



Statewatch Analysis

Revised EU asylum proposals: “Lipstick on a pig”

Steve Peers
Professor of Law, Law School, University of Essex

Introduction

As part of the project to create a ‘Common European Asylum System’, the EU adopted legislation between 2003 and 2005 on four key issues: the definition (ie, ‘qualification’) for refugee status; asylum procedures; reception conditions for asylum-seekers; and responsibility for asylum-seekers (ie the ‘Dublin’ rules, which in principle require asylum-seekers to apply in one Member State only, which is determined by those rules).

These measures were considered to form the ‘first phase’ of the Common European Asylum System, and the EU’s Hague Programme, which set out an agenda for the development of EU Justice and Home Affairs Law from 2005-2010, set the objective of adopting legislation establishing the second phase of the Common European Asylum System by 2010. This deadline was later changed to 2012.

The European Commission then tabled in 2008 and 2009 proposals to revise all of the four key measures referred to above. Negotiations between the European Parliament (EP) and the Council are at an advanced stage as regards the Qualification Directive, while the Council is having difficulty agreeing on how to revise the Dublin rules. Due to even greater difficulties agreeing on the proposals relating to reception conditions and asylum procedures, the Commission agreed to table amended proposals by June 2011 in order to restart discussions.

These proposals are subject to a ‘qualified majority’ in Council, with the ‘co-decision’ of the European Parliament (now known as the ‘ordinary legislative procedure’). It now falls to these two bodies to agree on the proposals.

Reception conditions

'Reception conditions' are the rules which apply to asylum-seekers when their claims for asylum are being considered, other than the rules related to their asylum claim as such. They include rules on access to health care, housing, employment, social assistance and education.

The current EU rules on this subject are set out in Directive 2003/9, which applies to all Member States except Denmark and Ireland. The UK has opted out of the 2008 proposal to amend these rules.

The key changes in the 2011 version of this proposal are as follows:

- a) the Directive would explicitly apply to asylum-seekers within the Member States' territorial waters (Article 3);
- b) as regards detention (Article 9), there is less detail concerning time limits for detention; it will be possible for administrative authorities to order detention; and there will be no requirement to inform asylum-seekers of the maximum period of detention;
- c) as regards detention conditions (Article 10), it will be possible to detain asylum-seekers in prisons, and other exceptions to basic standards will be permitted;
- d) as regards vulnerable asylum-seekers (Article 11), derogations will be permitted from the obligations to permit children to play (there is no equivalent exception in the EU's Returns Directive), to require privacy for detained families, and to detain female asylum-seekers separately from unrelated male asylum-seekers;
- e) access to the labour market for asylum-seekers could in some cases be delayed for up to a year, rather than six months (Article 15);
- f) it is now clear that equal treatment compared to nationals as regards social assistance will not be required (Article 17);
- g) the requirement for equal treatment with nationals as regards health care has been dropped (Article 19); and
- h) it will now be possible to withdraw reception conditions entirely, and in a greater number of cases (Article 20); there will no longer be an obligation to ensure the basic subsistence of asylum-seekers in all such cases.

As regards broader issues, the proposed Directive would expressly specify that the existing reception conditions Directive would continue to apply to the UK (see Article 31, as well as recital 28 in the preamble). It would also set 'standards', rather than 'minimum standards' regarding reception conditions; this change reflects the wording of the Treaty of Lisbon, which has come into force since the original proposal and has revised the EU's competence over asylum. However, Member States will still be free to set higher standards for asylum-seekers (Article 4).

Asylum procedures

The current EU rules on this subject are set out in Directive 2005/85, which applies to all Member States except Denmark. The UK and Ireland have opted out of the 2009 proposal to amend these rules.

The key changes in the 2011 version of this proposal are as follows:

- a) Member States would have far fewer obligations as regards the record and transcript of interviews with asylum-seekers (Article 17);
- b) the right to legal aid would be limited to appeals only, and could be subject to a prior assessment of its chances of success (Article 20);
- c) the lawyers which an asylum-seeker could use might apparently be limited to government officials (Article 21); this provision does not appear in the current 2005 Directive;
- d) it would now be possible to reject applications which are considered to be implicitly withdrawn (Article 28), and Member States could set a time-limit after which such rejections could not be re-opened;
- e) there would be more exceptions to the six-month time limit to decide on applications (Article 31(2)), including the possibility of leaving applicants without a decision indefinitely;
- f) there would be more cases which Member States could subject to accelerated procedures on the grounds that they can be presumed to be unfounded (Article 31(6));
- g) there would be lower standards as regards subsequent applications for asylum by the same person (Article 40); and
- h) there would no longer be a requirement to allow for judicial review of decisions to refuse to consider an application at all, pursuant to the application of the so-called 'super-safe' country rule; this provision does not appear in the current 2005 Directive (Article 46).

As regards broader issues, the like the amended version of the reception conditions proposal, the amended proposal for the asylum procedures Directive would expressly specify that the existing asylum procedures Directive would continue to apply to the UK and Ireland (see Article 53, as well as recital 45 in the preamble). It would also set 'common procedures', rather than 'minimum standards' regarding asylum procedures, again reflecting the revised wording of the Treaty of Lisbon. However, again Member States will still be free to set higher standards for asylum procedures (Article 5).

Comments

Almost all of the key changes to the text of the two proposals go in the direction of lowering standards as compared to the earlier proposals. In a few respects, as noted above, they set standards even lower than the existing Directives.

The more significant changes have been made to the reception conditions proposal. Most notably, the requirements as regards social assistance and

health care have been reduced, and it is possible to withdraw support entirely in some cases, without even ensuring the subsistence of asylum-seekers. This is consistent with the reduction in the legal aid obligations in the procedures proposal. There is also a consistent reduction in standards as regards the time limits to take a decision on an application, and the possible wait for access to employment.

Detention standards have also been reduced somewhat, most notably as regards the possible detention of asylum-seekers in prisons (there is still no maximum time-limit to their detention, unlike the time-limits for detaining other immigration detainees set out in the EU's Returns Directive).

It should be kept in mind that the European Court of Human Rights has already ruled that in many respects, the standards in the existing reception conditions Directive are not applied properly in practice (judgment in *M.S.S. v Belgium and Greece*). For example, some asylum-seekers in Greece, refused access to drinking water by police officers, had to resort to drinking water out of toilets. There is nothing in the revised proposals to address the possible failure to apply the standards concerned in practice.

Taken as a whole, the amended proposals will not require Member States to raise their standards very much, in particular to the extent that raising those standards would cost money. If these Directives are adopted as proposed, the second phase of the Common European Asylum System would therefore look a lot like the first phase. There would be largely cosmetic changes to the current inadequate standards. To borrow President Obama's phrase, this would be like 'putting lipstick on a pig'.

It remains to be seen whether the European Parliament and Member States consider it acceptable to have a 'deal at any cost', if that cost is the subsistence of asylum-seekers, childrens' access to play, the privacy of detained families, and the basic physical safety of female asylum-seekers.

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Sources

Asylum procedures

Directive 2005/85:

<http://www.statewatch.org/news/2011/jun/eu-oj-2005-L-326-asylum-procedures.pdf>

COM (2009) 554 - initial proposal:

<http://www.statewatch.org/news/2011/jun/eu-com-2009-554-4-procedures.pdf>

COM (2011) 319 - amended proposal:

<http://www.statewatch.org/news/2011/jun/eu-com-2011-319-asylum-procedures.pdf>

Reception conditions

Directive 2003/9:

<http://www.statewatch.org/news/2011/jun/eu-oj-2003-L-31-reception.pdf>

COM (2008) 815 - initial proposal:

<http://www.statewatch.org/news/2011/jun/eu-com-815-2008-reception.pdf>

COM (2011) 320 - amended proposal:

<http://www.statewatch.org/news/2011/jun/eu-com-2011-320-reception.pdf>

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