



Statewatch Analysis

The Revised Asylum Procedures Directive:

Keeping Standards Low

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 (i.e. 'qualification') for refugee status; asylum procedures; reception conditions for asylum-seekers; and responsibility for asylum-seekers (i.e. 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. 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 extended to 2012 but will soon expire.

The European Commission tabled in 2008 and 2009 proposals to revise all of the four key measures referred to above. The European Parliament (EP) and the Council agreed in mid-2011 on the revision of the Qualification Directive, which was then officially adopted in November 2011. However, the Council had difficulty agreeing on how to revise the other rules, in particular when it came to agreeing on the proposals relating to reception conditions and asylum procedures. The Commission tabled amended proposals on these two issues in June 2011 in order to restart discussions.

In the June 2011 Statewatch analysis of these new proposals, it was argued that, taken as a whole, the amended proposals would 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 were adopted as then 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 the extent that adopting the new rules would be like putting ‘lipstick on a pig’.

Since then, the Danish Council Presidency convinced the Member States’ representatives to the EU (known as ‘Coreper’) to agree on a compromise draft of the revised reception conditions Directive in March 2012, and on a compromise version of the Dublin rules in April (see the Statewatch analyses of these two agreements). Negotiations between the Council and the EP on both these measures began in May.

The only key proposal remaining is the revised asylum procedures Directive. On 16 May, the Council Presidency proposed to Coreper a deal on the Council’s version of this Directive. It is not known yet whether a sufficient number of Member States agreed to this proposal (a qualified majority of participating Member States is needed), and in any event, the text will still have to be agreed with the EP, since the EU’s ordinary legislative procedure (previously known as the ‘co-decision’ procedure) applies to the adoption of this text. Nevertheless, this seems an opportune point to consider the current state of negotiations on this proposal within the Council.

The current rules on asylum procedures are set out in Directive 2003/9 (the ‘2005 Directive’), which applies to all Member States except Ireland. The UK and Ireland have opted out of the 2009 proposal (as revised in 2011) to amend these rules, but the 2003 Directive will continue to apply to the UK and Ireland regardless.

Commission proposal

As compared to the 2005 Directive, the Commission’s revised 2011 proposal would do the following:

- a) extend the scope of the Directive to cover not only applications for refugee status, but also applications for ‘subsidiary protection’ status (Articles 1, 2(b) and 3), although it should be noted that the 2005 Directive anyway applies where a Member State has a ‘one-stop-shop’ system for both types of applications (Article 3(3), 2005 Directive);
- b) extend the Directive to cover expressly applications made in the territorial waters of a Member State (Article 3(1));
- c) reduce the number of cases where different authorities deal with asylum applications (Article 4(2)), and provide for training of officials (new Article 4(3));
- d) include more detailed rules on access to the asylum procedure (new Article 6(2) to (4)), including a time-limit to register an application;

- e) add further provisions on asylum applications by dependents (revised Article 7(2) - ex Article 6(3) - and new Article 7(3) and (4));
- f) add a new provision on counselling about and information on the possibility to make an asylum application (new Article 8);
- g) limit the possibility of the extradition of an asylum-seeker to a third State during the asylum procedure, by prohibiting extradition to the country of origin and applying expressly the principle of non-refoulement (revised Article 9, ex-Article 7);
- h) expressly regulate the relationship between applications for refugee status and subsidiary protection status (new Article 10(2));
- i) add a provision on specialist expertise regarding applications (Article 10(3)(d));
- j) delete an exception from the obligation to state reasons for asylum decisions (revised Article 11(2) - ex-Article 9(2)), and provide for a special rule where an application is decided on behalf of family (revised Article 11(3) - ex-Article 9(3));
- k) give asylum-seekers the right to country-of-origin information used by decision-makers as regards their claim (new Article 12(1)(d));
- l) amend the basic guarantees for asylum-seekers, as regards information about the consequences of withdrawing applications, communication with organisations, access to information, and the language in which they are informed of decisions (revised Article 12(1) - ex-Article 10(1));
- m) add provisions on the obligation to cooperate with the authorities, and provide that searches may be carried out only by persons of the same sex (revised Article 13(1) - ex-Article 11(1));
- n) amend the rules on personal interviews, to provide for rules on which authority holds the interview, and to delete some exceptions from the obligations to hold such interviews (revised Article 14(1) - ex-Article 12(1));
- o) add a number of safeguards relating to personal interviews (revised Article 15 - ex-Article 13);

- p) insert a new rule on the content of personal interviews (new Article 16);
- q) add further provisions relating to access to the report of the personal interview (revised Article 17 - ex-Article 14);
- r) insert a new clause on medical reports (new Article 18);
- s) add a new clause on legal and procedural information at first instance (Article 19);
- t) revise the rules on legal aid and assistance, in order to drop the current possible limit to legal aid for only one set of appeal procedures (revised Article 21(2) - ex-Article 15(3)), permit access to legal advice at all stages (revised Article 22(1) - ex-Article 15(1)), and to permit the legal adviser to have access to the file at all stages, require Member States to allow the adviser to attend interviews and strengthen procedural rights in cases where security exceptions apply (revised Article 23 - ex-Article 16);
- u) insert a new clause providing for special procedural guarantees, including in some cases an exception from some important limits on their procedural rights (new Article 24);
- v) strengthen the rules on representation and legal advice for unaccompanied minors, including again an exception from some important limits on their procedural rights (revised Article 25 - ex-Article 17);
- w) amend the rules on implied withdrawal of applications (revised Article 28 - ex-Article 20) to provide for conditions for rejecting applications in such cases, to provide for the right to make a fresh application, to set a minimum for any time limit on that right, and to regulate the relationship with the Dublin rules;
- x) provide for the UNHCR to have access to applicants at the border (revised Article 29 - ex-Article 21);
- y) set out a time limit of six months to decide on applications, with the possibility of extension for a further six months in certain cases, or an indefinite postponement if there are large numbers of applications and the situation is expected to be temporary (new Article 31(2));

Member States will have an extra three years to apply this clause (new Article 51(2));

- z) clarify the rules on the acceleration of decisions on well-founded applications (revised Article 31(5) - ex-Article 23(3)), and cut down on the grounds for accelerating decisions on unfounded applications (revised Article 31(6) - ex-Article 23(4)), also ruling out application of the latter rules where a person applies for asylum after an irregular entry and requiring that there be 'reasonable' time limits in such cases (new Article 31(7) and (8)) ;
- aa) drop some of the circumstances in which an application can be considered inadmissible, but provide for inadmissibility for some cases of subsequent applications (revised Article 33(2) - ex-Article 25(2));
- bb) add a special rule on admissibility interviews (new Article 34);
- cc) permit applicants to challenge the application of the principle of 'safe first country of asylum' in their particular situation (revised Article 35 - ex-Article 26);
- dd) delete the possibility of applying lower standards as regards the national designation of countries as 'safe countries of origin', and provide for a 'regular review of the situation' in such countries (revised Article 37 - ex-Article 30);
- ee) modestly raise the threshold for considering another State to be a 'safe third country', and provide for more possibilities to challenge the determination that such a State is safe (revised Article 38 - ex-Article 27);
- ff) remove the 'grandfather' clause relating to 'super-safe' third countries, allowing Member States to add new States to their list of such countries (revised Article 39 - ex-Article 36);
- gg) clarify the rules on repeat applications (revised Article 40 - ex-Article 32);
- hh) add a new rule on the consequences of certain repeat applications (new Article 41);

- ii) delete the possibility of applying lower standards as regards border procedures (revised Article 43 - ex-Article 35);
- jj) amend the rules on an ‘effective remedy’ to: change the circumstances where must be guaranteed, adding some cases and removing some others (revised Article 46(1) - ex-Article 39(1)); add new rules on the situation where a person has been denied refugee status but granted subsidiary protection status (new Article 46(2)), and requiring a review of the merits of decisions (new Article 46(3)); provide for better procedural rights as regards time limits for review (revised Article 46(4) - ex Article 39(2)); and to provide for more rights to stay on the territory pending an appeal decision (new Article 46(5) to (8) - compare to ex Article 39(3)); and
- kk) add a new rule on appointing contact points (new Article 49).

The draft Council position

The draft Council position differs from the Commission proposal as follows:

- a) the definition of an ‘applicant in need of special procedural guarantees’ has been amended to drop the list of circumstances where the concept applies, and to refer to the ‘limited’ ability to benefit from and be subject to the Directive, instead of a ‘need’ for special guarantees (revision of Article 2(d));
- b) the definition of a ‘representative’ has been revised so that a representative will not necessarily be the legal guardian of an unaccompanied child asylum-seeker (revision of Article 2(n));
- c) the rules on training of officials have been improved (revision of Article 4(3));
- d) there are new rules on asylum applications made to authorities (like police and border guards) other than asylum authorities (revision of Article 6(1) - proposed Article 6(3); this draws in part upon the current Article 6(5), which the Commission had proposed to delete);
- e) if an asylum-seeker does not take the opportunity to make an application when offered, Member States can consider that an application has been withdrawn (revision of Article 6(2));
- f) a new clause would regulate the question of when an application was lodged (new Article 6(4));

- g) the time limit to register an application in the event of a large influx of asylum-seekers is extended from 7 to 10 days (revision of Article 6(5) - proposed Article 6(4));
- h) the proposed new provision on counselling about and information on the possibility to make an asylum application (new Article 8) would be amended so that such information would only have to be provided on the asylum-seeker's request and access by NGOs and the UNHCR would be more limited;
- i) it would be possible to extradite an asylum-seeker to his or her country of origin on national security grounds (revision of Article 9(2)); while this reflects exceptions in the Geneva Convention on refugee status, it does not expressly take account of the ban on removal to face torture, et al, in the European Convention on Human Rights (ECHR), although arguably the new Article 9(3) would incorporate the ECHR rules;
- j) asylum-seekers would only have access to the country-of-origin information used by decision-makers after a decision has already been taken (revision to Article 12(1)(d));
- k) the provision requiring searches by persons of the same sex only would no longer be absolute (revision to Article 13(2)(d));
- l) a request for the interviewer and/or interpreter to be of the same sex as the applicant could be rejected if it was clearly discriminatory (revision to Article 15(3)(b) and (c));
- m) the rules on reporting and recording interviews would refer to an applicant *acknowledging* such reports rather than *approving* them (revision to Article 17(3) and (4); this is also a change as compared to the 2005 Directive);
- n) the applicant would not have access to the report until after the decision was made, where the proceedings were accelerated (revision to Article 17(5); note also that the circumstances where proceedings could be accelerated would also be expanded - see Article 31(6)); this is a significant reduction in standards as compared to the 2011 proposal, when it is considered in light of the possibility of refusing in-country applications in such cases (see Article 46(6));

- o) many of the new safeguards relating to medical examinations would be removed or watered down (revision to Article 18);
- p) as regards legal and procedural information and legal aid and assistance, the rules on information on first instance decisions would be less precise (revision to Article 19(1)), free legal aid could be refused by a body other than a court (although in such cases such decisions would be reviewable before a court: revision to Article 20(3)), Member States would have to limit free legal advice to persons admitted under national law (revision to Article 21(1)), the current possible restriction of free legal aid to one set of appeal proceedings only would be re-inserted (revision to Article 21(2)), and a specific reference to security procedures as regards access to information would be dropped (revision to Article 23(2)) ;
- q) the key safeguards relating to persons with special procedural needs have been watered down to the point of meaninglessness - namely, the obligation to identify such persons, the requirement to give them time and support and the exemption from important limits on their procedural rights have all been dropped (revision to Article 24);
- r) similarly, the obligation to exempt unaccompanied minors from an even larger number of important limits on their procedural rights have all been dropped (revision to Article 25(6));
- s) the rules on implied withdrawal of claims have been changed to drop the requirement for an interview before rejecting an application on such grounds, to reduce the maximum time limit (from one year to six months) for reopening the case, to permit Member States to limit the number of times that a case can be reopened and to drop a clause on the relationship with the Dublin rules (revision to Article 28);
- t) the rules on time limits for deciding on applications now include a provision on the relationship with the Dublin rules (revision to Article 31(2)), extend the possible extra waiting period to one year and lower the threshold (from 'impossible' to 'very difficult') as regards one of the grounds for this delay (revision to Article 31(3));
- u) the rules on prioritising applications now provide (like the 2005 Directive) for prioritisation in any cases (revision to Article 31(5));

- v) the rules on accelerating decisions now also provide for possible acceleration where the person concerned has made a subsequent application, has entered unlawfully or has refused to supply fingerprints (revision to Article 31(6));
- w) Member States are no longer obliged to lay down time limits as regards accelerated decisions, and the obligation to ‘ensure adequate and complete examination’ of claims in such cases has been dropped (revision to Article 31(7));
- x) Member States may apply the rules on accelerated decisions due to lack of documents or forged documents (revision to Article 31(8));
- y) Member States may find an application inadmissible where the person concerned already has subsidiary protection in another Member State; this limits much of the effect of reducing in the list of circumstances where Member States can treat an application as inadmissible (revision to Article 33(2));
- z) the new rules on interviews in admissibility cases are amended to drop the rule on the relationship with the Dublin system, and to drop the requirement that the persons interviewing applicants cannot wear police or military uniforms (revision to Article 34);
- aa) the threshold regarding non-refoulement in cases where the applicant has made a subsequent application has been lowered (revision to Article 41);
- bb) the rules on an effective remedy of decisions would provide (as in the 2005 Directive) expressly for a review of the super-safe third countries clause (revision of Article 46(1));
- cc) it deletes the proposed express requirement for Member States to preserve the rights and benefits of a person with subsidiary protection status if that person appeals a refusal to grant refugee status, and specifies that a Member State may refuse to allow such a person to appeal such a refusal if the rights and benefits granted to persons with subsidiary protection status in that Member State are the same as the rights and benefits granted to a person with refugee status (revision of Article 46(2)); and
- dd) it adds to the exceptions from the general rule that an asylum-seeker must be allowed to stay on the territory during an appeal (revision of Article 46(6), and deletes the clause on the relationship with the Dublin rules (dropping Article 46(8)).

If the draft Council position were to become the final text of the Directive, the following would change as compared to the 2005 Directive:

- a) the extension of scope of the rules to all subsidiary protection applications;
- b) the explicit extension of scope of the rules to applications made in territorial waters;
- c) the changes to the rules regarding cases where different authorities deal with asylum applications, and (augmented by the Council draft) training of officials;
- d) the revised rules on asylum applications made to authorities (like police and border guards) other than asylum authorities, and on time limits for registering applications;
- e) the possibility to consider an application withdrawn if it is not made as soon as possible (this is a significant reduction in current standards);
- f) the new definition of when an application was lodged;
- g) the revised rules on applications by dependents;
- h) the new rules (albeit watered down by the Council draft) on access to the procedure at the border or in detention;
- i) the new rules expressly regulating the relationship between applications for refugee status and subsidiary protection status, and on specialist expertise regarding applications;
- j) the changes to basic guarantees for asylum-seekers, as regards the obligations to state reasons, decisions taken on behalf of families, access to country-of-origin information (as watered down in the Council draft), information about the consequences of withdrawing applications, communication with organisations, access to information, the language in which they are informed of decisions, cooperation with the authorities, and searches (as watered down in the Council draft);
- k) the revised rules on when a personal interview must be held, and on the content and requirements for interviews, and (as watered down in the Council draft) on reporting and recording such interviews;

- l) the new rules on medical examinations (as watered down by the Council draft);
- m) the new provisions on legal and procedural information at first instance, and some modest changes to the rules on legal assistance (but not legal aid) on appeals;
- n) the new provisions on special procedural guarantees, although these are very weak in the Council's draft;
- o) the revised provisions on unaccompanied minors, as watered down considerably in the Council's draft;
- p) amendments to the rules on implicitly withdrawn claims, as watered down in the Council draft;
- q) some new rules (watered down by the Council draft) on time limits for deciding on applications;
- r) some reduction (watered down by the Council draft) in the list of circumstances in which a decision could be accelerated - assuming this list is exhaustive;
- s) some new provisions regarding 'reasonable' time limits as regards accelerated decisions (if a time limit is set at all) and the exclusion of use of accelerated decisions due to illegal entry - although the latter rule is undercut by the addition of a new rule in the Council draft, which permits some applications following illegal entry to be accelerated if other conditions are met;
- t) some limited reduction of cases where application can be considered inadmissible;
- u) some new rules on admissibility interviews;
- v) a new rule allowing an express challenge to a determination that a country is a 'first country of asylum';
- w) some derogations from the 'safe country of origin' rule would be dropped, and there would be a new requirement of the review of the application of this clause by Member States;
- x) some modest changes to the 'safe third country' clause;

- y) a new power for Member States to use the ‘super-safe’ third countries clause in future (this would reduce standards as compared to the 2005 Directive);
- z) there would be some changes to the rules on ‘subsequent applications’ ;
- aa) derogations from the rules on applications at the border would no longer be permitted; and
- bb) as regards the right to an effective remedy, there would now be an express right to appeal against being granted subsidiary protection status instead of refugee status, although this right would be highly circumscribed in the Council’s draft position; there would also be new rules on the review of merits of decisions and time limits for appeals; and there would be a new general rule permitting stay on the territory, although the Council’s draft would limit the practical impact of this clause as it would extend the exceptions to it (including by means of lengthening the list of the grounds on which decisions can be accelerated).

Taken as a whole, the proposed Council draft would provide for a fairly modest increase in standards relating to asylum procedures. The most important improvements which remained in the revised proposal of June 2011 have been removed or watered down by the Council: the cut-back of the grounds for accelerating proceedings, the number of exceptions from the right to remain on the territory during an appeal, the exemption from limits on procedural rights for unaccompanied minors and persons with special needs, other new rules regarding persons with special needs, early access to country-of-origin information and reports on interviews (in light of the possible denial of an in-country appeal). There are also some disturbing reductions of current standards as regards (surreally) the possibility to consider an application as withdrawn even though it was never made (if it is not made as soon as possible), and the power to reintroduce a ‘super-safe’ third country rule allowing for no consideration of an asylum application at all - a manifest breach of the Geneva Convention, international human rights law, and the EU Charter of Fundamental Rights. The enhanced rights for legal advisers would be undercut by the absence of any new rights relating to legal aid; so asylum-seekers would not have any increased ability to pay for the advisers to exercise these new rights.

While the proposed Council draft would likely result in modest but tangible improvements in procedural rights for *some* asylum-seekers, Member States would still be able to accelerate the consideration of a significant number of applications. In these cases, Member States could have denied the applicant legal aid, access to the information used against him or her and a

copy of the report of the interview during first-instance proceedings; and they could then prevent the applicant from staying on the territory during the appeal. The net result would be a grossly unfair procedure.

As with the other asylum proposals, it will remain to be seen whether the EP can convince the Council to raise procedural standards in the second phase of the Common European Asylum System in order to ensure that those persons who are genuinely facing persecution or serious harm have a fair opportunity to prove it.

May 2012

Sources

Existing Directive 2005/85:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>

2011 proposal to amend the Directive:

[http://ec.europa.eu/home-affairs/news/intro/docs/110601/319/1_EN_ACT_part1_v12\[1\].pdf](http://ec.europa.eu/home-affairs/news/intro/docs/110601/319/1_EN_ACT_part1_v12[1].pdf)

Draft Council position, Council doc 9831/12:

<http://www.statewatch.org/news/2012/may/eu-council-asylum-procedures-9831-12.pdf>

Analysis of deal on reception conditions Directive, March 2012:

<http://www.statewatch.org/analyses/no-172-reception.pdf>

Analysis of deal on Dublin Regulation, April 2012:

<http://www.statewatch.org/analyses/no-173-dublin-III.pdf>

Analysis of revised proposals on reception and procedures, 2011:

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