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Topic 2

The Effects of State Measures on the Stay of Applicants in the Sphere of Asylum

Invited paper by the Federal Office for Refugees, Switzerland

* The documentation for this work session will be processed as for seminars.

THE EFFECTS OF STATE MEASURES ON THE STAY OF APPLICANTS IN THE SPHERE OF ASYLUM

Introduction

In Switzerland, as in other European host countries, the nineties were characterized by a constant and, in some years, a strong increase in the number of aliens applying for asylum. This led to an excessive load on the authorities concerned with the processing of applications as well as on those responsible for the accommodation and the care of asylum seekers and, finally, on the authorities dealing with the return of persons not or no longer in need of international protection. The result was that most European countries started at the beginning of the nineties to revise the asylum legislation in order to introduce more efficient asylum procedures to deal with the increasing case load. Furthermore, the authorities responsible for processing applications experienced a massive reinforcement of personnel. In view of the relative low recognition quota, it became obvious that asylum legislation, with its function of protecting persecuted and threatened persons, was increasingly taking on the character of immigration legislation, which was called upon by persons without any prospect of emigration and residence in a European host country via the general aliens legislation. This trend changed to some extent towards the end of the nineties.

The following report will show, on the one hand, the results of applying current asylum legislation in Switzerland in recent years. At the same time, we will examine the outcome of asylum applications filed in the same period. More important, however, is the question about the effects of decisions on the stay of the asylum seeker in the host country. It will be shown after what period of time an asylum applicant either stays in the host country following a decision or when he leaves the country. Finally, we will take a closer look at the link between the length of decision proceedings and the probability of aliens being able to stay in the host country or of having to leave.

Demands on Asylum Proceedings

Compared with other proceedings, asylum proceedings present peculiarities which must be taken into consideration. In view of the obligations under international law on the part of the host countries, under the 1951 Geneva Convention Relating to the Status of Refugees and the European Human Rights Convention as well as other international instruments, the alien may as a rule await the outcome of proceedings in the host country. Exceptions are possible in cases where there is no doubt that the alien can be forced to leave Switzerland for a safe third country, which is firstly willing or obliged to receive him and secondly for its part respects the principle of non-refoulement. If, on the basis of this situation, asylum proceedings are called upon by persons in order to circumvent immigration provisions, these aliens have an interest in drawing out proceedings as long as possible. Contrary to other proceedings under private or public law, in asylum proceedings the person in question undertakes little or nothing to bring the proceedings initiated by himself to a quick end. Any interest in accelerated proceedings in these cases is more likely to be found on the side of the host country only. When adapting general rules of proceedings, precautions must be

taken that the law on asylum proceedings can meet the requirements of the following basic demands:

Without doubt, proceedings must be so conceived that the need for protection of the person seeking asylum can be clarified in a reliable manner. In view of the objects of legal protection under discussion, these can only be proceedings that meet the requirements of standards described in various recommendations of the Council of Europe and conclusions of the UNHCR Executive Committee.

At the same time, however, proceedings are to be organized so that applications can quickly pass through the stages. It should be possible to clarify both the need for protection and the question of the alien's stay in the host country within a short time. If this is not the case, proceedings represent an attractiveness factor that is not to be underestimated, because by merely claiming some kind of persecution, the applicant succeeds in bringing about a far longer stay in the host country than the entitled or permit-free stay. Thus, asylum legislation takes on the character of an alternative, unlimited immigration legislation.

The length of proceedings can essentially be controlled by means of the personnel and material resources invested in it. As a rule, proceedings become shorter if the decision capacity can be adjusted to the actual number of incoming applications. Should proceedings remain under this level, the result is a great number of unsettled applications and thus a continual stay of the applicant in the host country. However, the demand for sufficient decision capacity cannot be maintained indefinitely. On the one hand, in the event of a rapidly increasing, unforeseen increase in the burden of work, proceedings cannot be adapted immediately to rising needs to the necessary extent because qualified personnel in a position to make decisions must be trained over a long period of time. On the other hand, the building up of personnel in the decision-making authorities meets with certain objective limits, beyond which it is hardly possible to run an administration. As in such situations of massive influxes, minimal standards with regard to proceedings must be guaranteed, and consequently the number of individual decisions made by each official or judge cannot be increased, the result is a backlog of applications with all the consequences described above.

Legal Provisions

In the course of various revisions of the asylum legislation, the Swiss legislator introduced various time-limits, within which certain steps in proceedings should be effected. These were aimed at concluding proceedings at first instance within three to four months. In the case of a negative outcome of proceedings, the law foresaw a one-month time-limit for an appeal, which for its part was again to be dealt with within three or four months. In total, proceedings were not to take longer than about six months on average until legally final. On conclusion of proceedings the decision should be enforceable. Exceptionally, this should already happen with decisions to decide on the case without entering upon the substance at first instance. Under the prerequisite of a steady flow of applications and a sufficient processing capacity on the part of all offices concerned with proceedings, the applications of one year should accordingly be decided by the middle of the following year. At this point in time the alien should have found admission as a person in need of protection and have received a residence permit, or should have left the country, either voluntarily or non-

voluntarily. By the end of the nineties the aim of shortening the asylum procedure had largely been achieved, to a great extent due to the engaging of additional staff in order to enable the competent authorities to react quickly to fluctuating levels of asylum applications. However, despite the fact that it was possible to shorten the processing time an increasing number of persons who should have left the country after a final negative decision continued to stay in Switzerland as the enforcement of the return either could not be effected due to international legal obligations or was made impossible for technical reasons.

The Effects of Legal and Personnel Measures in Practice

Appendix 1: The annual number of asylum claims between 1989 and 1999. In this period, the number of asylum applications was subject to large fluctuations. In fact from 1987 until 1991 it continuously increased reaching 41,600 applications in 1991. This was primarily due to the unstable political situation in Sri Lanka, Turkey and in the former Yugoslavia, causing more and more persons to seek asylum in Switzerland.

The reaction of the Federal authorities responsible for decision-making at first instance was to increase the staff drastically between 1986 and 1992. In 1992 it was increased to 500 posts. It was decreased slightly in 1993, whereupon it remained stable until 1998, when it was increased again. 1999 where 600 posts were allocated. In 1995, the Federal authorities at first instance decided to establish an allocation reserve which should only be used according to needs. The idea was to have a flexible part of the staff. The Federal authorities responsible for personnel matters approved this so that the Federal authorities at first instance can draw on this reserve in cases of important increases in the number of new asylum applications. As the graph shows it has been necessary to draw on the reserve during the Kosovo crisis (1998 – 1999).

The decision capacity varies from year to year. The objective set by the Federal authorities at first instance for year 2000 is to decide on 40,000 cases.

Appendix 2: Number of posts allocated to first instance authorities between 1985 – 29.2.2000.

In 1992 the number of new asylum applications went down to 18,000. The reason for this reduction and stabilization until 1997 was indeed most probably to be seen in the effects of introducing accelerated proceedings (safe country of origin concept, safe third country concept, decision to decide on a case without entering upon the substance of the matter). Furthermore, increasing the staff at first instance also contributed substantially to the shortening of the processing time. Thus, the attractiveness factor otherwise represented by long length of presence during procedure was to a great extent removed.

Appendix 3: Shows the developments in the sphere of asylum from 1989 to 1999 indicated through the number of persons registered in the various categories of the asylum system.

The reduction in the number of new asylum claims in the beginning of the nineties did, in fact, make it possible to reduce the backlog.

However, as it became increasingly difficult to implement return decisions, especially as far as Bosnians were concerned, the Federal authorities decided to grant those persons a provisional stay for protection reasons. The graph shows the increasing number of persons being granted such a permit as from the mid nineties.

At the end of the nineties the number of new asylum claims started to go up again reaching a peak of 46,000 in 1999. The sharp increase in 1998 and 1999 was due to the Kosovo crisis, causing a parallel substantial increase in the number of pending cases. Switzerland decided to grant provisional protection to refugees coming from Kosovo in the spring of 1999. The provisional protection was, however, lifted again already in August of the same year, due to the changed political situation in Kosovo. The consequence of this for 1998 and 1999 was a substantial increase in the number of cases in the category of persons to be returned.

The graph shows that the problem of return of persons not or no longer in need of protection only started in 1991.

Appendix 4-6: The three cohorts show the situation as per end of 1999 concerning asylum seekers having arrived in 1990, 1995 and 1998, respectively. It should be stressed that the graphs show the situation as per end of the year 1999, not the evolution over years.

The graph concerning the year 1990 (*Appendix 4*) shows that per the end of 1999:

1. The number of pending cases had become very small. In March this year the Swiss Government decided to regulate the stay of a certain number of asylum seekers having arrived in Switzerland before the end of 1992. It is therefore to be expected that the backlog for 1990 will almost have disappeared by the end of the year 2000.
2. Only about a quarter of the persons having arrived in 1990 were still staying in Switzerland by the end of 1999.
3. The number of persons for whom the return could not be implemented for various reasons was insignificant.
4. Only very few persons received a provisional stay for protection reasons.

The graph concerning the year 1995 (*Appendix 5*) shows that per the end of 1999:

1. The number of pending cases was small.
2. Compared to the year 1990 the number of persons still staying in Switzerland by the end of 1999 was almost fifty percent more. This trend had started already in 1991. In fact, of those who arrived in 1994, almost half of them were still staying in Switzerland by the end of 1999. In 1996, the stay rate was similar to 1995 and in 1997 a decrease was to be noticed.
3. An important increase in the number of persons granted refugee status according to the 1951 Geneva Convention had taken place.

4. The number of persons granted a provisional stay for protection reasons had more than doubled compared to 1990. However, the share was slightly smaller than in 1994. In 1996, it was almost equal to 1995.
5. The number of persons who could not be returned increased significantly. A large number of the asylum seekers who arrived in Switzerland in 1995 came from various parts of the former Yugoslavia. A majority of them could not be granted refugee status according to the 1951 Geneva Convention and were therefore considered as rejected asylum seekers and should therefore in principle have been returned. However, returns were unenforceable on grounds of reasonableness (civil war situation in their native country), admissibility (e.g. the danger of inhumane treatment in their native country in the event of criminal acts), or for technical reasons the country of origin not being willing to take back their own nationals). This trend was confirmed in the following years.

The graph concerning the year 1998 (*Appendix 6*) shows that per the end of 1999:

1. About 30 percent of the cases were still pending by the end of 1999. This shows that it has indeed been possible to shorten the processing time, but the objectives laid at the beginning of the nineties have, however, not quite been obtained. The length of the processing has primarily been shortened at first instance, whereas this has proved more difficult at second instance.
2. The number of persons who were not or could not be returned was important due to the lifting of the provisional protection status for refugees from Kosovo. It is to be expected that most of these persons will have left Switzerland by the end of year 2000, which will reduce the numbers of persons being in the asylum structure and increase the number of persons who have left either on a voluntarily or a non-voluntarily basis.

Concluding remarks

At the beginning of the nineties it was justified to say that there was an asylum crisis not only in Switzerland, but in most Western European countries and that the problem was to solve the long duration of the asylum procedure in the first instance.

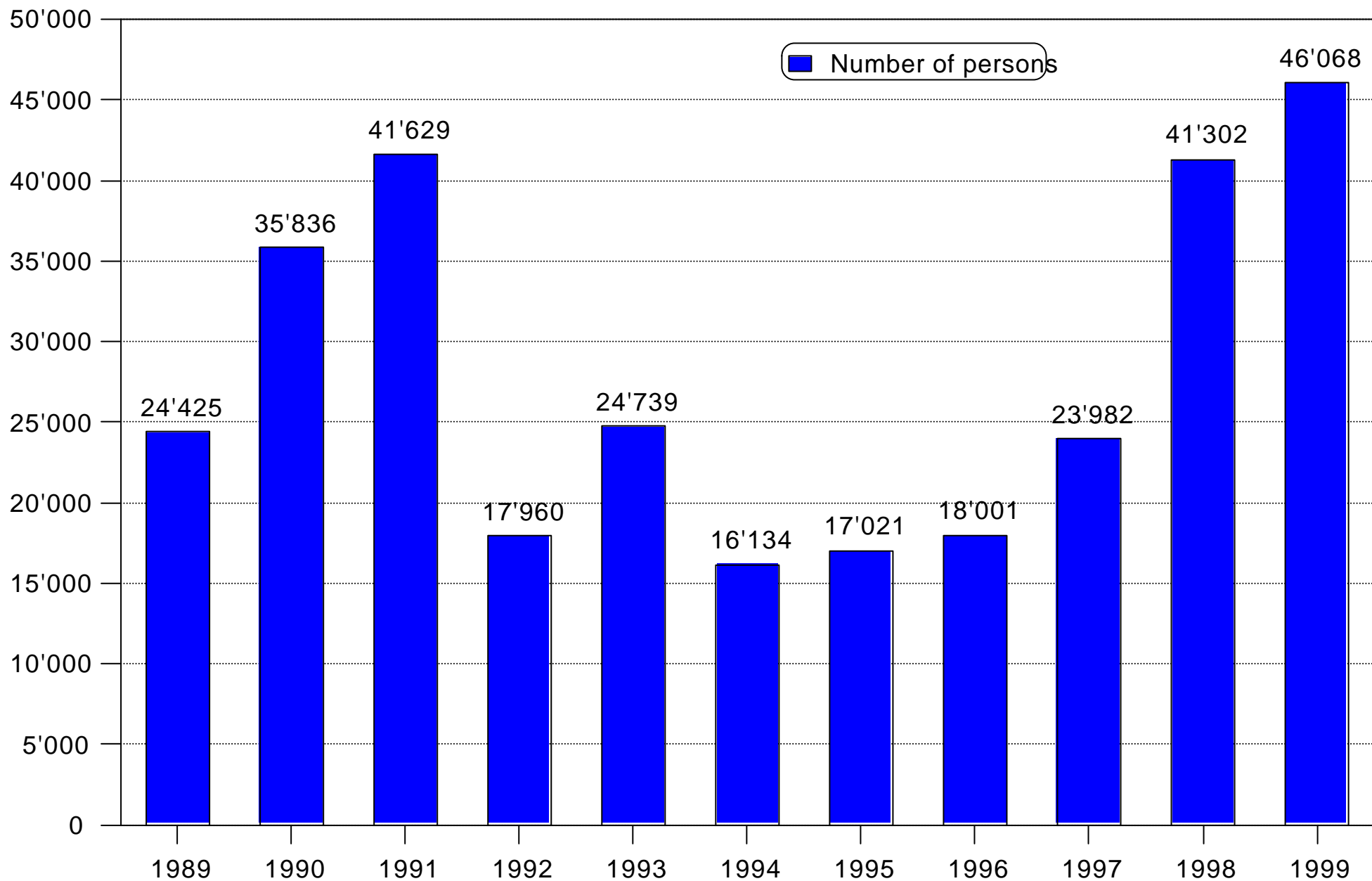
When the Swiss Federal authorities responsible for asylum applications were starting recovering from this crisis through the adoption of as well legislative as organizational measures the war in Bosnia-Herzegovina started resulting in a substantial increase in the number of new asylum seekers. As there was still an important backlog of asylum applications from previous years the authorities were almost overburdened with the new influx.

This led to a higher stay rate (*Appendix 5*) including a higher rate of those granted provisional protection and proportionally less returns of those who had no longer permission to stay in the country. This was independent of the duration of the asylum proceedings. The problem area had been shifted from the determination procedure to return of rejected asylum seekers. The factors decisive for the successful implementation of return are, however, not only dependent on the capacity of the asylum structures, but to a great extent on external circumstances.

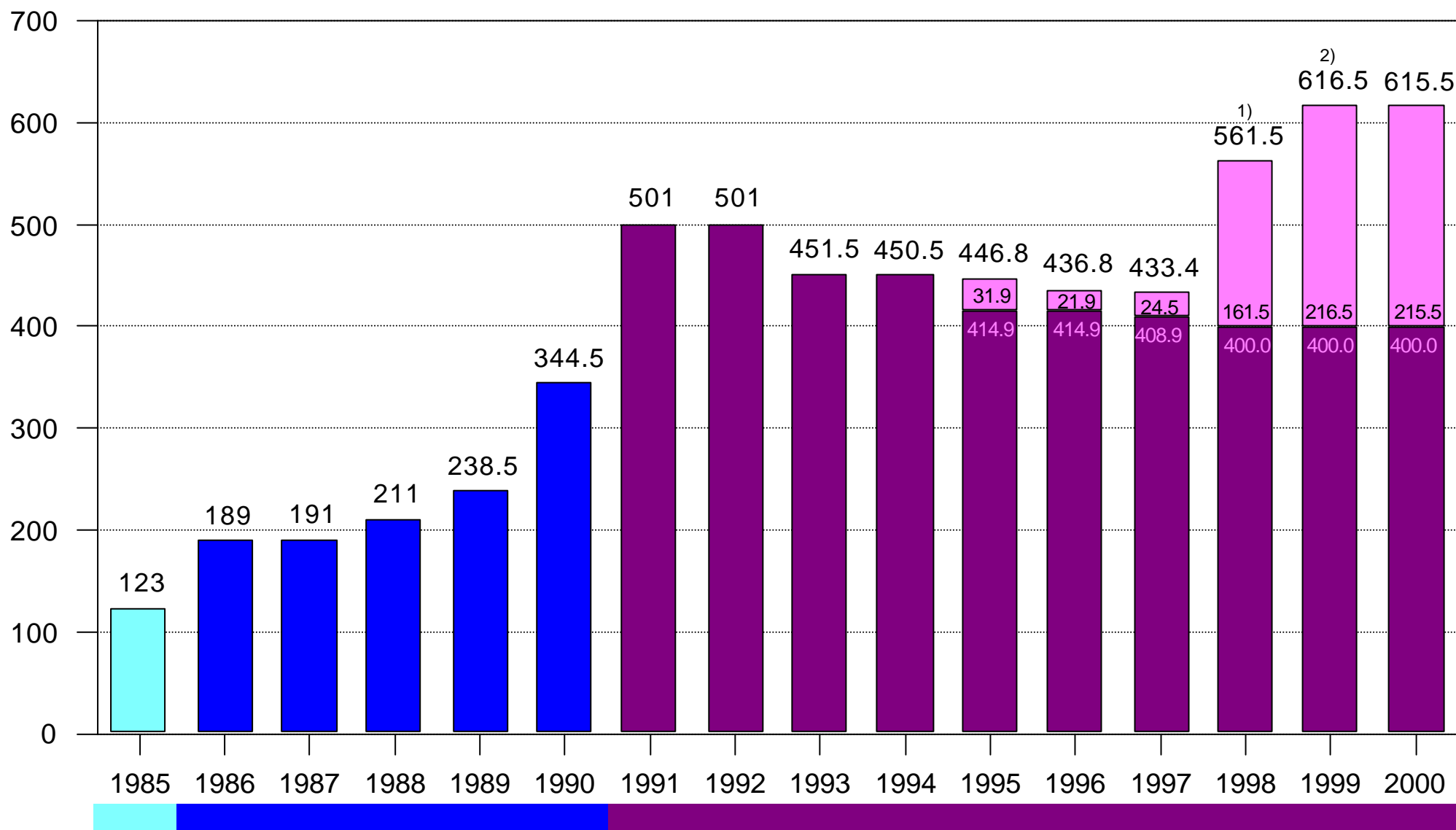
Therefore, the Federal authorities responsible for asylum matters have had to conclude that measures aiming at streamlining the asylum processing and making it more efficient are not sufficient to cope with the asylum problem. It is necessary to define a policy that also includes the countries of origin. This is the reason why Switzerland is now in the process of concluding a series of readmission agreements with countries of origin and in other ways find ways of establishing a dialogue with these countries.

Finally, it can be concluded that it has indeed been possible to reduce the attractiveness of Switzerland for aliens immigrating into the country through the asylum door. There is a risk, however, that this has resulted in an increase of the number of illegal migrants. Policy makers are therefore now faced with the challenge of combating this phenomenon.

Appendix 1: Asylum applications per year - 1989 - 1999



Appendix 2: Number of posts allocated to first instance authorities - 1985 bis 29.2.2000



Federal Office
for Police
(Asylum Division)

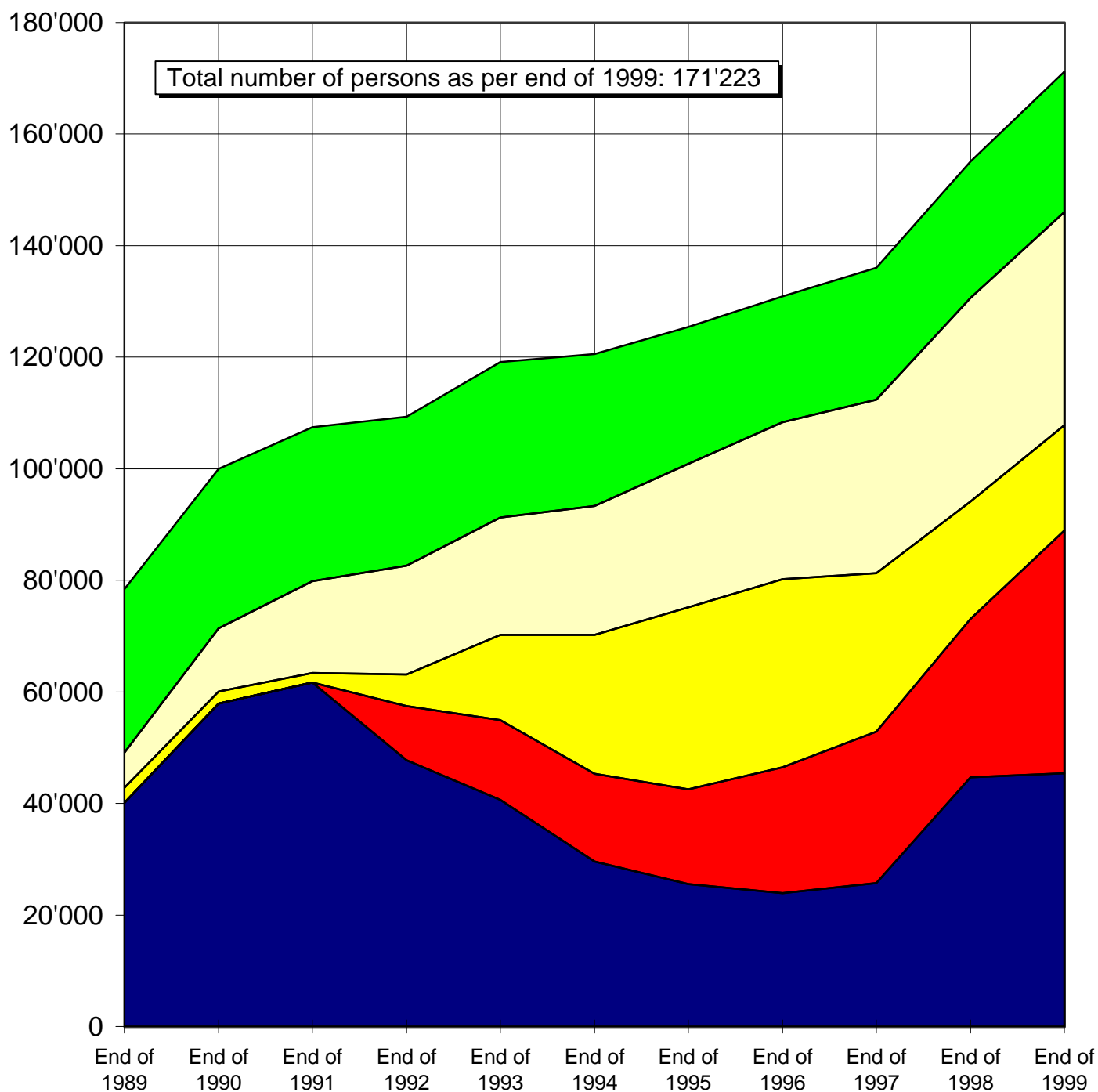
Delegate for Refugees

Federal Office for Refugees

1) Further 137 posts approved by Government.
2) Further 57 posts approved by Government.

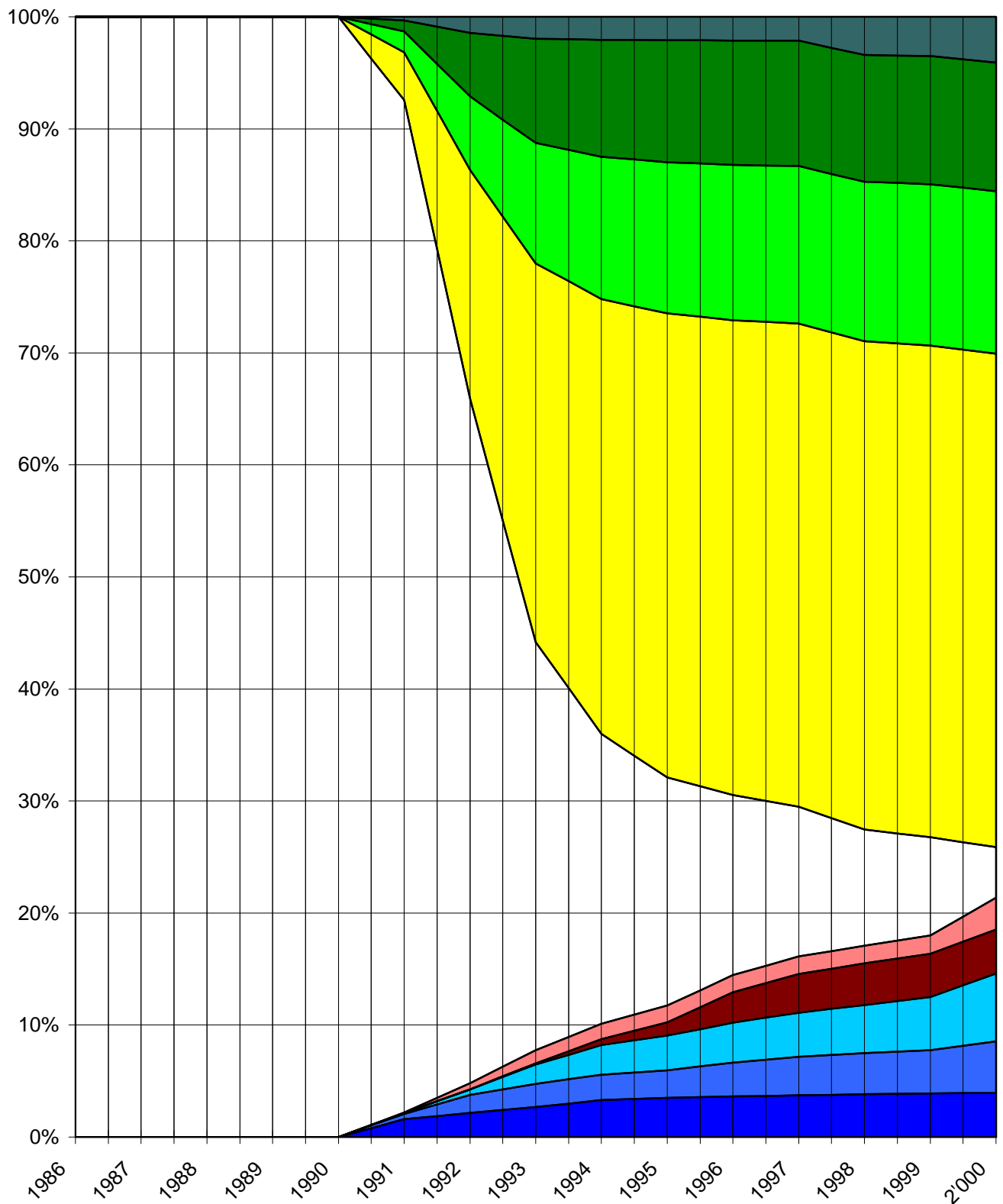
= Allocation reserve to be used according to needs

Appendix 3: Number of persons in the asylum system Development between end of 1989 till end of 1999



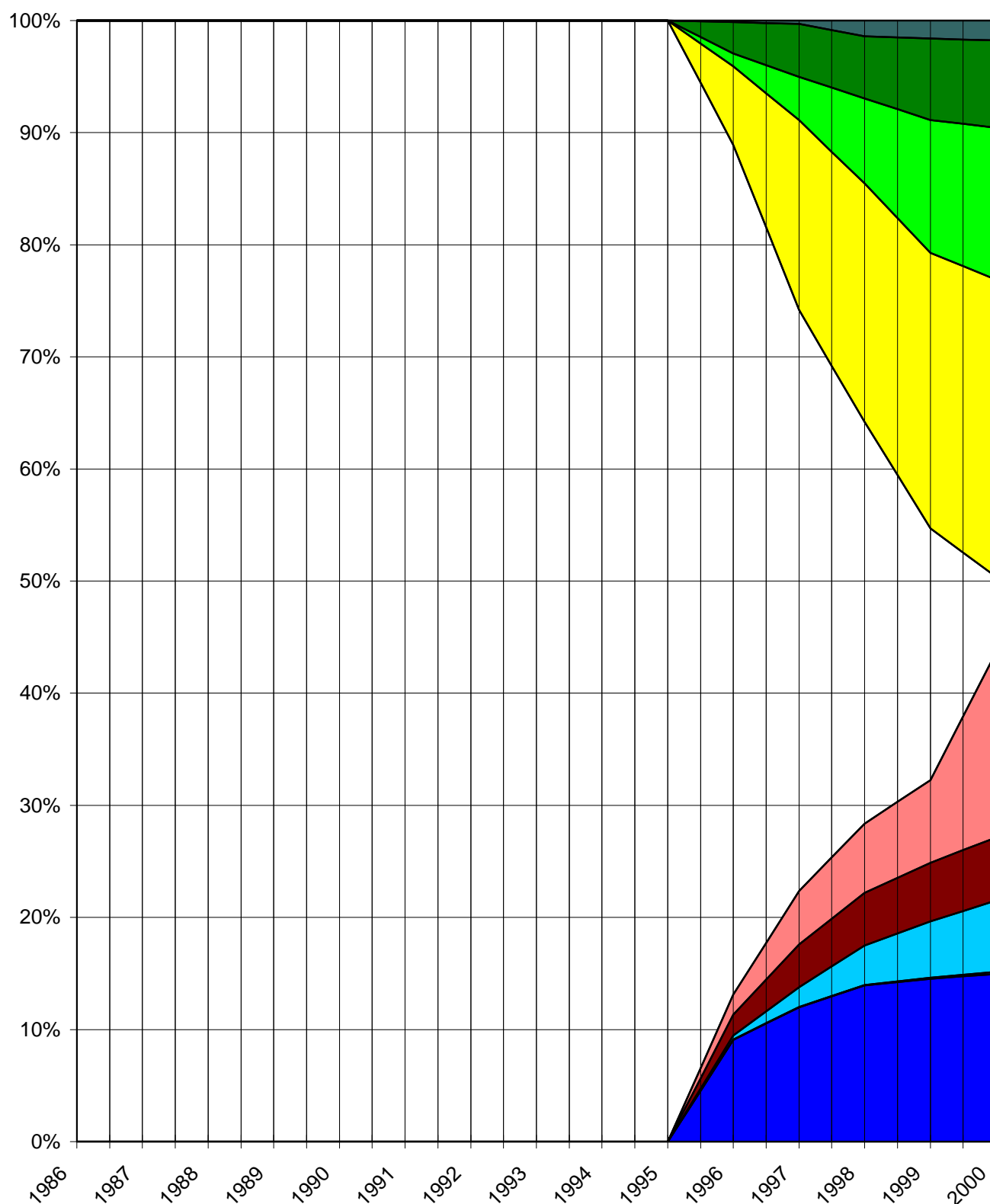
- Recognized refugees (Ende November 1999 = 25'202) 1)
- Humanitarien status and other permits granted by Aliens Police (End of November 1999 = 38'215) 2)
- Provisional protection status (End of December 1999 = 18'907)
- Permit / Return pending or blocked (End of December 1999 = 43'494) 3)
- Pending cases 1st and 2nd instance (End of December 1999 = 45'405)

Appendix 4: Number of asylum applications registered in 1990 Situation as per end of 1999



- | | |
|---|--------------------------------------|
| ■ Positive asylum decisions | ■ Humanitarian status |
| ■ Permits granted by cantonal police, other reasons | ■ Provisional protection status |
| ■ Return pending or blocked | □ Pending cases 1st and 2nd instance |
| ■ Absconders | ■ Voluntary return |
| ■ Returns | ■ Writing off's |

Appendix 5: Number of asylum applications registered in 1995 Situation as per end of 1999



- | | |
|---|--------------------------------------|
| ■ Positive asylum decisions | ■ Humanitarian status |
| ■ Permits granted by cantonal police, other reasons | ■ Provisional protection status |
| ■ Return pending or blocked | □ Pending cases 1st and 2nd instance |
| ■ Absconders | ■ Voluntary return |
| ■ Returns | ■ Writing off's |

Appendix 6: Number of asylum applications registered in 1998 Situation as per end of 1999

