ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
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ILPA commentaries on proposed European Commission Directives

ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on many Government and other 'stakeholder' and advisory groups. ILPA has a specialist subcommittee on European law, which regularly comments on EU proposals.

1. Proposed changes to EC asylum reception rules

In the period 2000-05, the Council, acting under Article 63 of the EC Treaty, adopted a package of asylum measures.[1] This was to constitute the first-phase legislation setting out EU-wide minimum standards with a view to establishing gradually a Common European Asylum System. In June 2008, in its Policy Plan on Asylum,[2] the Commission announced the amendments it would propose to the current Directives and Regulations in the asylum field in order to achieve a higher degree of harmonisation and improve standards of protection. The problem with the first-phase instruments is that they were negotiated under unanimity in the Council, which meant that agreement could be found only at the lowest common denominator, that obligations were vaguely formulated and that the wide degree of discretion allowed to Member States in the way these were to be met have resulted in negating the desired harmonising effect.

The Directive laying down minimum standards for the reception of asylum seekers is one of the first-phase measures. It was adopted by the Council on 27 January 2003 and entered into force on 6 February 2005. It is designed to harmonise the laws of Member States concerning support to asylum seekers during the determination of their claim, i.e. their access to health care, education and employment, the housing and financial support provided to them, and the circumstances in which support may be withdrawn. The Directive applies to all but two Member States: Ireland decided not to opt in and Denmark is automatically excluded from all Community Title IV measures.

The Commission put forward a proposal recasting the Reception Conditions Directive on 9 December 2008.[3] The proposed changes to the EU-wide asylum reception rules are substantial and the Commission therefore suggests that the Reception Conditions Directive (the 2003 Directive) be repealed and replaced by a new Directive. This is an

[1] The key first-phase asylum measures are: Directive 2005/85/EC on minimum standards for granting and withdrawing refugee status (Procedures Directive); Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals as refugees or as persons otherwise in need of international protection (Qualification Directive); Directive 2003/9/EC on minimum standards for the reception and support of asylum seekers (Reception Conditions Directive); Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced people and measures to promote a balance of effort between Member States (Temporary Protection Directive); Regulation 343/2003 determining the Member State responsible for examining an application for asylum (Dublin Regulation); Regulation 407/2002 on the creation and operation of a database of fingerprints of asylum seekers (Eurodac Regulation).

[2] COM(2008) 360 final.

[3] COM(2008) 815 final and Impact Assessment SEC(2008) 2944.

important distinction as it affects specifically the position of the UK, which had opted in to the 2003 Directive but has decided not to opt in to the new measure: with respect to an amending measure, the UK would still be bound by the existing measure even if it did not opt in to the amending legislation. On the other hand, recast legislation repealing the 2003 Directive would arguably give the UK the option to step out from the EC reception rules altogether, as the old rules would cease to form part of EU law. It is possible that a repeal and replacement mechanism, rather than amending legislation, was used to avoid a situation where the UK's non-participation in the amendment rendered the system inoperable for other Member States. It should be recalled that the Lisbon Treaty seeks to address this scenario by introducing a mechanism allowing the Council to decide to eject the UK from the existing measure and bear the financial consequences of it.[4]

The key changes to the EC standards on reception conditions for asylum seekers which the Commission is proposing concern the scope of the measure, new provisions on detention, facilitated access to employment, level of support, enhanced safeguards for minors and vulnerable persons and a new mechanisms at the national level for monitoring the reception system.

Scope

The 2003 Directive requires Member States to apply its provisions to non-EU nationals who make a claim for asylum under the Geneva Convention on the Status of Refugees and gives Member States the option to extend the provisions to applications for other types of protection. The new Directive amends the scope to applications for international protection, the definition of which refers to the Qualification Directive and includes requests for subsidiary protection, i.e. those who, while not refugees under the terms of the Geneva Convention, are at risk of serious harm if returned to their country of origin.[5] The recitals also clarify that the Directive is applicable during all stages and types of procedures (draft Recital 8). This should put beyond doubt that the Directive applies to asylum seekers caught in the Dublin procedure or placed in detention - two specific circumstances where Member States' practices have not been consistent. Somewhat problematically, the new Directive retains the provision that allows Member States, exceptionally and temporarily, to have different reception arrangements in place, amongst others, when asylum seekers are detained or confined at border posts (draft Article 18). While it is now stated that any derogation to the 'normal' reception regime has to be "duly justified", it is doubtful that this will add any clarity to one of the most ambiguous provisions of the 2003 Directive.[6]

Detention

The 2003 Directive makes no provision on the detention of asylum seekers.[7] It only deals with this issue as a derogation to the right to freedom of movement and residence by

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[4] New Article 4a of the Protocol on the Position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

[5] Under Article 15 of the Qualification Directive, serious harm consists of:
(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

[6] Directive 2003/9/EC, Article 14(8).

[7] None of the Asylum Directives does. The issue was supposed to be addressed by the Procedures Directive but Member States were unable to agree in Council on the rules for detention and eventually settled on a sole article which states that: 1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. 2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review. Directive 2005/85/EC, Article 18.

stating that asylum applicants may be confined to a particular place “when it proves necessary, for example for legal reasons or reasons of public order” (Article 7(3)). While confinement is clearly understood to mean detention, the grounds for detention, the procedural rules and guarantees and the treatment during detention are not addressed at all. The Commission considers it necessary to remedy this situation, particularly given the wide use of detention in the area of asylum, and proposes a new set of provisions, which are meant to ensure that detention of asylum seekers respects the principles of legality, necessity and proportionality. Thus, the new Directive sets out the general principle that a person should not be detained for the sole reason that he or she has applied for international protection (draft Article 8(1)). More specifically, applicants may be detained only if less coercive measures would not be effective and then only in order to establish their identity and nationality; determine elements of their applications which might otherwise be lost; decide on their right to enter; or for reasons of national security and public order. Authorities in Member States must also take into account the individual circumstances of the case, including specific vulnerabilities (draft Article 8(2)). With regard to the procedural rules and guarantees, it is stated that detention shall be for the shortest period possible. In particular, the duration of detention must not exceed the time needed for administrative authorities to fulfil the relevant procedural requirements. In any case, delays in the administrative procedure, if they cannot be attributed to the asylum seeker, should not justify the prolongation of detention (draft Article 9(1)).

Particularly welcome is the regime of judicial oversight of immigration detention. The new Directive lays down the requirement that detention must be ordered by judicial authorities, or confirmed by a judicial authority within 72 hours if, in urgent cases, ordered by administrative authorities. The detention order must be in writing, specifying the grounds and its duration. The detained asylum seeker must be immediately informed of the grounds of detention, its duration and of the possibilities to challenge the detention decision. In case of unlawful detention, the asylum seeker must be released immediately (draft Article 9(2)-(4)). The guarantees do not go as far as to provide for automatic review of continued detention by the courts, as this may happen either ex officio or on request of the asylum seeker (draft Article 9(5)) but procedures must laid down in national law on access to legal assistance and/or representation, free of charge where asylum seekers cannot afford to pay for it themselves (draft Article 9(6)).

With regard to the conditions of detention, the new Directive specifies that asylum seekers must not be kept in prison accommodation but in specialised detention facilities, that detained families must be provided with separate accommodation, that unaccompanied minors must never be detained, and that people with special needs should not be detained unless a suitably qualified person certifies that their health and well-being will not deteriorate significantly as a result of detention (draft Articles 10 and 11).

Given the current widespread concerns about detention of asylum seekers in the EU, both with regard to the generalised practice of detention and the conditions in detention facilities, these provisions would go some way to ensure that Member States’ practices are in line with fundamental principles of EC law and international human rights obligations. It will have to be seen, however, whether and in what form they will survive negotiation in Council and between the Council and the European Parliament. For the latter, the issue of immigration detention is a cause of major concern. As recently as 5 February 2009 the

European Parliament adopted, by 483 votes to 39, with 45 abstentions, an own initiative report criticising the "intolerable conditions" suffered by migrants in detention centres throughout the EU. The report takes stock of visits carried out to several detention centres in the EU by the Civil Liberties Committee (LIBE). It denounces overcrowding, poor hygiene standards, lack of medical care and legal aid and the "prison conditions" in which asylum seekers were being held, although they had committed no crimes.[8] In view of its fact-finding missions and first-hand observation of detention practices in the EU, it is to be hoped that the European Parliament will insist on the adoption of adequate guarantees and standards of protection.

One puzzling provision on detention in the new Reception Directive is the requirement that asylum seekers be kept separate from other immigration detainees (draft Article 10(1), second indent). This is not currently the common practice but may have its rationale in the somewhat different detention regime that is applicable to third country nationals subject to removal under the recently adopted Returns Directive.[9] The provisions for judicial supervision of detention are, for instance, considerably weaker in the Returns Directive than those proposed in the new Reception Directive: for those subject to removal, detention following an administrative decision must be approved by the courts "as speedily as possible".[10] This wording reflects a compromise, reached between the Council and the European Parliament, which had watered down the original proposal by the Commission for a regime of judicial oversight in line with what is currently proposed in the new Reception Directive: detention ordered by the courts, except for urgent cases where an order by the administration had to be confirmed by a court within 72 hours.[11] While it is desirable that the stronger guarantees for asylum seekers survive negotiation, it will be difficult to justify why third country nationals in pre-removal detention should be subject to a different, lower, set of guarantees.

Employment

Another important change concerns access to the labour market. The 2003 Directive grants access to employment only if a decision of first instance has not been taken within one year from the submission of the asylum application. The provision would be amended to ensure that employment is accessible within a maximum period of 6 months after lodging the application (draft Article 15). Unlike the current provision which links access to employment to the period before an initial decision on an asylum application is made, the right to take employment after six months would apply to the whole period under with the application is under consideration. The amended article would also prevent the imposition of national labour market conditions which could restrict or delay actual access to employment for asylum seekers.

The new employment access regime is proposed in order to deal with two problematic issues which the Commission has identified further to its evaluation process.[12] First, this right granted to asylum seekers is in practice made meaningless by the imposition of requirements such as possession of a work permit and other limitations and restrictions that can be placed upon this entitlement to work by national law. Secondly, the wide margin of discretion Member States can exercise in determining the timeframe for such

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[8] *Parliament criticises member states over detention centres*, Agence Europe, Brussels, 05/02/2009.

[9] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

[10] Directive 2008/115/EC, Article 15(2).

[11] COM(2005) 391 final, draft Article 14.

[12] See SEC(2008) 2944, pp.16-17.

access has meant a widely divergent practice in this respect. The Commission also points out that studies have highlighted the negative impact of forced unemployment on the physical and mental health of asylum seekers, not to mention their vulnerability to exploitation if they are forced to make a living in the underground economy.[13] These findings make a compelling argument for easing access to employment for asylum seekers. They greatly countervail the only argument that is commonly advanced by Member States authorities for keeping restrictions, i.e. that allowing access to the labour market may encourage fraudulent applications.

Level of support

The provisions on the level of material reception conditions are a clear illustration of the ambiguity of the Directive's text which makes it nearly impossible to monitor compliance of Member States' reception systems with the agreed standards. The 2003 Directive sets out the obligation to "ensure a standard of living adequate for the health of the applicants and capable of ensuring their subsistence" but what is to be considered adequate in this respect is nowhere defined. The Commission proposes to define the principle of adequacy better by inserting a general benchmark, i.e. the level of support is to be equal to the level of national income support (draft Article 17(5)).

The definition of 'adequate standard of living' in parity with mainstream welfare provisions granted to nationals would provide a clear benchmark and should therefore be welcomed, although it may not by itself ensure asylum seekers dignified standard of living, given that levels of income support vary in the Member States and asylum seekers often lack family or other informal kinds of support.

Another welcome development is the proposal to delete Article 16(2) of the 2003 Directive which allows the reduction or withdrawal of basic support from asylum seekers who fail to demonstrate that they applied as soon as reasonably practicable after arrival. The Commission recalls the House of Lords ruling which held that this practice was incompatible with Article 3 ECHR and striking this infamous provision out will avoid unnecessary further litigation in domestic jurisdictions and before the European Court of Justice.[14]

Minors and vulnerable persons

The 2003 Directive requires Member States to take into consideration the specific situation of vulnerable persons but does not specify how this obligation should be met. The Commission therefore proposes to place an obligation upon Member States to establish procedures in national legislation with a view to identifying persons with special needs as soon as the application for asylum is lodged (draft Article 21(2)). With regard to minors, standards of treatment are aligned with the 1989 UN Convention on the Rights of the Child, with particular emphasis on the best interests of the child principle which is to be assessed on the basis of relevant international and regional standards (draft Article 22).

Monitoring reception conditions

The Commission's evaluation report on implementation of the 2003 Directive showed that various Member States were not meeting the current EC obligations in the field of asylum support, and the ambiguity of the Directive's text in many key areas did not allow effective monitoring of compliance of Member States' reception systems with the agreed

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[13] Ibid. p.17.
[14] [2005] UKHL 66 on appeal from: [2004] EWCA Civ 540.

standards.[15] Besides clarifying some of the legal obligations, the new Directive will introduce a requirement on Member States to put in place relevant mechanisms to ensure adequate monitoring and control of the reception system and to submit relevant data to the Commission as in the form annexed to the Directive (draft Article 27). This will complement the Commission's duty to report on the application of the Directive every five years.

2. Dublin II and Eurodac proposals

Overview

In December 2008, the Commission proposed two Regulations to 'recast' the Dublin II Regulation and the Eurodac Regulation. A 'recast' entails replacing the existing text of EC legislation by a new measure, which brings together the original legislation and the successive amendments made to it, including some further amendments. Ireland has 'opted in' to both proposals, while the UK had not yet announced whether or not it would opt in at time of writing.

Although ILPA and other NGOs interested in asylum issues have long argued that the Dublin system of allocating asylum applications is fundamentally problematic and unworkable, the Commission's proposal to amend the rules would at least ameliorate their application in practice to a degree. To that extent the proposal is largely welcome, although in the short term the Commission needs to examine further whether, as part of the completion of the Common European Asylum System, the current Dublin system should be replaced by an 'applicant's choice' system.

Comments on the Regulation's compatibility with the ECHR are highlighted in grey.

Comments on the proposal

Subsidiary protection– The Commission's proposal would extend the Dublin rules to persons claiming subsidiary protection. This is objectionable because the scope of the Dublin procedure should be kept as limited as possible. However, if Dublin is going to be extended to this extra category of persons then there should also be criteria, as the Commission proposes, requiring Member States to take responsibility for applications where there is a family member with subsidiary protection, or who has applied for subsidiary protection.

Territorial scope – The proposal would limit the application of the Dublin rules, as at present, to applications made on the territory or at the border of Member States. It should also make clear that Member States must take responsibility for applications which are submitted to their national authorities *outside* their territory or borders or transit zones, for example on the high seas. In those cases, the Member State which has taken effective jurisdiction over the asylum-seeker should be responsible for the application.

Clarifying this point would bring the Regulation into compliance with the European Convention, which requires states to make accessible to individuals within their jurisdiction

[15] COM(2007) 745 final.

remedies for potential violations of their Convention rights. *See Hussun v Italy*, decision of 11 May 2006; *D v United Kingdom*, judgment of 2 May 1997, paragraph 48.

Family members – the Commission has proposed a wider definition of 'family members' (Art. 2(i)). This is welcome, as is the strengthened protection for unaccompanied minors (Art. 8) and the new rules on timing of applications where there are family members (Art. 7(3)). However, it would be preferable to have a family unity requirement as long as the family member has some legal status in a Member State, and to remove the condition that the responsibility where a family member is claiming protection only applies where there is no first-instance decision yet.

The proposal also strengthens the "best interests of the child" principle, and so decreases the likelihood that returns taking place through the Dublin system will violate the Convention (*see, e.g., Muilbanzila Mayeka & Kaniki Mitunga v Belgium*, judgment of 10 October 2006). The wider definition of family members also decreases this possibility, as the ECHR in general does not rely on traditional European notions of the family when considering whether the state has violated the right to respect for family life. However, the Dublin system will continue to interfere with individuals' respect for family life, requiring fact-sensitive decisions which will have to be taken in the context of challenges to removal.

Criteria of irregular entry and stay – These criteria (and the criteria relating to issue of a visa or a residence permit, or legal entry) would not be altered at all by the Commission's proposal. In ILPA's view, there is a strong argument that the criteria relating to irregular entry and stay should be suspended, at least until there is greater harmonisation of asylum law in the EU.

'Withdrawn' applications – the Commission's proposes to confirm that applicants who leave one Member State and are then set back there must still have their application fully examined. This is very welcome, as it would confirm the correct interpretation of the existing rules, which had been a subject of controversy due to Greek practice in particular.

From the perspective of the ECHR, this requirement will reduce situations such as that which occurred after the judgment in *T.I. v Germany* when Germany, two weeks after having given assurances to the European Court of Human Rights that Dublin returnees would have access to a discretionary procedure to pursue their claims, refused to hear the claim of a returnee from the UK under that procedure.

Remedies clause – The Commission proposes that a legal challenge to Dublin transfers must be available, and will suspend enforcement for at least one week.

It is the settled case law of the European Court of Human Rights (ECtHR) that transfers of applicants for international protection to 'safe' third country, including under the Dublin system, may engage the sending state's responsibility under Articles 2 or 3 ECHR (*T.I. v United Kingdom*, decision of 7 March 2000). In addition, Article 13 requires 'independent and rigorous scrutiny of a claim' for international protection arising under those articles (*see, e.g., Jabari v Turkey*, judgment of 11 July 2000).

The proposed Regulation provides a right 'to an effective judicial remedy, in the form of an appeal or a review, in fact and in law, of the transfer decision', and requires states to provide a reasonable time for such a review (*see Jabari*, paragraph 40) which will ensure

an effective remedy for Convention violations that may occur as a result of the application of the system and reduce the need to have recourse to the European Court for such violations.

Significantly, the Regulation provides for suspensive effect of appeal or judicial review of the transfer system (Article 26(3)-(4)), if only until such time as the domestic authorities can decide whether the applicant for international protection can stay in the state while the procedure is underway (maximum of seven days). This responds to the European Court's requirement that applicants for international protection have access to remedies with suspensive effect (*see, e.g., Conka v Belgium*, judgment of 5 February 2002; *Gebremehdin v France*, judgment of 26 April 2007). It is not however clear that the proposal goes far enough in this respect by limiting the suspensive effect to seven days, particularly if the applicant's removal to another EU country will hamper her/his ability to use this judicial remedy (*see, mutatis mutandis, Ben Khemais v Italy*, judgment of 24 February 2009, paragraph 85).

It should also be made clear that a national court can suspend all removals to a particular Member State, not just in respect of the individual asylum-seeker.

Detention – the Commission has proposed rules on detention as regards Dublin cases for the first time. This includes rules on limitation of the grounds for detention and new rules on the conditions of detention. These proposals are very welcome, although there could be further clarification to ensure that persons to be transferred are not detained as a matter of course.

These safeguards, including an individual assessment of each case, a requirement for detention to be as short as possible, requirement of a judicial order to detain, judicial review of detention at reasonable intervals, and the prohibition on detention of unaccompanied minors, improve the Regulation's compliance with Article 5 of the ECtHR (*see Saadi v United Kingdom*, judgment of 29 January 2008, paras 73-74).

Suspension of transfers – the Commission proposes that it should have the power to suspend transfers where a Member State cannot or will not apply EC asylum law. This is welcome, as it will ensure that more asylum applicants receive a fuller examination of their claim and fairer treatment during the determination procedure. It would be useful to clarify that the European Parliament or national parliaments, and individuals, NGOs and the UNHCR could also request the Commission to act, and to specify that the Council could also overturn a Commission's refusal to suspend transfers. It should be specified that the Commission is *obliged* (not just empowered) to suspend applications if the criteria in the Regulation are met, and that Member States can act unilaterally to suspend removals pending the Commission decision. The suspension should not prejudice transfers on family unity grounds.

Eurodac – The Commission proposal largely maintains the existing Eurodac system, except for: expanding its scope to cover applications for subsidiary protection, consistently with the amendments to the Dublin II rules; 'unblocking' the fingerprints of recognised refugees; and reducing the time limit for keeping border crossers' fingerprints to one year. The latter proposal is welcome since the period for keeping prints should match the responsibility clause in the Dublin II rules. However, the first change if objectionable for

the reasons set out above, and the second change is objectionable because recognised refugees should be allowed to move freely around the Community.

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