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DRAFT EU CONSTITUTION: IMPLICATIONS FOR ASYLUM AND IMMIGRATION

Summary

1. Britain's circumstances are very different from those of our European partners. We do not "fit" the continental model.

2. Experience so far of European "co-operation" has not been encouraging. Our European partners have declined to endorse British ideas for exerting EU economic pressure to achieve repatriation agreements. They have also effectively turned down suggestions for processing asylum seekers outside the European Union.

3. In the negotiations so far on the draft Constitution, the British Government's amendments have been almost entirely rejected.

No language has been agreed on the preservation of the "opt-out" (under the Amsterdam Treaty) that permits us to retain our own border controls. The British delegation has proposed, but has not achieved, a complete re-draft of the article on asylum. And the article on immigration hands over to European Law issues of great importance and domestic sensitivity. These laws will be decided by Qualified Majority Voting (QMV) under which Britain has only 29 votes compared to the 88 required to block an unwelcome proposal. Conclusions are at para 29.

Background

4. The Government claim that asylum and immigration is "a European problem" which requires European solutions.

This is shallow analysis. The reality is that Britain's situation is entirely different from that of our European partners, demographically, geographically, administratively and historically.

5. Some major European countries, such as Italy or Germany have a very low birth rate of about 1.1. In Britain, our birth rate is 1.78 - short of the replacement rate of 2.1 but very different in demographic terms from the situation of Italy or Germany. The fact is that our population is not declining. It is set to grow by at least 4 million over the next 25 years - even on a very cautious assumption about immigration. Nor is our work force declining. It would continue to increase for the next 20 years, even if there were no immigration at all, mainly because women will

work longer. Furthermore, the South East of England where, on present patterns, three quarters of migrants settle is one of the most crowded areas of Europe.

6. Geographically, the fact that Britain is an island has, in the past, enabled us to impose tight control at the borders, allowing almost total freedom once inside. Hence, unlike most countries in continental Europe, our administrative system has no requirement for personal identity cards. Consequently, there is no effective control of access by foreigners to the National Health Service and other benefits.

7. Historically, our links with a world-wide Commonwealth and the prevalence of English as a second language throughout the world place us in a different situation from other European union countries (except Ireland).

Co-operation so far

9. At the EU Summit in Seville in June 2002, the press were briefed that the Prime Minister would urge the European Union to use its economic muscle to ensure that third country nationals who failed asylum were accepted by their own Governments. This proposal was watered down to extinction.

10. At the European Summit in Greece in June 2003, the Prime Minister pressed for a scheme involving off-shore processing centres outside the jurisdiction of the European Union. This was turned down and Britain was left to conduct a pilot scheme with a small group of sympathetic countries.

The draft European Constitution

11. A draft European Constitution was drawn up by the Convention on the Future of Europe under the former French President Valery Giscard D'Estaing. It was presented to national governments in June 2003 and will be finalised at an Intergovernmental Conference (IGC) starting in October. Ratification could take place in 2004.

12. The draft EU Constitution locks Britain permanently into the existing international legal framework that has proved increasingly unworkable. The draft contains three principal Articles - 166, 167 and 168 dealing respectively with free internal movement, asylum and immigration. The relevant section of the draft is at Annex A.

13. An examination of this draft, and of the British Government's proposed amendments published in August, reveals that they have been comprehensively rejected and that there are a number of major issues which remain unresolved.

The Legal Framework

14. Article 7 of the Constitution provides for recognition of the rights, freedoms and principles set out in the Charter of Fundamental Rights. Paragraph 2 of this article makes it mandatory upon the Union to seek accession to the European Convention on Human Rights (ECHR). Paragraph 3 stipulates that the rights guaranteed by the ECHR and by the Charter of Fundamental Rights shall constitute general principles of the Union's Law. Thus the ECHR becomes a body of principles against which European legislation and the actions of European bodies will be tested.

15. The immediate relevance to asylum and immigration is that article 18 of the Charter of Fundamental Rights expressly guarantees the right to asylum "with due respect of the rules of the Geneva Convention". Furthermore, article III - 167 of the new Constitution states that the common policy on asylum "must be in accordance with the Geneva Convention of 28 July 1951.". The draft Constitution thus contains a double lock ensuring the continued applicability of the 1951 Geneva Convention on Refugees as well as locking Britain into the ECHR. It is precisely this framework of legislation that, despite five Acts of Parliament in ten years, has proved thoroughly unsatisfactory as a framework for tackling the modern phenomenon of very large scale economic migration often disguised as asylum seeking. It results in an extremely lengthy and expensive process for deciding asylum claims and, by restricting the use of detention, it renders removal very difficult. (See also Migrationwatch paper "Asylum Laws: A way forward".)

The Movement of Persons

16. Article III - 166 is designed to ensure the absence of controls on persons, whatever their nationality, when crossing internal borders (para 1(a)). The British Government have broadly accepted this article but with a fundamental (and revealing) reservation which reads as follows;

"This article and chapter will remain subject to arrangements preserving the United Kingdom's position of frontiers. The United Kingdom does not intend to give up its right under the treaties to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it considers necessary. As a consequence of its position on frontiers, the United Kingdom has not participated in certain measures relating to external borders, visas and immigration. A provision corresponding (to that in the Treaty of Amsterdam) will need to be added in due course". (emphasis added).

17. It is thus clear that our "Amsterdam opt-out" (text at Annex B) has not yet been secured. We do not yet know in what terms it may be secured. Nor do we know what price will have to be paid for this concession.

A common European asylum system

18. Article III - 167 states that such a system must be in accordance with the 1951 Refugee Convention. Paragraph 2 lays down in seven sentences a description of the framework of what this system might comprise. Britain will have only a minority voice in the drafting of the eventual laws and, once they are passed, we will have lost the flexibility needed to adjust them to our particular circumstances.

19. This is no doubt why the British delegation proposed a completely different text setting out general objectives for asylum policy rather than specific competences. They described it as "a fundamentally important amendment". It was disregarded.

20. The British Government have also suggested a paragraph permitting emergency measures where public policy or national security so require. Such matters could be imposed, perhaps for a maximum of one year, but would, in effect, require the approval of a qualified majority of the Council.

Common Immigration Policy

21. Article III - 168 states that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third country nationals residing legally in member states and the prevention of illegal immigration and trafficking in human beings.

22. Paragraph 2 of the article provides for European Laws or framework laws setting the conditions of entry and residence and standards on the issue by member states of long term visas and residence permits, including those for the purpose of family reunion. This sounds entirely reasonable but, in immigration matters as in others, the devil is in the detail. We, in Britain, will have lost control of the detail.

23. The same paragraph brings under Qualified Majority Voting (QMV) all aspects of third country nationals' right to live in another member state - including the right to social security. The British delegation described this as "a considerable extension of the Union's competence". They seem to have been ignored.

24. The same Article (para 5) states that:

"This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."

As there will be free movement after arrival, there will be nothing to prevent substantial onward movement to Britain. Such secondary movement would be completely beyond the control of the British government.

Qualified Majority Voting

25. Qualified Majority Voting (QMV) is a system of voting in the Council of Ministers. Under QMV, Member States are allocated a certain number of votes, depending on their size. Following the accession of the 10 new Member states next year, large countries like the UK will have 29 votes, whereas Malta (the smallest Member State) will have 3

26. Out of a total of 345 votes, 258 votes will be required to pass legislation ("by a qualified majority"), or 88 to block legislation. For an act to be passed, over half of the Member States must vote in favour of the proposal, and they must represent at least 62% of the population of the Union.

27. There will be discussion at the Intergovernmental Conference (IGC) of alternatives to this three-pronged voting system agreed at Nice in 2000. The Convention proposed a "dual majority" voting system, under which Member States' voting weights would be based purely on population size. And, again, over half the Member States would need to support a proposal, representing 60% of the EU's population.

28. The Government claim that QMV will speed up decision making. Probably so, but the real question is the nature of the decision. We will need a substantial number of allies in order to block

proposals which are contrary to our interests. Unfortunately, very few other Member States share our interests in this matter. As recent history has shown, many of them are perfectly content for asylum seekers and other economic migrants to pass through their territory on the way to Britain. The likely result is that we will lose any effective control over asylum and immigration policy.

CONCLUSION

29. It will be apparent that in each of these extremely sensitive fields - internal movement, asylum and immigration - we are signing up to European laws which have not yet even been drafted. When they are drafted they will be subject to qualified majority voting under which we will have less than 10% of the votes. It follows that the laws governing the protection of our borders and the right of foreigners to enter and reside in Britain will no longer be in our own hands.

30. This is a fundamental derogation of national sovereignty on a scale completely unknown in our history.

ANNEX A

Extract from the Draft EU Constitution

Section 2: Policies on Border Checks, Asylum and Immigration

Article 111-166

1. The Union shall develop a policy with a view to:

- a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
- b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
- c) the gradual introduction of an integrated management system for external borders.

2. For this purpose, European laws or framework laws shall establish measures concerning:

- a) the common policy on visas and other short-stay residence permits;
- b) the controls to which persons crossing external borders are subject;
- c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
- d) any measure necessary for the gradual establishment of an integrated management system for external borders;
- e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. This Article shall not affect the competence of the Member States concerning the geographical

demarcation of their borders, in accordance with international law.

Article 111-167

1. The Union shall develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.

2. For this purpose, European laws or framework laws shall lay down measures for a common European asylum system comprising:

- a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- g) partnership and co-operation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council of Ministers, on a proposal from the Commission, may adopt European regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article III-168

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. To this end, European laws or framework laws shall establish measures in the following areas:

- a) the conditions of entry and residence, and standards on the issue by Member States of long-term

visas and residence permits, including those for the purpose of family reunion;

b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.

c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

d) combating trafficking in persons, in particular women and children.

3. The Union may conclude readmission agreement with third countries for the readmission of third country nationals residing without authorisation to their countries of origin or provenance, in accordance with Article III-227.

4. European laws of framework laws may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article III-169

The policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Section shall contain appropriate measures to give effect to this principle.

ANNEX B

Extract from the Amsterdam Treaty

Protocol on the Position of the United Kingdom and Ireland, agreed by the contracting parties at the time of signature of the Amsterdam Treaty;

ARTICLE 1

Subject to article 3 the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to title IIIa of the Treaty establishing the European Community (now title IV of the Consolidated Treaty of Rome).

ARTICLE 2

In consequence of Article I and subject to Articles 3, 4 and 6 none of the provisions of title IIIa of the Treaty establishing the European Community, no provision of any international agreement concluded by the Community pursuant to that title and no decision of the Court of Justice interpreting such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no

such provision, measure or decision shall in any way affect the competencies, rights and obligations of those states: and no such provision, measure or decision shall in any way affect the *acquis communautaire* nor form part of Community law as they apply in United Kingdom or Ireland..

The remaining Articles of the Protocol make provision for the UK and Ireland to accede to title IV at a later date if they so chose.