



Statewatch Analysis

The revised directive on Refugee and Subsidiary Protection status

Steve Peers

Professor of Law, Law School, University of Essex

Introduction

The Council and European Parliament have apparently agreed a “first-reading” deal on revising the EU’s Directive on the definition and content of refugee and subsidiary protection status (the “qualification Directive”). Taken in isolation, the new rules are a modest improvement on the existing legislation. But seen in a broader context, they leave untouched the more troubling aspects of the EU’s regime on asylum and border control.

It should also be noted that the existing qualification Directive will continue to apply to the UK and Ireland, even though the new legislation will not.

The following analysis looks first of all at the background to the Directive, then looks at the specific position of the UK and Ireland. It then lists all the main changes to the existing legislation which the new Directive will make, explaining the issues which were particularly the subject of negotiations between the EU Commission, Council and the European Parliament. Finally, it sets out broader conclusions on the context, content and negotiations of the new Directive.

Background

The EU plans to develop a “Common European Asylum System” were first set out at the Tampere summit of 1999, which referred to the adoption of legislation establishing the System in two phases. The first-phase legislation, proposed in 2000 and 2001, was adopted between 2003 and 2005.

There are four main measures:

- a) the Directive on the definition and content of refugee and subsidiary protection (the “2004 qualification Directive”, Directive 2004/83);
 - b) the Directive on asylum procedures (Directive 2005/85);
 - c) the Directive on asylum-seekers’ reception conditions (Directive 2003/9);
- and

- d) the Regulation on responsibility for asylum applications (Regulation 343/2003), known in practice as the “Dublin Regulation”.

Each of these measures was agreed by unanimous voting of Member States in the Council, and each was criticised for setting low standards - particularly the asylum procedures directive.

The 2004 Hague Programme on the development of EU Justice and Home Affairs Policy set a deadline to adopt the second-phase legislation for the Common European Asylum System of 2010, but this deadline was later changed to 2012.

The four second-phase measures were proposed by the Commission in 2008 and 2009:

- a) the revised Directive on the definition and content of refugee and subsidiary protection (COM (2009) 551);
- b) the revised Directive on asylum procedures (COM (2009) 554);
- c) the revised Directive on asylum-seekers’ reception conditions (COM (2008) 815); and
- d) the revised Dublin Regulation on responsibility for asylum applications (COM (2008) 820).

Although qualified majority voting, along with co-decision with the European Parliament (EP), has applied to asylum law since 2005, these proposals have been difficult to agree. To break the deadlock, the Commission proposed revised versions of the Directives on reception conditions and asylum procedures in June 2011, which would raise standards much less than the Commission’s original proposals: see *Statewatch analysis, “Lipstick on a Pig?”* [1]

It now remains to be seen whether the agreement on the revision of the qualification Directive will have any impact on the negotiation of the other three proposals.

Position of the UK and Ireland

One important issue regarding the revision of the qualification Directive is the position of the UK and Ireland. The issue arises because these countries opted into the 2004 qualification directive, but not the 2009 proposals, now agreed. The same issue arises as regards the amendment of the asylum procedures Directive (for both countries) and the reception conditions Directive (for the UK, but not Ireland). No such issue arises as regards the amendment of the Dublin Regulation, since both countries have opted in to discussions on the proposed amendment.

The special Protocol to the EU Treaties on the position of the UK and Ireland as regards Justice and Home Affairs (JHA) issues states that in the event that the UK and Ireland do not opt in to measures amending an act by which they are already bound (as in this case), the Council *may* decide, on a proposal from the Commission, to terminate those countries’ participation in the prior measure, if their non-participation in the amendments to that measure makes the rules “inoperable” for the EU or other Member States. It is also arguable that where (as in this case) such a prior legal act is not just amended in part, but entirely *repealed*, that the prior legislation is repealed also as regards the UK and Ireland.

It is understood that the Council legal service has already addressed the issue of these Member States' non-participation in JHA acts amending measures by which they are already bound, as regards the proposed European Investigation Order - where Ireland has opted out, but the UK has opted in. The analysis of the Council legal service at that time is examined in the **Statewatch Revised analysis - the European Investigation order.**[2]

In its more recent analysis of the issue, specifically concerning the revised qualification Directive, it is understood that the Council legal service has repeated its earlier analysis of this issue. So it has argued again that the Council could only choose to terminate the UK or Ireland's participation in previous legislation if that legislation concerned an EU agency or EU information system. Obviously the revised qualification Directive does not concern these issues. It has also argued again that the Council has a choice whether to repeal the prior legislation as regards all Member States or only as regards those Member States participating in the revised measure. The legal service therefore suggested that the Council repeal the prior legislation *only* as regards Member States participating in that prior legislation.

The Council document setting out the agreed text of the qualification Directive specifies that since none of the participating Member States objected to this suggestion, it will be followed. This means that the UK and Ireland will still be bound by the 2004 qualification Directive.

This approach is consistent with that taken to a number of other adopted or agreed JHA measures - the Directives on trafficking in persons, offences against children and cyber-crime, as well as the Regulation on social security for third-country nationals - as well as the proposals for Directives on the position of crime victims and (as regards asylum again) asylum procedures and asylum-seekers' reception conditions.

In fact, the Council has never (since the Treaty of Lisbon entered into force) repealed a prior JHA measure as regards Member States which did not participate in the legislation repealing that prior measure. Nor has it ever even considered expelling the UK or Ireland from their participation in a prior JHA act because of their decision not to participate in an amendment to that act.

Changes from the 2004 qualification Directive

The following summarises the changes that the agreed text of the 2011 qualification Directive would make to the 2004 qualification Directive.

- a) the title of the Directive has changed, to refer to a "uniform status" rather than "minimum standards" on these issues, although in fact Article 3 of the Directive retains the power for Member States to set higher standards. The revised wording reflects the revised competence of the EU over asylum since the entry into force of the Treaty of Lisbon. However, it should be noted that the amended Treaty also refers to a status "valid throughout the Union"; the agreed text makes no mention of this point and the references to this phrase in the preamble of the Commission's proposal were dropped at the Council's behest.
- b) there is a wider definition of "family members" of refugees and persons with subsidiary protection. Children need no longer be "dependent" and

one of the three new categories of family members proposed by the Commission (and supported by the EP) has been accepted - parents. However, the Council was not willing to add the other two categories proposed. The deal on this point could be relevant to the other asylum proposals, since the definition of "family members" has also been a difficult issue for those negotiations as well.

- c) on the issue of actors of protection (Article 7), there are some amendments to clarify the conditions under which asylum-seekers could have been considered as protected in their countries of origin. The EP had sought more radical changes (for instance, dropping the possibility of protection by non-state actors), but was not successful.
- d) on the "internal flight alternative" (ie the idea that refugees could have sought protection in a "safe" part of the same country) in Article 8, the derogation from the rules in the current Article 8(3) has been dropped, and there is a more detailed definition of how this rule should apply, referring to access to protection and the possibility of legal travel and stay in the part of the country concerned reflecting the case law of the European Court of Human Rights on this issue.
- e) the definition of "persecution" of refugees in Article 9 now includes a rule that persecution can consist of the authorities' failure to protect against actions by private parties - cf the *Krystallnacht* in the history of Nazi Germany.
- f) on the grounds for persecution of refugees (Article 10), the definition of persecution of a "particular social group" is amended to state that gender issues "shall" be considered, at the EP's behest (the 2004 Directive says "might", while the Commission and Council suggested a change to "should"); also at the EP's behest, there is a specific reference to "gender identity".
- g) the provisions on cessation of refugee or subsidiary protection status (Articles 11(3) and 16(3)) have been amended to specify that status will not cease, despite a change in circumstances, in the event of "compelling circumstances", ie particularly traumatic treatment of the persons concerned.
- h) the option to reduce benefits for those who have deliberately brought about their own status (Article 20(6) and (7)) is deleted, and specific references are added to trafficking victims and persons with mental disorders (the Commission had proposed "mental health") as vulnerable persons (Article 20(2)).
- i) the Directive will specify that a person must be able to understand (if possible) the information given to them (Article 22 - amendment at the EP's behest).
- j) the rights in the Directive will apply fully to the family members of persons with subsidiary protection, rather than leaving Member States with wide discretion over how to treat this group of persons (Article 23(2)); the EP also fought off a Council attempt to weaken the obligation to ensure family unity (Article 23(1), which will not be changed); but the EP's

attempts to make the extension of benefits to wider family members mandatory (Article 23(5)) were not successful.

- k) residence permits for persons with subsidiary protection (and their family members) will be renewable for two-year periods (Article 24). This was a compromise between the Council and the EP; the EP had supported the Commission proposal to treat subsidiary protection beneficiaries the same as refugees (ie the initial residence permit would be valid for three years).
- l) persons with subsidiary protection will have to be given travel documents if they are unable to get a passport from their country of nationality, whereas currently they are entitled to such documents only in the case of "serious humanitarian reasons" (Article 25(2)). The EP fought off a Council attempt to place extra conditions on this right.
- m) persons with subsidiary protection will have equal access to employment, and there are new references to employment training and counselling for both refugees and persons with subsidiary protection (Article 26). Member States must endeavour to ensure full access to such activities, but the Commission proposal, supported by EP, to go further and refer to financial support and part-time study was dropped, at the Council's behest.
- n) a new provision on the recognition of qualifications (Article 28; although Article 28(1) is the same as the prior Article 27(3)) includes a new rule that Member States must try to ensure full access to recognition procedures for those without documentary evidence of their prior qualifications; but the Commission proposal, supported by the EP, to refer also to reducing the costs of the recognition process was rejected by the Council.
- o) Member States must ensure equal treatment as regards health care for persons with subsidiary protection (Article 30, ex-Article 29); also there will be a reference to the special needs of those with "mental disorders" (again, the Commission had proposed "mental health" more generally).
- p) as regards unaccompanied minors, there is stronger wording regarding the obligation to trace their relatives; the EP and Council agreed on a further provision referring to beginning to trace relatives even while an asylum application was being considered (Article 31, ex-Article 30).
- q) on housing, there is a new provision requiring Member States to "endeavour" to ensure equal treatment with nationals, although the Council added a provision permitting Member States to continue "dispersal" policies (Article 32, ex-Article 31).
- r) Member States must ensure equal treatment for persons with subsidiary protection (compared to refugees) as regards integration schemes, referring also to the "specific needs" of the persons concerned; although a specific reference to language training and introduction programmes which the Commission had proposed was dropped (Article 34, ex-Article 33).
- s) Finally, in future the Commission's report on the application of the Directive will have to focus on Articles 2 and 7 (on family members and non-state protection), presumably because the EP and Commission settled for a

review of these issues when the Council refused to accept their more ambitious proposals (Article 38, ex-Article 37).

It should also be noted that Member States will retain the possibility to limit equal treatment in social welfare for persons with subsidiary protection to “core benefits” (Article 29 - ex Article 28) despite the Commission proposal, supported by the EP, to ensure equal treatment with nationals in this area.

Conclusions

In the separate Statewatch analysis of the revised proposals on asylum procedures and reception conditions, it is argued that the proposed legislation on those issues is now at risk of making purely cosmetic changes to very unsatisfactory legislation - described there as putting “lipstick on a pig”. Can the same critique be made of the agreed text of the revised qualification Directive?

First of all, the existing qualification Directive does not set as low a standard as the existing Directives on reception conditions and asylum procedures, so it was not as much in need of improvement (although some improvement to the qualification Directive was certainly needed). The higher standard in the existing qualification Directive is largely due to the Geneva Convention on refugee status and the case law of the European Court of Human Rights.

Secondly, as for the substance of the changes which have been made, the changes to the definitions clauses regarding family members are modest, and the changes to the rules on internal flight alternatives and non-state protection largely reflect the case law of the European Court of Human Rights and the EU’s Court of Justice. The changes made as regards gender-related persecution are more significant, and represent the biggest success of the EP in the negotiations on this legislation, counter-balancing the EP’s failure to get further changes made to the rules on non-state protection.

The changes to the rules on the status of persons with subsidiary protection (better treatment as regards residence permits and travel documents; equal treatment as regards employment, integration and health care), and their family members, are rather more significant, although it should be pointed out that only a minority of Member States actually took up the option of treating such persons worse than refugees.

Having said that, those persons with subsidiary protection who cannot find employment will still not have the right to equal treatment in social assistance, and neither refugees nor persons with subsidiary protection will have the right to equal treatment in housing, so the daily life of those persons with subsidiary protection who are less fortunate might not improve much.

So overall, the changes to the qualification Directive, while not radical, are more than trivial, in part because of the EP’s efforts at securing further changes to the rules on gender-based persecution. It should also be recalled that the EP and the Council recently adopted a Directive extending long-term residence rights to persons with refugee status or subsidiary protection, after five years’ legal residence in a Member State.

However, the modest improvements to the qualification Directive should be seen in a broader context. When negotiating the “first-phase” EU asylum legislation, it

was generally understood that Member States were willing to be relatively more generous on the definition and status of refugees and persons with subsidiary protection, with a trade-off as regards maintaining low standards on issue of asylum procedures - therefore ensuring that relatively few people actually qualified for refugee or subsidiary protection status. Also, the parallel development of Frontex, the EU's border control agency, as well as further EU border control policies, was intended to ensure that fewer protection seekers gained access to Member States' territory to claim for asylum in the first place.

Again, there is a risk that the rise in standards in the qualification Directive will be offset by retaining relatively weak rules in the asylum procedures Directive - and by further attempting to limit access to the EU's territory. It is notable that a set of amendments to the rules governing Frontex were agreed at about the same time as the amendments to the qualification Directive.

More specifically, there is a risk that the additional rights of family members of persons with subsidiary protection will be frustrated because Member States will be more reluctant to admit such persons (unless the reference to "family unity" in the Directive can be interpreted as an obligation to admit them). It is notable that sponsors with subsidiary protection are excluded from the EU's family reunion Directive (in contrast, refugees are included in that Directive, and benefit from special more liberal rules on family reunion).

Finally, an underlying problem which could not be solved by these amendments is the gap, in some cases, between Member States' legislative obligations and the practice on the ground. For instance, in the case of *MSS v Belgium and Greece* the European Court of Human Rights has observed that Greece was not properly implementing the EU's reception conditions Directive, and the judgment contains evidence that the EU's asylum procedures Directive and the current qualification Directive are not applied there properly either. For instance, the success rate for persons applying for asylum in Greece is 0.15% at first-instance (adding together the refugee and subsidiary protection claims), whereas the success rate in five of the six Member States with more claims is 36.2% - para 126 of the *MSS* judgment. In other words, asylum-seekers applying in those other Member States *are more than 200 times more likely* to be successful at first instance than those accepted in Greece.

Addressing this problem will require either an effective system for suspending transfers to Member States which fail to apply the EU's rules, or a profound rethink of the processes used to ensure that Member States apply EU law in practice.

July 2011

Documents:

Current qualification Directive - Directive 2004/83:

<http://www.statewatch.org/news/2011/jul/eu-com-qualifications-2004-oj.pdf>

Proposed amendments to Directive - COM (2009) 551:

<http://www.statewatch.org/news/2011/jul/eu-com-qualification-COM-551.pdf>

EP orientation vote:

<http://www.statewatch.org/news/2011/jul/ep-qualifications-orientation-vote.pdf>

Council negotiating position:

<http://www.statewatch.org/news/2011/jul/eu-council-qualifications-trilogue-position.pdf>

Agreed text, July 2011:

<http://www.statewatch.org/news/2011/jul/eu-council-qualification-tcn-12337-rev1-11.pdf>

Footnotes

1. Statewatch analysis, "Lipstick on a Pig?":

<http://www.statewatch.org/analyses/no-132-asylum.pdf>

2. Statewatch Revised analysis - the European Investigation order

<http://www.statewatch.org/analyses/no-112-eu-eio-update.pdf>

© Statewatch ISSN 1756-851X. Personal usage as private individuals/"fair dealing" is allowed. We also welcome links to material on our site. Usage by those working for organisations is allowed only if the organisation holds an appropriate licence from the relevant reprographic rights organisation (eg: Copyright Licensing Agency in the UK) with such usage being subject to the terms and conditions of that licence and to local copyright law.