

Chequered progress towards a common EU asylum policy

by Tim Morris

Examination of the common EU asylum standards so far adopted suggests that there is still a long way to go before asylum policy and practice are harmonised and that this process of harmonisation may undermine the principles enshrined in the Refugee Convention.

The adoption of the Amsterdam Treaty by the members of the European Union in 1997 marked the beginning of a new era for asylum policy making in Europe. Title IV, Article 63 of the Amsterdam Treaty refers to the adoption of minimum standards on procedures in member states for granting and withdrawing refugee status and the establishment of EU-wide binding minimum rules on asylum and immigration. In the same year the Dublin Convention clarified that individuals claiming asylum must make their application in the first EU country that they enter.¹

Following the Amsterdam Treaty's entry into force in May 1999, EU leaders held a summit in Tampere, Finland, in October 1999 which shaped the political guidelines that constituted the framework in which the EU's policies and legislation on asylum and immigration were to be developed. They reaffirmed the EU's commitment to the right to seek asylum. They agreed to "work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva [Refugee] Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*".² The Tampere conclusions also state that, in the long term, community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the EU.

The Tampere meeting endorsed an initial working document on harmonisation prepared in March 1999. It emphasised that common minimum standards would both ensure that any individual asylum applicant should receive the same decision

irrespective of the EU state in which s/he lodges the asylum claim and would also act to prevent secondary migration of asylum applicants (so-called 'asylum shopping') between countries of the EU.³

At Tampere EU leaders confirmed the target date of May 2004, set out in Article 63, as the deadline for completion of harmonisation. This turned out to be unrealistic. Difficult negotiations slowed down the process and disappointed those who thought Tampere would usher in better protection for persons fleeing persecution and better solutions to the problems faced by governments.⁴ Just prior to the expiry of the deadline, EU Justice Ministers met in Brussels and agreed to adopt a draft Directive on Minimum Standards for Member States' Procedures for Granting and Withdrawing Refugee Status (the 'Procedures Directive')⁵ and a Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who otherwise need International Protection (the 'Qualification Directive').⁶

The outcome of the harmonisation process has been rather contradictory and therefore remains unclear. On the one hand the Qualification Directive clarifies that in the determination of protection status the actor of persecution is irrelevant and can include non-state actors such as militia. This goes some way to reducing the differences in interpretation of the Convention which existed in EU states up till now. Importantly, the Directive also allows for the recognition as a refugee of those persons who have a well-founded fear of being persecuted on account of their sexual orientation or gender. At the same time the Procedures Directive

- at least on the face of it - appears to set out some basic procedural guarantees to asylum applicants - including the right to remain in the EU country pending examination and in relation to examination and decision making (including legal assistance and representation, personal interview and stating of reasons for rejection). Nevertheless, the Directive has failed to achieve its overall objective of establishing a Common European Asylum System based on the full and inclusive application of the Refugee Convention. This is arguably because of fundamental weakness in the draft Procedures Directive which potentially seriously undermines the ability of asylum seekers and refugees to access protection.

Directive's shortcomings

The wide scope of inadmissible applications listed in the draft Procedures Directive leaves EU states free to refuse access to asylum procedures. It is cause for concern that:

- Article 27's definitions of the 'safe third country' concept is open to criticism due to the ambiguous stipulation of whether there is to be case-by-case examination of whether the third country concerned is in reality safe for the particular asylum applicant.
- The scope for applicants to challenge the application of the 'safe third country' concept on the grounds that s/he be subjected to torture, cruel, inhuman or degrading treatment or punishment in that country is not only minimalist but is also at variance with the general criteria for 'safe third countries' in the same Article.
- Scope for inadmissibility under the notion of so-called 'supersafe third countries' allows for refusal of substantive examination of asylum applications submitted by persons entering through certain European countries outside the EU: the criteria for designating such 'supersafe third countries' are formalistic.

- 'Safe countries of origin' are to be designated not only by EU members according to existing legislation but also through a minimum common list to be adopted by the Justice and Home Affairs (JHA) Council. Eventually, the JHA Council gave up reaching agreement on this list, postponing the decision till the abandonment of the unanimity requirement.
- While the Commission initially intended to modify the concept of 'manifestly unfounded' asylum applications in order to narrow the scope of application of accelerated procedures, the adopted Directive allows for extensive application of such procedures. This follows partly from the option to lay down national rules for such procedures to cover a wide number of situations and partly from the introduction of 'specific procedures' which allow individual EU members to derogate (ie avoid the full implementation) of the basic principles and guarantees of the Directive.

Derogation is allowed if examination of asylum claims takes place in the context of decisions on entry into the territory at the border or in transit zones. Importantly, the scope

of existing national rules may have been extended during the drafting process, since the decisive date for such rules is the time of the adoption of the Directive.

These procedural arrangements and limited safeguards regarding appeal against negative decisions imply serious risks for the legal safety of individuals. In certain circumstances this may result in merely cosmetic examination of the need for international protection. This is particularly worrying because certain EU states intending to implement these optional provisions already apply similar practices jeopardising refugee protection, while others have little experience with procedural safeguards for asylum applicants and may embrace such a fragile legal framework. The introduction of sub-minimum standards provides no effective guarantees for the thorough examination of individual applicants' need for international protection.

Diversity or evasion?

As with the Refugee Convention definition, the interpretation of the Qualification Directive (stipulating who qualifies either for refugee or subsidiary protection status) is likely

to be intertwined with the concrete assessment of individual cases in which evidentiary issues play a major role. This is likely to reduce transparency. Domestic norms and practices limiting judicial review may exacerbate the transparency problem. It may become difficult to prove if EU states deviate (indirectly) from the minimum standards laid down in the Qualification Directive regarding the delimitation of persons in need of protection.

The Procedures Directive governs administrative and procedural matters where there will be more control over whether the minimum requirements have been implemented. EU countries will simply not have the same opportunities for ignoring or evading these common standards because any administrative or procedural arrangement at variance with the Procedures Directive will be readily discovered both by the individuals affected and by those bodies controlling the implementation of EU law. This might explain why EU states utilised their right of veto inherent in the unanimity requirement to insist on a vast amount of exceptions or derogations in order to ensure the possibility of maintaining domestic peculiarities. This is

Asylum seekers from Albania arrive in Brindisi harbour, Italy.



no surprise given that there have traditionally been few international obligations concerning asylum procedures, due to different administrative and judicial traditions of States parties to the Refugee Convention.

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The unanimity requirement within this policy area has now been abandoned. It remains to be seen whether the modified legislative system, allowing for future asylum standards to be adopted in the co-decision procedure under Article 251, will remedy the failures so characteristic for the harmonisation of asylum procedures.

A Single Asylum Procedure as the route to protection?

In November 2004 the EU adopted the 'Hague Programme' on the development of EU justice and home affairs policy over the next five years.⁷ The Hague Programme will strengthen EU cooperation on asylum and immigration issues and specifies actions the EU will take to further coordinate and integrate immigration and asylum policies. It stipulates that by 2010 the EU should have a common asylum policy executed by a single EU body through a single asylum procedure. To avoid gridlock in reaching consensus, almost all decisions on immigration of the 25 EU members - including in relation to asylum - will no longer require a unanimous vote but will be taken by qualified majority.⁸

A single asylum procedure should facilitate applications for protection and save both time and money. It may prove an important deterrent to abuse of existing systems due to:

- shorter duration of asylum procedures as a result of the joint examination of both Refugee Convention and subsidiary protection grounds
- fewer administrative resources spent by joining the two examination procedures
- more effective enforcement of negative decisions by denying asylum applicants the chance to postpone deportation by

introducing a new procedure on subsidiary protection grounds.

- scope to facilitate protection and integration due to the more rapid granting of protection to those in genuine need.

However, there are some disadvantages and problems associated with the introduction of an all-inclusive or partial single procedure. One major concern is the potential for a 'watering down' of Convention refugee status. The examination of any asylum application carries the risk of an incorrect decision, a risk that might arguably be exacerbated by the current hostile climate and by an accelerated pace of decision making. The existence of separate procedures for examination on Refugee Convention and subsidiary protection grounds provides the opportunity for remedying mistakes in the former. Thus, the introduction of a single asylum procedure eliminates a structural safeguard. In addition, it may involve the risk of undermining the primacy of the Refugee Convention, due to the incentive to opt for the less demanding alternative within the same examination procedure.

The reduction of procedural safeguards may be compensated for by the higher procedural standards for the examination of subsidiary protection cases that will, in a number of EU states, follow from the extension of the scope of EU standards on asylum. However, this extension of the scope of procedural standards in turn requires an increased level of protection in terms of appeal rights. Unlike the Refugee Convention, which has no specific demands in terms of examination and appeals procedures, the human rights obligations of *non-refoulement* underlying subsidiary protection require compliance with the related right to effective remedies. This imposes on EU members the obligation to secure a right to suspension of deportation as long as the relevant legal remedy has not yet reached a conclusion. Hence, the efficiency inherent in the single asylum procedure cannot be obtained without some investment in 'fairness' in terms of enhanced procedural standards.

ECRE welcomes the proposal for steps towards the development of a single asylum procedure as further progress towards a Common European Asylum System. However, ECRE cautions that this must be based on the full and inclusive application of the 1951 Refugee Convention and other international human rights law instruments as originally set out in Tampere at the outset of the harmonisation process. In this respect, ECRE reiterates its grave concerns about the standards contained in the Procedures Directive, which are capable of interpretation and application in a manner inconsistent with international refugee and human rights law. It is vital that EU states view developments towards a single asylum procedure as a means to improve both the quality and efficiency of decision making, rather than as an opportunity to further reduce standards of protection to the lowest common denominator, thereby putting at risk the lives and safety of individuals fleeing persecution.

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1. www.irishrefugeecouncil.ie/factsheets/dublin-convention4.html
2. www.europarl.eu.int/summits/tam_en.htm
3. <http://aei.pitt.edu/archive/00001277/>
4. The European Council on Refugees and Exiles assessment is at: www.ecre.org/positions/Tampere_June04_full.doc
5. <http://register.consilium.eu.int/pdf/en/04/st14/st14203.en04.pdf>
6. www.eurunion.org/news/press/2004/20040069.htm and further discussion of the Directive on p56.
7. www.statewatch.org/news/2004/nov/hague-annotated-final.pdf
8. For the EU a qualified majority is when at least 55% of EU members, including at least 15 countries and comprising states which make up at least 65% of the EU's population, are in agreement.

The Forced Migration Online team at the RSC has produced a resource page on **Asylum in Europe** to complement this feature section. See: www.forcedmigration.org/browse/thematic/asylum.htm