reasons, it seems inevitable that there will be delays, since the interests of the individual involved in the proceedings are at stake.

The ACVZ therefore suggests a number of ways to reduce the length of preliminary proceedings:

1. creation of an accelerated procedure.
2. restrictions on the submission of written and oral observations.
3. creation of a specialised chamber dealing with European asylum and migration law at the Court of First Instance.
4. making appeal to the Court of Justice possible only on points of law.

These suggestions would require amendment of the Court of Justice's Statute and/or its Rules of Procedure. The impact of these proposals should therefore be mapped out in the near future and if necessary the Netherlands should take steps to further their achievement.

The ACVZ would point out that there are a number of specific technical problems in the draft asylum procedure directive and the family reunification directive, which will require attention in the near future.

### **The report sets out the following recommendations and points of interest:**

- 1 It is vital for European policymaking and for individual countries to have consistent, comparable and up-to-date information on migration flows per country. Eurostat has indicated that it will make proposals for European legislation obliging every member state to collect such information and deliver it to Eurostat within specific time limits. In the ACVZ's view, the Netherlands should make every effort during the Presidency to convert these proposals into legislation. Partly in view of enforceability, it would be preferable to couch this in the form of a regulation pursuant to article 66 of the EC Treaty. See p. 18 of the report.**
- 2 During the Dutch Presidency, particular attention should be focused on introducing, implementing and consolidating any legislation adopted by that time and on concluding negotiations and enacting any legislation as yet unadopted. See p. 17 of the report.**
- 3 Further elaboration of Article III-169 of the Draft Constitution (the 'solidarity article' enabling measures to be taken in the field of burden-sharing) is of vital importance to the success of any future European migration policy. A common policy rests on the member states proving that they are genuinely committed to cooperation and in the interests of such cooperation are prepared to relinquish some of their national interests. See pp. 28 and 35 of the report.**
- 4 The Dutch Government must take an active role aimed at achieving further harmonisation in the field of asylum policy and further definition of the international treaty norms in this area. The ACVZ considers the current raft of proposed and adopted measures a first step towards the establishment of a European asylum policy, but would note that this is at minimum level. It would recommend further harmonisation of the proposed measures in terms of substance and procedure, and amendment of legislation already adopted to this end. In this way individual rights will be safeguarded and conflict with international treaty law pre-empted as far as possible. See p. 23 of the report.**
- 5 The ACVZ considers a well thought out asylum qualification directive and asylum procedure directive indispensable to the establishment of a European asylum policy. In this context, it will be necessary to review and amend both draft directives to take account of the points raised in the report. See pp. 24-27 of the report.**
- 6 The ACVZ believes that the scope for protection and application assessment in the region merits further exploration, but would stress that the considerations and points of interest raised by the ACVZ as set out in the report must be taken into account in this context. See pp. 29-31 of the report.**

- 7 In the view of the ACVZ, a high level of harmonisation of the rules on admission of labour migrants is not a logical step either now or in the near future. On the one hand, differences in the economic situation in the various member states are significant. On the other, there is uncertainty regarding the consequences of the accession of ten new member states for the economy and the internal market. Until this has become clearer, it would be wise to confine measures at European level to monitoring best practices in labour migration policy in the different member states.  
See p. 23 of the report.
- 8 Measures to make the EU as a whole competitive in relation to other economic blocs are necessary in order to attract highly qualified immigrants. More specifically, the ACVZ recommends the development of an EU employment and residence permit. This should not lead to a situation in which competition between the member states becomes impossible. See p. 34 of the report.
- 9 The ACVZ recommends that the ultimate goal must be for third-country nationals to receive equal treatment, in all important respects, with EU citizens, and that they should therefore in the longer term be granted more rights than they have at present. The time for such far-reaching equality will only be ripe when it is clear what consequences a right to free movement for third-country nationals will have. Account must also be taken of the impact of free movement for nationals of the new member states. Research is necessary on all these issues. New policy could then be developed, if appropriate, on the basis of the outcome of such a study, which should also focus on developments in labour mobility as a result of the accession of the ten new member states on 1 May 2004. See p. 35 of the report.
- 10 New measures aiming to intensify and strengthen internal controls in order to combat illegal residence could be launched through the exchange of best practices and open coordination, given that the member states will see the adoption of European legislation in these matters as infringing on their freedom to pursue their own policy. Such measures could include steps to make it more difficult and less profitable for employers to employ illegal aliens. See p. 36 of the report.
- 11 During the Dutch Presidency a debate should be launched on the scope for the use of the instrument of regularisation and consequences of such use for the member states. The European Commission should be requested to perform a study of this issue.  
See p. 36 of the report.
- 12 Finally, the ACVZ recommends that the measures set out in this report should be explored and developed so that a solution can rapidly be put in place should the workload of the ECJ prove to be too heavy. See p. 42 of the report.