

Introduction

This report is concerned with the issue of access to justice for migrants and asylum seekers within Europe. It deals in particular with the identification of means and measures – both existing and new – for facilitating and ensuring such access for those persons falling into these two categories. The report has been prepared at the request of the European Committee on Legal Co-operation (CDCJ) of the Council of Europe further to the adoption by the European Ministers of Justice of Resolution No. 1 on *access to justice for migrants and asylum seekers* at their 28th Conference.¹

The importance of the full achievement of access to justice for all persons cannot be understated. Without this the rule of law is undermined because the law concerned favours some over others without any rational and objective justification. Recognition that some sectors of society are particularly disadvantaged and vulnerable is a crucial first step towards achieving access to justice for them. Its actual realisation is, however, much more difficult as it requires not just a change in the rules but also in practice, as well as the provision of resources, whether new or reallocated. This can be particularly difficult where the group facing problems in securing access to justice is comprised of outsiders such as migrants and asylum seekers, even if the circumstances of many, if not all, makes a compelling case for treatment. An additional factor in the vulnerability of many migrants and asylum seekers will be their difficulty in negotiating the requirements of legal processes that they either do not comprehend on account of their age or linguistic incompetence or cannot cope with because of trauma or emotional distress.

The report begins by defining the two key terms – access to justice and migrants and asylum seekers – and then examines the scope of the rights that should be enjoyed. It then looks at the various means and requirements under regional and international law for securing the realisation of those rights and providing remedies where the former does not happen. Thereafter it considers both the shortcomings of regional and international standards, the considerations that lead to the non-implementation of established standards at the national level and some good practices that might be emulated. Finally it suggests what action might usefully be taken by the Council of Europe to improve the present situation.

1. Lanzarote, October 2007.

Although there are extensive and important standards concerning access to justice for migrants and asylum seekers, there are also gaps in their coverage and failures to implement them in practice. The report proposes the adoption of a recommendation by the Committee of Ministers to clarify and elaborate the requirements concerning access to justice for migrants and asylum seekers so that these can be more readily appreciated and implemented.

Definitions

The terms *access to justice* and *migrants and asylum seekers* are both subject to a variety of meanings and understandings. It is important, therefore, to clarify the way in which they are being used in this report.

Access to justice

There are two main approaches to the use of the term *access to justice*. At the very minimum – and indeed as originally conceived – it is a term seen as being concerned with the means for securing vested rights, particularly through the use of courts and tribunals.² From this perspective the particular focus has been on developing means of overcoming the obstacles faced by certain groups in making use of the processes established to provide redress where rights are considered not to have been respected. These have included public funding for legal advice and representation, special procedures (such as class actions and public interest litigation), simplified procedures (for smaller claims) and less judicial procedures (such as mediation). It is important, however, that such processes are a means to obtaining respect for rights or appropriate remedies where this has not occurred and do not entail any surrender of entitlements unless this is done pursuant to an act of consent that is both genuine and informed.

Concern about the cost of state funding for lawyers in private practice as a means of facilitating access to justice has also led to the awarding on a competitive basis to only certain law firms of contracts for the provision of legal services, the promotion of the use of conditional and contingency fees to finance litigation, the use of paralegals in place of lawyers for certain types of problems and support for the creation and operation of specialist centres (whether public entities with a degree of independence or genuinely non-governmental bodies) to provide advice and representation.³

Although the attention of those concerned with this view of access to justice was initially given to processes relating to the enjoyment of private law rights, it has come to be seen as equally relevant to the processes dealing with the exercise of constitutional and human rights and the determination of criminal responsibility.⁴ The way in which witnesses are treated in administrative, civil and criminal proceedings might also be regarded as an element of access to justice in the procedural sense, particularly as this may impact adversely on rights which they may themselves have.

2. See M. Cappelletti and B. Garth. "Access to justice: the worldwide movement to make rights effective – a general report" in M. Cappelletti and B. Garth (eds.) *Access to justice: a world survey* (Milan: Dott. A. Guiffre Editore, 1978) (vol. 1, book 1).

3. See, e.g., *Modernising justice: The government's plans for reforming legal services and the courts*, Cm 4155 (London: Lord Chancellor's Department, 1998).

4. *Ibid.*

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However, the term *access to justice* has increasingly been defined in a somewhat broader manner than the essentially procedural approach just described, with the focus being more on ensuring that legal and judicial outcomes are themselves “just and equitable”. The broader view of access to justice can thus be seen as being particularly concerned with the substantive aspect of justice – notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives.⁵ It may thus be concerned as much with the ability to seek and exercise influence on law-making as with ensuring access to law-implementing processes and institutions.⁶

At the same time changes to substantive rights may be essential in some instances so that more effective procedural arrangements can be put in place to ensure that some forms of harm that have been suffered will then be remedied on a more widespread basis and at a lower cost. The most notable instance of this has been the replacement of civil liability for motoring accidents by no-fault insurance schemes.⁷

Although the broader view of access to justice might be seen as particularly pertinent to the situation of developing countries, it is one that could also be applicable to the situation of various groups – notably the poor, persons subject to systematic discrimination and persons belonging to minorities – in the more developed context of Council of Europe member states. However, it does not seem especially relevant for the purposes of the present report since the difficulties faced by migrants and asylum seekers in those specific capacities arise generally with respect to rights that they are already guaranteed, at least at the regional or global level. Nonetheless there is some reflection in the report of the broader notion of access to justice since some instances of the need to enhance the scope of their substantive rights are noted as being required in order to ensure that they are treated fairly and with dignity in their capacity as migrants or asylum seekers.

While the more procedural approach to ensuring access to justice understandably tends to focus on overcoming formal and practical barriers to securing redress for wrongdoing, it is important that this should not be done in an entirely abstract manner. Certainly, unless there is also an awareness of the actual needs of those for whom steps to ensure access to justice are being taken, the efforts being made to assist them may well be misdirected and result in a loss of resources.⁸ Identifying these needs is, however, often handicapped by the absence of suitable empirical studies and there is often no choice but to rely upon evidence of a more impressionistic character. This is particularly so as regards the position of migrants and asylum seekers with respect to access to justice and this needs to be kept in mind when adopting reforms. Thus, while impressionistic evidence about the position of persons falling into these categories may point to various solutions of a general character for the problems that would seem to need to

5. See, e.g., UNDP, *Access to justice: practice note*, 9/3/2004, at 6.

6. See, e.g., *A framework for strengthening access to justice in Indonesia* (<http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf>) and the Access to Justice Round-Table Discussion (Johannesburg, 2003).

7. See E.L. Lascher and M.R. Powers (eds), *The economics and politics of choice no-fault insurance* (Dordrecht: Kluwer, 2001).

8. See, e.g., H. Genn, *Paths to justice: what people do and think about going to the law* (Oxford: Hart Publishing, 1999).

be addressed, gathering and taking account of more specific information about the situation in individual countries would be appropriate before implementing them.

Success in addressing the problem of access to justice in the more procedural sense is dependent in particular upon those seeking to secure their rights having appropriate and understandable information about the scope of these rights and how to access them, a readily accessible infrastructure – in both the formal and practical sense – for acquiring this information and then acting upon it, the quality in practice of the operation of this infrastructure and the confidence of those needing to have resort to the infrastructure in its utility and integrity.⁹

Notwithstanding that courts and lawyers are likely to remain the pre-eminent means of ultimately achieving access to justice, it has already been seen that the manner in which they are provided does not have to be based upon the classical model of private litigation. Moreover awareness of rights and good quality decision-making by the relevant public officials which is understood and recognised as having legitimacy can ensure that justice is achieved without the delay and expense entailed in any form of dispute settlement process.

There may be an especial need for some tailor-made arrangements in the case of migrants and asylum seekers who will for instance, include persons who have rather limited linguistic capabilities, are subject to restrictions on their liberty and may be the object of proceedings for removal with only short deadlines for possible challenges. Certainly such factors may render more traditional forms of legal advice and representation ineffective in practice.

Migrants and asylum seekers

Migrants and asylum seekers are undoubtedly numerous,¹⁰ with the former comprising several sub-categories in addition to the latter.

Migrants

Migrants are taken to comprise non-nationals of a country who have moved (or are endeavouring to move) there from another one – often but not necessarily the one of their nationality – and whose presence there may or may not be lawful or regular.¹¹ Furthermore the move (or attempted move) may not always be voluntary because sometimes the persons concerned will have been brought there by force, improper pressure or deception with a view to their future exploitation and in other instances the compulsion to move may come from economic or natural disasters and environmental catastrophes.

9. See further the *Access to Justice Round-Table Discussion* (Johannesburg, 2003).

10. The UN Commission on Population estimated there to be 65 million migrants in Europe in 2005 (POP/942, 30 March 2006), while the UNHCR considered there to be 1 585 600 refugees in Europe by the end of 2007 and around 165 000 persons awaiting determination of an application for asylum; UNHCR Statistical Yearbook 2007, (UNHCR, 2008).

11. The term “irregular migrants” is one that is capable of embracing both those who have entered a country of which they are not a national in breach of the immigration laws and those whose authorisation to enter such a country has ceased to be (or is found never to have been) valid, whether because of the passage of time or because of something that they did in order to gain entry or have done subsequent to their having done so. On the desirability of using the term “irregular” rather than “illegal”, see R. Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights*, (Council of Europe, 2005), pp 8-9.

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The term would not, therefore, include those nationals of a predecessor state habitually resident in the territory over which sovereignty has been transferred to a successor state and who have not acquired its nationality.¹²

It would also not include diplomats and consular officials whose entry to the country concerned is for the purpose of representation rather than settlement, although they could become migrants if they seek to remain in the country after leaving their posts.¹³

However, there is no fixed notion of how long the move from one country to another should be. For many migrants the aim of the move may well be for a very long period, if not a permanent one. On the other hand for some the period could be fairly short, while for others – particularly asylum seekers – it may be uncertain since it is very likely to depend on circumstances over which they have no control.¹⁴ Nonetheless in all cases the notion of a “move” does carry with it a sense of settlement in the country concerned which might well be regarded as excluding persons such as tourists whose visit to a country is clearly temporary. However, the use of a tourist visa may either be the basis on which a person puts him or herself in a position to seek asylum and thus become an asylum seeker or a decision to stay is made only after arriving for what was genuinely intended to be a temporary visit. It would not, therefore, be inappropriate to exclude entirely from the definition of migrants those persons whose visits to a country start as a very temporary one.

Although migrants is a term embracing a wide variety of persons in many different situations, a number of categories might be distinguished either because they are recognised in international instruments or because their circumstances require particular attention. The following categories are certainly not intended to be exhaustive.

Migrants will certainly include persons who have the benefit of the particular protection afforded to refugees and stateless persons that is respectively afforded by the Convention relating to the Status of Refugees (“the Refugee Convention”) and the Convention relating to the Status of Stateless Persons (“the Stateless Persons Convention”).

The nationals of one European Union country moving to another could also be considered as a particular category of migrants and are treated as such in this report notwithstanding that they are not so regarded under European Union law but rather are seen as citizens exercising their right to freedom of movement.

Another category within the term *migrants* that might be distinguished is that of “migrant workers”, as a consequence of certain treaty provisions being specifically devoted to them. “Migrant workers” are variously defined as non-nationals who have been authorised to engage in a gainful occupation in a state’s territory,¹⁵ non-nationals who

12. Pursuant to Article 20 of the European Convention on Nationality such persons shall have the right to remain in the successor state and shall enjoy equality of treatment with its nationals in relation to social and economic rights but may be excluded from employment in the public service involving the exercise of sovereign powers.

13. Their family members would also be excluded while present on that basis. Officials of international and inter-governmental organisations and their family members might, on the other hand, be seen as migrants, notwithstanding that they may benefit from the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with International Law, as they are more akin to others moving country for the purpose of employment.

14. Such as the political situation in their country of nationality.

15. Article 18 of both the European Social Charter and the Revised European Social Charter.

have been authorised to reside in a state's territory in order to take up paid employment¹⁶ or non-nationals who are engaged or have been engaged in a remunerated activity, whether or not they are "documented or in a regular situation".¹⁷ Those migrant workers who are "documented or in a regular situation" are persons who are authorised to enter, to stay and to engage in a remunerated activity in the state of employment pursuant to the law of that state and to international agreements to which that state is a party.¹⁸

In the case of the European Social Charter, the Revised European Social Charter and the European Convention on the Legal Status of Migrant Workers the only non-nationals covered are those from another Contracting Party whereas there is no such qualification of those to whom the International Convention on the Protection of the Rights of All Migrant Workers and Members applies.

However, not only does the precise definition of this sub-category differ in the relevant treaties but the provisions of the European Convention on the Legal Status of Migrant Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families do not apply to all who might fall within the definitions that they use.

Thus the European Convention on the Legal Status of Migrant Workers is particularly restrictive as to its application as its provisions do not apply at all to frontier workers, artists, other entertainers and sportsmen engaged for a short period and members of a liberal profession, seamen, persons undergoing training, seasonal workers and workers carrying out specific work in the territory of a state on behalf of an undertaking having its registered office outside its territory. On the other hand the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families includes some of them and certain other migrant workers within its scope – setting some limits on the application of its provisions to them dependent upon the sort of migrant worker concerned¹⁹ – but entirely excludes others and some additional groups from the benefit of its provisions.²⁰

The right to assistance and protection afforded by the European Social Charter and the Revised European Social Charter extends to the families of migrant workers without defining the latter in specific terms whereas the provisions in the International Convention on the Protection of the Rights of All Migrant Workers and Members of

16. European Convention on the Legal Status of Migrant Workers, Article 1.

17. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2.

18. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 5.

19. Part V deals with the application of the Convention to the following categories of migrant workers: frontier workers, seasonal workers, itinerant workers, project-tied workers, specified-employment workers and self-employed workers.

20. Its provisions do not apply at all to persons sent or employed by international organisations or agencies, persons employed by a state outside its territory whose admission and status are regulated by general international law or by specific international agreements or conventions, persons taking up residence as investors, refugees and stateless persons, students and trainees, seafarers and workers on an offshore installation, persons engaging for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialised skill, persons engaging at their employer's request in work whose nature is transitory or brief and who have to leave at the end of an authorised period of stay or earlier if no longer undertaking the specific assignment work; Article 3.

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Their Families are made generally applicable to the “members of the family” of a migrant worker, who are defined as persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the states concerned.²¹ The “families” of migrant workers also have the benefit of most of the rights assured in the European Convention on the Legal Status of Migrant Workers, which regards them as comprising “the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving state, who are dependent on the migrant worker”.²²

A further category of migrants are those persons who have or are being brought from one country to another with a view to their exploitation. Their existence is recognised in international and regional treaties directed at slavery, forced labour and the trafficking of persons, notably, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the Abolition of Forced Labour Convention, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the Council of Europe Convention on Action against Trafficking in Human Beings. These treaties are concerned primarily with preventing this form of migration but to a certain extent they also address the rights and status of those whose migration has been or is being effected in a manner contrary to their provisions.

Specific acknowledgement of the situation of family members who may accompany or later seek to join a migrant falling into one of the categories mentioned in the treaties referred to above is limited. However, family members might also be seen as a forming a distinct category of migrants, whose position is ultimately underpinned by the right to respect for family life.

Although children may often migrate as family members, they also do so alone whether because they are seeking to be reunited with those family members having become separated from them, they no longer have any family members or they have had for some reason to leave them behind. Whatever the reason unaccompanied children are especially vulnerable and it would be appropriate to treat them also as a distinct category of migrants.

Another category of migrants that might be distinguished is one that embraces Travellers, Roma, Sinti, Yenish and other groups who have a nomadic or semi-nomadic lifestyle, at least insofar as this leads them to cross, or to attempt to cross, national borders.

Persons who are internally displaced within the country of their nationality would not come within the strict definition of migrants given above because they have not actually moved from one country to another. Moreover as nationals of the country concerned they should have – at the formal level – the greatest range of rights and freedoms available under national law and under regional and international treaties,

21. Article 4.

22. Article 12 allows, however, for temporary derogation from the right of family reunion which could affect the protection which families have under the Convention.

particularly as regards access to justice. Their position is not, therefore, generally addressed in the two following sections on rights and access to justice, although these sections do confirm the extent of their formal entitlement to rights and freedoms. However, it has been recognised that in practice persons who have been internally displaced within the country of their nationality can face similar problems in securing access to justice to those that confront many migrants²³ and some standards applicable to them have been adopted. It would thus be appropriate for any measures taken to deal with the latter problems also to embrace the situation of internally displaced persons and this is the approach adopted in the penultimate section of this report.

Asylum seekers

Asylum seekers are also a particular category of migrants which strictly speaking only embraces those of them who have specifically sought or are endeavouring to seek the status of a refugee pursuant to the Refugee Convention, whether or not they actually come within the scope of its provisions. For the purpose of the Refugee Convention someone will only be regarded as a refugee if “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.²⁴

However, they might also be regarded as comprising for the purpose of this report, any migrants seeking to resist their removal to another country on the basis that such action would give rise to a serious risk of them losing their lives, being subjected to torture or inhuman or degrading treatment or punishment or even becoming victims of violations of certain other rights and freedoms contrary to the requirements of various human rights treaties.²⁵ Where such a risk can be substantiated removal would be a violation of the right to life, the prohibition on torture or inhuman or degrading treatment or the right or freedom concerned.²⁶ The protection afforded against removal under the human rights treaties concerned is more extensive than that under the Refugee Convention in that not only does it extend to a wider range of risks that would be faced following removal but it also applies to certain persons who cannot invoke the protection of the Refugee Convention because of past or apprehended conduct.²⁷

23. See the Report presented by the Minister of Justice of Spain at the 28th Conference of European Ministers of Justice (Lanzarote, 25-25 October 2007), MJU-28 (2007) 01 E, at pages 7 and 9. See also Recommendation Rec (2006) 6 of the Committee of Ministers to member states on internally displaced persons.

24. Article 1A. Certain people are excluded from having the benefit of the Convention's provisions notwithstanding that they fulfil all the conditions set out in the text, namely, if they have committed crimes against peace, war crimes or crimes against humanity or have committed serious non-political crimes outside the country of refuge prior to admission or have been guilty of acts contrary to the purposes and principles of the United Nations; Article 1F.

25. Cf the description by the European Union of such persons as beneficiaries of subsidiary protection; see below, page 27.

26. See below, page 59.

27. See below, page 19; and footnote 24, page 12 above.

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An asylum seeker coming within the scope of the provisions of the Refugee Convention is thereby entitled to a range of rights, including one of particular relevance to securing access to justice²⁸ but it will be seen that such a person does not have any significant advantage over a migrant protected against removal through reliance on human rights treaties as rights conferred on him or her by these and other instruments are at least as extensive in their scope.²⁹

The requirement to be outside the country of one's nationality in the Refugee Convention's definition of a refugee³⁰ would mean that internally displaced persons could not be asylum seekers. However, they could come within the scope of protection under human rights treaties against removal to a part of their country where there was a serious risk of them losing their lives, being tortured and so.

Although asylum seekers are migrants they will be specifically referred to in the report because of the longstanding recognition given to them by international law as a group of persons in need of special protection.

Conclusion

Access to justice and migrants and asylum seekers are clearly wide-ranging terms and, as will be seen, all the more so when put together.

Although there are two different approaches to the concept of access to justice, both are of significance for the situation of migrants and asylum seekers, even if the procedural one is potentially more important in practice than the substantive one.

The different categories of migrants demonstrate the variety of circumstances and motives of those who migrate and also the considerations that may affect the rights and freedoms which those in the receiving countries are willing to grant to them. Some migrants may well fall into more than one category at the same time or they may change the category into which they fall after the passage of time or the occurrence of certain events. Some but not all categories of migrants have attracted special measures either in their favour or for the purpose of controlling them.

In the remainder of this report the term *migrants* will be used where the discussion concerns their situation in general or measures and requirements that seem to deal with as a whole. Reference will only be made to specific categories, in particular asylum seekers, where this is especially relevant to the context or the measure concerned.

28. See below page 67.

29. See below, "Challenge to removal" on page 99; see also below, page 104.

30. Article 1A.