



## **A Survey of European Asylum Policy and Legislation**

by  
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### **Introduction**

1. This paper describes and assesses the development of EU policy and legislation on asylum issues, since the Treaty of Amsterdam, adopted in 1997, first gave the EU institutions powers of legislation on this subject. The first part of the paper summarises the developments in the powers of the EU institutions to legislate on asylum and immigration matters. The second, third and fourth parts describe in detail the legislation on asylum adopted by the Council of Ministers and the European Parliament between 2001 and 2005 following the programme adopted by the European Council of Heads of State and Government at their meeting at Tampere in Finland in October 1999. The fifth part describes the background to the European Commission's plans for further legislation following the programme adopted by the European Council at its Hague meeting in 1990 and outlines three proposals put forward by the Commission to amend some of the earlier legislation in December 2008. The sixth part of the paper assesses some policy and legal problems which the UK government may have to deal with in responding to these new proposals. Finally, I give a brief overall assessment of how the EU's legislation on asylum has worked so far and its impact on the UK.

### **Part I: The Institutional Background: The Dublin Convention, the Third Pillar in the Maastricht Treaty and the Treaty of Amsterdam**

2. The first step towards the development of common European policies on asylum and immigration was the Dublin Convention, signed in 1990, which

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laid down criteria for determining which Member State should be responsible for examining applications for asylum status. This was an international agreement between the governments of the Member States, taken outside the EU treaties, based on work which had originally been done under the Schengen Agreement (see paragraph 6 below). The first step to bring asylum policy within the EU framework was taken in the Treaty of Maastricht, signed in 1992. Article K1 of the so-called Third Pillar of the Treaty required the Member States to treat certain policy issues in the area of justice and home affairs as “matters of common interest.” These included:-

- Asylum policy;
- The rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
- Immigration policy and policy regarding nationals of third countries: -
  - (a) conditions of entry and movement by nationals of third countries on the territory of Member States;
  - (b) conditions of residence by nationals of third countries on the territory of of Member States, including family reunion and access to employment;
  - (c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States.

Other policy areas to be treated as matters of common interest included judicial cooperation in both civil and criminal matters.

3. The Maastricht Treaty gave the EU no powers to legislate on any of these matters. Nor was the European Court of Justice (ECJ) given any say on them. The European Parliament (EP) had to be consulted and informed, but that is all. The main obligation on Member States was to inform and consult each other on developments under the agreed policy headings “with a view to coordinating their action”. They could in addition agree on “joint positions” and adopt “joint actions” and, more significantly, the Council of Ministers could “draw up joint conventions”, which it could recommend Member States to adopt “in accordance with their constitutional conventions.”
4. Unsurprisingly, further progress towards a common policy, going beyond the Dublin Convention, was relatively limited under the Third Pillar. In 1997 in order to speed up progress towards common EU policies on asylum and immigration matters the European Council agreed, as part of the Treaty of Amsterdam to grant the EU institutions the power to legislate on “visa, asylum, immigration and other policies related to the free movement of persons”. Specifically, the Amsterdam Treaty provides for a five year programme of measures aimed at achieving:-
  - the absence of any controls on persons, whether citizens of the Union or nationals of third countries when crossing internal borders;
  - agreed standards and procedures to be followed by Member States on persons crossing their external borders, including harmonised rules on short-term visas;
  - measures on the treatment of asylum seekers and other refugees and displaced persons;
  - measures on immigration policy, including standards on procedures for the issue of long-term visa and residence permits, measures to combat illegal

immigration and residence and measures defining the rights and conditions under which nationals of third countries, legally resident in a Member State may reside in other Member States.

The Amsterdam Treaty in most cases stipulates that EU legislation on these matters should set minimum standards rather than completely harmonised standards.

5. The Treaty required that for the first five years after its entry into force any legislation on the matters listed in paragraph 5 had to be adopted by unanimity, with two relatively minor exceptions. These were agreement on lists of third countries whose nationals must be in possession of visas in order to cross the EU's external borders and of those third countries whose nationals were exempt from this requirement and agreement on a uniform format for visas. After the initial five years measures to harmonize the procedures and conditions for issuing visas and rules on a uniform visa would automatically become subject to Qualified Majority Voting (QMV) and the Council of Ministers would also be asked to consider moving to QMV on all the other matters described above. The latter decision would itself require unanimity. In fact the EU agreed to move to QMV in all these areas in December 2004. The Amsterdam Treaty also severely limits the role of the European Court of Justice (ECJ) in relation to any EU legislation adopted under this chapter. A case can only be sent to the ECJ for an interpretative ruling when the court of the highest instance in a Member State decides this is necessary to enable it to give judgement.

6. The original driver of all these developments was the obligation on Member States to remove any checks on entrants at their common internal frontiers imposed by the Single European Act of 1987, as part of the removal of barriers to movement of goods, services, capital and persons within the internal market. The continental Member States had responded to this obligation by setting up the Schengen Agreement, which enabled them to agree on at least minimum common standards to be applied at their external frontiers for the admission of would-be entrants from third countries, including asylum seekers.

7. The UK and Ireland had stayed out of the Schengen Agreement and the UK had disputed the interpretation of the 1987 obligation to remove internal frontier checks. The Treaty of Amsterdam incorporated the Schengen Agreement into the EU framework, but at the same time agreed in a separate Protocol that the UK should be entitled to exercise whatever controls it considered necessary on persons seeking to enter the UK at its frontiers with other Member States in order to check and decide on their right to enter the UK. The Protocol also allowed the UK and Ireland to maintain the historic Common Travel Area between the two countries.

8. At the same time the UK and Ireland also negotiated a Protocol giving them the right to opt out of or into any legislative proposals put forward on asylum or immigration issues. Denmark went further and negotiated the right to opt

out of all measures under this part of the Treaty without having the right to opt in. (They also opted out of all EU decisions and actions with defence implications). They subsequently changed their minds on asylum and immigration and in 2004 negotiated arrangements to bring them within the terms of the Dublin Convention. So far the UK has opted into nearly all proposals on asylum issues, but has not opted into any immigration legislation. Ireland has opted into fewer of the asylum proposals and none of the immigration legislation.

9. The Treaty of Lisbon, which has not yet been ratified by all Member States, amends the Amsterdam provisions by setting the EU a goal of achieving common policies on asylum and immigration matters rather than just minimum standards and by giving the ECJ full oversight over EU policy and legislation on them. The Treaty also amends the UK/Ireland Protocol in order to deal with the problems which may arise, when the EU wishes to amend earlier asylum or immigration legislation, which the UK and/or Ireland have agreed to adopt, if they decide not to opt into the proposed amendments. This problem has now arisen in relation to three recent proposals from the European Commission to amend earlier asylum legislation, which the UK had opted into. These proposals and their implications are discussed below (The potential impact of the Lisbon Treaty is set out in my earlier paper on this subject as Briefing Paper 4.10 on this web-site).

## **Part 2: EU Legislation on Asylum: General**

10. On the basis of a programme adopted by a special meeting of the European Council at Tampere in Finland in 1999 the EU has to date adopted 9 pieces of legislation on asylum issues. Although these pieces of legislation are based on setting “minimum standards” for Member States, the Tampere conclusions point towards the more ambitious goal of a Common European Asylum System based on uniform standards, on which further proposals are now in the pipeline ( see Part 5). A first group of three pieces of legislation collectively referred to as the “Dublin System” establish criteria and mechanisms for deciding which Member State shall be responsible for examining an asylum application lodged in one of the Member States by a third-country national. They include two Regulations, which provide for the establishment of the “EURODAC” system, which requires Member States to take the fingerprints of all asylum seekers and other applicants for international protection and in the case of asylum seekers to send the fingerprints to a central data-base, so that a check can be made to see if the same person has previously applied for asylum elsewhere in the EU. In chronological order these measures are: -

- Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of “EURODAC” for the comparison of fingerprints ( Official Journal (OJ) L 316, 15.12 2000);
- Council Regulation (EC) No 407/2002 of February 2002 laying down rules to implement Regulation No 2725/2000 concerning the establishment of “EURODAC”; ( OJ L 62, 5.3.2002)

- Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged by a third- country national in any Member State; ( OJ L 50, 6.2. 2003);

11. The second group of measures is focused on three issues. First, the measures define three different categories of persons in need of international protection (temporarily displaced persons, refugees and persons in need of “subsidiary protection”. Second, they create common standards for deciding the eligibility of applicants to be granted these two types of international protection, establish legal procedures, standards of proof and safeguards for the granting and withdrawing of refugee status. Finally, they set minimum standards for the reception and treatment of asylum seekers, displaced persons and those in need of subsidiary protection during the different stages of their presence within Member States. These standards cover subsistence, accommodation, health care, access to education and employment and other forms of assistance. Again in chronological order the measures are: -

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons; ( OJ L 212, 7.8.2001);
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; ( OJ L 31, 6.2.2003);
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; (OJ L 304, 30.09.2004);
- Council Directive 2005/85/EC of 1<sup>st</sup> December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; (OJ L 326, 13.12.2005).
- Council Decision 2006/688/EC; establishing a mutual information mechanism concerning Member States’ measures in the areas of asylum and immigration.

12. The provisions of these measures are summarised below and described in more detail in Annexes 1 – 6 attached. Readers interested in reading the texts for themselves can look them up at the references listed above to the EU’s Official Journal ( L for Legislation series) most of which are also available via the European Commission’s web-site (Directorate-General for Justice and Home Affairs, asylum section). All these measures are binding on the Member States, which signed up to them. Regulations are directly binding on the Member States without any further action on their part; Directives generally require implementing national legislation. The preambles to all these pieces of legislation make it clear that they are based on “ the full and inclusive application of the 1951 Geneva Convention relating to the Status of Refugees, as supplemented by the New York Protocol of 1967”. In particular, the legislation uses the Geneva Convention’s definition of a refugee and respects the binding principle that no refugee shall be expelled or returned to territories where he/she would be at risk of persecution (the “non-refoulement” principle of Article 3 of the Convention). All the legislation also states that it

“observes the fundamental rights and principles in the EU’s Charter of Fundamental Rights. In effect, this means that it respects the judgements given on human rights by the European Court of Human Rights in Strasbourg and by the EU’s European Court of Justice.

13. The Commission has also published detailed reports on how three of the measures have been implemented by the Member States and how they are working in practice. These are the Council Regulations on the Dublin criteria and mechanisms for deciding which Member State should examine asylum applications and the supporting EURODAC arrangements and the Council Directive on minimum standards for the reception of asylum seekers.

14. Finally, the Commission made three proposals in December 2008 to amend the Dublin system for deciding which Member State should be responsible for handling individual asylum applications, the EURODAC system and the 2003 Reception Standards Directive. These too are described below along with an assessment of their implications for the operation of the UK/Ireland Protocol (see paragraph 7 above).

### **Part 3: The Dublin System**

#### **(a) Council Regulation (EC) 343/2003: Criteria and Mechanisms for determining the Member State responsible for examining an asylum application.**

15. This Regulation incorporates into EU law the principles and procedures originally established by the 1990 Dublin Convention, which it replaces. The United Kingdom and Ireland, which had previously been signatories of the Convention, exercised their right to opt into this Regulation. The Danes’ one-way only opt-out prevented them from opting into the Regulation, but it was agreed that the original Dublin Convention would remain in existence for the purpose of facilitating continued cooperation between Denmark and the rest of the EU in handling asylum applications. Subsequently, Norway and Iceland (in 2001) and Switzerland and Liechtenstein (in 2008) agreed to participate in the Dublin System

16. The main objective of the Regulation (as of the Convention) is to provide a clear, workable and speedy mechanism, which ensures that there will always be one, but only one, Member State responsible for examining an asylum application lodged by a third-country national on the territory of a Member State. It also aims to end the phenomenon of “refugees in orbit”, round the EU, going from country to country, and to prevent “asylum shopping” in the form of multiple applications for asylum submitted simultaneously or successively by the same persons in several Member States with the sole aim of prolonging their stay in the EU. The Regulation deals only with asylum seekers, as defined by the Geneva Convention. It does not deal with refugees in need of “subsidiary protection”, a category subsequently defined in Directive 2004/83/EC as persons, who are seeking to escape from the threat of death or cruel and unusual punishment in their country of origin.

17. The principle underlying the Dublin Regulation, which was inherited from the earlier Convention was that, subject to certain exceptions, asylum applications should be dealt with by the Member State, which played the greatest part in the entry of the applicants into the territories of the Member States and their continued presence on it, i.e. the Member State which the applicant first entered whether legally or illegally. Where a Member State can demonstrate that a person who has lodged an asylum application with its authorities in fact entered the EU through another Member State, the Member State, which received the application, is entitled to ask the Member State of entry to take responsibility for the applicant and send him/her back. The main exception to this principle is the overriding consideration of maintaining the family unity of the applicant's family, which was strengthened in the Regulation compared with the Convention. If there is insufficient evidence to determine where the applicant first entered the territories of the Member States and none of the other criteria (such as family unity) definitely identify another Member State as responsible, the default solution is that the application has to be examined by the Member State with which it was lodged.

18. The main features of the mechanism created by the Regulation are: -

- The hierarchy of criteria which Member States should normally use to determine which Member State should examine and decide on applications for asylum status;
- a set of procedures and time-limits to be followed by Member States for transferring either the asylum application or the applicant or both from one Member State to another, where this can be shown to be justified under the criteria;
- provisions for fixing the standards of proof and/or circumstantial evidence, which will be deemed to be sufficient to justify a transfer of the application and /or the applicant or both from one Member State to another. If formal proof is not available to determine e.g. which Member State an applicant entered first, circumstantial evidence should be accepted, provided it is "coherent, verifiable and sufficiently detailed".

The procedures are set out in more detail in Annex 1 attached.

### **Part 3: The Dublin System**

#### **(b) Council Regulation (EC) 2725/2000: The EURODAC System**

19. The EURODAC Regulation was negotiated to support the operation of the original Dublin Convention and continues to support the Dublin Regulation. The United Kingdom and Ireland both opted into the EURODAC system, though Denmark initially stayed outside as it had stayed outside the Convention.

20. The Regulation requires Member States to take the fingerprints of every third-country national above 14 years of age, who applies for asylum on their territory or who is apprehended when irregularly crossing their external border. They have to send the fingerprints in computerised form to the

EURODAC Central Unit in the Commission, which then checks them against its database of prints sent by other Member States to determine whether the person in question has previously applied for asylum in any other Member State. If a positive hit is registered, the relevant Member States can then use this as to help them determine which of them is responsible for assessing the person's asylum application in accordance with the Dublin Regulation. Member States can also (if they wish) take the fingerprints of any alien found illegally staying on their territory and send these to the Central Unit, solely for determining whether the alien has made an earlier application for asylum in another Member State.

21. The details of the EURODAC System are set out in Annex 2 attached.

### **Part 3: The Dublin System**

#### **(c) COM(2007) 299 final and SEC(2007) 742: The Commission's Reports on the operation of the Dublin Regulation and EURODAC**

22. These two documents contain the Commission's assessment of how the Member States have implemented the Dublin Regulation and the EURODAC mechanism and how far these mechanisms have been effective in achieving their goals over the first three years of their operation to the end of 2005.

23. During the first three years Member States made 55,300 requests to other Member States to take responsibility for an asylum application made to them, representing 11.5% of the total number of asylum requests made in all Member States over the period. Of these requests 72% (40,180) were accepted, compared with 69% under the Dublin Convention. However, out of the cases accepted only 16,842 asylum applicants were actually transferred by the requesting Member State to the accepting Member State. The main reason for this is that many asylum seekers absconded after the announcement of the decision to transfer them, particularly in Member States, which had no system for detaining asylum seekers during the decision process. Nevertheless, the proportion of acceptances, which resulted in the transfers actually being made, is reported to have increased significantly from 25.6% under the Convention to 40% under the Regulation. As a proportion of the total number of asylum seekers the numbers transferred increased from 1.67% under the Convention to 4.05% under the Regulation.

24. There were considerable variations between Member States in their efficiency in transferring asylum applicants after their cases had been accepted by another Member State. The overall EU average for numbers transferred as a proportion of cases accepted was 52%, with the Czech Republic the most efficient transferor (91.5%), followed by the UK (88.4%). At the other end of the scale nine Member States transferred only between 15% and 32% of accepted cases.

25. In terms of absolute numbers both the incoming and outgoing transfers were heavily concentrated in three Member States. 47% of all incoming requests were received by Germany and Poland, while 71% of all outgoing requests came from Germany and the UK. The impact of the transfers on the

total number of asylum applications in each Member State was relatively modest in most Member States. But incoming transfers amounted to 20% of the total number of asylum applications in Poland and 12% and 10% respectively in Slovakia and Hungary. Outgoing transfers reduced the total number of asylum seekers by 23% in Luxembourg and 20% in Iceland and in the UK, Ireland and the Czech Republic there were decreases of between 4% and 7%.

26. The operation of EURODAC has generally worked well according to the Commission's report. During the reference period EURODAC received data on 657,753 applicants. The numbers received fell during the three-year period from 238,325 in 2003 to 187,223 in 2005, despite the arrival of 10 new Member States in 2005, reflecting the general drop in asylum applications observed in the EU in those years. Matches made by EURODAC were used as evidence in about 50% of the requests made by Member States to "take back" the asylum seeker.

27. Data received by EURODAC on third-country nationals apprehended in Member States in connection with an irregular border crossing totalled 48,657 over the three-year period. This number has been increasing considerably each year, but is regarded by the Commission as surprisingly low. The EURODAC data for matches between these "Category 2" data sets and the Category 1 database for asylum applicants show that most of the matches are with asylum applicant data previously submitted by Italy, Spain and Greece.

28. Finally, Member States voluntarily sent 101,884 data sets relating to third country nationals apprehended as illegally present on the territory of the Member States. This figure also seems relatively low given that over the same period Member States reported separately to Eurostat that 1,231,076 persons had been apprehended as illegally present on their territory.

29. The Commission concluded from these reports that the Dublin System was working reasonably well with two main exceptions; first, the relatively low level of transfers by the requesting Member States of those applicants accepted in principle by the requested Member States; second, the reluctance of Member States to accept informal or circumstantial evidence as a basis for "taking charge" of asylum seekers or for "taking back" those who have illegally entered EU territory. In the case of the asylum seekers this reluctance is said to have had particularly negative effects on the application of the family unity test.

#### **Part 4: Legislation Harmonizing the Procedures for Granting and Withdrawing Refugee Status and the Reception and Treatment of Refugees**

30. Taken together, the measures described under this heading do three things. First, they identify and define three categories of person, who may be in need of international protection. These are temporarily displaced persons in cases where there is a mass influx as a result of, e.g, war or civil strife; persons falling under the Geneva Convention's definition of refugees, as

persons suffering discriminatory persecution in their country of origin or residence; and persons in need of “subsidiary protection”, defined as people under threat of serious harm in their country of origin or residence. Second, one Directive creates common legal procedures and safeguards for determining whether third country and stateless persons qualify for the granting or withdrawing of refugee status; this may also apply if the Member States so choose to persons seeking subsidiary protection. Third, taken together the Directives prescribe minimum standards for the reception and treatment of all three categories of people in need of international protection in relation to, e.g. subsistence, free movement, accommodation, access to employment and education and health treatment and other social entitlements. In addition, a Council Decision establishes a mutual information system on Member States’ measures in the areas of asylum and immigration.

#### **Part 4: Harmonizing Legislation**

##### **(a); Minimum Standards for Temporary Protection in the event of a mass influx of Displaced Persons: Council Directive 2001/55/EC**

31. The origin of this Directive was the concern that lessons should be learnt from the problems of handling displaced persons during the conflicts in the countries of the former Yugoslavia in 1992-3 and during the Kosovo crisis in 1999.

32. The Directive provides that the system of temporary protection for which it provides would have to be triggered by a specific Council Decision that there was a mass influx of a specified group of displaced persons or the imminent risk of such an influx. The initial duration of the Decision would be one year, though it could be extended if necessary in six month periods. The Directive envisages that each Member State would indicate how many displaced persons it would be prepared to receive and that the allocation would be set out in the original Council Decision setting up the period of temporary protection. Financial Assistance would be provided from the European Refugee Fund set up in 2000.

33. The Directive stipulates that a decision to introduce such temporary protection does not prejudice recognition of refugee status under the Geneva Convention and therefore does not confer asylum status. Article 17 of the Directive does, however, grant all persons enjoying temporary protection the right to apply for asylum at any time and any such application has to be processed by the relevant Member State if it has been lodged before the end of the period of temporary protection. The Dublin criteria apply for determining which Member State is responsible for considering the asylum application. If an application for asylum is refused, the applicant will continue to enjoy temporary protection as long as the period of such protection lasts.

34. The Directive obliges Member States to provide persons enjoying temporary protection with appropriate levels of subsistence, health care, accommodation and social welfare and limited access to employment as well as protection for unaccompanied minors and other vulnerable persons. They

are also obliged to reunite them with family members. The details of these and other obligations are set out in Annex 3 attached.

35. Member States may exclude persons from temporary protection if there are serious reasons for considering that they have committed a war crime, or crime against humanity or serious non-political crime before their entry into the Member State or have been guilty of acts contrary to the purposes or principles of the United Nations; or, if they can reasonably be regarded as a danger to national security or, having been convicted of a serious crime, are a danger to the community of the host Member State. In all these cases the person concerned can mount a legal challenge against the decision to exclude them in the Member State concerned.

. 36. Though temporary assistance has never been triggered, the types of protection described above are mirrored in several of the subsequent EU legislation described below and in Annexes 4 – 6 attached.

37. The UK opted into this Directive; Ireland opted out.

#### **Part 4: Harmonizing Legislation**

##### **(b) Minimum Standards for the reception of Asylum Seekers: Council Directive 2003/9/EC**

38. The stated purpose of this Directive is to ensure that asylum seekers have “a dignified standard of living and comparable living conditions in all Member States”. A secondary purpose is to discourage “the secondary movement of asylum seekers influenced by the variety of conditions for their reception”. The Directive covers all third country nationals and stateless persons, who make an application for asylum at the border or in the territory of a Member State; an “application for asylum” is defined as a request for international protection as defined in the Geneva Convention of 1951. Member States are also invited, but not required to offer the same reception conditions in connection with applications for kinds of protection other than that emanating from the Geneva Convention, (presumably those applying for “subsidiary protection” are meant). Article 4 makes it clear that the reception conditions laid down in it are “minimum standards” by explicitly stating that Member States may apply more favourable conditions. Any negative decisions taken by the authorities of Member States regarding the granting of the benefits required by the Directive or any restrictions on the freedom of movement of applicants must be appellable within the procedures of the Member State, including in the last resort appeal or review by a judicial body.

39. The minimum standards in the Directive for the treatment of asylum seekers, most of which follow from recommendations made in the Geneva Convention, cover information and documents to be given to applicants,

residence/freedom of movement, subsistence levels and access to health care, and access to education and employment. These obligations and exceptions from them are set out in detail in Annex 4 attached.

40. The Directive allows Member States a good deal of flexibility over the type of accommodation they provide for asylum seekers. They are also given considerable discretion over the applicants' freedom of movement. The Directive specifically allows Member States to confine (i.e. detain) the applicant to a particular place for legal or public order reasons in accordance with their national law. In all these cases Member States must ensure the protection of the applicants' family life and their possibility of communicating and meeting with relatives, legal advisers and representatives of the UNHCR and recognised NGOs. Details are in Annex 4.

41. The Directive lays down detailed provisions relating to the protection of minors, in particular, unaccompanied minors. In particular, unaccompanied minors must be: -

- Provided with appropriate legal representation;
- Placed with adult relatives , a foster-family or in suitable accommodation;
- Kept together with his/her siblings as far as possible.

The Member State must try to trace the family members of the unaccompanied minor as soon as possible, while taking care not to jeopardise the security of the child or his/her family through their enquiries. At all times the Member State must act in the best interest of the child.

42. The UK opted into this Directive, but Ireland did not.

#### **Part 4: Harmonizing Legislation**

##### **(c) Council Directive 2004/83/EC: Minimum Standards for the Qualification and Status of third country nationals/stateless persons as refugees or as persons who otherwise need international protection.**

43. The main objectives of this Directive are to ensure that the Member States apply common criteria for the identification of persons genuinely in need of international protection and to ensure that a minimum level of benefits is available to applicants granted refugee status. As a secondary objective, the harmonization of rules proposed is expected to limit secondary movements of applicants for asylum between Member States.

#### **Definitions of Refugee and Persons in need of Subsidiary Protection**

44. The Directive defines a "refugee" in identical terms to the Geneva Convention as a third country national or stateless person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group" is outside the country of nationality (or in the case of a stateless person his/her country of habitual residence) and is unable or unwilling to avail himself of the protection

of that country. The Directive fleshes out how this definition should be interpreted in more detail. These and other detailed provisions of the Directive are set out in Annex 5.

45. A person in need of subsidiary protection is defined as a “third country national or stateless person, who does not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that, if the person were returned to his or her country of origin/ country of habitual residence “would face a real risk of suffering serious harm”. “Serious harm” is subsequently defined as “the death penalty or execution; torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. Although the Geneva Convention does not cover this category of asylum seeker, it was in fact established in law in UK jurisprudence (where it was known as “exceptional leave to remain”) well before the Treaty of Amsterdam and any EU legislation on the topic. The UK courts (and presumably the courts in other Member States acted similarly) decided to extend the UK’s commitments under the European Convention on Human Rights(ECHR) itself not to use the death penalty or execution (prohibited under Article 1 of Protocol 6 of the ECHR) or torture or inhuman or degrading treatment (prohibited under Article 3 of the ECHR) to protect applicants for asylum, who would be at risk of such treatment if returned to their own countries by granting them “exceptional leave to remain”. The two ECHR prohibitions are now incorporated more or less verbatim into the EU’s own Charter of Fundamental Rights, which is part of the Lisbon Treaty (on which see my earlier Briefing Paper 8.23 on this web-site).

46. The Directive, however, disqualifies persons who fall within these two definitions from benefiting from the protections provided by the Directive if there are serious grounds for believing that they have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of refuge or has been guilty of acts contrary to the purposes and principles of the United Nations. Applicants for refugee status can also be disqualified if they are under the protection of UN agencies other than UNHCR or if they have taken up residence in another country and enjoy the same rights and obligations as the nationals of that country. Applicants for “subsidiary protection” can also be disqualified if they constitute a danger to the community or to the security of the Member State in which they are present or if, prior to their admission to the Member State, they have committed crimes, which would have been punishable by imprisonment in the Member State and if they have left their country of origin solely to avoid the sanctions resulting from these crimes. Similarly, the Directive defines sets of circumstances in which persons previously granted refugee status or subsidiary protection shall cease to qualify for international protection. Further details are in Annex 5.

## **Assessment of Applications for International Protection**

47. The Directive sets out the facts and circumstances which Member States must take into account when they assess whether applicants qualify for either refugee status or subsidiary protection. It also, in effect, lays down relaxed standards of proof which they must apply in evaluating the available evidence. Where there is no documentary or other evidence to support aspects of the applicants case, Member States are required to ignore the lack of evidence, provided that the applicant has made a genuine attempt to substantiate his/her application, has supplied all the evidence available and given a satisfactory explanation about the lack of other evidence; that his/her statements are found to be coherent and plausible and do not run counter to the available general and specific information relevant to his/her case.

### **Granting and Withdrawal of Refugee Status and Subsidiary Protection**

48. Member States are required to grant refugee status or subsidiary protection to third country nationals or stateless persons who qualify for these forms of protection in accordance with the definitions and standards described in paragraphs 44 - 47 above. Member States are conversely required to “revoke, end or refuse to renew” refugee status or subsidiary protection if they have ceased to be a refugee or in need of subsidiary protection or if they should never have been granted protection in the first place, because they were guilty of the serious crimes mentioned in paragraph 46 above; or, if they had misrepresented or omitted facts, which were decisive for the granting of international protection to them. Their protected status can also be revoked if they can reasonably be regarded as a danger to the security of the Member State in which they are present; or in the case of persons enjoying subsidiary protection constitute either a danger to the community or to the security of the Member State; or, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community. In the case of persons granted subsidiary protection Member States may also remove subsidiary protection if prior to their admission they had committed crimes, which would be punishable by imprisonment had they been committed in the Member State and if they had left their country of origin solely in order to avoid sanctions resulting from these crimes.

### **Content of International Protection**

49. The Directive sets minimum standards for the living standards and other benefits, familiar from the Reception Conditions Directive, to be provided for applicants granted refugee status or subsidiary protection. The details are in Annex 5.

50. Member States are also required to respect the Geneva Convention’s principle of non-refoulement (i.e. not returning refugees against their will to their country of origin if they have a well-founded fear of persecution, except in cases where the refugee is reasonably considered to be a danger to national security or, having been found guilty of a particularly serious crime, constitutes a danger to the community).

### **Final Provisions**

50. Finally, Member States are required to exchange information with the Commission and other Member States and to ensure that the authorities and organisations implementing the Directive have received the necessary training and are bound to respect the confidentiality of information they receive in their work.

51. The Directive entered into force in 2004. Both the UK and Ireland took part in the adoption and application of it.

#### **(4) (d): Council Directive 2005/85/EC: Minimum Standards on Procedures in Member States for granting and withdrawing refugee status**

52. This Directive requires all Member States to comply with “due process” in reaching decisions on applications for refugee status. The main body of the Directive therefore consists of a series of procedural guarantees, which Member States must provide to the applicants, subject to some carefully defined exceptions. Together with the parts of Directive 2004/83, which lay down the substantive issues to be dealt with and the standards of proof to be applied, it imposes common minimum standards for the handling of asylum applications. The Directive’s obligations must also be complied with in respect of applications for subsidiary protection in those Member States, which already apply the same domestic procedures as those used for asylum application to all types of application for international protection. The Directive also invites, but does not require, other member States to do the same.

53. The second half of the Directive authorises Member States to accelerate or prioritise the processing of certain categories of case. It also sets out the circumstances in which Member States can provide for specific procedures, which may derogate from the guarantees and principles described in paragraph 55 below and in Annex 6 or in which they can dismiss asylum applications as inadmissible or unfounded. Member States are also authorised to treat asylum applications as inadmissible, because there are other safe third countries to which it is reasonable to send the applicant. Article 29 and Annex 2 of the Directive also set up a procedure and criteria under which the Council can agree on a minimum common list of third countries, which shall be regarded as safe countries of origin, to which applicants can reasonably be returned; and Article 30 permits Member States to retain or introduce their own lists of third countries which they deem to be safe countries of origin on the same or similar criteria as those used for the common minimum list.

#### **Responsible Authorities**

54. Article 4 of the Directive requires Member States to designate a single determining authority which will be responsible “for an appropriate examination of the applications in accordance with this Directive.

#### **Guarantees for Handling Applications**

55. The procedural guarantees for applicants are set out in full in Annex 6. The most important are as follows. All adults with legal capacity must be allowed to apply for protection. Their application must be examined “individually, objectively and impartially” and they are entitled to a personal interview with a competent official. They are normally entitled to remain in the Member State while their application is being examined. They must be provided with interpreters whenever necessary and must have access to the e UNHCR or organisations representing it at any time. They have a right to legal representation/advice during the examination. Decisions on applications must be given promptly and in writing and, if negative, with reasons. There must be a right of appeal against negative decisions and, at that stage, legal advice/representation must be free, if the applicant cannot afford it. Finally applicants must not be held in detention solely because they are applicants for protection and there must be the possibility of speedy judicial review of decisions to detain.

### **Procedures at First Instance, Accelerated, Inadmissible and Unfounded Applications**

56. Member States must generally process asylum applications in accordance with these guarantees “as soon as possible without prejudice to an adequate and complete examination”. If a decision cannot be taken within six months, the applicant must either be informed of the delay or receive on his/her request a non-binding forecast of the time-frame within which a decision can be expected.

57. Member States may, however, prioritise or accelerate an examination (still in conformity with the basic principles and guarantees) in cases where the application is expected to be well-founded or where the applicant has special needs. The accelerated or prioritised procedures can also be used in a variety of cases where the validity of the application is considered open to challenge, notably, if the application is substantively or procedurally weak or the applicant refuses to comply with his/her obligations, e.g to give his/her fingerprints ;or is considered a danger to national security or public order or is considered inadmissible; e.g because he/she could be reasonably returned to a “safe country of origin” or could reasonably be sent to a “first country of asylum” outside the EU or to another “safe third country”, with which he/she has a plausible connection. Fuller details of all these categories are given in Annex 6, which also contains a summary of the criteria laid down in the Directive for designating third countries as “safe countries of origin” to which applicants could be safely returned.

58. Member States may dispense with a full or even any examination of an asylum application, where a competent authority has established that the applicant is seeking to enter or has illegally entered their country from a designated “European safe third country”, as defined in the rest of the Article.

59. This category of safe third countries differs from the other countries defined as safe third countries in Article 27 of the Directive (see Annex 6) in

that it must meet even more stringent standards regarding its compliance with the Geneva Convention and must also have ratified the European Convention on Human Rights, including the standards relating to effective remedies and have an asylum procedure prescribed by law. The procedure for designating these countries is in Annex 6.

### **Fast-track Examinations of Subsequent Applications and Failures to Appear**

60. The Directive provides for a fast-track “preliminary examination” which Member States may use in cases where an applicant, who has withdrawn or abandoned his/her earlier application or received a negative decision submits a further application. Details of the fast-track procedure are in Annex 6.

### **Procedures for the Withdrawal of Refugee Status**

61. The Directive specifies rules for withdrawing refugee status, when new elements or findings arise, which indicate there are reasons to reconsider the validity of the refugee’s status. The procedure is set out in Annex 6. This procedure for withdrawing refugee status is additional to the authority given to the Member States by Directive 2004/83/EC to terminate refugee status where it has been obtained by false information or the refugee has committed serious crimes before entry or is a threat to national security or public safety.

### **Appeals Procedures**

62. Applicants/refugees must have a right to appeal ( “right to an effective remedy”) against the following decisions: -

- a) (i) a decision taken on their application for asylum, including a decision:
  - (ii) to consider an application inadmissible under Article 25 ( see paragraph 53 above);
  - (iii) not to conduct an examination because there is a European safe third country which could take the applicant ( see paragraphs 58 - 59 above);
- b) a refusal to re-open the examination of the application after its explicit or implicit withdrawal;
- c) a decision not to proceed to a full examination of the application after a preliminary examination under Articles 32 and 34 (see paragraph 60 above);
- d) a decision refusing entry under the special procedures allowed in border or transit zones (see paragraphs 91-92 above);
- e) a decision to withdraw refugee status under Article 38 (see paragraphs 61 above);

63. The detailed procedures for the appeals procedures are largely left to the Member States to decide, but they are required to fix time-limits and other necessary rules to enable the applicant to pursue his/her appeal; to determine in accordance with their international obligations whether the applicants may remain in the Member State concerned pending the outcome of their appeal and to set out the grounds for challenging decisions that the applicants are inadmissible on the grounds that there is a safe third country available.

### **Final Provisions**

64. The Directive had to be implemented by Member States by 1<sup>st</sup> December 2007. Both the UK and Ireland opted into this Directive.

### **Council Decision of 5 October 2006 on a mutual information mechanism concerning Member States measures in the area of asylum**

65. This Council Decision, as the title implies, requires Member States to inform the Commission and all other Member States of any measure they intend to take or have recently taken in the areas of asylum and immigration, where these measures are publicly available and are “likely to have a significant impact on several Member States. The information has to be communicated through a web-based information network, managed by the Commission. The network provides for Member States and the Commission to ask follow-up questions about any new measures introduced by another Member State, to which the latter is required to respond within one month. Once a year the Commission will prepare a general report summarising the most relevant information received during the year and identifying issues of common interest. These reports are transmitted to the European Parliament and the Council of Ministers and form the basis for a debate on national asylum and immigration policies at ministerial level.

### **Part 5: Second Phase of EU Legislation on Asylum: Proposals to move towards a Common European Asylum Area**

66. The long-term aim of completing a Common European Asylum System (CEAS) based on uniform, rather than minimum, standards, mentioned in the Tampere Programme, was strengthened by a meeting of the European Council in the Hague in November 2004, which set a target date of 2010 for achieving this goal. The Hague Conclusions were followed in 2007 by the publication of, and widespread consultation, on a Green Paper by the Commission on the Future of the European Common Asylum System. This in turn was followed in June 2008 by a “Policy Plan on Asylum: an Integrated Approach to Protection Across the EU” in a Communication by the Commission to the Council of Ministers and the European Parliament.

67. In December 2008 the Commission published the first three draft legal measures envisaged in the Policy Plan. These propose substantial amendments to Directive 2003/9/EC on the Reception Conditions for Asylum Seekers and to the Dublin and EURODAC Regulations, determining which Member State should be responsible for examining particular asylum

applications. In all three cases these proposals repeal the earlier measures described above and replace them with amended texts, which are discussed below. The UK has decided not to opt into new Reception Conditions Directive at this stage, but is opting into the two new Regulations amending the Dublin System. The possible legal problems posed for the UK and Ireland by these new proposals and the reasons for the UK's decision to opt out of the Reception Conditions Directive are also discussed in paragraphs 91 - 98 below. The Commission is planning to publish three further proposals this year, the first two of which will propose amendments to Directives 2004/83 and 2005/85 dealing with the Qualifications and Standards for persons seeking international protection and the procedures governing the granting and withdrawal of refugee status. The final proposal is to establish and fund a European Asylum Support Office to provide practical assistance to Member States in taking decisions on asylum claims, particularly to those countries facing heavy pressures on their asylum systems such as Malta, Italy and Greece.

## **Part 5: Second Phase of Legislation**

### **(a) Proposal for an Amended Directive on minimum standards for the reception of asylum seekers and applicants for international protection**

68. The Commission states that the main purpose of the new proposal is “to ensure higher standards of treatment for asylum seekers with regard to their reception conditions that would guarantee a dignified standard of living in line with international law”. The further harmonisation of standards needed to achieve this is also argued as desirable in order to limit secondary movements of asylum seekers between Member States in search of better conditions. The main amendments put forward, most of which are based on the findings of an Evaluation Study of how Member States had implemented Directive 2003/9, cover the issues described in paragraphs 69 – 75 below.

#### **Scope of the Directive**

69. The 2003 Directive only covered asylum seekers. In the Evaluation Study it emerged that most Member States in practice applied the same standards to applicants for subsidiary protection. The new Directive accordingly makes this a requirement, using the definition and eligibility standards laid down in Directive 2004/83 to define this category of applicant. (The Directive somewhat unhelpfully uses the terms “applicant” and “asylum seeker” indifferently to refer to applicants for either type of international protection).

70. The proposal also extends the definition of family members, who can be regarded as dependants of the applicant/s in relation to the Member State's obligation to maintain family unity. These can now include married minor children “where it is in their best interests to reside with the applicant”, the parents or guardian of the applicant, where the latter is a minor and unmarried; and minor unmarried siblings of the applicant in cases where the latter is minor and unmarried or when the applicant or his/her siblings are minors and married if it is in the best interests of one or more of them to reside together.

## **Access to the Labour Market**

71. The 2003 Directive allows Member States to delay applicants' access to the labour market for a maximum of 12 months and also, for reasons of labour market policy, to give priority to EU and EEA citizens and legally resident third country nationals. The Commission proposes to reduce the maximum delay to 6 months and also stipulates that national labour market policies must "not unduly restrict access to employment for asylum seekers. The Commission argues that these measures are desirable to encourage asylum seekers to be self-supporting, to reduce the burden on social security systems and to discourage illegal working.

## **Asylum Seekers Living Standards (Material Reception Conditions)**

72. The draft Directive makes two main proposals to harmonize reception conditions for asylum seekers at a higher level: -

- Member States' would be required to guarantee asylum seekers that the total (monetary) value of the material reception conditions they are provided with is equivalent to the amount of social assistance provided to their own nationals;
- Member States would be obliged to take account of special needs, including gender and age considerations, in allocating housing.

## **Detention**

73. The Evaluation Review found widespread divergences in the use and length of detention by Member States. The new proposal adopts as its underlying principles that no one should be held in detention for the sole reason that he/she is seeking international protection, that detention should only be used in exceptional circumstances and that detainees and other applicants must be treated in a humane and dignified manner. The proposals, which take account of the developing case-law of the European Court of Human Rights are as follows:-

- Applicants may only be detained, when other less coercive measures would not be effective, on one of four grounds: to determine the identity or nationality of the applicant; to determine the elements on which the application for asylum is based, which in other circumstances could be lost; in the context of a procedure to decide on the applicant's right to enter the territory; or when the protection of national security and public order so requires. Detention shall be limited to the shortest period possible and, in the case of the first three of the grounds just described shall not exceed the time required to obtain the information needed about the applicant or to reach a decision on their right to enter the territory;
- Detention has to be ordered by judicial authorities or in urgent cases confirmed by them within 72 hours. The detention order must be in writing, state the reasons in fact and law justifying it and specify the maximum period of it. The detainee must be informed of the details of

the decision and of the procedures for challenging it. The continued detention has to be reviewed by the judicial authority at reasonable intervals or on the asylum seeker's request. Free legal assistance has to be provided to the detainee if he/she cannot afford the costs involved;

- Detention shall only be carried out in special detention facilities, not in prison. Those in detention must be allowed to contact, legal representatives and family members, who, together with UNHCR and competent NGOs must also have the right to contact and visit detainees;
- There are special protections applying to vulnerable groups and persons with special needs. Unaccompanied minors cannot be put into detention at all and minors only when it is in their best interest. Persons with special needs can only be detained if a qualified professional certifies that their health, including their mental health, and well-being will not significantly deteriorate as a result.

The 2003 Directive in contrast gave Member States a broad power to “confine applicants to a particular place” for legal reasons or reasons of public order in accordance with their national law.

### **Persons with special needs**

74. The proposed Directive contains a new provision requiring Member States to establish legally binding procedures to identify applicants with special needs as soon as an application for international protection is lodged and thereafter to provide support and appropriate monitoring of their situation throughout the asylum procedure. The definition of those with special needs is extended to include the victims of trafficking and the mentally ill. The proposal contains numerous additional safeguards to ensure that applicants' special needs are taken into account in relation to health care, housing facilities and the education of minors, for example the provision of rehabilitation facilities, counselling and psychiatric treatment to victims of torture and violence.

### **Monitoring and Reporting**

75. Member States are now to be required to put in place monitoring arrangements to assess the level of compliance with the reception conditions and to submit data on the results to the Commission.

### **Part 5: Second Phase of Legislation**

#### **(b) Proposals to Amend the Dublin Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States**

76. The Commission's Evaluation Report on the Dublin System found that it had largely achieved its main objective of setting up a “clear and workable mechanism” for assigning the responsibility for examining asylum applications to particular Member State, based on the principle that the responsibility should primarily lie with the Member State, which played the greatest part in the applicant's entry into and residence on the territory of the Member States,

with some exceptions primarily designed to give priority to family unity. The Report identified a number of ways in which the effectiveness of the system could be improved. However, responses to the Commission's Green Paper on the future of the EU Common Asylum System from the UNHCR and many civil society organisations expressed concerns about the level of protection offered to applicants for refugee status or other international protection during the application of the Dublin rules. These organisations argued, inter alia, that the EU should adopt a new approach based on the principle that responsibility for examining an application should fall to the Member State where an application for international protection is made.

77. A majority of the Member States preferred to maintain the underlying principles of the Dublin System. The Commission's proposal to amend the Dublin Regulation upholds the principles of the Dublin System and puts forward a number of measures designed to improve its efficiency, but also contains substantial changes to expand its scope and to bring in procedural and other safeguards for the protection of the applicants. It also includes a proposal to suspend the Dublin system temporarily to help Member States, which are being swamped with large numbers of asylum seekers. The most significant of these amendments are described below.

### **Scope of the Regulation**

78. The scope of the new Regulation is expanded in the same two ways as the Directive on Reception Conditions. First, it brings applicants for "subsidiary protection" within the Dublin System. This means that Member States can apply the same criteria to applicants for subsidiary protection as to asylum seekers to determine which is the right Member State to examine their application and, when appropriate, transfer them to that Member State, using the amended EURODAC system (see below) for fingerprint- matching.

79. The Regulation also adopts the expanded definition of family members, who can be regarded as dependants of the applicant/s in relation to the overriding obligation to assign responsibility for handling an application to the Member State best placed to maintain family unity. As in the amendments to the Reception Conditions Directive, eligible dependants therefore now include married minor children "where it is in their best interests to reside with the applicant", the parents or guardian of the applicant, where the latter is a minor and unmarried; and minor unmarried siblings of the applicant in cases where the latter is minor and unmarried or when the applicant or his/her siblings are minors and married provided it is in the best interests of one or more of them to reside together. The Member State deemed to be responsible for examining a particular application may therefore have to process applications from these additional dependants. In some cases this may lead to a different Member State being identified as responsible for maintaining family unity.

### **Improved Protection for Applicants under Dublin System**

80. The new Regulation introduces several of the legal safeguards for the applicants, which also apply in relation to the substantive decisions that the

responsible Member State has to take on the merits of the applicant's case to be offered international protection under Council Directive 2005/85 on the Minimum Standards to be applied in Granting or Withdrawing Refugee Status. In particular, Member States are required to: -

- Give the applicant full information about the procedure for deciding which Member State will examine his/her application and the time-lines for the decision. The proposal envisages the drafting of a common information leaflet for this purpose. The applicant subsequently has to be fully informed of any decision to transfer him/her to another Member State, the reasons for the decision and how it may be challenged;
- The applicant has to be offered an interview with a person qualified under national law to allow the applicant to submit relevant information to help the authorities to identify the correct Member State;
- The applicant is also given a right to appeal against any decision to transfer him/her to another Member State;
- Member States must provide every applicant, who is a minor, with a legal representative and must throughout the procedure have regard to the best interests of the child in cooperation with other Member States which may be concerned. Member States are now required to establish binding national procedures for tracing the family members and other relatives of unaccompanied minors present in the Member States.
- Detention of applicants during the Dublin procedure is subject to the same restrictions as proposed under the Proposal to amend the Reception Conditions Directive (see paragraph 107 above). The Regulation adds the additional condition that Member States may only detain an applicant, who is subject to a decision to transfer him/her to another Member State, if there is "a significant risk of him/her absconding. The Article dealing with detention also requires that all asylum seekers held in detention shall "enjoy the same level of reception conditions for detained applicants" as those laid down in the amendments to the Reception Conditions Directive. Clearly, this could be problematic for the UK if it continues to opt out of the new Reception Conditions Directive ( see further below).

## **Family Unity**

81. In addition to widening the definition of dependant family members the new Regulation extends the right of family reunification to include family members, who reside in other Member States as beneficiaries of subsidiary protection. The proposal also makes it compulsory for Member States reunify dependent relatives, whereas in the original Regulation this was left to the Member States to decide on humanitarian grounds.

## **Efficiency of the System**

82. The Proposal includes a number of relatively minor changes to improve efficiency. These include a new deadline for "take-back requests" being made to another Member State (within three months of the application being lodged in the requesting Member State). A new provision in the Regulation specifies

that the full costs of transferring any applicant to another Member State falls on the requesting Member State. One potentially significant change is to provide for a dispute settlement mechanism which can be used to settle any matters of dispute between Member States covering the entire application of the Regulation; (previously, the dispute settlement mechanism had been limited to dealing with disputes about decisions by Member States voluntarily to accept responsibility for a refugee on humanitarian grounds. The dispute settlement mechanism is a conciliation procedure under which the Member States concerned undertake to take the utmost account of the solution proposed by a conciliation committee of three other Member States.

### **Temporary Suspension of the Dublin System**

83. The Regulation proposes two important new procedures under which the transfer of applicants for international protection to a particular Member State could be temporarily suspended for two reasons. First, a Member State may request such a suspension for itself on the grounds that it is faced with a “particularly urgent situation, which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure” and that it would then be unreasonable for it to bear the additional burden of receiving transferred applicants from other Member States.

84. Second, a procedure to suspend may also be initiated if the Commission itself considers or receives concerns expressed by another Member State that the circumstances prevailing in a Member State “may lead to a level of protection for applicants for international protection, which is not in conformity with Community legislation”, in particular with the amended version of the Reception Conditions Directive.

85. In either of these circumstances the Commission may put forward a proposed decision to suspend all transfers of applicants to the Member State concerned for a period of up to 6 months. In deciding whether to make such a proposal the Commission has to take account of all the relevant circumstances, including the impact of the suspension on other Member States. Any Member State may request a Council discussion of the Commission’s decision within one month of receiving it. The Council may then (by QMV) take a different decision, including rejection of the Commission’s decision within a further month of the Member State’s request for a discussion. Suspensions of transfers may be subsequently extended for further periods of up to six months by the same procedure, if the grounds for the suspension still persist.

86. The proposal to suspend transfers to Member States under great pressure from asylum seekers has evidently been inspired by the difficulties faced by Malta, Greece and Italy in having to deal with large numbers of would-be asylum seekers from North Africa or the Middle East. The second proposal is slightly more surprising in that the Commission always has the power to bring infringement proceedings in the ECJ against Member States, which do not meet the obligations of EU laws.

## **Impact on Non-EU Countries Complying with the Dublin System**

87. Norway, Iceland (in 2001) and Liechtenstein and Switzerland (in 2008) became parties to the original Dublin Regulation and to the EURODAC arrangements and will have to decide whether they want to continue if and when this amended Regulation is adopted.

### **Part 5: Second Phase of Legislation**

#### **(c) Proposals to Amend Council Regulation (EC) 2725/2000 establishing EURODAC**

88. The Commission have also put forward a proposal to amend the provisions of the Regulation setting up the EURODAC system for the comparison of the fingerprints of asylum applicants described in paragraphs 31 – 35 above.

89. The only major substantive change to the Regulation is, in parallel with the changes proposed to the main Dublin Regulation, to extend its scope to cover applicants for subsidiary protection as well as refugees as defined in the Geneva Convention. The fingerprints of applicants for subsidiary protection will therefore be sent to the EURODAC centre and matched against their existing data-base of applicants for asylum or subsidiary protection in all Member States. In addition, the Commission proposes a number of minor amendments to improve the efficiency and accuracy of EURODAC's operations, in particular by: -

- Requiring Member States to take and submit fingerprints within 48 hours of the lodging of an application for international protection. The original Regulation just required this to be done promptly;
- Better communication between Member States when one of them has deleted an applicant's data from the data-base;
- Unblocking of data currently held on EURODAC relating to applicants, who have been granted refugee status in a Member State, since it has emerged that some persons apply for refugee status in a second Member State, despite having been already been accepted as a refugee in a first Member State;
- Better data-protection;
- Empowering the Commission in due course to bring the data-base under a single Management Authority, which will also manage the Schengen and Visa data-bases.

90. As with the main Dublin Regulation, Norway, Iceland, Liechtenstein and Switzerland will have to decide whether they want to continue if and when the new Regulation is adopted.

### **Part 6: House of Lords' Report on the UK's Approach to the Proposals to amend the Reception Conditions Directive and the Dublin System**

91. As noted above, the UK Government has announced its intention to opt into the two proposed Regulations, which repeal and replace the original

Dublin and EURODAC Regulations, but (for the moment) to opt out of the proposal to repeal and replace the Reception Conditions Directive.

92. The House of Lords' European Affairs Committee published a report on 24<sup>th</sup> March 2009 (HL Paper 55, available on the Parliament web-site), which discusses some potential problems of both substance and law that may arise in the government's negotiations on the proposals to amend the Dublin Regulation, connected with its decision to opt out of the Reception Conditions Directive.

93. An exchange of letters, published with the House of Lords' report, between Philip Woolas, a junior Home Office Minister, and Lord Roper, the chairman of the European Affairs Committee, discloses two main reasons for the government's decision to opt out of the new Reception Conditions Directive. The first of these is the restrictions that the new Directive would place on the detention of applicants for international protection (see paragraph 73 above), in particular the requirement that all detentions must be ordered or endorsed and then subject to regular review by the judicial authorities. This could present a threat to the government's current practice of detaining certain applicants for the duration of a fast-track procedure for determining whether the applicant's case has any substance (the linguistically bizarrely named Detained Fast Track System). Under UK law the detention of applicants for international protection does not require judicial approval, though the applicant can apply for bail. The government's second concern is the requirement in the proposed new Directive that the monetary value of the package provided to applicants for their material subsistence must be equal to the social assistance provided to national citizens (see paragraph 106 above). (The government argues that the material assistance it now provides is sufficient to give applicants an adequate level of subsistence).

94. The House of Lords' report points out, however, that the proposal to amend the Dublin Regulation contains ten cross-references to new provisions in the proposed new version of the Reception Conditions Directive of which several refer to the provisions in the latter about detention or the material reception conditions or in one case both. The report suggests that these cross-references could cause difficulties for the government in the forthcoming negotiations on the Dublin Regulation.

95. Four of the cross-references seem to me to be potentially problematic: -

- Paragraph 9 of the preamble to the revised Dublin Regulation states that "in order to ensure equal treatment of all asylum seekers" the new Reception Conditions Directive "should apply to the procedure regarding the determination of the Member State responsible as regulated under this Regulation". Although the preambles to EU legislation do not have the full force of law the Member States and the ECJ may use them as guidance as to how the legislation should be interpreted;
- Article 27 deals with detention of applicants during the Dublin procedure, laying down the same limitations as are proposed in the new Reception Conditions proposal. In particular, Article 27 (6)

requires that the detention must be approved by judicial authorities or confirmed by them within 72 hours. Article 27(8) provides for the regular review of detentions by a judicial authority;

- Article 27(12) requires that asylum-seekers detained during the Dublin procedure should benefit from the same minimum reception conditions as laid down in the new Reception Conditions Directive. This would include the improved levels of subsistence to which Philip Woolas's letter objects.
- Finally, under the suspension provisions set out in Article 31(2) and (3) one of the grounds for suspending transfers to a Member State is its failure to observe the new Reception Conditions Directive.

96. Unless the UK is able to get other Member States to agree to amend or delete the provisions described above, then the government will be bound directly by Article 27(6) and (8) in the new Regulation to submit any detention orders it makes relating to applications being examined under the Dublin procedure to judicial approval and subsequent regular review. Article 27(12) would on the face of it require the government to provide such detainees with the more generous subsistence levels set by the new Reception Conditions Directive. On this last point the UK might argue that, because it has opted out of the new Directive, it should not be bound to observe Article 27(12). But, if this point of interpretation went to the ECJ, the chances that it would find in the UK's favour would be no better than evens.

97. It appears therefore that the UK's current strategy rests on getting a Qualified Majority in the Council of Ministers to agree that participation in the revised Dublin System should not entail willingness to comply with requirements of the new Reception Conditions Directive and therefore to agree to delete the cross-references to the latter and amend or delete Article 27(6) and (8). The UK will have precedents on its side, since Ireland has participated in the existing Dublin System, despite having opted out of the original Reception Conditions Directive. (Assuming Ireland is opting into the new Dublin Regulations, it will presumably support the UK). Moreover, the four non-EU countries, which participate in the Dublin System have not signed up to the Reception Conditions Directive. According to the House of Lords' report UK officials obtained a reluctant confirmation from the EU Commission that opting into the new Dublin Regulations without opting into the new Reception Conditions Directive would not cause insuperable difficulties. On the other hand, if a majority of Member States now attach greater importance to there being a "level playing field" for the treatment of applicants throughout the Dublin procedure and, more generally, for the whole international protection system, getting special exemptions for the UK and Ireland may be more difficult.

98. In connection with this issue the House of Lords' report advances the argument that, if the UK maintains its opt-out from the new Reception Conditions Directive, then the original Directive may still continue to apply to the UK, while the new Directive applied in other Member States, apparently on the grounds that the UK had not been a party to the repeal of the old version. The government and its legal advisers argue, however, that, if the old

Directive is repealed by all the Member States without opt-outs, it still disappears totally from the EU's "acquis" and has no force anywhere. I agree entirely with the government's view on this point; if the UK and (presumably) Ireland opt out of the new Directive, they effectively give the other Member States carte blanche to amend or repeal the old Directive as they see fit. If they opt for the Commission's "repeal and replace" proposals, the original version of the Directive simply no longer exists.

### **Overall Assessment of the EU's Asylum Legislation and the UK's Participation in it.**

99. The objectives set by the European Council for the first phase of legislation on the Common European Asylum Area were, first, through the Dublin System, to establish a clear and workable system for determining which Member State should be responsible for deciding on claims for international protection. The Dublin Regulations were based on the principle that the responsibility for examining proposals should primarily lie with the Member State which played the greatest part in the applicant's entry into and residence in the territories of the Member States, with some exceptions mainly designed to protect family unity. The second objective was to secure common minimum standards for the treatment accorded to asylum seekers throughout the period while their application was being examined, common procedures and criteria and standards of proof for examining their applications and common guarantees of fair treatment and "due process" during the examination. These common minimum standards were no doubt partly in response to pressures from organisations representing refugees and other displaced persons, but were also driven by the wish of Member States for a "level playing field" to discourage "asylum shopping", multiple asylum applications and so-called "secondary movements of refugees.

100. For all the continental Member States the need for a mechanism for determining responsibility for asylum applications was the consequence of the decision taken in the Single European Act of 1985 to define the single market as an area without internal frontiers and to abolish all checks at internal frontiers. The first moves towards the Dublin System in fact were part of the intergovernmental Schengen Convention set up by these States in response to the Single European Act. The UK and Ireland reasonably did not want to remove their internal frontier controls, which except for their common border, coincided with their external frontiers and eventually obtained an opt-out from this requirement in the Treaty of Amsterdam in 1999. The Treaty also gave them the right to opt into and out of EU legislation on asylum and immigration matters. They both, however, saw advantage in opting into the Dublin system and to other asylum legislation, deciding case by case. This was presumably because many of the applicants for asylum in the UK and Ireland arrive from other EU Member States either legally or illegally and they have been able to use the Dublin System to request other Member States to take some of these applicants back.

101. The initial focus of the Dublin System and of the Directives setting standards for the treatment of the applicants related to refugees as defined in

the Geneva Convention. The main innovation in subsequent Directives and the three recent proposals to amend the Dublin System and the Reception Conditions Directive has been gradually to apply the same or similar standards to applicants at serious risk of harm if they returned to their own countries from the threat of death, torture or other inhuman or degrading treatment. This extension stems from the protections laid down in the European Convention on Human Rights (see paragraph 45 above and from the practice of national courts in extending these rights to other applicants for international protection. As noted above, the UK's courts (and probably those of other Member States) had adopted the practice of granting "exceptional leave to remain" long before the EU's legislation. The EU was therefore building on the existing practice of Member States rather than inventing a new doctrine itself in this respect. The incorporation of the concept of subsidiary protection into EU legislation does, however, entrench it in Member States' own systems.

102. The Commission's review of the operation of the Dublin System suggests that it is indeed a reasonably clear and workable system for assigning responsibility for the examination of asylum applications. The statistics quoted in paragraphs 36 – 39 above indicate that around 11% of applications generate requests from the Member State where the application is lodged to another Member State to take charge or take back the application. The UK is one of the main users of the system and derives a useful benefit in managing its asylum applicants, though it is relatively modest in relation to our overall numbers of asylum seekers.

103. Whether the legislation has achieved its secondary purpose of discouraging "secondary movements" of would-be applicants and "forum shopping" is unclear. The Commission presents no evidence on this point in its evaluation of the Dublin System. The acid test for this would be whether the proportion of transfers of applicants between Member States declined in relation to the total number of refugees. The Commission provides no evidence on this point. The present author is sceptical as to whether harmonization of reception conditions is likely to make much difference to the would-be refugee's choice of destination and therefore to secondary movements. It seems much more likely that the main factors affecting applicants' choice of country for asylum, apart from having relatives in the country, is whether there is a sizeable community of co-nationals, possibly including friends or acquaintances, and what their chances of finding employment will be.

104. The standards laid down in the first-phase of legislation for level of support to be given to applicants for subsistence, for their access to health care, education, housing and employment derive originally from recommendations in the Geneva Convention and actual practice in the Member States. A fair amount of discretion is given to the Member States in relation to housing, employment and health care. While they were under negotiation, fears were expressed by organisations representing refugees that the EU Directives would lead to lower standards on average. The EU report on the Reception Conditions Directive says that this has not happened. The

standards set in the first stage of legislation generally seem reasonable to the present writer.

105. For the UK and Ireland the main issue which they have to weigh up in deciding whether to opt in to EU asylum legislation is whether the advantages which they get from the Dublin System may not be outweighed by the other constraints imposed by the legislation on how they handle asylum applications and on the standard of living and other benefits and guarantees they are required to provide to applicants. The second-phase legislation now proposed is explicitly intended to raise the standards of treatment both legal and material guaranteed to applicants for international protection. This is in line with the increased emphasis placed on human rights in the Hague programme and with the general tendency of the European Commission to propose high standards for the protection of citizens' and consumers' rights in other policy areas. It remains to be seen how far it will be acceptable to the Member States, whose taxpayers have to bear the additional costs.

106. So far there seems no reason to question the government's judgement that opting- in has been on balance beneficial. However, as indicated above, the latest proposals on a new Reception Conditions Directive have for the first time led the government to opt out from an asylum Directive, because the standards of protection or care go beyond what the government is willing to provide. There is a risk as described in paragraph 132 above that this could complicate our negotiations over the revision of the Dublin System. The European Parliament on 7<sup>th</sup> May endorsed the Commission's proposals to repeal and replace the Reception Conditions Directive and the Dublin System, with some further amendments of its own. The EP's amendments to the main Dublin Regulation include a proposal to create a reallocation programme to enable beneficiaries of international protection to be received by a Member State other than the one which granted them this protection. This appears to go further in the direction of "burden-sharing" between Member States than the Commission's proposals for the temporary suspension of the Dublin system described above. The amendment is likely to be contentious within the Council of Ministers, but may further complicate the UK's negotiating position.

107. The further proposals in preparation by the Commission to move to harmonized common standards in relation to the qualifications and standards to be applied in deciding on applications may give rise to similar problems in due course. So the decision for the UK government on whether to opt in or out of asylum proposals may become more problematic in future

20 May 2009

**Council Regulation (EC) 343/2003: Criteria and Mechanisms for determining the Member State responsible for examining an asylum application**

The main features of the Regulation are as follows: -

- a hierarchy of criteria which Member States should normally use to determine which Member State should examine and decide on applications for asylum status;
- a set of procedures and time-limits to be followed by Member States for transferring either the asylum application or the applicant or both from one Member State to another, where this can be shown to be justified under the criteria;
- provisions establishing the standards of proof and/or circumstantial evidence, which will be deemed to be sufficient to justify a transfer of the application and /or the applicant or both from one Member State to another.

**The Criteria**

5. The process of determining which Member State is responsible for examining begins as soon as a Member State receives an application for asylum. Under Article 4 of the Regulation, where a Member State receives an application from an asylum seeker currently living in another Member State, the responsibility for determining which Member State should examine the application falls on the Member State where the applicant is present. In making their determination the authorities in each Member State have to follow a hierarchy of criteria set out in Articles 5 – 14 of the Regulation.
6. These criteria are based on the general principle that responsibility for examining an asylum application should lie with the Member State, which played the greatest part in the applicant's entry into or residence on the territories of the Member States., subject to exceptions designed to protect family unity.
7. In summary, the first criterion (Articles 6 – 8 and 14 of the Regulation) deals with the principle of family unity. Articles 6 – 8 require that, where an applicant for asylum has a family connection with a particular Member State (in the form of a family member already present in that State whether

as a legal resident or as an asylum applicant, whose application is under examination) his/her application must be examined by the same Member State. (In keeping with this principle of family solidarity Article 14 requires that, where several members of the same family submit applications for asylum more or less simultaneously, but the application of the subsequent criteria of the Regulation, described in the following paragraphs, would involve separating the family members, the Member State responsible shall be that which the criteria indicate is responsible for taking charge of the largest number of family members or, if that is not decisive, the Member State responsible for the examining the application of the oldest family member).

8. If the family unity principle is not relevant, the second criterion (Article 9) requires a Member State to accept responsibility for those asylum applicants who have a connection with it by reason of their possession of a visa or other residence document issued by that State. Where an applicant may have multiple residence documents or visas issued by different Member States, the regulation provides for the responsible Member State to be determined by reference to which document has the longest period of validity and/or the latest expiry date. A Member State will still be responsible in the case of applicants, who hold residence documents, which expired less than two years previously, or visas, which expired less than six months previously.
9. If the second criterion is not met, Article 10 provides that, where it can be shown on the basis of agreed standards of proof or circumstantial evidence, that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, that Member State bears the responsibility for examining the asylum application for a period of twelve months from the date of the irregular border crossing. Where the twelve month period has lapsed or, in the case of asylum seekers whose circumstances of entry cannot be clearly established, but it can be proven that the applicant has been living in a particular Member State for a continuous period of five months, then that Member State becomes responsible.
10. Articles 11 and 12 deal with two other relatively clear-cut cases. Under Article 11, if a third-country national enters a Member State, which waives the requirement for him or her to have a visa, that Member State has to examine the visa application, except in the case when he or she applies for asylum in another Member State which also waives any need for a visa. Article 12 states that, where an asylum application is made in the international transit area of a Member State, it is that Member State, which must examine the visa.
11. Finally, Article 13 provides the default solution that, where responsibility cannot be determined by the application of the first five criteria, the first Member State, with which the asylum application is lodged, is responsible for examining it.

12. States are permitted, if they so wish, may go beyond these criteria and agree to deal with asylum seekers, for whom they would not necessarily be responsible under the rules, e.g. for humanitarian reasons (Article 15).

## **The Transfer Mechanisms**

10. Articles 16 to 20 of the Regulation set out detailed readmission rules for, and time-limits within which, one Member State can ask another Member State to take charge of examining an application and/or to take back an asylum seeker. The rules aim is to ensure that an asylum seeker cannot continue to pursue an asylum claim in a Member State other than the one which has been deemed to be responsible under the criteria described above. The requesting Member State has to be able to justify its request under those criteria by providing sufficient proof or circumstantial evidence. Such requests have to be made within three months of the date on which the application was lodged. The requested Member State then has to respond within two months of the date of receipt of the request or within one month where the requesting Member State has asked for urgency, for example, if the applicant has been arrested for an unlawful stay or is in detention. If the requested Member State fails to meet the deadline, it then has to take over responsibility for examining the application. Where a requested Member State has accepted responsibility for a particular case, the requesting Member State is then required to notify the applicant of the decision to transfer his/her application and, where necessary, to arrange for the applicant to return to the requested Member State. This has to be done within six months of the request having been accepted.

## **Standards of Proof**

11. Article 18 of the Regulation requires the Member States to use “elements of proof and circumstantial evidence in determining which Member State should be responsible for examining an application for asylum. In particular, a Member State, which requests another Member State to take charge of an application or to take back an applicant, must be able to provide sufficient proof or circumstantial evidence to justify their request. The Regulation distinguishes between “formal proof”, which determines responsibility pursuant to the Regulation “as long as it is not refuted by proof to the contrary” and circumstantial evidence, “which, while being refutable, may be sufficient, in certain circumstances, according to the evidentiary value attributed to” it.” The Regulation adds that : - “If there is no formal proof, the Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.”

12. Formal proof appears to mean accepted documentary evidence e.g. that a Member State has already registered an application for asylum from the person in question or granted him or her an entry visa or other residential document.

13. Article 27 of the Regulation sets up a Committee of experts from Member States to assist the Commission, which is charged with, , inter alia, drawing up two lists of “elements of formal proof and circumstantial evidence.”

14. The final Articles of the Regulation provide for routine cooperation between the Member States in particular through exchanging the personal data relating to particular applicants, where that is needed by the responsible Member State to help it decide on the application. They also require the Commission to make a report to the European Parliament and Council of Ministers not later than three years after the date of entry into force of the Regulation.

**EUROPEAN ASYLUM LEGISLATION**  
**Detailed Summary of Legislation**  
**Annex 2**

**Council Regulation (EC) 2725/2000: The EURODAC System**

1. The EURODAC Regulation was negotiated to support the operation of the original Dublin Convention and continues to support the Dublin Regulation. The United Kingdom and Ireland both opted into the EURODAC system, though Denmark initially had to stay outside.
  
2. The Regulation requires Member States to take the fingerprints of every third-country national above 14 years of age, who applies for asylum on their territory or who is apprehended when irregularly crossing their external border. They have to send the fingerprints in computerised form to the EURODAC Central Unit in the Commission, which then checks them against its database of prints sent by other Member States to determine whether the person in question has previously applied for asylum in any other Member State. If a positive hit is registered, the relevant Member States can then use this as to help them determine which of them is responsible for assessing the person's asylum application in accordance with the Dublin Regulation. Member States can also (if they wish) take the fingerprints of any alien found illegally staying on their territory and send these to the Central Unit, solely for determining whether the alien has made an earlier application for asylum in another Member State.

3. The Regulation provides in detail for the setting up of the EURODAC Central Unit in the Commission and regulates the taking and subsequent processing and handling of the fingerprints of the three different categories of person mentioned in paragraph 2, as follows: -

- In the case of asylum applicants the Central Unit can compare fingerprints sent to it by a Member State with the fingerprint data sent to it by other Member States and already stored on its database. It can keep the fingerprints of asylum applicants on its data-base for a maximum of 10 years, in case an immigrant, who has requested asylum in one Member State subsequently requests asylum in another Member State. However, the data must be removed from the data-base once the person has acquired the citizenship of any Member State;
- The fingerprints of persons apprehended while making an irregular crossing of an external frontier can only be compared with data on applicants for asylum transmitted subsequently to the Central Unit, (presumably on the grounds that, since they are entering via an external frontier, they will not have previously applied for asylum in any Member State). The Central Unit is expressly forbidden from comparing these persons' prints with any data subsequently sent relating to other persons apprehended for irregular crossing of an external frontier. The data of these immigrants can be stored for a maximum of 2 years only and have to be removed from the data-base if the immigrant has been issued with a residence permit or been granted citizenship by a Member State or left the EU within the 2 year period;
- The fingerprints of immigrants found illegally present on the territory of a Member State can be sent to the Central Unit at the option of the Member State. The Central Unit can only check these cases against the fingerprint data of applicants for asylum transmitted by other Member States and already recorded in the central data-base. The fingerprints of this third category cannot themselves be stored on the central data-base and have to be erased as soon as the comparison has been made.

4. A further limitation on the use of fingerprint data of applicants for asylum is that their data has to be blocked (and not used in any subsequent comparisons) once the person has been recognised and admitted as a refugee in any Member State. This appears to be because at the time of the adoption of the Regulation no agreement could be reached on whether or not the data could be used once a person had been given recognised refugee status. The Regulation therefore provides that, after EURODAC has been operating for 5 years, the EU institutions should decide whether their fingerprint data could be the subject of comparisons with other entries on the data-base or erased totally.

5. The rest of the Regulation lays down detailed rules for protecting the security of the fingerprint data by the Member States and by the Central Unit, the rights of the data-subject to be informed about the data taken from him or her and the use to be made of it, the correction of any inaccurate data and the liability of the Member States for any damage caused by the unlawful use or processing of the data. It also sets up a Joint Supervisory Authority staffed by the Member States to supervise the proper use of data by the Central Unit.

**EUROPEAN ASYLUM LEGISLATION**  
**Detailed Summary of Legislation**  
**Annex 3**

**Council Directive 2001/55/EC: Minimum Standards for Temporary Protection in the event of a mass influx of Displaced Persons**

1. The origin of this Directive was a concern that lessons should be learnt from the problems of handling displaced persons during the conflicts in the countries of the former Yugoslavia in 1992-3 and during the Kosovo crisis in 1999.

2. The Directive requires the system of temporary protection for which it provides would need to be triggered by a specific Council Decision that there was a mass influx of a specified group of displaced persons or the imminent risk of such an influx. The initial duration of the Decision would be one year, though it could be extended if necessary in six month periods. The Directive envisages that Member States would indicate how many displaced persons they would be prepared to receive and that the allocation would be set out in the original Council Decision setting up the period of temporary protection. Financial Assistance would be provided from the European Refugee Fund set up in 2000.

3. A decision to introduce such temporary protection does not prejudice recognition of refugee status under the Geneva Convention and therefore does not confer asylum status. Article 17 of the Directive does, however, grant all persons enjoying temporary protection the right to apply for asylum at any time and any such application has to be processed by the relevant Member State if it has been lodged before the end of the period of temporary protection. The Dublin criteria apply for determining which Member State is responsible for considering the asylum application. If an application for asylum is refused, the applicant will continue to enjoy temporary protection as long as the period of such protection lasts.

4. The main obligations of Member States to persons enjoying temporary protection are set out in Articles 8 to 16 of the Directive as follows: -

- To provide them with residence permits and, if necessary, visas for the duration of the period of temporary protection;
- To provide them with a document (in a language they are likely to understand) setting out the provisions of the temporary protection arrangements;
- To take back any person granted temporary protection on their territory, if the person concerned remains on, or seeks to enter the territory of another Member State during the period of the temporary protection;
- To authorise persons enjoying temporary protection to engage, for the duration of the temporary protection but not beyond, in employment, self-employment or education, vocational training or workplace experience Member States may, however, as part of their labour market policies, give priority to EU and European Economic Area citizens and legally-resident third-country nationals, who receive unemployment benefit;
- To provide access to suitable accommodation or the means to obtain housing;
- To provide social welfare and assistance if the persons concerned do not have sufficient resources.
- To provide as a minimum emergency medical care and treatment for illness and the necessary medical care and assistance for persons with special needs, such as unaccompanied minors, who have undergone torture, rape or other forms of violence;
- To grant persons under 18 years access to the education system;
- To reunite persons enjoying temporary protection with other family members, ( spouse or partner, minor children and other close family members, who were part of the same family unit), who have been separated by the events leading to the mass influx of displaced persons;

- To provide legal guardianship or representation by an appropriate organisation for unaccompanied minors, who are under temporary protection and place them with adult relatives or with a foster-family or suitable reception centres.

5. The Directive requires Member States to assist the voluntary return of the displaced persons to their country of origin before the period of temporary protection is over, subject to ensuring that they return in full knowledge of the facts and allow them to return to temporary protection, depending on the circumstances prevailing in their country of origin. At the end of the period of temporary protection Member States must conduct any enforced returns with due respect for human dignity and not expel any previously protected persons, who cannot reasonably be expected to travel, for health reasons.

6. Member States may exclude persons from temporary protection if there are serious reasons for considering that they have committed a war crime, or crime against humanity or serious non-political crime before their entry into the Member State or have been guilty of acts contrary to the purposes or principles of the United Nations; or, if they can reasonably be regarded as a danger to national security or, having been convicted of a serious crime, are a danger to the community of the host Member State. In all these cases the person concerned can mount a legal challenge against the decision to exclude them in the Member State concerned.

7. Though temporary assistance has never been triggered, the types of protection described above are mirrored in several of the subsequent EU legislation described below.

8. The UK opted into this Directive; Ireland opted out.

## **EUROPEAN ASYLUM LEGISLATION**

### **Detailed Summary of Legislation**

#### **Annex 4**

### **Council Directive 2003/9/EC: Minimum Standards for the reception of Asylum Seekers**

1. The stated purpose of this Directive is to ensure that asylum seekers have “a dignified standard of living and comparable living conditions in all Member States”. A secondary objective is to discourage “the secondary movement of asylum seekers influenced by the variety of conditions for their reception”. The Directive covers all third country nationals and stateless persons, who make an application for asylum at the border or in the territory of a Member State. An “application for asylum” is defined as a request for international protection as defined in the Geneva Convention of 1951. Member States are also invited, but not required to offer the same reception conditions in connection with applications for kinds of protection other than that emanating from the Geneva Convention (presumably “subsidiary protection” is meant). Article 4 makes it clear that the reception conditions laid down in it are “minimum standards” by stating explicitly that Member States may apply more favourable conditions. Any negative decisions taken by the authorities of Member States regarding the granting of the benefits described below or restrictions on the freedom of movement of applicants must be appellable within the procedures of the Member State, including in the last resort appeal or review by a judicial body.

2. The Directive sets minimum standards for the treatment of asylum seekers in the following areas: -

- **Information:-** Member States must inform asylum seekers of the benefits to which they are entitled and the obligations with which they must comply within 15 days of their application being lodged. They must also inform them of organisations or groups which can provide legal assistance and inform them what reception facilities are available, including health care;
- **Documentation:-** Member States must, within 3 days after an asylum application has been lodged, provide the applicant with a document certifying

his/her status as an asylum seeker and setting out any restrictions on their freedom of movement;

- **Residence/Freedom of Movement:-** Asylum seekers are in principle granted freedom of movement within the host Member State or within an area assigned to them by the Member State. However, Member States may decide on where the asylum seeker should reside for reasons of public order, public interest or, when necessary, for the swift processing and monitoring of their application. They may also confine (i.e. detain) the applicant to a particular place for legal or public order reasons in accordance with their national law. On a case by case basis they may make the provision of material reception conditions subject to the applicant's residence in a specific place determined by the Member State. Where the applicant's movement is restricted, the Member State must provide the possibility for granting applicants temporary permission to leave the assigned area or place and decide on individual requests for permission to leave objectively and impartially, giving reasons for any refusal. Finally, Member States may require applicants to keep their authorities informed of their current address and of any change of residence.
- **Families:-** Member States are required to take appropriate measures to maintain as far as possible the unity of family members present on their territory in cases where the Member State provides the applicants' housing;
- **Medical Screening:-** Member States may require applicants to be medically screened on public health grounds;
- **Schooling and Education of Minors:-** Member States are required to grant minor children ( defined by reference to the Member State's own age of legal majority) access to education under similar conditions to their own nationals, as long as any expulsion order against them or their parents has not been enforced. However, such education may be provided in accommodation centres.
- **Employment and Vocational Training:-** Member States may bar an applicant from access to the labour market for up to one year from the date their application was lodged. Member States may, for reasons of labour market policy, give priority to EU citizens, nationals of the EEA countries and legally resident third-country nationals. Access to the labour market for applicants cannot be barred during appeals procedures. Access to general vocational training must be allowed, irrespective of whether access to the labour market has been granted, except where the training is related to a particular employment contract.
- **Material Reception Conditions and Health:-** Member States have to provide a standard of living adequate for the health of the applicants and capable of ensuring their subsistence from the time of their application. As in the Directive on displaced persons (see paragraph above), the standard of living must be sufficient to meet any special needs of the applicant and their families. The same standards have to be met for persons in detention. Provision of this standard of living may, however, be means-tested and Member States are also allowed to meet the reception conditions through financial allowances or vouchers or in kind. Health care must be provided to cover at least emergency care and essential treatment of illness and any special needs.

3. The Directive lays down specific conditions relating to the provision of housing in kind. This may be provided in the form of premises used for the purpose of housing applicants during the examination of their application at the border; accommodation centres which provide an adequate standard of living; or private flats, houses hotels or other suitably adapted premises. In all these cases Member States must ensure the protection of the applicants' family life and their possibility of communicating with relatives, legal advisers and representatives of the UNHCR and recognised NGOs. The last three groups of contact must also be guaranteed access to the premises, unless restrictions are justified on security grounds. Applicants must be protected against assault in accommodation centres and specialised border premises. Member States must also ensure that staff at accommodation centres are adequately trained and bound by the principle of confidentiality.

4. Member States are exceptionally allowed to make different housing provision than those described above for short periods, while the applicants' needs are being assessed, where

suitable housing is temporarily not available or the applicant is in detention or confined to a border post. Basic needs must, however, be covered in all cases.

5. The Directive specifies a number of special circumstances where a Member State can reduce or withdraw to grant the reception conditions described above, where an applicant has failed to comply with his/her residence conditions, reporting conditions or other obligations or has lodged an earlier application in the Member State or has concealed his/her financial resources. Reception conditions may be refused where an applicant has failed to make an application as soon as was reasonably practical after arrival in the State. Member States may also sanction violent behaviour in accommodation centres. In all these cases decisions to reduce, withdraw or refuse access to reception conditions must be taken case-by-case, objectively and impartially, with reasons given. Access to emergency health care must always be provided.

6. The Directive lays down detailed provisions relating to the protection of minors, in particular, unaccompanied minors. In particular, unaccompanied minors must be: -

- Provided with appropriate legal representation;
- Placed with adult relatives, a foster-family or in suitable accommodation;
- Kept together with his/her siblings as far as possible.

The Member State must try to trace the family members of the unaccompanied minor as soon as possible, while taking care not to jeopardise the security of the child or his/her family. At all times the Member State must act in the best interest of the child.

7. Finally, Member States are required to report regularly to the Commission on the numbers of persons covered by the reception conditions and on the type, name and format of the document given to asylum seekers to confirm their status. They are also required to allocate the necessary resources to implement the Directive and to ensure that the staff of the implementing authorities and other organisations have received the necessary basic training with respect to the needs of male and female applicants.

8. The UK opted into this Directive, but Ireland did not.

**EUROPEAN ASYLUM LEGISLATION**  
**Detailed Summary of Legislation**  
**Annex 5**

**Council Directive 2004/83/EC: Minimum Standards for the Qualification and Status of third country nationals/stateless persons as refugees or as persons who otherwise need international protection.**

1. The main objectives of this Directive are to ensure that the Member States apply common criteria for the identification of persons genuinely in need of international protection and to ensure that a minimum level of benefits is available to applicants who are granted refugee status. As a secondary objective, the harmonization of rules proposed is expected to limit secondary movements of applicants for asylum between Member States.

**Definitions of Refugee and Persons in need of Subsidiary Protection**

2. Article 2 (c) of the Directive defines a “refugee” in identical terms to the Geneva Convention as a third country national or stateless person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group” is outside the country of nationality (or in the case of a stateless person his/her country of habitual residence) and is unable or unwilling to avail himself of the protection of that country. Article 2(e) defines a person in need of subsidiary protection as a “third country national or stateless person, who does not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that, if the person were returned to his or her country of origin/ country of habitual residence “would face a real risk of suffering serious harm”. “Serious harm” is further defined in Article 15 as “the death penalty or execution; torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. The first two elements of this definition are derived respectively from Article 1 of Protocol 6 to the European Convention on Human Rights (ECHR) ( freedom from death or execution) and from Article 3 of ECHR (torture or inhuman or degrading treatment or punishment).

3. Articles 12 and 17 respectively disqualify persons who fall within these two definitions from benefiting from the protections provided by the Directive if there are serious grounds for believing that they have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of refuge or has been guilty of acts contrary to the purposes and principles of the United Nations. Applicants for refugee status can also be disqualified if they are under the protection of UN agencies other than UNHCR or if they have taken up residence in another country and enjoy the same rights and obligations as the nationals of that country. Applicants for “subsidiary protection” can also be disqualified if they constitute a danger to the community or to the security of the Member State in which they are present or if, prior to their admission to the Member State, they have committed crimes, which would have been punishable by imprisonment in the Member State and if they have left their country of origin solely to avoid the sanctions resulting from these crimes.

4. Articles 11 and 16 define sets of circumstances in which persons previously granted refugee status or subsidiary protection shall cease to qualify for international protection. In the case of refugees Article 11 requires that people granted refugee status shall cease to be refugees, if they voluntarily return to their country of nationality or reacquire their nationality, having previously lost it; if they have acquired a new nationality and enjoy the protection of the country of their new nationality; or, if the Member State is satisfied that there has been a sufficiently significant and durable change in the refugee's country of origin or habitual residence to allow him/her to return to it without fear of persecution. Article 16 provides that subsidiary protection shall cease when the Member States have satisfied themselves that "the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed" significantly and durably.

### **Assessment of Applications for International Protection**

5. Articles 4 – 8 of the Directive set out the facts and circumstances which Member States must take into account when they assess whether applicants qualify for either refugee status or subsidiary protection and, in effect, lays down relaxed standards of proof which they must apply in evaluating the available evidence. The facts to be taken into account and evaluated for each individual case, as listed in Article 4, include: -

- All relevant facts relating to the applicant's country of origin at the time of taking the decision, including the laws and regulations of that country and how they are applied;
- The relevant statements and documentation presented by the claimant including information on whether the claimant has been or may be subject to persecution or serious harm;
- The individual position and circumstances of the applicant;
- Whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose him/her to persecution or serious harm if returned to the country.

6. As regards standards of proof, the fact that an applicant has already been subject to persecution or serious harm or to threats of such is to be regarded as a serious indication that the applicant has a well-founded fear of persecution/serious harm, unless there are good reasons to believe that such persecution or serious harm will not be repeated. In addition, where Member States require the applicant to substantiate his/her case for international protection, but there is no documentary or other evidence to support aspects of the applicants case, Member States are required to ignore the lack of evidence, provided that the applicant has made a genuine attempt to substantiate his/her application, has supplied all the evidence available to him/her and has given a satisfactory explanation about the lack of other evidence; that his/her statements are found to be coherent and plausible and do not run counter to the available general and specific information relevant to his/her case; and that he/she has applied for international protection at the earliest possible time or can demonstrate good reason for not having done so.

7. Articles 5 – 8 deal with four other factors to be taken into account by Member States in their assessment. Article 5 lays down that a well-founded fear of persecution or a real risk of suffering harm may be based on events or activities of the applicant which took place since he/she left his country of origin, though it is also possible for Member States to refuse refugee status if the risk of the applicant being persecuted is based on circumstances created by the applicant by his own decision since leaving his country of origin. Article 6 defines "actors of persecution or serious harm" as including the State, parties controlling the State or a substantial part of its territory and non-State actors, when no one in power is willing or able to provide any protection. Article 7 defines the potential "actors of protection" as including the State and parties or organisations, including international organisations, which control the State or a substantial part of its territory. Finally, Article 8 allows Member States to decide that international protection is not necessary if there is a part of the applicant's country of origin where the applicant may reasonably be expected to stay without fearing persecution or the risk of serious harm.

### **Qualification for being a Refugee**

8. Articles 9 – 10 flesh out in more detail the Geneva Convention’s definition of a refugee quoted in paragraph 63 above. In brief, Article 9 defines “acts of persecution” as being acts or a serious accumulation of measures, which constitute a serious violation of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10 spells out in more detail the different types of discrimination referred to in the Geneva Convention’s definition. For example, racial persecution is defined to include considerations of colour, descent or membership of an ethnic group. Similarly, “religion” is defined to include “theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, acts of worship” etc. A social group is one, whose members share “an innate characteristic or a common background that cannot be changed, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it and that the group has a distinct identity in the relevant country, because it is perceived as different by surrounding society”. “Gender related” aspects might be considered “without by themselves alone creating a presumption for the applicability of this Article”. Sexual orientation might also be considered as a defining characteristic of a persecuted social group, depending on the circumstances in the country of origin, though “sexual orientation” cannot be considered to include “acts considered to be criminal” under the law of the EU Member States.

### **Granting and Withdrawal of Refugee Status and Subsidiary Protection**

9. Articles 13 and 18 require Member States to grant refugee status or subsidiary protection to third country nationals or stateless persons who qualify for these forms of protection in accordance with the definitions and standards described in paragraphs 5 - 8 above. Articles 14 and 19 require Member States to “revoke, end or refuse to renew” refugee status or subsidiary protection if they have ceased to be a refugee or in need of subsidiary protection for the reasons specified in Articles 11 and 16 (see paragraph 4 above) or if: -

- He /she should have been disqualified from refugee status/ subsidiary protection at the outset for the serious crimes covered under Articles 12 or 17(1 and 2) respectively ( see paragraph 3 above);
- He/she misrepresented or omitted facts, which were decisive for the granting of international protection to them;
- When there are reasonable grounds in the case of refugees for regarding him/her as a danger to the security of the Member State in which he/she is present; or in the case of persons enjoying subsidiary protection constitute either a danger to the community or to the security of the Member State;
- He/she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community.

In the case of persons granted subsidiary protection Member States may also remove subsidiary protection if prior to their admission they had committed crimes, which would be punishable by imprisonment had they been committed in the Member State and if they had left their country of origin solely in order to avoid sanctions resulting from these crimes.

### **Content of International Protection**

10. Articles 20 – 34 set minimum standards for the living standards and social benefits to be provided for refugees and persons granted subsidiary protection; in some areas, indicated below, the level of benefits required is higher for refugees than for those in subsidiary protection.

11. Article 20 requires Member States to follow two general principles in the protection provided; first, that they will take specific account of the special needs of particularly vulnerable persons; second, that, when implementing the Directive’s provisions relating to minors, the best interest of the child will be the primary consideration.

12. Article 21, which applies only to refugees, requires Member States to respect the Geneva Convention’s principle of non-refoulement (i.e. not returning refugees against their will to their country of origin if they have a well-founded fear of persecution, except in cases where the

refugee is reasonably considered to be a danger to national security or, having been found guilty of a particularly serious crime, constitutes a danger to the community.

13. Other requirements on Member States cover areas familiar from the Reception Conditions Directive as follows; -

- **Maintenance of family unity**, including the provision of the same benefits to the family members of refugees and of persons enjoying subsidiary protection, even if they are eligible for the same status. In all these cases a guaranteed standard of living must be provided;
- **Residence permits** valid for 3 years and renewable for refugees and for 1 year and renewable for those in subsidiary protection, to be granted as soon as possible after their status has been granted;
- **Travel documents**: for refugees to travel anywhere outside the Member State's borders, unless compelling reasons of national security or public order require otherwise; and for those beneficiaries of subsidiary protection, who cannot obtain a national passport, enabling them as a minimum to travel abroad for humanitarian reasons, unless compelling reasons of national security or public order require otherwise;
- **Access to Employment/Employment-related or Vocational Education**: These are guaranteed for refugees, but in the case of beneficiaries of subsidiary protection Member States may prioritise access to employment for EU and EEA citizens and legally resident third country nationals for a period of time in accordance with national law;
- **Social Welfare and Health Care**: - Member States must grant the same necessary social assistance and health care for refugees as is available for their own nationals, but may limit the provision made to beneficiaries of subsidiary protection to so-called "core benefits", those again must be provided at the same levels and under the same conditions as nationals;
- **Unaccompanied Minors**: - Member States must provide them with appropriate legal representation and make regular assessments of its adequacy. Unaccompanied minors must also be accommodated with adult relatives, a foster family or in suitable centres or other accommodation. Member States must do their best to keep siblings together and to trace other family members as soon as possible;
- **Access to accommodation and Freedom of Movement within the Member State**: - These must be extended to both refugees and beneficiaries of subsidiary protection under the same conditions as they are extended to other third country residents legally resident in their territories;
- **Integration Facilities**: - Member States must provide for integration facilities, which they consider appropriate, for refugees and, where they consider it appropriate, for beneficiaries of subsidiary protection as well;
- **Repatriation**:- Member States may provide assistance to refugees and/or beneficiaries of subsidiary protection, who wish to repatriate.

## Final Provisions

14. Finally, Member States are required to exchange information with the Commission and other Member States and to ensure that the authorities and organisations implementing the Directive have received the necessary training and are bound to respect the confidentiality of information they receive in their work.

15. The Directive entered into force in 2004. Both the UK and Ireland took part in the adoption and application of it.

**EUROPEAN LEGISLATION ON ASYLUM**  
**Detailed Summary of Legislation**  
**Annex 6**

**Council Directive 2005/85/EC: Minimum Standards on Procedures in Member States for granting and withdrawing refugee status**

1. The main purpose of this Directive is to ensure that all Member States comply with “due process” in reaching decisions on applications for refugee status. The main body of the Directive therefore consists of a series of procedural guarantees, which Member States must provide to the applicants, subject to some carefully defined exceptions. Together with the parts of Directive 2004/83, which lay down the substantive issues to be dealt with and the standards of proof to be applied, it imposes common minimum standards for the handling of asylum applications throughout the procedure. The requirements of the Directive also to be respected in processing applications for subsidiary protection in those Member States, which already apply the same domestic procedures as those used for asylum application to all types of application for international protection (see Article 2). Article 3 in effect invites, but does not require, other member States to do the same. The second half of the Directive authorises Member States to accelerate or prioritise the processing of certain categories of case. It also sets out the circumstances in which Member States can provide for specific procedures, which may derogate from the guarantees and principles listed in paragraph 77 or by which they can dismiss asylum applications as inadmissible or unfounded. There are a number of situations in which Member States can treat asylum applications as inadmissible, because there are other safe third countries to which it is reasonable to send the applicant. Article 29 and Annex 2 of the Directive also sets up a procedure and criteria under which the Council can agree on a minimum common list of third countries, which shall be regarded as safe countries of origin, to which applicants can reasonably be returned; and Article 30 permits

Member States to retain or introduce their own lists of third countries which they deem to be safe countries of origin using the same or similar criteria as those used for the common minimum list.

### **Responsible Authorities**

2. Article 4 of the Directive requires Member States to designate a single determining authority which will be responsible “for an appropriate examination of the applications in accordance with this Directive. However, Member States are explicitly allowed to appoint different authorities for deciding whether the applicant can be transferred to another Member State under the Dublin System; for deciding to refuse applications on national security grounds, subject to the determining authority being consulted as to whether the applicant qualifies for refugee status; for conducting a preliminary examination where an applicant has submitted a second application; and for processing decisions taken in border areas as provided for in Article 35 of the Directive.

### **Guarantees for Handling Applications**

3. The main procedural guarantees for applicants are as follows: -

- **Access to the Procedure:** Member States must ensure that any adult with legal capacity has the right to apply for asylum on his/her own behalf, but may require the application to be made in person or at a designated place. Member States may allow an applicant to apply on behalf of his/her dependants, subject to the latter’s consent. Member States may also determine the cases in which a minor may apply on their own behalf and those where an unaccompanied minor’s application must be lodged by a legal representative (Article 6);
- **Right to remain in a Member State:** The right to remain in a Member State while an application is being examined has to be granted, but does not constitute a residence permit. The only exceptions to granting a right to remain are when a second application will not be further examined under Articles 32 and 34 (see below) or where an applicant is being surrendered or extradited to another Member State, to a third country or to an international court (Article 7);
- **Examination of applications:** Applications must be examined and decisions taken “individually, objectively and impartially” on the basis of up-to-date information from, e.g. UNHCR, and other sources on the situation in the country of origin and, where necessary, in countries through which the applicant has transited. The examiners must have this information made available to them and must also have knowledge of the relevant standards in asylum and refugee law (Article 8);
- **Decisions:** Applicants must be given notice in reasonable time of the decision on their application. Decisions must be given in writing and in a language the applicant may reasonably be expected to understand, in cases when they have no legal adviser and no free legal advice is available. Where the decision is negative, reasons in fact and in law must be given and the applicant informed in writing of how to challenge the decision (Article 9 and Article 10(1)(d) and (e));
- **Information and other assistance to applicants:** Applicants must be informed in good time and in a language they may be reasonably supposed to understand about the procedure and time-frame to be followed and of their rights and obligations under it, in particular about what information they should supply to examiners and how (Article 10(1)a);
- **Interpreters:** Applicants must be provided with interpreters whenever necessary (Article 10(1)(b));
- **Personal Interview:** - Applicants must be given the opportunity of a personal interview on their application with a person competent under national law to conduct such an interview. Member States, however, have discretion to dispense with such interviews when they can give a positive decision, when they consider the application to be unfounded (see further paragraph 8, third bullet point, and paragraph 10 below) or when the applicant is judged unfit or unable to be interviewed. Member States can also decide to offer personal interviews to family dependants and decide in what circumstances minors shall be given them. The personal interview must take place in

conditions which ensure confidentiality and the applicants must be allowed to present their case in a comprehensive manner. The authorities must produce a written note of the interview, containing at least the essential information about the application, to which the applicant must be given timely access (Articles 12, 13 and 14);

- **Access to UNHCR:** Applicants must not be denied access to UNHCR or to any organisation representing it in the Member State concerned. The UNHCR must be allowed access to all applicants in asylum wherever they are held and to all information on individual applications for asylum and on the course of the procedure and the decisions taken on them, subject to the applicant so agreeing (Article 10(1)(c) and Article 21);
- **Right to legal Advice/Representation:-** Member States must allow applicants, at their own cost, to consult a legal adviser or other counsellor, admitted or permitted to practise under national law, on matters relating to their application. Free legal assistance or representation must be granted on request in the event of a negative decision. However, Member States may restrict the provision of free advice only for appeals at first instance to a court or tribunal and/or subject to a means-test and/or only to specifically designated legal advisers or other counsellors. Member States may also restrict free advice only to cases where an appeal or review is likely to succeed, provided this power is not used arbitrarily to restrict its availability. They may also set money- or time-limits on the free advice and/or require that applicants are not more generously treated than their own nationals. Legal advisers and counsellors must have access to all information in the applicant's file relevant to the examination of their case, unless disclosure would jeopardise national security and access to the applicant, including in closed areas and detention. Member States may provide that the applicant can bring a legal adviser/counsellor to the personal interview ( Articles 15 and 16);
- **Guarantees for Unaccompanied Minors:-** Unaccompanied minors must be given a legal representative, unless they are about to reach the age of majority or have access to free legal advice. In any personal interview the interviewer must have the necessary knowledge about the special needs of minors. Member States may use medical examinations to determine the age of unaccompanied minors, but only with the latter's consent (Article 17);
- **Detention:** - Member States shall not hold a person in detention solely because he/she is an applicant for asylum. When an applicant for asylum is held in detention, Member States must ensure the possibility of speedy judicial review (Article 18);
- **Protection of the Applicants' Data:** - Member States must not directly disclose information regarding applications for asylum or the fact that an application has been made to the alleged persecutors of the applicant. Similarly, Member States must not obtain information from the alleged actors of persecution in a manner that result in such actors being informed of the fact that an application had been made and would jeopardise the physical integrity of the applicant and his/her dependants or the liberty and security of his/her family members still living in the country of origin (Article 22);
- **Right of Appeal:** Applicants must be given the right to an effective remedy before a court or tribunal against all negative decisions against their application and against a decision to withdraw refugee status ( Article 39 – see further below).

### **Obligations of the Applicants for Asylum**

4. Article 11 gives the Member States discretion to impose obligations on asylum seekers to cooperate with the competent authorities insofar as is necessary for processing their applications. In particular, applicants can be required to: -

- Report to the competent authorities or appear before them in person either without delay or at a specified time;
- Hand over documents relevant to their application such as passports;
- Inform the authorities of their current place of residence or address and of any subsequent changes;
- Allow the competent authorities to search them and their belongings and to photograph them.

The competent authorities may also record all the applicants' oral statements, provided he/she has been so informed in advance.

### **Procedures in case of Explicit or Implicit Withdrawal of the Application**

5. Articles 18 and 19 authorise Member States to discontinue the examination of, or reject, applications which are explicitly or implicitly withdrawn by the applicants. In the case of explicit withdrawals Member States are required to ensure that their determining authority takes a decision either to discontinue the examination or reject the application. Where the case is discontinued without being rejected a notice to that effect must be entered in the applicant's file.

6. Member States may assume that an application has been implicitly withdrawn when the applicant has failed to provide requested information, which is essential to his/her application under the terms of Directive 2004/83/EC or has not appeared for a personal interview ( unless the applicant demonstrates within a reasonable time that his/her failure was for reasons beyond his control); or has absconded or without authorization left his place of residence or detention without contacting the authorities in reasonable time or has not complied with reporting obligations or other obligations to communicate. In these cases the Member States must ensure that the determining authority decides either to discontinue the examination or reject the application on the grounds that the applicant has not established an entitlement to refugee status.

### **Procedures at First Instance, Accelerated, Inadmissible and Unfounded Applications**

7. Article 23 requires Member States generally to process asylum applications in accordance with the basic principles and guarantees set out in paragraph 77 and to do so "as soon as possible without prejudice to an adequate and complete examination". If a decision cannot be taken within six months, the applicant must either be informed of the delay or receive on his/her request a non-binding forecast of the time-frame within which a decision can be expected.

8. Member States may, however, prioritise or accelerate an examination (still in conformity with the basic principles and guarantees) in cases where the application is expected to be well-founded, where the applicant has special needs or in cases where the validity of the application may be open to challenge, on the grounds, which may be summarised as follows, that the applicant : -

- has only raised issues that are not relevant or of minimal relevance to whether he/she qualifies as a refugee;
- clearly does not qualify as a refugee or for refugee status under Directive 2004/83/EC;
- has made an application which is considered to be unfounded either because he/she comes from a safe country of origin within the meaning of Articles 29,30 and 31 (see below); or because there is a country which is not a Member State, which is considered a safe third country for him/her to be sent to;
- has produced information about his his/her identity or nationality; which is false, incomplete or contradictory; or has made claims to have been the object of persecution which are clearly unconvincing;
- has submitted a subsequent application which does not raise any new elements regarding his/her particular circumstances or to the situation in his her country of origin;
- has failed without reasonable cause to make his/her application in reasonable time;
- is making an application merely to delay or frustrate an earlier decision to remove him/her;
- has failed without good reason to comply with obligations laid down in Directive 2004/83/EC or in this Directive; or refuses to comply with an obligation to have his fingerprints taken;
- is a danger to national security or public order or has been forcibly expelled for these reasons under national law;

- made an application as an unmarried minor contrary to the legislation of the Member State as provided in Article 6 above.

### **Inadmissible Applications**

9. Articles 25 -27 provide that, apart from those applicants who are transferable to other Member States under the Dublin System, Member States are not obliged to examine any applications, which are inadmissible for any of the following six reasons: -

13. Another Member State has granted refugee status;
14. A country, which is not a Member State, is considered as a “first country of asylum” under Article 26, i.e. if the applicant has been recognised as a refugee in that country and can still avail himself/herself of that protection or otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement. This is subject to the proviso that the applicant will be readmitted to this country;
15. A country, which is not a Member State, is considered a “safe third country” for the applicant. Under Article 27 “safe third countries” must offer protection to refugees in accordance with the Geneva Convention; respect the principle of non-refoulement and prohibit the removal of third country nationals countries, which would violate their rights to freedom from torture or other cruel and inhuman or degrading treatment, as laid down in international law. They must themselves be countries in which life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion. There must also be a connection between the applicant and the third country concerned, which makes it reasonable for him/her to go to that country. If the safe third country does not accept the applicant, his/her application must be properly examined by the Member State concerned;
16. The applicant is granted a status equivalent to that of a refugee on some other grounds;
17. The applicant is allowed to remain in the Member State concerned and is protected against refoulement, while a decision is being taken on whether to grant him/her a status equivalent to that of a refugee on other grounds;
18. The applicant has lodged an identical application after a final decision;
19. The dependant of an applicant lodges an application after having already agreed to have his/her case heard as part of the applicant’s case and there are no facts relating to the dependant’s situation, which justify a separate application.

### **Unfounded Applications**

10. Article 28 authorises Member States to consider an application as unfounded if the determining authority has established that the applicant does not qualify for refugee status under the criteria in Directive 2004/83/EC (see Annex 5 above).

### **Safe Country of Origin**

11. Articles 29 – 31 set out procedures and criteria for designating third countries as “safe countries of origin” to which asylum applicants could reasonably be repatriated. Article 29 sets up procedures under which the Council of Ministers, after consultation with the European Parliament could agree a minimum common list of safe countries of origin and subsequently add to or remove or suspend countries from the list.

12. The criteria, which are in Annex 2 to the Directive, require that it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC (see Annex 5 above), no torture or inhuman or degrading treatment or punishment and no threat of indiscriminate violence in situations of international or armed conflict. In deciding whether a country is safe account has to be taken of the extent of the protection against persecution provided in practice by the country's laws and regulation and by its observance of the laws and freedoms laid down in the European Convention on Human Rights and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture. Safe countries must also respect the Geneva Convention's principle of non-refoulement and provide for a system of effective remedies against any violation of the relevant human rights and freedoms.

13. Article 30 allows Member States to retain or introduce legislation, which enables them to designate third countries as safe other than those on the minimum common list, provided that in their view they meet the criteria described in paragraph 12 above. In addition, Member States are also allowed to retain legislation in force at 1<sup>st</sup> December 2005 that allows national designation of third countries as safe countries of origin solely on the basis that they are satisfied there is no persecution or torture or degrading treatment in the countries concerned. Member States must notify the Commission of any countries that they designate as safe under this Article.

14. Article 31 provides that a third country designated as safe under either Article 29 or 30 can only be considered as safe for a particular applicant if he/she has the nationality of that country or, if a stateless person, was formerly habitually resident in it and has not submitted any serious grounds for considering the country not to be safe in his/her particular circumstances. In these cases Member States can consider the asylum application to be unfounded.

#### **Fast-track Examinations of Subsequent Applications and Failures to Appear**

15. Articles 32 – 34 provide for a fast-track “preliminary examination” which Member States may use in cases where an applicant, who has withdrawn or abandoned his/her earlier application or received a negative decision submits a further application.

16. Under Article 32 Member States may carry out a preliminary examination of the second application to determine whether it contains any new “elements or findings, relating to whether the applicant qualifies as a refugee. In carrying out this examination Member States may take into account all aspects of the examination of the first application and of any appeal on or review of the first decision. On completion of the preliminary examination of the subsequent application Member State are only required to carry out a full further examination if “new elements or findings arise or are presented by the applicant, which significantly add to the likelihood of him/her qualifying as a refugee”. Member States may in addition decide that they will only proceed to a further full examination if the applicant was through no fault of his own, incapable of putting forward the new elements or findings now put forward in the examination of his/her first application, in particular by exercising the possibility of an appeal. Article 33 allows Member States to use the same fast-track examination of cases where the applicant has either intentionally or through gross negligence failed to go to a reception centre or appear before the competent authorities at the appropriate time.

17. Article 34 sets out procedural rules for these preliminary examinations. These require that the applicants should, as in a full examination, be properly informed about the procedure to be followed, the time-frame and their rights and obligations under it and have rights to an interpreter, to communicate with UNHCR and to employ a legal adviser. However, Member States may oblige the applicant to indicate facts and substantiate evidence, which justify a new full examination, require the applicant to submit any new information within a time-limit and permit the preliminary examination be conducted on a documents-only basis with no personal interview. Member States must inform the applicant of the outcome of the preliminary examination, of the reasons for any negative decision and the possibilities of seeking a review or appeal of it.

## **Border Procedures**

18. Article 35 allows those Member States, which have not yet set up arrangements for carrying out a full examination of asylum applications in accordance with the guarantees and rights required by this Directive at their border or transit zones, to use a special procedure to decide whether asylum applicants may enter their territory to pursue their applications. This derogation applies only to Member States, which had special border/transit zone regimes in force at 1<sup>st</sup> December 2005. The special procedure must ensure that the applicants in question: -

- Are allowed to remain at the border or transit zones of the Member State until their case is determined;
- Are immediately informed of their rights and obligations;
- Have access if necessary to the services of an interpreter;
- Are interviewed about their application, before any decision is taken, by persons with appropriate knowledge of refugee and asylum law;
- Can consult a legal adviser or counsel as under the normal procedure;
- In the case of unaccompanied minors have a representative appointed.

If permission to enter is refused by a competent authority, the latter must state the reasons in fact and in law why the application is considered as unfounded or inadmissible. If a decision at the border or transit region is not made within four weeks, the applicant must be granted entry into the territory of the Member State so that their application can be examined in the normal way.

19. In special cases, e.g. where a large number of third country nationals or stateless persons arrive at the border or in a transit zone and it is impossible to deal with their cases on the spot, they can be accommodated at locations in the vicinity of the border or transit zone and be dealt with there under the same special procedure.

## **The European safe third countries concept**

20. Article 36 provides that Member States may dispense with a full or even any examination of an asylum application, where a competent authority has established that the applicant is seeking to enter or has illegally entered their country from a designated safe third country, as defined in the rest of the Article.

21. This category of safe third countries differs from the safe countries defined as safe third countries in Article 27 (see paragraph 9, third bullet point above) in that it must have ratified and be observing the Geneva Convention with no geographical limitations, must also have ratified the European Convention on Human Rights, including the standards relating to effective remedies and have an asylum procedure prescribed by law. The second of these conditions apply only to other non-EU European countries. A list of the qualifying third countries has to be agreed by the Council after consultation with the European Parliament, though until such a list has been agreed Member States which have designated third countries as safe in accordance with these criteria in national legislation in force on 1<sup>st</sup> December 2005 may continue to dispense with examinations of asylum applications in the cases defined in paragraph 36 above. When Member States return an applicant to a European safe third country, they must inform the applicant accordingly and provide them with a document informing the third country that the application has not been examined in substance. If the authorities of the third country does not readmit the applicant, the Member States must examine the application in accordance with the normal rules.

## **Procedures for the Withdrawal of Refugee Status**

22. Articles 37 – 38 specify rules for withdrawing refugee status. Under Article 37 Member States may initiate a procedure for withdrawing refugee status, when new elements or findings arise indicating there are reasons to reconsider the validity of the refugee's status. Article 37 requires that the refugee should be given advance notice that his/her refugee status is being reconsidered with the reasons for this and given the opportunity of a personal interview under the same conditions as those applying for the examination of initial

applications as provided in Articles 10(1)(b), 12, 13 and 14 or of making a written statement as to why his/her refugee status should not be withdrawn. If the competent authority decides to withdraw refugee status, the refugee must be informed in writing with reasons given. At that point the refugee is entitled to free legal aid and access to UNHCR or one of its local agencies under the same conditions as in the case of an initial application (see paragraph 77, bullet points 8 and 9 above). During this procedure Member States must get up to date information as to the general situation in the country of origin of the person concerned. They must also avoid any contact with the actors of persecution which might compromise the position of the refugee or jeopardise his/her safety or that of their family members.

23. This procedure for withdrawing refugee status is additional to the authority given to the Member States by Directive 2004/83/EC to terminate refugee status where it has been obtained by false information or the refugee has committed serious crimes before entry or is a threat to national security or public safety.

### **Appeals Procedures**

24. Article 39 specifies the decisions against which applicants/refugees must have a right to appeal ( "right to an effective remedy") as follows: -

- f) (i) a decision taken on their application for asylum, including a decision:
  - (ii) to consider an application inadmissible under Article 25 ( see paragraph 9 above);
  - (iii) not to conduct an examination because there is a European safe third country which could take the applicant ( see paragraphs 20 - 21 above);
- g) a refusal to re-open the examination of the application after its explicit or implicit withdrawal ( see paragraphs 5 and 6 above);
- h) a decision not to proceed to a full examination of the application after a preliminary examination under Articles 32 and 34 (see paragraphs 15 – 16 above);
- i) a decision refusing entry under the special procedures allowed in border or transit zones (see paragraphs 18 – 19 above);
- j) a decision to withdraw refugee status under Article 38 (see paragraphs 22 – 23 above);

25. The detailed procedures for the appeals procedures are largely left to the Member States to decide, but they are required to fix time-limits and other necessary rules for the applicant to pursue his appeal; to determine in accordance with their international obligations whether the applicants may remain in the Member State concerned pending the outcome of their appeal and on the grounds for challenging decisions that their applications are inadmissible on the grounds that there is a safe third country available.

### **Final Provisions**

26. The Directive had to be implemented by Member States by 1<sup>st</sup> December 2007. Both the UK and Ireland opted into this Directive.

