WHOSE FREEDOM, SECURITY AND JUSTICE?

This book brings together contributions from some of the leading authorities in the field of EU immigration and asylum law to reflect upon developments since the Amsterdam Treaty and, particularly, the Tampere European Council in 1999. At Tampere, Heads of State and Government met to set guidelines for the implementation of the powers and competences introduced by the Amsterdam Treaty and make the development of the Union as an area of freedom, security and justice a reality.

Since 1999, a substantial body of law and policy has developed, but the process has been lengthy and the results open to critique. This book presents a series of analyses of and reflections on the major legal instruments and policy themes, with the underlying question, to what extent the ideals held out of 'freedom, security and justice accessible to all' are in fact reflected in these legislative and policy developments. Have freedom from terrorism and the spectre of illegal or irregular migration, and increasingly strict border securitisation and surveillance, overshadowed the freedom of the migrant to seek entry or residence for legitimate touristic, work, study, or family reasons, a secure refuge from persecution, and effective access to justice? In 2004, the Heads of State and Government presented a programme for the next stage of development in these areas; the Hague Programme and the Directives and Regulations that have been agreed are now being transposed and applied in Member States' legal systems. What are the main challenges in the years ahead as the Hague Programme and the existing legislative *acquis* are implemented?

Whose Freedom, Security and Justice?

EU Immigration and Asylum Law and Policy

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Foreword

In 1999, shortly after finalisation of the Amsterdam Treaty, Elspeth Guild suggested the need for a commentary on the provisions concerning the Area of Freedom, Security and Justice established by the Treaty. In time, this became a book of essays, published with the generous co-operation of Richard Hart under the title *Implementing Amsterdam*. In his Introduction, Peter Boeles defined the values underlying the new area of competence widely: freedom would encompass fundamental freedoms, freedom of movement and, 'as far as it is within the power of governments to provide such, freedom from worry or fear'. Security would not only comprise safety from external threat and from criminal acts but would also draw from international rights texts protection against persecution, torture and inhuman or degrading treatment or punishment. Justice implied law enforcement, but above all 'a system in which injustice is fought by respecting the rule of law, fundamental rights and freedoms and the principle of non-discrimination'.[1]

Although in many ways the individual essays were critical, it is fair to describe the tone of the book as generally positive and even hopeful. There were indeed causes for optimism. A substantial project on human rights for the Union had just been completed and published[2] and, even if no directly effective anti-discrimination right had found its way into the Amsterdam Treaty, the provisions on police and judicial co-operation (Article 29 EC Treaty) spoke of common action by the Member States to prevent and combat racism and xenophobia. An existing agency was to be strengthened. Moreover, the Union was apparently on the point of agreeing a Charter of fundamental freedoms, with a comprehensive anti-discrimination clause.[3] At Amsterdam, a hard fight, in which many dedicated migrants' organisations had participated, had been fought for the incorporation of the aberrant third pillar into the European Community and, if this had not been entirely successful, it was generally agreed that progress had been made towards that goal.

In some ways, therefore, the end piece I contributed to the collection struck a discordant note. As a professional sceptic, alert to the 'spin' and media manipulation that characterise modern British government, I

[1] P Boeles, 'Introduction: Freedom, Security and Justice for All' in E Guild and C Harlow (eds), *Implementing Amsterdam* (Oxford, Hart, 2000) 11.

[2] *Comité des Sages, Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, Vienna (9–10 Oct 1998). And see P Alston (ed*), The EU and Human Rights* (Oxford, Oxford University Press, 1999), a project completed for the committee.

[3] Now Treaty establishing a Constitution for Europe, Art II-21.

doubted the commitment of Member State governments to their utopian formula. In a metaphor drawn from Lorenzetti's *Allegory of Good Governance*, I described the 'ambiguous personage' of Securitas, with a gallows and hanged man as his insignia. I foresaw an opportunity for the new club to 'level down' its commitment to past international obligations—a danger that Guy Goodwin-Gill, with greater expertise in the subject, warned was already present.[4] Although I did not fully articulate my feelings, I saw the new EU competence as a safe haven for governments, drawing on the classical constitutional foreign affairs power, to 'play away from home', secure in the knowledge that the democratic accountability mechanisms of the home society could be frustrated. Linguistic problems, distance, the difficulty of accessing information,[5] the complexity and fluidity of the institutional arrangements would combine to make the work of civil society much harder. This would amount to neither representative nor participatory democracy. In short, the Justice and Home Affairs programme presaged for me an unwelcome drift from democratic and relatively accountable 'national government' to a form of 'transnational governance' based on 'soft law' and diplomatic practices borrowed from Schengen, Dublin and the Maastricht third pillar.[6] I did not myself see Amsterdam as likely to reverse the trends or even halt the progression.

Five years after publication, what has changed? According to the European Council, we have seen prodigious developments. The Hague Programme text talks of 'comprehensive and coordinated progress' towards 'a common legal framework in the field of justice and home affairs, and the integration of this policy area with other policy areas of the Union'. The Council claims also that 'the foundations for a common asylum and immigration policy have been laid, the harmonisation of border controls has been prepared, police cooperation has been improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgments has been well advanced'.[7]

[4] G Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam' in Guild and Harlow, above n 1.

[5] See notably the shameful *Hautala* cases: Case T–14/98 *Hautala v Council* [1999] ECR II–2489 noted by de Leeuw (1999) 36 *CML Rev* 1059; Case C–353/99P *Hautala v Council No 2* [2001] ECR I–9565 noted by Leino (2002) 39 *CML Rev* 621.

[6] Views later expressed in C Harlow, *Accountability in the European Union* (Oxford, Oxford University Press, 2002); C Harlow, 'Deconstructing Governance' (2004) 23 *Yearbook of European Law* 57.

[7] The Hague Programme, doc 16054/04 (5 Nov 2004).

In a recent Communication, the Commission draws up its own balance sheet. The basis for a common immigration and asylum policy is now in place, 'although the level of ambition appears to be generally limited'. The draft asylum policy 'lacks ambition'. There has been less progress than hoped towards establishing a policy for legal immigration. On the other hand, an External Borders Agency has been set in place and there has been significant progress towards co-operation in criminal justice with the creation of Eurojust and the entry into force of the European arrest warrant, though the Commission feels it is under-used. Only six Member States had implemented the 'Qualifications Directive'[8] by the due date of 10 October 2006, provoking the Commission to threaten infringement proceedings.[9] Once again, the Commission blamed the need for unanimity for the 'insurmountable blockages', omitting to mention how the legislative framework confined the role of the European Parliament to the old-style consultation procedure. Launching a debate on a 'Tampere II' agenda, the Commission proposed no new ideas, suggesting merely a 'deepening of the process begun in 1999 and to rectify [sic] the all too slow implementation of the drafts and instruments adopted'.[10]

These are the official views, which may not be shared by all of the authors who have contributed to this second Hart publication, the purpose of which is to assess progress made since Tampere I, with a qualitative evaluation of the legal output. Particular attention is paid to the extent to which output now conforms to the Member States' international obligations or represents a 'levelling down'. The Qualification Directive is suspect, felt to fall short of the protections required by international law while, to quote the editors of this volume, overall the development of a Common European Asylum System has generated new, harmful practices that pose 'a serious challenge to the international refugee protection regime'. Again, the controversial Procedures Directive[11] comprises only minimum procedural standards, though it does at least leave Member States some limited freedom to adopt more protective measures.[12]

Amongst the most serious grounds for concern highlighted by the contributors to this volume are the reluctance to expand the remit for the Court of Justice to the whole Area of Freedom, Justice and Security,

[8] Dir 2004/83/EC [2004] OJ L304/12.

[9] Euractive Newsletter, 13 Oct 2006.

[10] *Ibid.* See also Communication from the Commission to the Council and the European Parliament—Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004)401 final, 2 June 2004.

[11] Dir 2005/85/EC [2005] OJ L326/13.

[12] The degree of freedom is contested. See reference to the Council Legal Services' Opinion in Ch 7 of this volume.

attacked in Chapter 3 for the second time by Steve Peers.[13] While the Court of Justice has shown itself willing to embark on emasculation of the third pillar,[14] it can go only so far; judicial intervention is likely to create serious inconsistencies; moreover, the Court's concern for caseload is partially justified (the decreasing backlog of the Court of Justice being offset by a marked rise in the backlog of the Court of First Instance) and the Court has no reason to expect the Treaty amendment necessary for the restructuring of the Community judicial system. It is one thing to argue—as Brouwer does in this volume—for access to justice and legal aid, but quite another to persuade Member States with burdened budgets that this is a fundamental right or, indeed, more than luxury goods.[15]

I myself would single out as a particular point of concern the continuance of the backstairs policy-making customary in this area,[16] on which it is difficult for the most experienced 'repeat players' to obtain information and documentation. As Statewatch remarked shortly before adoption of the Hague Programme, 'it is not yet a public document so there will be little or no time for parliaments and civil society to react'.[17] The most notable current example is that of the March 2006 'G6' meeting in Heiligendamm, Germany, which agreed Conclusions covering a series of Justice and Home Affairs issues (including police access to the planned Visa Information System, EURODAC, etc) and led to a sharply critical report from the House of Lords European Committee.[18] As Statewatch, without whose conscientious monitoring much less would be known about asylum, immigration and the third pillar, remarked of Justice and Home Affairs policy-making, it is 'utterly lacking in the rudiments of accountability as understood at national or EU level'.[19]

My second concern is for the sudden proliferation of Council executive agencies, removing planning and policy-making still further from the public zones. These include Europol and Eurojust, jointly mandated in the Hague Programme with the furthering of mutual recognition of judicial decisions and certificates both in civil and in criminal matters, practical

[13] E Guild and S Peers, 'Deference or Defiance? The Court of Justice's Jurisdiction in Immigration and Asylum' in E Guild and C Harlow, above n 1.

[14] Case C–105/03 *Pupino* [2005] ECR I–5285; Case C–176/03 *Commission v Council* 'Environmental Crimes' (13 Sept 2005).

[15] C Harlow, 'Access to Justice as a Human Right: the European Convention and the European Union' in Alston (ed), above n 2, and for the converse trend in the UK, R Rawlings, 'Review, Revenge and Retreat' (2005) 68 *MLR* 378.

[16] On which see E Guild, 'The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union' in P Craig and C Harlow (eds) *Lawmaking in the European Union* (Dordrecht, Kluwer Law International, 1998).

[17] *Statewatch News* on line 8 Oct 2004, available at www.statewatch.org.

[18] House of Lords European Union Committee, *Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm*, 40th Report of Session 2005–06, HL 221.

[19] *Statewatch News* on line, 26 Oct 2006, available at www.statewatch.org.

police and judicial co-operation, the approximation of laws and the development of common policies. The External Borders Agency has already been mentioned. Secret policy-making by non-accountable agencies in areas affecting human rights and civil liberties must always be a matter of concern; equally worrying is the fact that these are *Council* agencies, falling outside the Commission's control and publicised framework for agencies.[20] They have all too often become operative before their formal inauguration.[21]

The shadow of Securitas looms much larger over the area of freedom, security and justice than when I last wrote. On 9/11, the hanged man moved to the front of the picture, bringing the hangman with him. This very welcome and timely collection of essays asks in its title the question 'Whose Freedom, Security and Justice?'. Two slightly different questions are equally pertinent: how much freedom? and how much justice? Many years ago, in times which seemed to me more hopeful, John Griffith, noting the inevitable tension between the individual and society, remarked that 'societies are by nature authoritarian. Governments even more so.'[22] Aliens, migrants and foreigners have always felt the truth of this remark. Today the pendulum has sharply swung towards the authoritarian end. The current emphasis is on criminalisation, sanction and penalty, the policy-making focus on people trafficking, drug running and anti-terrorist measures; as I write, the Commission has announced the allocation of €9 million to enhance trans-European 'prevention, preparedness and response to terrorism'—not, be it noted, to provide for lawful immigration, or to resettle migrants or victims of people trafficking.[23] The punitive and authoritarian atmosphere is undercutting traditional respect for criminal procedure, as witnessed by erosions of traditional safeguards for extradition, under the European arrest warrant,[24] and the double jeopardy principle. In the name of security, dubiously legal exchanges of information take place.[25] Classical due process rules strongly protected by the European Convention are set to one side in the name of international comity.[26]

[20] See Commission Communication on the operating framework for the European regulatory agencies, COM(2002)728 final, 11 Dec 2002.

[21] See the work of D Curtin, 'Delegation to EU Non-majoritarian Agencies and Emerging Practices of Public Accountability' in D Gerardin, R Munoz and N Petit (eds), R*egulation through Agencies: A New Paradigm of European Governance* (Cheltenham, Edward Elgar, 2005).

[22] JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1, 2.

[23] IP/06/1482 Brussels, 26 Oct 2006.

[24] Case C–303/05 *Advocaten voor de Wereld* (12 Sept 2006).

[25] Joined Cases C–317 and 318/04 *Parliament v Council* (30 May 2006).

[26] Case T–306/01 *Ali Yusuf and others v Council and Commission* and Case T–315/01 *Yassin Abdullah Kadi v Council and Commission* (21 Sept 2005) though see now Case T–49/04 *Chafiq Ayadi v Council, Faraj Hassan v Council and Commission* (12 July 2006).

Under the auspices of Eurojust, the approximation of national criminal laws is moving forward outside public forums.

This is not the way things should be done.

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Contents

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List of Key Legislative and Policy Documents

General

Communication from the Commission to the Council and the European Parliament, Report on the implementation of the Hague Programme, COM(2006)333 final, 28 June 2006

Implementing The Hague Programme: the Way Forward, COM(2006)331 final, 28 June 2006

Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union [2005] OJ C 198/1

The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1

EU Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [1999] OJ C 019/1

Institutional

Communication, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities—Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM(2006)346 final, 28 June 2006

Communication from the Commission to the Council and the European Parliament, Evaluation of EU Policies on Freedom, Security and Justice, COM(2006)332 final, 28 June 2006

Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty [2004] OJ L 396/45

Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title IV of the Treaty of the European Union, COM(2005)280 final, 30 June 2005

Communication from the Commission—Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: Methodology for systematic and rigorous monitoring, COM(2005)172 final, 27 April 2005

Citizenship

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77

Asylum

Adopted Legislation

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13. Deadline for the transposition by the Member States into national laws: 1 December 2007

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 [2004] OJ L 304/12. Deadline for the transposition by the Member States into national laws: 10 October 2006

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 in one of the Member States by a third-country national [2003] OJ L 50/1. Entry into force: 16 March 2003

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18. Deadline for the transposition by the Member States into national laws: 6 February 2005

Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L 62/1. Entry into force: 5 March 2002

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 and bearing the consequences thereof [2001] OJ L 212/12. Deadline for the transposition by the Member States into national laws: 31 December 2001

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1. Eurodac started its activities on 15 January 2003

Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund [2000] OJ L 252/12

Proposed Legislation

Amended proposal for a decision of the European Parliament and the Council establishing the European Refugee Fund for the period 2008–2013 as part of the General programme 'Solidarity and the Management of Migration Flows', COM(2005)123 final/3, 24 May 2006

Communications

Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation—New structures, new approaches: improving the quality of decision making in the Common European Asylum System, COM(2006)67 final, 17 February 2006. Annexes to the Communication SEC(2006)189

Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM(2005)388 final, 1 September 2005

Communication from the Commission to the Council and the European Parliament. A More Efficient Common European Asylum System: The Single Procedure as the Next Step, COM(2004)503 final, 15 July 2004

Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: 'Improving access to durable solutions', COM(2004)410 final, 4 June 2004

Communication from the Commission to the Council and the European Parliament. Towards more accessible, equitable and managed asylum systems, COM(2003)315 final, 3 June 2003

Commission working document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, COM(2001)743 final, 5 December 2001

Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open coordination method—First report by the Commission on the application of Communication COM(2000)755 final of 22 November 2000, COM(2001)710 final, 28 November 2001.

Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum, COM(2000)755 final, 22 November 2000.

Commission working document. Towards common standards in the field of asylum procedure, SEC(1999)271, 3 March 1999

Irregular Migration

Adopted Legislation

Council Decision 2006/688/EC of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration [2006] OJ L 283/40

Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services [2005] OJ L 83/48

Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [2004] OJ L 261/28

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19. Deadline for the transposition by the Member States into national laws: 6 August 2006

Regulation 491/2004/EC of 10 March 2004 of the European Parliament and of the Council establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS) [2004] OJ L 80/1

Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals [2004] OJ L 60/55

Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network [2004] OJ L 64/1

Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by Air [2003] OJ L 321/26. Deadline for the transposition by the Member States into national laws: 6 December 2005

Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1. Deadline for the transposition by the Member States into national law: 5 December 2004

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/4. Deadline for the transposition by the Member States into national law: 5 December 2004

Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L 149/34. Deadline for the transposition by the Member States into national law: 2 December 2002

Proposed Legislation

Amended proposal for a Decision of the European Parliament and the Council establishing the European Return Fund for the period 2007–2013 as part of the General programme 'Solidarity and Management of Migration Flows', COM(2006)123 final/3, 24 May 2006

Proposal for a Regulation of the European Parliament and of the Council on Community statistics on migration and international protection, COM(2005)375 final, 14 September 2005

Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005)391 final, 1 September 2005. Commission's impact assessment annexed to the proposal, SEC(2005)1057

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Communication from the Commission on policy priorities in the fight against illegal immigration of third-country nationals, COM(2006)402 final, 17 July 2006

Communication from the Commission to the Council on the monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, COM(2005)352 final, 28 July 2005

Commission staff working paper. Annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents, SEC(2004)1349, 25 October 2004

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—Study on the links between legal and illegal migration, COM(2004)412 final, 4 June 2004

Communication from the Commission to the European Parliament and the Council, in view of the European Council of Thessaloniki, on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003)323 final, 3 June 2003

Communication from the Commission to the Council and the European Parliament on a community return policy on illegal residents, COM(2002)564 final, 14 October 2002

Green paper on a community return policy on illegal residents, COM(2002)175 final, 10 April 2002

Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM(2001)672 final, 15 November 2001

Borders and Visas

Adopted Legislation

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1

Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism [2005] OJ L 141/3

Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism [2005] OJ L 68/44

Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L 385/1

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1

Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data [2004] OJ L 261/24. Deadline for the transposition by the Member States into national law: 5 September 2006

Council Decision of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L 213/5

Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2004] OJ L 183/83

Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection [2004] OJ L 235/11

Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism [2004] OJ L 162/29

Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit [2003] OJ L 64/1

Common Consular Instructions on visas for the diplomatic missions and consular posts [2002] OJ C 313/1

Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications [2001] OJ L 116/2

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81/1

Proposed legislation

Proposal for a Regulation of the European Parliament and of the Council Establishing a Community Code on Visas, COM(2006)403, 19 July 2006

Commission proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending the Border Agency Regulation as regards that mechanism, COM(2006)401 final, 19 July 2006 and Commission staff working paper, SEC(2006)953, 9 July 2006

Proposal for a Regulation of the European Parliament and of the Council amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications, COM(2006)269 final, 31 May 2006

Amended proposal for a Decision of the European Parliament and the Council establishing the External Borders Fund for the period 2007–2013 as part of the General programme 'Solidarity and Management of Migration Flows', COM(2006)123 final/3, 24 May 2006

Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, COM(2005)600 final, 24 November 2005

Proposal for a Council Decision on the establishment, operation and use of the second generation Schengen Information System, COM(2005)230 final, 31 May 2005

Proposal for a Regulation on the establishment, operation and use of the second generation Schengen Information System, COM(2005)236 final, 31 May 2005

Proposal for a Regulation regarding the access to SIS II by the services of Member States responsible for issuing vehicle registration certificates, COM(2005)237 final, 31 May 2005

Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, COM(2004)834, 28 December 2004

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Communication from the Commission to the Council—Termination of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, COM(2006)335 final, 16 June 2006

Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM(2005)597, 24 November 2005

Communication from the Commission to the Council and the Parliament—Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach, COM(2003)826 final, 16 December 2003

Legal Migration

Adopted Legislation

Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15. Deadline for the transposition by the Member States into national law: 12 October 2007

Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12. Deadline for the transposition by the Member States into national law: 12 January 2007

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44. Deadline for the transposition by the Member States into national law: 26 January 2006

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

[2003] OJ L 251/12. Deadline for the transposition by the Member States into national law: 3 October 2005

Proposed Legislation

Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001)386, 11 July 2001. This proposal was officially withdrawn in March 2006: [2006] OJ C 64/8

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Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Policy plan on legal migration, COM(2005)669 final, 21 December 2005. Commission's Impact Assessment, SEC(2005)1680

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Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—Study on the links between legal and illegal migration, COM(2004)412 final, 4 June 2004

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, COM(2003)336 final, 3 June 2003

Communication from the Commission to the Council and the European Parliament on an open method of coordination for the community immigration policy, COM(2001)387 final, 12 July 2001

Communication from the Commission to the Council and the European Parliament on a Community immigration policy, COM(2000)757 final, 22 November 2000

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Readmission Agreements

Council Decision concerning the signing of the Agreement between the European Community and the Russian Federation on readmission, Council doc 8859/06, 17 May 2006

Council Decision 2005/809 of 7 November 2005 on the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation [2005] OJ L 304/14. For the Agreement see [2005] OJ L 124/22

Council Decision 2005/372 of 3 March 2005 concerning the conclusion of the Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation [2005] OJ L 124/41

Council Decision 2004/424 of 21 April 2004 concerning the conclusion of the Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation [2004] OJ L 143/97

Council Decision 2004/80 of 17 December 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation [2004] OJ L 17/23

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Communication from the Commission, A Strategy on the external dimension of the area of freedom, security and justice, COM(2005)491 final, 12 October 2005

Communication to the Commission from Commissioner for External Relations and European Neighbourhood Policy, Benita Ferrero-Waldner: Implementing and promoting the European Neighbourhood Policy, SEC(2005)1521, 22 November 2005

Commission Communication, European Neighbourhood Policy: Strategy Paper, COM(2004)373 final, 12 May 2004

Communication from the Commission to the Council and the European Parliament—Wider Europe Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM(2003)104 final, 11 March 2003

Communication from the Commission to the Council and the European Parliament, integrating migration issues in the European Union's relations with third countries, COM(2002)703 final, 3 December 2002

From Amsterdam and Tampere to The Hague: An Overview of Five Years of EC Immigration and Asylum Law

ANNELIESE BALDACCINI AND HELEN TONER

INTRODUCTION

EU ASYLUM AND immigration law is a fast-moving field. The Conclusions adopted in 1999 at the Tampere European Council and the publication in 2004 of the Hague Programme setting out the agenda for the next stage of development of the 'Area of Freedom, Security and Justice' represent two important milestones in its development. In those critical five years, a range of legal instruments were adopted alongside action plans and policy documents, which all have a significant impact on third country nationals' freedom of movement and residence, or ability to seek access to the territory of the EU for protection or other purposes.[1] During the same period, the Constitutional Treaty was adopted (although it would not come into force as planned) and the EU enlarged to 25 with the accession of 10 more Member States. The chapters in this volume aim to draw out the most significant themes and issues presenting an assessment of the progress so far.

The book is divided into four parts, each structured around a particular theme. The first, *Constitutional Issues in EU Migration Law,* tackles general constitutional themes of citizenship, lawmaking processes, fundamental rights, remedies and judicial control. The second part addresses *Access to Asylum and Refugee Protection* and considers the key legal texts in the area of refugee protection as well as the incipient external actions of the EU in the asylum field. The third part tackles the theme of *Borders and the Enforcement of Migration Control,* which embraces irregular migration and its criminalisation, policies on border security, issues of surveillance, detention of migrants, returns and readmission agreements. The

[1] For a comprehensive treatment, including the major legal texts in full, see further S Peers and N Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Leiden/Boston, Martinus Nijhoff, 2006).

fourth and final part addresses the theme of *Managing Legal Migration* and looks at key texts and policies on long-term resident third country nationals, family reunification, economic migration and migration from the new Member States.

Before drawing together the contributions to this volume, we will review below the legal framework created by the Treaty of Amsterdam and the five-year work programme agreed at the Tampere European Council, designed to implement the Amsterdam project of establishing an area of freedom, security and justice 'accessible to all'. Finally, the main features of the agenda set out in the Hague Programme for the next five years will be outlined, along with some considerations regarding institutional changes to come.

THE AMSTERDAM COMPETENCES AND THE TAMPERE PROGRAMME

Competences in the Amsterdam Treaty

The competences on immigration and asylum in the Amsterdam Treaty, which entered into force on 1 May 1999, were incorporated in Title IV of the EC Treaty.[2] They include competences to enact measures dealing with borders (absence of controls at internal borders, crossing of external borders, and visas—Article 62) and measures dealing with freedom for third country nationals to travel for less than three months, including a five-year period for the Council to act.

The EC is given competence to enact measures dealing with asylum in Article 63(1), measures dealing with temporary protection and burden sharing in Article 63(2), and measures dealing with immigration policy, in particular conditions of entry and residence (including family reunification), illegal immigration (including repatriation) and third country nationals taking up residence in *other* Member States in Article 63(3). Again, there is a five-year period for the Council to act but burden-sharing (Article 63(2)(b)), action on legal entry and residence (Article 63(3)(a)) and legally established third country nationals taking up residence elsewhere in the EU (Article 63(4)) are not subject to the five-year period.

Article 67 sets out arrangements for decision-making. Initially legislation was to be initiated either by the Commission *or* Member State with consultation of Parliament and unanimous decision in Council. After five years, however, there would be transition of some parts of Title IV to qualified majority voting (QMV) and co-decision with the European

[2] Treaty establishing the European Community (consolidated text) [2002] OJ C 325/1.

Parliament, and there is provision for the Council (deciding unanimously) to move all or part of the rest of Title IV to co-decision and QMV. The jurisdiction of the Court of Justice is also curtailed under this Title (Article 68), with references admissible only from those courts against whose decisions there is no judicial remedy, although there is again provision for this to be adapted after five years by unanimous voting in the Council (Article 67(2) second indent).

The Tampere Programme

In October 1999, the European Council met in Tampere (Finland) to draw operational conclusions from the Amsterdam Treaty and make the development of the Union as an area of freedom, security and justice a reality.[3] The Tampere milestones included the establishment of the first stage of a Common European Asylum System based on a full and inclusive application of the Refugee Convention. The particular measures envisaged were 'a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status'.[4] It was also to be 'completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection'.[5] Later it was envisaged that 'Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.[6]

As to third country nationals, the Tampere Conclusions envisaged that the 'Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States'. A more vigorous integration policy was called for, aimed 'at granting [third country nationals] rights and obligations comparable to those of EU citizens'. It envisaged that 'the legal status of third country nationals should be approximated to that of Member States' nationals' and that long-term residents 'should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens'.[7]

Management of migration flows is another theme in the Tampere Conclusions.[8] Here, the further development of a common active policy on visas and false documents is called for, including closer co-operation

[3] Presidency Conclusions, Tampere European Council, 15–16 Oct 1999.
[4] *Ibid*, para 14.
[5] *Ibid*.
[6] *Ibid*, para 15.
[7] *Ibid*, paras 18–21.
[8] *Ibid*, paras 22–27.

between EU consulates in third countries and the establishment of common EU visa issuing offices. On irregular migration, the Council called for serious sanctions against those who engage in trafficking in human beings and economic exploitation of migrants, and asked Member States, together with Europol, to direct their efforts to detecting and dismantling the criminal networks involved, while securing the rights of the victims of such activities. Emphasis was placed on the effective control of the Union's future borders, on the promotion, with the assistance of countries of origin and transit, of voluntary return and on the conclusion of readmission agreements with relevant third countries.

The Position of the United Kingdom, Ireland and Denmark

It is worth reminding ourselves at this point that Denmark, Ireland and the UK have a particular position on Title IV measures: they are not bound by these measures in the same way as other Member States. Denmark does not take part at all in Title IV, therefore none of the measures adopted is either binding upon or applicable in Denmark.[9] The UK and Ireland have negotiated a position whereby they may opt in to measures if they wish but are not bound to do so.[10] In practice, this discretion has been used by the UK in favour of opting in to many of the measures dealing with asylum and irregular migration, but much less so in relation to those measures dealing with legal migration (the Long-Term Residents and Family Reunification Directives in particular) and borders. Ireland has followed a fairly similar but not identical pattern of participation.

The UK (and Ireland) is in a similar position in relation to measures building on the Schengen *acquis* by virtue of the Schengen Protocol. Any proposal which builds upon the Schengen *acquis* is made subject to the relevant EC Treaty provisions and, therefore, to the UK's position on retaining internal border controls. This has precluded, for instance, its participation in the Regulation establishing the European Border Agency, although it wished to take part in it. The UK has brought an action against the Council before the ECJ challenging this exclusion.[11]

A General Assessment: Decision-making Process and Outcomes

There are several important features of the decision-making process under the Amsterdam and Tampere mandates which require some preliminary

[9] Protocol (No 5) on the position of Denmark, annexed to the Treaty of Amsterdam [1997] OJ C 340/03.

[10] *Ibid*, Protocol (No 4) on the position of the United Kingdom and Ireland.

[11] Case C–77/05 *United Kingdom v Council*. See further Ch 12 in this volume.

comment. Member States (unusually) have *shared* the right of legislative initiative with the Commission during this initial period of five years. Unanimous voting (the 'veto' of which we hear so much in the press and media discussion of all things related to the EU) is the decision-making process in the Council, thus allowing one Member State to block progress on a desirable measure (or, on the contrary, depending on one's point of view, allowing one Member State to hold out against measures being agreed in an undesirable state and enabling it to press more effectively for adequate standards to be maintained). Co-decision with the European Parliament was not used during this first phase; it only had *consultation* rights, which meant that the views expressed could all too easily be sidelined and ignored by the Council.

As many contributions in this volume highlight, certain problems became apparent during this process: in particular, the process was slow—at times downright laborious and frustrating—and agreement proved somewhat difficult to reach on contentious points. In negotiating the EU immigration and asylum measures, Member States have shown a reluctance to divest national administrations of discretion over these issues and to commit to unequivocal standards, fully compliant with their international obligations. The views of the European Parliament have not always been listened to, and thus the democratically directly elected voice of European citizens has seemed sadly muted in this process. More than one piece of legislation became subject to litigation[12] as a result of this lack of accountability, democracy and legitimacy in the legislative process, as it seems clear enough that a number of these disputes might well have been resolved without litigation had the Parliament's input been taken more seriously, and, in particular, had its institutional position in relation to these matters been stronger from the outset.

With the new five-year programme agreed at The Hague in November 2004 underway, the underlying question is to what extent the ideals held out of 'freedom, security and justice accessible to all', to which the Heads of State and Governments committed themselves in Tampere, are in fact reflected in the measures that have been adopted. Below we review some of

[12] On visas, the Commission has challenged the legality of the Council's reservation to itself of implementing powers in Regs 789/2001 and 790/2001 [2001] OJ L 116/2 and L116/5, respectively (Case C–257/01 *Commission v Council* [2005] ECR I-345). The Parliament has challenged certain restrictive provisions of the Family Reunification Directive (Case C–540/03 *Parliament v Council* [2006] ECR I-5769), the Passenger Name Records (PNR) Transfer Agreement with the US (Joined Cases C–317 and 318/04 *Parliament v Council* [2005] ECR I-2457), and the Asylum Procedures Directive [2005] OJ L 326/13 (pending Case C–133/06 *Parliament v Council*). See Chs 1 (visas), 15 (family reunification), 12 (PNR), and 5 (asylum procedures) for details on litigation over these issues before the ECJ.

the main themes that emerge from the analysis of the legislative instruments and policies in the field of EU immigration and asylum offered in this book.

WHOSE FREEDOM, SECURITY AND JUSTICE?

Constitutional Issues in EU Migration Law

Free movement of persons is at the heart of the EU constitutional project and is one of the most immediately visible and highly valued of the rights of persons living in the EU. For nationals of EU Member States, it is buttressed by enshrined EC Treaty rights and the developing concept of European citizenship. Free movement rights have recently been consolidated in the Citizens' Rights Directive[13] and are gradually being widened to include third country nationals. Chapter 1 examines the relationship in EU migration law between Union citizens and third country nationals. Guild finds that this relationship is one of both convergence and divergence. Convergence because the category of third country nationals enjoying the same or similar rights to Union citizens is widening, a prime example being that of third country national family members of Union citizens, although their treatment remains problematic. Divergence because in the developing EU law on borders and admission, residence and status of third country nationals, Member States have subjected the right of free movement of third country nationals to barriers that the European Court of Justice (ECJ) has severely limited, and in many cases excluded, with regard to Union citizens. Guild identifies such barriers for instance in the lower threshold for their expulsion and in the additional requirements to access social security benefits. The result is that the developing concept of EU citizenship is premised upon discrimination between classes of citizens and that for third country nationals enjoying free movement rights the dividing line between citizenship rights and discrimination against the alien remains rather blurred.

Free movement rights, however, also depend on the individual having the opportunity to realise those rights in practice and the right to remedies where Member States fail in their duty to secure them. Brouwer addresses these issues and highlights the importance of the roles of national courts and the ECJ in securing effective access to justice as the new legislation on immigration and asylum is transposed, implemented and applied in Member States. Drawing on previous jurisprudence of the ECJ and of the

[13] Dir 2004/38/EC of the European Parliament and of the Council of 29 Apr 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

European Convention on Human Rights (ECHR), she argues that references to legal remedies or mounting legal challenges can and should be infused with real substance. She singles out particularly three basic principles of EC law, which provide a more fundamental basis for the right to legal remedies: the protection of fundamental rights which incorporate the effective remedies accorded by Articles 6 and 13 of the ECHR; the principle of effective remedies to secure rights conferred by EC law, which has been interpreted also to apply in the field of immigration law procedures and is now enshrined in Article 47 of the EU Charter of fundamental rights; and the necessity of effective judicial procedures to ensure a uniform and clear interpretation of EC law.

While recourse to general principles of EC law may help third country nationals secure their rights in practice, it remains the case that, for the time being, the ECJ's lack of full jurisdiction over immigration and asylum matters subjects third country nationals to an underdeveloped legal regime. Jurisdiction over these matters is still subject to special rules which prohibit national courts, other than those of final instance, from applying to the Court in Luxembourg for preliminary rulings. There has been reluctance to move—as Peers argues is required by the Treaty—to regularise the position of the Court of Justice for fear of an unmanageable caseload. This is an objectionable reason for failing to accord the same degree of judicial protection to this as to other areas of EC law and one that, should the prediction of a 'deluge' of cases actually materialise, could be addressed by reforms to the judicial architecture. On the other hand, the practice since 1999 shows that the limitation of reference powers to final courts has substantially restricted access to the ECJ in practice and that, as a result, the Court cannot make an effective contribution to ensuring the uniform interpretation, effective enforcement or control of legality of EC immigration and asylum law. It remains to be seen whether Member States will act on the proposal currently on the table to adapt the powers of the Court in this field.[14] As Peers demonstrates, they have little to fear from such a move and should do so immediately to comply with the clear Treaty obligation.

Normalisation of the ECJ's jurisdiction over these matters is all the more urgent as the lawmaking process is by no means complete—immigration and asylum law remain high on the legislative agenda. Even if the foundations have now been laid, much work still remains, albeit perhaps at a somewhat slower pace now. A potentially significant feature of legislative drafting and policymaking across the board, inspired by the drive for 'better regulation' and the Lisbon agenda, is the use of Integrated Impact

[14] Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM(2006)346 final, 28 June 2006.

Assessments since 2002. Toner examines their use in immigration and asylum law and questions critically both whether there is yet a clear vision of their conceptual place in the lawmaking process and the extent to which they have yet been able to serve a useful practical purpose in this particular area, beyond what was already being done by way of consultation and research. She is particularly critical of their record in addressing with sufficient clarity and detail some of the difficulties that are key to securing final agreement on legislative texts and in ensuring proper standards of rights protection. Whilst Impact Assessments may be useful in terms of transparency to give some insight into the motivations and justifications behind major strategic decisions on how law and policy will proceed, she concludes that expectations at this stage should be realistic. She is also sceptical of their ability to do much to deliver improved standards of rights protection as they currently operate.

Access to Asylum and Refugee Protection

The question of compliance with fundamental rights is particularly relevant with respect to the implementation and application of the legislative instruments adopted to develop the first phase of the Common European Asylum System. Three major Directives have been adopted, dealing with Asylum Procedures,[15] Reception Conditions,[16] and Qualification for Refugee and Subsidiary Protection Status.[17] In addition, the (1990) Dublin Convention dealing with the determination of which Member State has responsibility for examining applications for asylum has now been adopted as a Regulation (the 'Dublin II' Regulation).[18] The contributions in Part II examine the strengths and weaknesses in these measures and the extent to which they comply with international law standards and obligations by which the Member States are bound, with particular focus on the general principles of EC law. While often sceptical and critical of the standards that have been developed in legislation, the authors highlight how general principles of EC law may constrain the apparent discretion afforded to Member States in many areas of asylum decision-making or remedy the equivocal standards adopted. They are also criticised for being a weak and ineffective exercise in harmonisation in any event.

The main concerns with regard to the Asylum Procedures Directive—the most controversial of all the post-Amsterdam measures in the asylum field—is that it puts in place generalised procedures which, in the worst

[15] Dir 2005/85 [2005] OJ L 326/13.
[16] Dir 2003/9 [2003] OJ L 31/18.
[17] Dir 2004/83 [2004] OJ L 304/12.
[18] Reg 343/2003 [2003] OJ L 50/1.

cases, entirely substitute for an individual determination process. The grounds for special, accelerated and inadmissible procedures are wide, with the consequences of being dealt with by such procedures potentially draconian and serious, particularly as the basic procedural guarantees are weak in any event. Costello, however, contends that, in spite of the wording of the Directive, the robust procedural guarantees of the general principles of EC law require careful individual assessment of asylum claims and limit the apparent discretion afforded to national administrations. Taking also into account the provisions of the Qualification Directive on evidential assessment, she argues that in four key areas the apparent discretion afforded by the Procedures Directive is constrained by these general principles: entitlement to an interview, requirement of a reasoned decision, right to legal aid and effective judicial protection.

Underlying expeditious processing is the preoccupation with unfounded claims and the need to discourage misuse of the asylum system. It is also meant to alleviate public spending concerns, because, as Handoll puts it, 'the claim for protection carries with it a moral—and a legally endorsed—right to support while a claim is being considered'. The Directive on Reception Conditions enshrines this right in EC law, but standards provided therein appear designed, as Handoll states, 'as much to discourage future asylum seekers as to satisfy the basic needs of the already-arrived'. There are two concepts at play that risk being mutually exclusive: harmonisation and dignity. While seeking to 'ensure a dignified standard of living', the Directive's *minimum* standards of reception aim to achieve also comparable living conditions in Member States so that support does not act as a pull factor. Securing this latter objective, Handoll optimistically argues, may result in generous levels of support across the EU. But there is much leeway in the provisions for Member States to set standards so low as to make them the most unattractive of destinations. This is the case, for instance, in relation to provisions that allow restrictions on the freedom of movement of asylum seekers, or outright detention, prohibition on employment, and the withdrawal of support to sanction 'negative' behaviour when the support provided is designed to meet needs that are no more than basic. Whether this is compatible with the principle of human dignity will be for the courts to ascertain.

The Qualification Directive, likewise, has given rise to some difficulties. Perhaps the most troublesome aspects of it are the provisions on exclusion, revocation and *non-refoulement*. The drafting history of this instrument testifies how, in the post-9/11 climate, security concerns became pre-eminent, and found expression in subtle, yet significant, changes to the Refugee Convention's exclusion and cessation clauses reflected in the Directive. The Directive now includes possible revocation where 'there are reasonable grounds for regarding the refugee as a danger to the security of the Member State' or 'the refugee having been convicted of a particularly

serious crime, constitutes a danger to the community of that Member State'. Gil-Bazo suggests that these constitute de facto provisions on exclusion, which, arguably, fall short of existing and evolving international law and standards. Again, it is the case that the legality of the Directive's security provisions, and those enacted in national legislations to implement the Directive, remain subject to the scrutiny of national courts and the ECJ. There is moreover a discretion conferred on Member States to introduce more favourable rules which could reasonably lead them to grant protection to excludable individuals whom they are not allowed to remove under international human rights law. Whether this is a distinct possibility will depend on the ECJ's standpoint on the Council Legal Services' Opinion that by doing so Member States would defy the objective of harmonisation of their asylum laws.

The Directive is nevertheless considered to constitute a major step forward in the recognition of the rights of refugees and other persons protected by international law. Its criteria for refugee status include the possibility of persecution by non-state agents. It recognises gender- and child-specific forms of persecution. It creates a system of subsidiary protection for those at risk of 'serious harm'. Clarifying these elements it is believed will go some way to reducing the current disparities in Member States' protection systems, and the difficulties these create in the application of other aspects of the emerging asylum *acquis*, particularly the Dublin Convention (now Regulation) designed to determine which Member State has responsibility for an asylum claim.

The Dublin Regulation, like the Convention before it, has also not been immune from criticism. The move from the Convention to the Regulation has not resulted in significant changes in the criteria allocating responsibility. Nicol finds that they continue, disappointingly, to be based on the premise that the asylum applicant should not have a free choice as to which Member State should consider the substance of the application. Furthermore, they continue to put a disproportionate burden on those Member States on the Eastern and Southern borders of the EU, which are the most popular points of entry. What undoubtedly constitutes advancement is the different status of the Regulation as an instrument of EC law: it applies directly in the national legal order and is subject to the (albeit limited) jurisdiction of the ECJ.

As Nicol highlights, the Regulation, and before it the Convention, has been successful in addressing the pernicious practice of bouncing asylum applicants from one Member State to another with none taking responsibility. But other practices, no less harmful, have emerged which have generated less attention but pose nevertheless a serious challenge to the international refugee protection regime. Various plans have been conceived with the underlying objective of containing refugees in their regions of origin or deflecting them away from the EU borders. There has been talk of

protection in regions of origin, external processing of asylum claims, protected entry procedures etc. Few of these have had any real lasting impact in progressing beyond the stage of discussion, and some of them have been heavily criticised both internally and externally. The increasing preoccupation of Member States with what is known as the 'external dimension of asylum' is reflected in the Hague Programme, which forms the second phase of the work begun in Tampere, where considerable emphasis is placed on this aspect. Baldaccini considers how the emerging EU's external policies on immigration and asylum result in pushing responsibility for asylum seekers away and make a mockery of the commitment, which was made at Tampere, to maintain access to asylum within the EU.

Borders and the Enforcement of Migration Control

There is much distrust and suspicion surrounding the movements of third country nationals, whether for protection or other purposes, such as tourism, work, study or family reasons. Much of this may have a historical explanation in the over two decades of EU Member States' inter-governmental co-operation on asylum and immigration, and on policing and criminal matters, where these matters were juxtaposed, before being transferred to two distinct EU pillars by the Amsterdam Treaty: asylum and immigration to the first pillar (Title IV of the EC Treaty) and policing and criminal matters to the third pillar (Title VI of the EU Treaty). However, Cholewinski also suggests that it is the absence of a clear rights-based approach to EU migration law and policy that is fuelling the increasing criminalisation of migration.

Various legal measures have been adopted – on external border controls, visas and irregular migration – where rules on refusal of entry and expulsion are much looser than those operating in respect of EU nationals entering other Member States.[19] Third country nationals seeking admission to a Member State may find a barrier in the wide interpretation some Member States have given to criteria under which data are entered in the Schengen Information System (SIS) for entry refusal purposes.[20] EU visa rules profile third country nationals as coming from a risk country in terms of irregular migration or crime.[21] Another extensive database is to be set up, the Visa Information System (VIS), which will collect and store fingerprints and other biometric identifiers of all third country nationals

[19] See, for instance, Reg on the Schengen Borders Code [2006] OJ L 105/1.
[20] Art 96 of the Schengen Implementing Agreement [2000] OJ L 239/19
[21] See, eg, Common Consular Instructions [2000] OJ L 239/318 and [2002] OJ C 313/1 and the recent proposal recasting the CCI into a Community instrument, COM(2006)269 final.

applying for visas and of their sponsors, and access to which will be given to relevant authorities for law enforcement purposes.[22] As Cholewinski puts it, these developments are 'fast narrowing the gap between law enforcement and migration control'. He also contends that even measures which have the laudable objective of combating human trafficking and smuggling have been adopted in an overly law enforcement context.[23]

Irregular migration (although the EC institutions persist in using the pejorative term 'illegal' rather than irregular) has been the subject of intense Union activity, with a steady stream of policy papers and action plans.[24] A disproportionate focus has been on removing irregular migrants. Operational activities and standard setting on this matter have been largely based on the 2002 Return Action Programme.[25] Initiatives to facilitate return include Member States' co-operation in the facilitation of expulsions,[26] assistance in the cases of transit for the purposes of removal by air,[27] and the organisation of joint flights.[28] What is striking in all these initiatives is the lack of adequate legal safeguards. Phuong argues that 'operational co-operation should be based on a legal framework which clearly identifies the rights of the migrants to be removed and the respective responsibilities of the states involved in the removal operations'. She also directs our attention to the fact that operational efficiency does not ensure that returns will be sustainable. The weak linkage between

[22] Council Dec 2004/512/EC establishing the Visa Information System (VIS) [2004] OJ L 213/5; Proposal for a Council Dec concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, COM(2005)600 final.

[23] Council Framework Dec 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1; Council Dir 2002/90/EC of 28 Nov 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17; Council Framework Dec 2002/946/JHA of 28 Nov 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1; Council Dir 2004/81/EC of 29 Apr 2004 on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities [2004] OJ L 261/19.

[24] Since 2001, amongst others: Communication on a Common Policy on Illegal Immigration, COM(2001)672; Green Paper on A Community Return Policy on Illegal Residents, COM(2002)175; Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union [2002] OJ C 142/23; Communication on a Community Return Policy on Illegal Residents, COM(2002)564; Commission Communication on the Development of a Common Policy on Illegal Immigration, COM(2003)323; Study on the Links Between Legal and Illegal Migration, COM(2004)412; and Commission Staff Working Paper: Annual Report on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders, and the Return of Illegal Residents, SEC(2004)1349.

[25] Council doc 14673/02.

[26] Council Dir 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L 149/34.

[27] Council Dir 2003/110/EC [2003] OJ L 321/26.

[28] Council Dec 2004/573/EC [2004] OJ L 261/28.

return and reintegration in the EU policy on returns needs to be addressed if these are to be sustainable in the medium to long-term.

There has also been a flurry of activity to get target countries to sign EC readmission agreements. Such agreements have so far been entered with Hong Kong, Macao, Sri Lanka, Albania and Russia, while negotiations by the Commission with other target countries (Algeria, China, Morocco, Pakistan, Turkey and Ukraine) appear to be progressing very slowly—perhaps, as Phuong suggests, because of the one-sided nature of such negotiations. A sour chapter in the implementation of the Return Action Programme is the adoption of common procedural standards on return. These should have logically preceded operational co-operation but a proposed Directive was published only in September 2005 and adoption seems a long way off.[29] Negotiations are proving very difficult as there appears to be all-round disagreement on this measure among Member States and between the institutional co-legislators, the Council and the European Parliament.

This lack of agreement on adequate common standards and procedures on return is most unfortunate, given that operational co-operation is to continue to feature as a major plank in the EU's policies on irregular migration. A greater role is being assigned in this regard to the newly-established European Borders Agency (also known as FRONTEX)—a body at the forefront of the EU legal framework to achieve border security.[30] The Borders Agency (operational since May 2005) has already been involved in the organisation of joint return operations and is to play a role in the establishment of a Mediterranean Costal Patrols Network, but the extent of its powers in co-ordinating operational co-operation among Member States is not at all clear. Mitsilegas further questions the self-perceived role of this Agency as a 'purely technical actor', immune from obligations that arise under international human rights law with regard to the rights and the treatment of third country nationals who are affected by its activities. Given the Agency's supposedly sole managerial role, the legal framework provides very little in terms of transparency and scrutiny over its operations, and limited accountability. Mitsilegas casts doubts on whether this will be defensible in the future. A recent legislative proposal adding to its tasks the deployment of Rapid Border Intervention Teams may prove his point.[31]

[29] Proposal for a Dir on common standards and procedures in Member States for returning illegally staying third country nationals, COM(2005)291.

[30] Council Reg (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States [2004] OJ L 349/1.

[31] Commission proposal for a Reg establishing a mechanism for the creation of Rapid Border Intervention Teams and amending the Border Agency Regulation as regards that mechanism, COM(2006)401 final, 19 July 2006.

Along with enhanced operational co-operation, border controls are being increasingly enforced by various legislative measures which allow for the collection and exchange of data. Following the 9/11 attacks, controls on air carriers' passenger data have been crucial to the 'securitisation' agenda. A Directive on Advance Passenger Information was adopted in 2004.[32] In the same year, an agreement with the US on transfer of passenger name records (PNR) was signed,[33] preceded by a Commission Decision certifying that the US data protection standards were adequate.[34] The PNR agreement with the US has recently been annulled by the ECJ, further to a challenge brought by the European Parliament, for being wrongly based on the first (Community) pillar whereas, as a matter of public security and criminal law, it should have been concluded under the third pillar.[35] Although this aspect was not addressed in the Court's ruling, the wrong legal footing has implications also for data protection as data collected and transmitted for counter-terrorism/national security purposes are potentially more invasive of privacy rights and require stricter safeguards than data transmitted for commercial purposes. National security concerns are also resulting in the widening of access to existing and future EU-wide databases (such as EURODAC, SIS and VIS), which will allow immigration data to be used for law enforcement purposes. There is something eerie in the prospect that the data of millions of visa applicants, and arguably their sponsors, will be accessible to law enforcement agencies, as if third country nationals were a specific category of suspect individuals. Again, the same issues of securitisation, prevention and control of migration are uppermost in the development of these measures.

The treatment of migrants as criminals is most visible in Member States' detention policy. There are some 200 places scattered all over the Union where third country nationals are detained while awaiting permission to enter (primarily those applying for asylum), or because they have been refused entry or are awaiting removal.[36] While detention continues largely to be a matter for national law, the emerging common EU policy on asylum and immigration has resulted in legislative instruments which bear upon

[32] Council Dir 2004/8/EC on the obligation of carriers to communicate passenger data [2004] OJ L 261/24.

[33] [2004] OJ L 183/83.

[34] [2004] OJ L 235/11.

[35] Joined Cases C–317 and 318/04 *European Parliament v Council*, judgment of 30 May 2006 (not yet reported).

[36] According to figures from a European parliamentary group. Germany has the most (45), followed by Poland (24), France (20), Greece (19), Italy (16), Spain (13), UK (12), Czech Republic (10), Hungary (8), Belgium and Ireland (6), Austria and Sweden (5), Portugal and Malta (4). See Brian Beary, 'Over 200 Migrant Detention Centres in EU', *Europolitics*, 22 May 2006.

immigration detention.[37] However, standards therein are generally weak and, arguably, provide inadequate protection against arbitrary detention. Whether those detained may be entitled to protection against arbitrary detention under the general principles of EU law is as yet a matter of speculation. Wilsher argues that this would require the ECJ to embrace third country nationals as subjects of EC law in an innovative way and follow the same principles for them as it has developed for EU citizens.

Managing Legal Migration

In sharp contrast to the plethora of legislative measures and policies adopted and developed to prevent and control migration and achieve 'border security', far less political attention has been paid to legal migration and measures related to the status of third country national migrants within the EU. This area has seen the adoption of several legal instruments, most importantly the Directives on Family Reunification,[38] and on the legal status of Long-Term Resident Third Country Nationals.[39] These two Directives have been weakened during their passage, and this has made the final versions less effective in protecting the position of third country nationals and has attracted some criticism. In particular, the European Parliament has challenged, although unsuccessfully, certain provisions of the Family Reunification Directive alleging incompatibility with principles of respect for family life.[40] The Court of Justice, however, emphasises the need for compliance with fundamental rights by the Member States when they implement and apply the Directive.

Here, the depth of commitment—of Member States and of the Community institutions—to the pursuit of the goals set out in the Tampere Conclusions of fair treatment of third country nationals and to development of rights comparable and as close as possible to those of EU citizens is at stake. Whilst recognising the important steps forward that these Directives constitute in recognising and improving the position of significant numbers of legally resident third country nationals, it is disappointing that these ideas of 'fair treatment' and rights that are 'comparable' seem to have been interpreted rather loosely. Time and again, categories of individuals have been excluded as the Directives have been developed. At the same time, the substantive content of the Directives has also been narrowed steadily, meaning that those who are left within their personal scope find the rights and protection they would have obtained weakened.

[37] See, for instance, Art 18 Asylum Procedures Dir, Art 7 Dir on Reception Conditions, and draft Art 14 of the proposed Dir on Returns, COM(2005)391 final.
[38] Dir 2003/86 [2003] OJ L 251/12.
[39] Dir 2003/109 [2004] OJ L 16/44.
[40] Case C–543/03 *European Parliament v Council* [2004] OJ C 47/21.

One element that has been particularly controversial in the Long-Term Residence Directive is the integration requirement. This, maintains Groenendijk, may oddly 'turn out to be the main obstacle to the full effectiveness of a Directive aiming at the integration of long-term immigrants'. Although the relevant provisions in the Directive are not mandatory, it reflects new requirements, such as language tests, introduced in some Member States' policies. As an optional requirement under EC law, it may well lead other Member States to follow suit or even make existing integration conditions stricter. According to Groenendijk, what risks being lost here is the previously predominant *inclusive* concept of integration in EC law, with its focus on secure legal status and equal treatment as a condition for integration, for a more *exclusive or selective* one where secure status and eventual naturalisation are the prize for the completion of a successful period of integration.

Member States have been similarly exclusive or selective in negotiating the Family Reunification Directive where the personal scope was gradually narrowed down to only those who have a reasonable prospect of obtaining a permanent right of residence. Oosterom-Staples points out that both the concepts of 'reasonable' and 'permanent' are not further explained and would perhaps benefit from an interpretation by the ECJ. In addition, the failure to provide a right to family reunification for EU citizens who have not exercised a right to free movement has put EU citizens in the unfavourable position of having their applications to be reunited with third country national family members processed under the immigration law of the Member State concerned.

Other exclusionary rules are to be found in the period of time required to qualify for family reunification, the age limits of children, and the restriction of family reunification rights to the 'traditional' married couple. It is particularly the integration condition imposed on minors over the age of 12 and travelling independently that prompted the European Parliament to start annulment proceedings before the ECJ, alleging incompatibility of certain provisions of the Directive with the right to family and private life guaranteed by Article 8 ECHR. Oosterom-Staples finds reassurance in the judgment, handed down on 27 June 2006. While finding against the European Parliament on the merits of the human rights arguments as a basis for outright annulment of the provisions, it nevertheless establishes important principles of interpretation and application which will be relevant to other EC immigration and asylum legislation as well.

On economic migration, there has been no tangible progress as Member States see this as a core area of competence touching on vital national interests that they are unwilling to surrender. A proposal for a Directive on

entry for employment and self-employment was presented by the Commission in July 2001, but failed to attract support and had to be withdrawn.[41] This led the Commission to approach the subject rather more cautiously. In January 2005, it launched a consultation based on its Green paper on an EU approach to managing economic migration,[42] and in December 2005 a policy plan was published which sets out the more limited agenda of regulating the admission of the highly skilled and seasonal workers, leaving open the possibility that other categories could be covered.[43] It remains to be seen whether this approach will be any more successful in overcoming Member States' reluctance to negotiate an EU legal framework governing economic migration: the first two Directives are expected in 2007. Ryan suggests that this reluctance is well founded as there is no strong justification for EU regulation of admission policies for labour purposes. He argues that the focus should instead be on upholding the rights of third country workers who are present in the labour market of the Member States. Conferring, as a matter of EC law, the right to change employer, to move between Member States for employment, and to equal treatment in the labour market would assist the completion of the legal integration of the EU labour market, achieve fair competition and uphold migrant workers' fundamental rights.

It seems apt to conclude this collection with a chapter on the rights of nationals of the new Member States. As the EU comes to terms with the 2004 and 2007 enlargements, the process whereby third country nationals are assimilated gradually to the position of citizens of existing EU Member States remains a source of tension. In fact, despite becoming citizens of the Union there have been concerns about abuse of the rights of economic free movement by the nationals of the new Member States. This has led to the inclusion in the Accession Treaty of transitional provisions which allow the 'old' Member States to delay the right of access to the labour market, for up to seven years, to the nationals of eight new Member States out of the 10 which joined in 2004. Cyprus and Malta were not subjected to these transitional arrangements. Rollason considers the transitional provisions relating to the 2004 enlargement and criticises them, and their implementation in the UK, for delaying basic rights of EU citizenship. This tension is unlikely to pass quickly, with Member States lifting restrictions on nationals of the so-called 'A-8' Member States only slowly, and the inclusion of similar provisions on delay of free movement of workers in the Accession Agreements of Romania and Bulgaria, which have joined in 2007. The issue of free movement of workers continues to be a rather sensitive one.

[41] COM(2001)386 final.
[42] COM(2004)811 final.
[43] COM(2005)669 final.

THE HAGUE PROGRAMME: WHICH WAY FORWARD?

The Hague Programme

The Hague Programme on *Strengthening Freedom, Security and Justice in the European Union* was adopted by the European Council in November 2004.[44] It reaffirms the priority the EU attaches to the development of an area of freedom, security and justice, and sets out a programme for the next five years. It builds on continuing work arising from the Tampere Programme laying particular emphasis on the need to monitor implementation and evaluate the effects of the measures adopted. As to specifics of migration and asylum policy, 'a comprehensive approach involving all stages of migration with respect to the root causes of migration, entry, and admission policies and integration and return policies' is envisaged.

In the field of asylum, immigration and border control, the Hague programme contains the following key measures:

— by 2010, a common European asylum system with a common procedure and a uniform status for those who are granted asylum or protection;
— measures for foreigners to work legally in the EU in accordance with labour market requirements;
— a European framework to guarantee the successful integration of migrants into host societies;
— partnerships with third countries to improve their asylum systems, better tackle illegal immigration and implement resettlement programmes;
— a policy to expel and return illegal immigrants to their countries of origin;
— a fund for the management of external borders;
— swift establishment of the (second generation) Schengen Information System (SIS II) and Visa Information System (VIS);
— common visa rules, increasing the use of biometrics and information systems (including maximising effectiveness and *interoperability* of these systems), as well as cross-border exchange of law enforcement information.

Since the end of 2004, Member States and the EU institutions have worked to ensure the implementation of the Programme in accordance with the Council and Commission Action Plan adopted in June 2005.[45] Implementation of the Programme was expected to overlap with the entry into force

[44] [2005] OJ C 53/1.
[45] [2005] OJ C 198/1.

of the Constitutional Treaty, and the Programme was to be reviewed and adjustments were to be made in the light of relevant provisions in the Treaty which affected the EU policies on freedom, security and justice. The failed ratification of the Treaty by France and the Netherlands has put the constitutional project on hold, as well as the changes in decision-making procedure and jurisdiction of the ECJ which were part of it. It has also meant that the EU Charter of fundamental rights would not become legally binding.

Changes to Decision-making

As we have seen, it can hardly be denied that the combination of unanimity of decision-making in the Council and consultation with the Parliament has had noticeable effects on the process of decision-making and the outcomes of deliberations. Decision-making changes have, however, already occurred in several respects. First, we must recognise that in 2004 the entire landscape of EU decision-making changed quite radically with the accession of 10 new Member States. The changes, however, run deeper than simply bringing more discussants to the table. The Amsterdam Treaty envisaged from the very beginning a first phase of five years during which unanimous voting in the Council and consultation of the European Parliament would be the normal mode of decision-making, followed by changes as the first phase of harmonisation of Member States' immigration and asylum laws was completed and the second phase was begun. Hence, some matters moved automatically, or by unanimous decision of the Council,[46] from unanimity and consultation to QMV and co-decision. The only area still governed by the original procedure is legal migration (Article 63(3) and (4)). The Constitutional Treaty had envisaged consolidating the normal decision-making procedure as QMV/co-decision throughout the EU's activities in building its immigration, asylum and borders/visa policy. The only exception to this was to be the continued exclusion of competence over *volumes* of economic immigration.[47] With no immediate prospect of the Treaty coming into force, the final transition to QMV/co-decision in the field of legal migration will have to come by Council Decision, as provided for by Article 67(2) EC Treaty. The possibility of proceeding on this basis is currently being explored by the Commission.[48]

[46] As from 1 Jan 2005, for measures referred to in Art 62(1), (2)(a) and (3) and Art 63(2)(b) and (3)(b). See Council Dec 2004/927/EC of 22 Dec 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art 251 of that Treaty [2004] OJ L 396/45.

[47] Treaty establishing a Constitution for Europe, Art III-267(5).

[48] Implementing The Hague Programme: the Way Forward, COM(2006)331 final, 28 June 2006.

Decision-making procedures aside, Impact Assessments are now a regular and familiar feature of the Commission's legislative drafting and policy-making work but, as Toner points out, there may be some way to go before they offer much hope of better lawmaking. Above all, it must be recalled that they cannot and will never be a substitute for a comprehensive political commitment amongst all the EU institutions and Member States to build fair, just, and humane immigration and asylum laws and policies.

More Involvement for the Court of Justice

Another important aspect of the future development of EU migration law and policy will be the adaptation of the jurisdiction of the Court of Justice over matters of immigration and asylum. As we have seen, by way of exception to the standard regime, the jurisdiction of the Court of Justice in matters covered by Title IV is currently more limited than in other areas where Community law applies. It is not possible, for example, for a national court or tribunal of first instance or an ordinary appeal court to refer questions of interpretation of Community law in these matters to the Court of Justice for a preliminary ruling. The claimant must first exhaust all national remedies before the Community Courts can be asked to interpret the relevant law. It is an anomaly that an area that is particularly sensitive in terms of fundamental rights does not benefit from the same jurisdictional control or uniform application throughout Europe as other areas of EC law. It has also the practical effect of depriving a wide category of people (asylum seekers, applicants for family reunification, third country nationals challenging expulsion orders or discriminatory treatment, etc) of effective judicial protection. The normalisation of the jurisdiction of the Court of Justice for Justice and Home Affairs matters under the Constitutional Treaty was, therefore, very much welcomed.[49] Again, discounting the possibility of the Constitutional Treaty coming into force, it is urgent that normalisation proceeds by other means.

As we have seen, under Article 67(2) EC Treaty, the Council should have taken a decision to adapt the Court's jurisdiction after a five-year transitional period, which expired on 1 May 2004. The decision requires unanimity in the Council. Leaving aside the vexed issue of the Council's failure to fulfil this legal obligation (on which see Chapter 3 in this

[49] Except for the continuation of a limit in the Court's jurisdiction to rule on the 'validity and proportionality' of police operations. See Constitutional Treaty, Art III-377.

volume), the Commission has now taken matters into its own hands and has drafted a Council Decision which is proposing to normalise this area, with effect from 1 January 2007.[50]

The EU Charter of Fundamental Rights

A final few words on the emerging agenda must go to the European Charter of fundamental rights. It is heartening to see the Court of Justice developing (on the whole) relatively generous jurisprudence in relation to fundamental rights connected with family reunification, drawing increasingly on the ECHR concept of respect for family and private life. And the development of the EU's own Charter of fundamental rights certainly has the potential to be a significant milestone in the recognition and further development of rights protection in the EU. Nonetheless, its immediate effect has been blunted and its real utility diminished first by the failure to agree binding legal status when the Charter was initially developed, then by the collapse of the Constitutional Treaty where its binding status would have been ensured (although with a possibly confusing distinction between 'rights' and 'principles' in terms of justiciability). The first explicit reference to it by the ECJ, in the recent case concerning the European Parliament's challenge to the Family Reunification Directive, however, proves that it is a crucial tool in the armoury of those concerned with rights protection in relation to EU migration law. This, together with the possibility of essentially normalised jurisdiction of the Court of Justice, holds out some hope for stemming the worst of the effects of the legislation that has thus far been adopted and now awaits full implementation.

CONCLUSION

This introductory chapter has sought to chart the major issues that have arisen in the development of European Community migration and asylum law since 1999. It has been seen that although indeed a significant amount of progress has been made, a number of problems have also arisen. These are partly inherent in the process of seeking agreement on the details of such difficult and highly politicised issues, however strong may be the case in general terms for some Community co-operation in these matters. Nonetheless, this should not cause us to overlook the degree to which these difficulties have been exacerbated by the lack of democratic participation in the legislative process. Nor should it excuse the low standards that have

[50] COM(2006)346 final, 28 June 2006, above n 14. The draft Council Decision is annexed to this Communication.

led to criticisms that some of the measures agreed arguably breach fundamental rights and international obligations to which the Member States are signatories and to which the EU publicly declares itself to be committed. Much still remains to be done, in both the evaluation and implementation of the existing *acquis* and the adoption of further legislative measures.

Part I

Constitutional Issues in EU Migration Law

1

Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons

ELSPETH GUILD

INTRODUCTION

AFTER THE REFERENDA in France and the Netherlands at the end of May and beginning of June 2005, the chances that the proposed Constitutional Treaty would enter into force rapidly diminished. In this chapter, I will consider the consequences of the failure to provide a strong constitutional base for developments on three aspects of EU law on movement of persons: (i) the rights and complaints of citizens of the Union; (ii) the legal relationship of citizens and third country nationals (as non-EU citizens are generally known) and (iii) the transformation of the law on the control of borders.

Since 1993, citizenship of the Union has appeared as the status of EU nationals. Only in 2004 was a Directive adopted setting out the rights of citizens,[1] but the traditional framework of citizenship—a Constitution—was lacking. In the UK this is not so striking, as we are accustomed to an unwritten constitution which is made up of bits and pieces, but for other Member States this is a rather unsatisfactory state of affairs. Without the Constitutional Treaty, the EU Constitution will continue to follow the UK model—made up of odds and ends, treaties, judgments, etc, rather than the continental model of a document specifying the mechanisms of governance and the rights of the citizen. But it is not only the vagaries of the constitutional setting of EU citizenship which are changing. The relationship of citizens and third country nationals is also in transition. In some

[1] Dir 2004/38/EC of the European Parliament and of the Council of 29 Apr 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Reg (EEC) No 1612/68 and repealing Dirs 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77.

fields they are converging, in others drifting apart, but, throughout, this process is complicated by the mechanisms by which third country nationals become citizens of the Union, most importantly enlargement.

Just as the people of Europe are changing and, with them, the allocation of rights and duties, so too are the borders of Europe subject to important changes. The adoption of a Regulation on the Community Border Code[2] means that there is a common EU law on how the internal and external borders of the Union are managed for the purpose of movement of persons (leaving aside the 'opted outs'—Denmark, Ireland and the UK). The duties of border guards to admit or refuse admission to third country nationals (albeit mainly limited to those arriving for short stays) at the external border are now set out in EU law. Member States must apply it. The abolition of the checks at the internal border is similarly specified in EU law in the Regulation and is no longer a matter for national law. Thus, the EU has acquired common internal and external border controls but it lacks a state. I will examine the Regulation for a Community Border Code to see what the common control is and what it means for the individual. At the heart of these developments is the EU promise of free movement of persons.

Free movement of persons in the EU is one of the most immediately visible and highly valued of the rights of persons living in the EU. It includes the right of individuals to move, for a wide variety of reasons, across the EU and is gradually being widened to include third country nationals. However, there is all too often a gap between the rights of individuals and their exercise, first at the hands of the administrations of Member States other than that of their nationality and, secondly, by actors in the economic and cultural sectors. For many persons entitled to free movement, the most obvious personal reward of EU law has been the right not to encounter the public administration at all.

Member States, also, have the right to know who is on their territory. The right of free movement is not absolute. The interests of public policy, public security and public health are expressly recognised in EU law as the grounds on which the right of free movement of persons may be limited. However, in exercising their duties to secure public policy, security and health, the Member States must respect the priority of the right of free movement. The exceptions are exactly that. Their use must be justified by the Member States when seeking to rely on them and the measures taken must be proportionate to the legitimate interest protected. Further, as the European Court of Justice (ECJ) has stated:

[2] Reg (EC) No 562/2006 of the European Parliament and of the Council of 15 Mar 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1.

> The requirement for legal certainty means that the legal situation resulting from national implementing measures must be sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations.[3]

This necessary quality of EU law is becoming more important when assessing the developing EU law on borders and admission, residence and status of third country nationals.

FREE MOVEMENT OF PERSONS IN THE EU—FROM IMMIGRANTS TO CITIZENS IN EU LAW?

The Developing EU Law on Free Movement of Persons

The objective of free movement of persons is part of the original EEC Treaty of 1957. It is in no way new. The end of the transitional period for free movement of economically active persons came in 1968. The legislation, which was adopted then, remained more or less in place until 2004 when it was replaced by Directive 2004/38, which had to be implemented in the Member States by 30 April 2006.[4] Although it was not clarified by the ECJ until 1999, the right of free movement of persons for economic purposes was limited to nationals of the Member States (as certified by the Member State of origin and not open to question by the host Member State) and their family members, as defined, of any nationality (subject to the possibility of extension by secondary legislation).

In 1986, the Single European Act added what is now Article 14 EC Treaty providing for the abolition of border controls among the Member States for the movement of persons. For the first time, the right not to be controlled on crossing the internal borders of the EU applied not only to nationals of the Member States and their family members of any nationality, but to anyone within the Union. The transposition date was 31 December 1992 but on account of political difficulties, which included implacable opposition by the UK and the Schengen experiment in the abolition of border controls among a limited group of states outside the exigencies of EU law, it was not respected. Instead, the abolition of border controls among the Member States (excluding Denmark, Ireland and the UK) was achieved by the insertion of the Schengen *acquis* into EU law in 1999.

In 1990, EU law in this field acquired a new aspect—secondary legislation providing a right of free movement for the economically inactive, such as pensioners and the independently self-sufficient, as well as

[3] Case C–136/03 *Dörr and Ünal* [2005] ECR I–04759, para 52.
[4] Above n 1.

students, provided that they could support themselves without public funds. This extension was then completed when in 1993, with the entry into force of the Maastricht Treaty, the nationals of the Member States became citizens of the Union. They acquired new rights (such as the right to vote and stand for election) but as regards free movement there was little added, if anything. In September 2001, the ECJ first stated that 'Union citizenship is destined to be the fundamental status of nationals of the Member States',[5] though it would not be until 2002[6] that the Court would find that the right of citizens of the Union to move and reside has direct effect in the legal orders of the Member States.

It would be incomplete to fail to mention the important dates of 1 May 2004 and 1 January 2007, which saw the enlargement of the EU to 27 Member States. The citizens of the new Member States all became citizens of the Union. But, except for nationals of Cyprus and Malta, the rest did not enjoy the right of free movement as workers, as the Accession Treaties delayed this right (the final date for free movement of workers for nationals of the 2004 Member States is 1 May 2011; for the 2007 Member States nationals it is 2014). The first delay was between 1 May 2004 and 1 May 2006 when there was a presumption against any new right of access to the labour market. However, workers who had already completed 12 months in the labour force of an old Member State had protected rights. From 1 May 2006 until 1 May 2009 Member States may, on the basis of a prior notification to the Commission, retain the exclusion of free movement of workers regarding nationals of the eight new Member States (A8). Thereafter, there is a very strong presumption in favour of free movement of workers, which can be displaced only on serious grounds and for a further period of two years. Three Member States applied free movement of worker rights to A8 workers, either fully on accession of the A8 (Ireland and Sweden) or subject to a very light a posteriori control (the UK). On 1 May 2006, a further four 'old' Member States lifted transitional restrictions on movement of workers from the A8—Finland, Greece, Portugal and Spain, and in July 2006 Italy also removed the restriction.

It is important, however, to note that it is only the right of free movement of workers which is delayed. Nationals of the new Member States are entitled to enjoy immediately on accession the right of free movement of the self-employed, of service providers and service recipients. It may well be that the reluctance of the 'old' Member States to permit free movement of workers from the beginning has resulted in increased pressure and concerns about abuse of the other rights of economic free movement by nationals of the 'new' Member States. The spectre of the

[5] Case C–184/99 *Grzelczyk* [2001] ECR I–6193, para 31.
[6] Case C–413/99 *Baumbast* [2002] ECR I–7091.

Polish plumber has most unjustly haunted some of the discussions on liberalisation of service provision in the EU.

The EU has not finished enlarging. Bulgaria and Romania joined in 2007. In the Accession Agreements the same provisions on delay of free movement of workers appear as regards the eight new Member States of 2004. Negotiations with Turkey on accession began in October 2005. The issue of free movement of workers is rather sensitive. The Commission has suggested that there may be need for a permanent safeguard provision which could be invoked to limit movement of workers from Turkey.[7] The position regarding Croatia's accession remains in the balance.

The adoption of Directive 2004/38 provides an important staging point for citizens of the Union as regards their right of free movement. While there have not been very many additions to the rights of movement of citizens of the Union, the rights have now been consolidated (with some exceptions relating to family members) in one document, which applies to all categories of citizens of the Union exercising their free movement rights. The right of free movement is still open to limitation by the Member States on the basis of public policy, public security and public health. However, for those citizens of the Union who reside in a host Member State for more than three months (under that period their identity card or passport is sufficient proof), there is no longer an obligation to obtain a residence permit. This document is replaced by a registration certificate, which must be issued immediately on presentation of a very limited list of documents. Member States are no longer required to oblige citizens of the Union to obtain registration certificates but, if they do, citizens may not face sanctions that are either disproportionate or discriminatory (Article 8). After five years' residence in the host Member State in a qualifying capacity, the citizen of the Union obtains a right of permanent residence, which is no longer dependent on his fulfilling the qualifying criteria. What this means, in effect, is a right to enjoy social assistance (see below). While Member States remain prohibited from refusing admission or expelling citizens of the Union except on grounds of public policy, public security and public health, where the citizen of the Union has permanent residence, there is a further qualification that the grounds must be serious (Article 28). As the jurisprudence of the ECJ on the interpretation of the terms public policy, security and health is already very restrictive as regards Member States' justification of exclusion and expulsion, this further

[7] Communication from the Commission to the Council and the European Parliament—Recommendation of the European Commission on Turkey's progress towards accession, COM(2004)656 final.

strengthening of the right of residence seems to bring it very closely into line with the right of nationals of the state.[8]

The Position of Third Country National Family Members of Migrant Citizens of the EU

Third country national family members of citizens of the Union who exercise their free movement rights are entitled to the same treatment as their EU national principal. The class of family members entitled to admission include spouses and registered partners if the host state already gives broadly similar treatment to married couples, and direct descendants under 21 or dependent, and dependent direct relatives in the ascending line (Article 2). They are entitled to work or self-employment. Three issues have given rise to substantial friction in the Member States regarding these family members.

The first issue is: are non-EU national family members to be treated as citizens of the Union or as third country nationals in national legislation? This issue was recently under discussion before the ECJ in a case regarding the inclusion of third country family members of citizens of the Union in the Schengen Information System (SIS) as persons to be refused admission.[9] The SIS applies to third country nationals only as regards alerts to be refused visas and admission. It is unlawful for citizens of the Union to appear in the Article 96 (Convention Implementing the Schengen Agreement 1990—CISA) database (an issue which has caused quite a lot of work removing the nationals of the new Member States from the database). Spain considered that third country national family members of migrant citizens of the Union are to be treated as third country nationals rather than assimilated to the position of their principals, nationals of the Member States. As a result Spain refused visas to the third country national spouses of migrant citizens of the Union to join EU national principals in Spain on the ground that there was a SIS alert in existence. When the ECJ considered the matter, it held that alerts on the basis of Article 96 CISA in respect of third country national family members of citizens of the Union could be held in the SIS. It went on to find:

> [T]he inclusion of an entry in the SIS in respect of a national of a third country who is the spouse of a Member State national does indeed constitute evidence that there is a reason to justify refusing him entry into the Schengen area. However, such evidence must be corroborated by information enabling a

[8] See the comments of Ockleton J on the strengthening of these rights in the first case to consider the Dir, *MG and VC v Secretary of State for the Home Department* [2006] UKAIT 00053.

[9] Case C–503/03 *Commission v Spain* [2006] ECR I–1097.

> Member State which consults the SIS to establish, before refusing entry into the Schengen Area, that the presence of the person concerned in that area constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[10]

What this does, in effect, is to make the strict EU criteria regarding territorial exclusion of EU citizens and their family members the standards which must be clearly applicable in the SIS. When properly applied this is likely to transform at least parts of the SIS, making it more transparent and less arbitrary.

Secondly, what happens if the EU national principal leaves the host Member State or the couple divorces? This issue arises primarily for spouses, not for children as they will usually have the nationality of a Member State (though not necessarily—for instance when they are children of a first marriage of the third country national spouse). Children who are nationals of a Member State will have a right of residence as citizens of the Union (there may be questions about the requirement that they have sufficient funds to support themselves) and they will have the right to have their third country national parent remain with them in order that they may exercise their right of residence as citizens.[11] The state of the marriage and the whereabouts of the citizen of the Union principal (ie parent) are irrelevant here. Where there is no EU national child, so long as there is a third country national child who is considered a child of the family, if the EU national principal remains resident in the host Member State, then the child will have a right of residence. But if the parent leaves the state definitively, the child's claim to remain on the territory will depend on his or her right to schooling. As far as I am aware, there is no decision of the ECJ on this question regarding third country national children, only as regards EU national children.[12]

Previously, the third country national spouse did not acquire an EU independent right of residence, but this has changed under Directive 2004/38, which creates such an independent right after five years' qualifying residence (Article 16(2)).[13] Before transposition of the Directive into national law, the status of the third country national spouse and third country national children remained dependent on the continuity of the marriage for the spouse and the continued residence of the EU national principal in the host Member State. Article 13(2) of the new Directive also protects the residence of third country national family members before they acquire a permanent residence right in four situations: (i) where the

[10] *Ibid*, para 53.
[11] Case C–200/02 *Chen* [2004] ECR I–9925.
[12] Case 390/87 *Echternach and Moritz* [1989] ECR 723.
[13] There is one exception for widow(er)s of EU national workers who have fulfilled certain criteria on length of work in the Member State (Reg 1251/70 [1970] OJ L43/1).

marriage (or registered partnership) has lasted three years including one in the Member State; (ii) where the third country national spouse has a court order of custody of his or her child or children; (iii) where continued residence is warranted by particularly difficult circumstances, such as where the individual has been a victim of domestic violence during the marriage; or (iv) where the spouse has a court order of access to a minor child in the host Member State.

Thirdly, when can the family return to the Member State of nationality of the EU national principal? Here the underlying problem is that EU law on family reunification for nationals of the Member States is more generous as regards both the definition of qualifying family members[14] and the conditions which must be fulfilled[15] than national law in a number of Member States. Following the ECJ's decision in *Surrinder Singh* in 1992,[16] after enjoying the right of family reunification in EU law in a host Member State while exercising an EU free movement right, the family is entitled to return to the home Member State of the EU national. Thus, citizens of Member States with more restrictive family reunification rules for their own nationals than those which exist in EU law are encouraged to move to another Member State to enjoy family reunification rights as migrant citizens of the Union so that they can return sooner or later to the state of origin and enjoy those rights at home as well. One of the questions which arises frequently here is: how long does the family need to remain in the host Member State? There is no ECJ guidance on this issue; so long as the exercise of the economic activity by the EU citizen is genuine and effective, the reasons the family has moved are irrelevant—even if they are exclusively so that the family can enjoy family reunification. A rather perplexing decision of the ECJ in 2003[17] seems to indicate that third country national family members must have a regular status at some point somewhere in the Union before they can acquire a right of residence on the basis of EU law, though this judgment is difficult to reconcile with the decision in *MRAX*, which recognises the direct effect of the EU rights of entry and residence of third country national family members, irrespective of whether that family member has already been admitted as a resident in another EU Member State.[18]

[14] Spouses, children up to 21 years old and thereafter if dependent, direct relatives in the ascending line (except for students): see Art 7(4) Dir 2004/38 [2004].

[15] These are limited to the exercise of a right of free movement, if economically active; the activity must be more than marginal and ancillary, ie genuine and effective; and there must be sufficient housing ie considered normal in the region. Only the economically inactive and students are required to have sufficient resources not to be a burden on the social assistance system of the Member State and sickness insurance. See Art 7(1) Dir 2004/38.

[16] Case C–370/90 *Singh* [1992] ECR I–4265.

[17] Case C–103/01 *Akrich* [2003] ECR I–9607.

[18] Case C–459/99 *MRAX* [2002] ECR I–6591.

At the heart of the issues which arise in respect of third country national family members of migrant citizens of the Union is the wish of a number of Member States to exclude family members either of their own nationals or the nationals of other Member States. These Member States' desire to continue to apply national aliens' law to these persons rather than the provisions of EU law, which have either direct effect or direct applicability, results in the distortion of EU rights of family life.

OBSTACLES TO FREE MOVEMENT OF PERSONS: CONCLUSIONS FROM THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

The concerns of citizens of the Union and their families regarding exercise of their rights of free movement can be seen from the jurisprudence of the ECJ. As individuals only rarely have direct access to the Court of Justice according to very strict rules of standing, virtually all the cases about individuals which come before the Court do so via references from national courts presented with questions on the interpretation of EU law. The cases fall into four main categories (leaving aside those of third country family members which have already been considered above). These are: (i) expulsion; (ii) recognition of diplomas in order to access employment; (iii) administrative obstacles in respect of the exercise of economic rights; and (iv) access to social benefits in the host Member State. I will consider here some cases which typify the kinds of issues which arise and the manner in which the ECJ approaches and resolves them.

Expulsion

Salah Oulane, a French national, was stopped in the Netherlands on suspicion of illegal residence on 3 December 2001. He stated that he was a French national in the Netherlands on holiday for approximately three months, but he did not have an identity document with him at the time he was stopped. He was immediately detained on the ground that there was a risk that he would evade deportation. On 7 December 2001, he presented his French identity document (the judgment does not tell us how it was delivered to him in detention), at which point the Dutch authorities accepted that he was a citizen of the Union and no longer contested his statement that he was a tourist. Nine months later he was arrested again, this time by the railway police in Rotterdam as he was in a goods tunnel closed to the public. Again, he did not have identity documents with him and, once again, he was detained with a view to deportation. On this second occasion he stated he had been 18 days in the Netherlands and that

he wanted to return to France. He was deported to France six days later. He appealed against his treatment and the national judge referred nine questions to the ECJ for clarification.[19]

The Court answered the questions in four groups. First, does a citizen of the Union have to produce an identity document as evidence of the fact that he or she is exercising a right of service receipt? The Court recalled that 'the principle of freedom of movement is one of the foundations of the Community. Accordingly, provisions enshrining that principle must be given a broad interpretation.' It confirmed that the presentation of a valid identity card or passport in order to prove that the person is a citizen of the Union is no more than an administrative formality, the sole object of which is to provide national authorities with proof of a right which the person has directly by virtue of his or her status. Thus, the production of an identity document or passport cannot be the sole means of proving his identity and nationality. The individual is entitled to exercise his or her right where identity can be proven unequivocally by other means.

In the second group of questions which the Court considered, the main issue was whether the obligation on a citizen of the Union to produce on demand an identity document is lawful where own nationals are not under such an obligation. Here the Court relied directly on Article 49 EC Treaty, the right of service provision. The Court noted that this constitutes discrimination contrary to that provision: '[s]uch different treatment is prohibited by the Treaty'. In the third set of questions the main issue was about the legality or otherwise of the detention of Mr Oulane. The Court stated:

> [D]etention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement.[20]

The argument of the Dutch authorities that there may be a subsequent award of damages was considered by the Court to be irrelevant. The detention, without justification on the basis of public policy, public security or public health, as interpreted by the Court, was an unjustified infringement of the right of service provision, and contrary to Article 49 EC Treaty.

The final group of questions which the Court considered relates to the definition of a recipient of services under the relevant Directive (73/148).[21]

[19] Case C–215/03 *Oulane* [2005] ECR I–1215.

[20] *Ibid*, para 40.

[21] Council Dir 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ 1973 L 172/14 (now repealed by Dir 2004/38, above n 1).

Is a Member State entitled to assume that a citizen of the Union is not exercising a Treaty right of service receipt when he or she is unable to give a fixed abode or residence and has no money or luggage? Here the Court's answer is slightly more ambiguous. The Court has regard to the Directive's wording, which permits a three-month period of access to and residence on the territory of a host Member State solely on the basis of an identity document or passport; thereafter the Directive states that the host Member State is to issue a residence certificate establishing the right. At that point the Member State may require proof that the individual comes within one of the classes of persons referred to in the Directive. Nonetheless, the Court confirms that where the means of evidence are not specified evidence may be adduced by any appropriate means. No further guidance is given in this regard.

Thus, the Court stresses the importance of the right of free movement for all citizens of the Union and places emphasis on the right of the individual against interference by the Member State. It excludes detention as a 'normal' procedure in respect of Union citizens who are exercising free movement rights and places them on a strong basis of equality with the state's own nationals as regards the duty to produce identity documents. Again, the ECJ confirms that expulsion and exclusion of Union citizens exercising free movement rights are not allowed unless the state can justify the ground. As regards evidence that the individual is actually exercising a right, the ECJ sets the threshold very low for the individual.

Recognition of Diplomas

The right of free movement for the purposes of study and economic activity loses much of its attraction if the diploma obtained is not recognised in the state where the citizen of the Union seeks to exercise an economic activity. Problems arise for two main groups: (i) those nationals of one Member State who go to another Member State to exercise an economic activity and are frustrated by the national authorities of the host Member State, which place obstacles in the way of the recognition of the diploma; and (ii) nationals of one state who obtain diplomas in other Member States, then return to their Member State of origin and seek to rely on their diploma to exercise their economic activities.

Ms Aslanidou falls into the second category. She is a Greek national who obtained a diploma in physiotherapy in Germany and returned to Greece. She sought to exercise her profession there, but her application was refused on technical grounds which were outside the scope of the relevant

Directive (92/51).[22] Under the Directive an individual in such circumstances is entitled to authorisation to take up the regulated profession. The Member State is not permitted to make such authorisation dependent on the recognition of the qualification by the national authorities. The Member States may not continue to apply their national rules on recognition of diplomas obtained in other Member States where the diplomas come within the terms of the Directive. Recognition is automatic and the host Member State is obliged to issue the authorisation, subject only to requirements of good character and the like specified in the Directive itself.[23]

As in the first case, one notes the Court's strong position in support of the right of free movement of workers and the obligations on the Member States, which are part of the exercise of that right. In the Court's interpretation of the right of movement, the individual is entitled to the relevant document in order to exercise economic activities.

Obstacles of an Administrative Nature

Other administrative obstacles also appear in the way of nationals of one Member State seeking to exercise economic activities in another. An example of these arises in the case of Coname, a company which obtained a contract for the award of services covering the maintenance, operation and monitoring of the methane gas network for the Comune di Cingia de' Botti (Italy).[24] The Comune notified the company that it was awarding the contract to a company in which the Comune held a 0.97 per cent share. The Court was not impressed by the argument that the interest of the Comune in the second company was a special circumstance. Instead it noted that the lack of transparency meant that no undertaking, whether in Italy or another Member State (and it is the interests of undertakings in other Member States which bring the matter within the scope of EU law), could have a real opportunity of expressing its interest in obtaining the concession, as there was no possibility that it would be able to obtain sufficient information regarding the possible contract to express its interest. The Court stressed that the minimum requirements to ensure that undertakings in other Member States could apply include ensuring that such undertakings can have access to appropriate information regarding the concession before it is awarded so that they can be in a position to express an interest in obtaining such a concession.

[22] Council Dir 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Dir 89/48/EEC [1992] OJ L 209/25.

[23] Case C–142/04 *Aslanidou* [2005] ECR I–7181.

[24] Case C–231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I–7287.

The concern of the Court is to secure a level playing field for nationals of all the Member States as regards economic opportunities in other Member States. Administrative obstacles to market access are rarely permissible without very exceptional circumstances which fulfil the limited criteria.

Access to Social Benefits

The final field in which citizens of the Union have sought to establish rights of equality and to which Member States have been resistant is access to benefits. Here the key issue has been the link of the individual to the Member State. Among the key decisions of the ECJ on social benefits as citizenship rights[25] three are about students (*Grzelczyk*, *D'Hoop* and *Bidar*) and their access to social benefits. In each case the host Member State sought to exclude from social benefits tied to the status of students (or former students) nationals of other Member States (or in *D'Hoop*'s case the state's own national who had studied abroad). In all three cases the ECJ found in favour of the young people on the ground that their citizenship right includes a right to equal treatment even in the field of social benefits. In *Bidar*, the ECJ found it necessary to reverse its previous jurisprudence on the basis of citizenship itself.[26] However, central to the ECJ's decision in all three cases was the link of the student to the host Member State. Grzelczyk had already studied for a number of years in the host Member State before he sought some help to get to the end of his studies. D'Hoop had attended secondary school in a Member State other than that of her nationality and then returned home to complete her higher education, and subsequently sought a benefit which the home state had made dependent on completion of secondary education in that state, at least for those who were not children of migrant workers. In *Bidar* the ECJ puts it this way:

[25] Cases C–184/99 *Grzelczyk* [2001] ECR I–6193; C–224/98 *D'Hoop* [2002] ECR I–6191; C–138/02 *Collins* [2004] ECR I–2703; C–456/02 *Trojani* [2004] ECR I–7573 and C–209/03 *Bidar* [2005] ECR I–2119.

[26] 'It is true that the Court held in *Lair* and *Brown* (paras 15 and 18 respectively) that "at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof [later Article 6 of the EC Treaty, now, after amendment, Article 12 EC]". In those judgments the Court considered that such assistance was, on the one hand, a matter of education policy, which was not as such included in the spheres entrusted to the Community institutions, and, on the other, a matter of social policy, which fell within the competence of the Member States in so far as it was not covered by specific provisions of the EEC Treaty. However, since judgment was given in *Lair* and *Brown*, the Treaty on European Union has introduced citizenship of the Union into the EC Treaty and added to Title VIII (now Title XI) of Part Three a Chapter 3 devoted inter alia to education and vocational training (*Grzelczyk*, paragraph 35)': *Bidar,* above n 25, paras 38, 39.

> In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.[27]

> [T]he existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.[28]

In the struggle of EU citizens and the Member States surrounding access to social benefits, the student cases indicate the emergence of a concept of integration based on residence in that Member State which is a necessary link to the right to social benefits.

If one looks at the non-student cases on citizenship and social benefits, *Collins* and *Trojani* represent the norm. In both cases the applicants are nationals of one Member State present on the territory of a host Member State. In both cases, had they been nationals of the host state they would have been either entitled to the contested benefit or in a substantially better position to claim it. In the case of Mr Collins, the application of a residence test for access to a social benefit meant that he was disadvantaged. The ECJ held that a residence test may be compatible with citizenship of the Union if its purpose is to establish that there is a genuine link between the individual and the employment market of that state (hence a fragmentation of the idea of the EU labour market). But a proportionality test will also be applied, in that the requirement cannot go beyond what is necessary to achieve the legitimate aim. In *Trojani*, the ECJ appears rather unsympathetic to the situation of the citizen of the Union, who is a tramp in need of hostel accommodation in a Member State other than that of his underlying nationality. Had *Trojani* been a Belgian national (rather than a French national in Belgium), it appears from the judgment that he would have been entitled to the social benefit under Belgian law. But he is not. The ECJ finds:

> In those circumstances, a citizen of the Union in a situation such as that of the claimant in the main proceedings does not derive from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364.[29]

The integration test, which appears to be at work in these judgments, is the link to the labour market. Citizenship itself will not achieve the link; the individual must also be integrated in some durable way into the national labour market.

The right which all of these citizens of the Union seek is equal treatment with nationals of the host Member State as regards social benefits. It is

[27] *Ibid,* para 57.
[28] *Ibid,* para 59.
[29] *Trojani,* above n 25, para 36.

exactly this aspect of citizenship which the host Member State is unwilling to recognise. The ECJ proves itself somewhat circumspect as regards that equal treatment right where it costs Member States money. In particular, it appears willing to separate the right to residence from the right to equal treatment in social benefits. Only where the individual gains the trust of the Member State, evidenced by the issue of a residence permit, does the ECJ seem to be willing to accord an equal treatment right in this rather sensitive area. With the entry into force of Directive 2004/38 and the abolition of residence permits, it is unclear how the individual will evidence his or her right.

Free Movement and Immigration—Who are the Citizens and who are the Immigrants?

Third country nationals are those persons who do not hold the nationality of a Member State (either new or old). As has been clarified by the ECJ, the rights of free movement of workers, the self-employed and service providers are limited to nationals of the Member States. The jurisprudence of the Court is more ambiguous about the rights of service recipients, such as tourists, though it is unclear whether this status can give rise to a right of movement for third country nationals. In 1986, the Single European Act enlarged the scope of the right of free movement of service providers to include the ability to adopt measures providing for the free movement of third country national service providers. This opportunity has not been taken up. Although the Commission proposed a Directive to provide for this in 1999, this was withdrawn. The extension was reintroduced in the draft Services Directive in 2005, but withdrawn in the face of heavy criticism by some Member States and social partners.

EU nationals, however, have a right to exercise free movement rights which right entails a movement right for third country nationals. In particular, EU businesses which provide services across EU borders are entitled to deploy their personnel of any nationality for this purpose.[30] While it appears that Member States can require that the third country national personnel have been lawfully admitted to a Member State, other obstacles, such as obligatory periods of previous employment with the enterprise before the deployment, are not permissible.[31]

Third country nationals are entitled to rely on all EU free movement rights except those of movement of persons. Thus, for example, they are not excluded from the personal scope of free movement of goods or capital. Further, by virtue of agreements between their countries of origin

[30] Case C–43/93 *Vander Elst* [1994] I–3803.
[31] Case C–445/03 *Commission v Luxembourg* [2004] ECR I–10191.

and the EU, some third country nationals enjoy some rights which are attached to free movement of persons, such as security of employment and residence, equal treatment in social security, education, etc. The most extensive of such rights accrue to Turkish workers under the EC–Turkey Association Agreement and the Decisions of the Association Council, in particular Decision 1/80, which has been the subject of substantial jurisprudence from the ECJ.[32] However, there are also rights of self-employment in the agreements with Bulgaria, Romania and Croatia and employment and social security protection rights in a wide number of other agreements. The Court has held some of these rights to be directly effective.[33]

Between 1992 and 1999 there was much dissension among the Member States (mainly between the UK and the rest) as to whether third country nationals have the right of free movement attendant on the abolition of border controls under Article 14 EC Treaty. In 1999, the Amsterdam Treaty made it clear that they do have the right to move without control among the Member States, ie to enjoy the rights of free circulation in Article 62 EC Treaty. I will return to this issue in the next section. The 1999 changes also brought into the competence of EC law immigration and asylum as regards third country nationals. A five-year period, ending on 1 May 2004, required the adoption of measures under these new powers. Regarding legal migration, the measures adopted are:

— Regulation 1030/2002 on residence permit format;[34]
— Regulation 859/2003 on third country nationals' social security;[35]
— Directive 2003/86 on family reunion;[36]
— Directive 2003/109 on long-term residents.[37]

The second five-year period is the subject of the Hague Programme adopted by the Council and the Commission, setting out the agenda of measures to be adopted. According to this agenda, there will be significantly less new legislation than in the first five years of Community competence.[38]

Most significant for third country nationals lawfully living in the EU are the two Directives on long-term resident third country nationals and on family reunification for third country nationals. First, Directive 2003/109

[32] See K Groenendijk, *ILPA European Update*, June 2005.
[33] Cases C–235/99 *Kondova* [2002] ECR I–6427; C–268/99 *Jany* [2002] ECR I–8625.
[34] [2002] OJ L 157/1.
[35] [2003] OJ L 124/1.
[36] [2003] OJ L 251/12.
[37] [2004] OJ L 16/44.
[38] For a commentary on the new multi-annual programme see ILPA, *Response to the Hague Programme: EU Immigration and Asylum Law and Policy*, available at www.ilpa.org.uk.

on long-term resident third country nationals provides that third country nationals who have resided lawfully in a Member State for a period of five years (except for certain excluded classes such as refugees, and an exception for students who must complete 10 years' residence in a Member State) have a right to move and exercise economic activities as workers, self-employed, service providers or recipients or as students in any of the Member States.[39] They may also move for other purposes subject to an economic self-sufficiency requirement. This right derives from EU law, not national law, and had to be transposed by January 2006. Thus, so long as the individual has completed the qualifying five years of lawful residence in accordance with the conditions, he or she has the right, notwithstanding what national law may state. Further, the Directive does not recognise any delay in the right. All those third country nationals who fulfil the requirements as at the transposition date are entitled to the free movement right. This Directive is likely to result in substantial new friction between the authorities of the Member States and third country nationals who seek to rely on their rights.

The second important Directive is that on family reunification. Directive 2003/86 creates a right of family reunification for third country nationals in EU law. While there are conditions of support and accommodation, and the group of family members with which third country nationals enjoy a right of reunification is substantially smaller than that which applies to migrant citizens of the Union (ie it includes only spouses and minor children), it is nonetheless a substantial step for EU law.[40]

FREE MOVEMENT WHERE? THE EXTERNAL BORDER AND THE INTERNAL BORDER

In the contentious period from 1985 to 1999, the relationship between the internal and external borders of the EU was central. The creation of the internal market required the abolition of intra-Member State border controls, including on the movement of persons. However, control of the external border as regards the movement of persons remained a matter of national competence. This bifurcation of responsibilities and competences led to endless difficulties, not least as, in order to have the confidence to abolish internal border controls, the Member States considered that they needed confidence in one another's application of external controls. The control of the EU external border can be divided into two parts: (i) the common territorial border; (ii) the virtual border created by the mandatory

[39] See S Carrera and T Balzacq, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy* (Brussels CEPS, 2005). Also Ch 14 in this volume.

[40] See Ch 15 in this volume for a detailed legal analysis of Dir 2003/86, above n 36.

visa system. I will deal with these separately, devoting substantially more attention to the common territorial border, in respect of which a Community Code has been adopted in the form of a Regulation,[41] than to the virtual border where, only in May 2006, the Commission submitted a proposal for a Regulation.[42]

The Common Territorial Border

The development of an EU common system of border controls took place within the Schengen arrangements. Starting in 1985, the Schengen Agreement called for the abolition of intra-Member State controls (a precursor to Article 14 EC Treaty) and, as a flanking measure, the common control of the external border. The nuts and bolts of the system were set out in the 1990 Schengen Implementing Agreement and the operational measures adopted by an Executive Committee. In 1999, the Amsterdam Treaty moved these arrangements into EU law, but with an opt-out for Denmark, Ireland and the UK.

When the Schengen *acquis* (as it came to be known) was inserted into the treaties, it was published for the first time in the Official Journal. However, the Common Border Manual was not published as it was considered confidential.[43] Thus only officials qualified to read the confidential material could know what the rules were for the crossing of the external borders of the EU.

Further, the insertion of the border code as part of the Article 62 EC Treaty *acquis* on abolition of border controls led to substantial problems as regards updating the Manual. The Council reserved the power (which had previously been exercised by the Schengen Executive Committee) to do so to itself by virtue of Regulation 790/2001[44] which reservation was challenged by the Commission before the ECJ.[45] The Court upheld the validity of the Regulation, but only for the duration of the first five-year transitional period. The end of the five-year period also required the Council to

[41] Reg establishing a Community Border Code, above n 2.

[42] Proposal for a Reg of the European Parliament and of the Council amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications, COM(2006)269 final, 31 May 2006.

[43] The Schengen acquis—Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13) [2000] OJ L 239/317, at 403.

[44] Council Reg (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance, [2001] OJ L 116/5.

[45] Case C-257/01 *Commission v Council* [2005] ECR I-345.

take a decision on moving the law-making procedure to co-decision with the European Parliament. For the field of borders, the decision took effect from 1 January 2005.[46]

In May 2004, the Commission proposed a Regulation establishing a Community Code on the rules governing the movement of persons across borders.[47] This Community Code was designed to replace the Schengen Common (Border) Manual, which was still confidential. It was the first measure to be adopted by the EU under the new co-decision procedure by the European Parliament and Council on 23 June 2005. Formal adoption took place on 13 April 2006: it is now Regulation 562/2006,[48] and applies from 13 October 2006. The Community Code comes hard on the heels of the establishment of the External Borders Agency of the EU by Regulation 2007/2004,[49] which agency started work on 1 May 2005 based in Warsaw.[50] The two together are intended to form a new stage in the law and management of the EU's external border.

The Commission's proposal for the Community Code states that it goes well beyond a mere recasting of the Common Manual, though this is somewhat difficult to determine as the Manual was not published. However, from the references in the Commission's explanatory memorandum, which accompanied the proposal, almost every provision is prefaced by a reference to the Common Manual and highlights the similarity or identical nature of the measure. Like the Common Manual, the Community Code covers the crossing of both the external and internal borders of the Member States. I will examine them in this order as well. Regarding the 2004 and 2007 Member States, the Accession Acts (Article 3(1)) provide that these Member States are required to apply immediately the external borders *acquis* of the EU though they are not entitled to enjoy the abolition of internal borders until a later date. That later date has not yet been set, but will probably be in 2008 for the Member States which joined the EU in 2004.

Crossing the External Border

The personal scope of the Community Code applies to any person crossing the internal or external border of the EU, but without prejudice to the

[46] Council Dec 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art 251 of that Treaty, [2004] OJ L 396/45.

[47] COM(2004)391 final.

[48] Above n 2.

[49] Council Reg (EC) No 2007/2004 of 26 Oct 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1.

[50] Ch 12 in this volume examines the External Border Agency's role and powers.

entitlements of persons enjoying Community free movement rights (including third country national family members) and the rights of refugees and persons requesting international protection. It is worth noting here that while the internal market of the EU now includes 27 Member States, the internal border of the EU within which there is no control on the movement of persons applies to only 13 of those Member States (excluding Ireland, the UK and the 2004 and 2007 Member States), but includes Iceland and Norway. Thus the internal border of the EU cuts through the heart of the EU's internal market. Its material scope includes the manner in which the control of the crossing of internal and external frontiers of the EU Member States takes place. Unlike its Schengen predecessor, the Code now creates a strong presumption, if not a right, for a third country national to enter the EU where the conditions are fulfilled. The wording is 'for stays not exceeding three months per six month period, the entry conditions for third country nationals shall be the following …'[51] (see below regarding the conditions). The criticism which Cholewinski so cogently made against the Schengen Border Manual, that it provided only that the third country national 'may' be granted admission, appears to have been rectified.[52] At the insistence of the European Parliament, an Article entitled 'conduct of border checks' has been introduced, which requires border guards fully to respect human dignity and that 'any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures'.[53] Further it states that '[w]hile carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[54]

This is a particularly important addition which must not be forgotten irrespective of the situation in which public officials may find themselves. I was rather surprised when a Member State's official who had participated in the negotiations in the Council on the Code gave (in public) as an example of an issue yet to be resolved regarding joint procedures by EU border guards legal protection of guards when they draw their guns. I had rather thought that border guards draw their entry stamps at the border. It seems more appropriately the job of the military to draw their guns at the external borders.

The entry conditions for third country nationals are, for the purposes of this investigation, the most important part of the Community Code. For

[51] Art 5(1) of Reg 562/2006 [2006] O.J. L105/1.

[52] R Cholewinski, 'No Right of Entry: The Legal Regime on Crossing the EU External Border' in K Groenendijk, E Guild and P Minderhoud, *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003) at 105–30.

[53] Art 6(1), second indent, of Reg 562/2006, above n 51.

[54] *Ibid*, Art 6(2).

the first time, there is expressed clearly in EU law what third country nationals must provide in order to fulfil the conditions of entry into the EU for a period of three months or less out of every six. The requirements are as follows:

(a) a valid travel document;
(b) a valid visa (if required under Regulation 453/2003);
(c) justification of the purpose and conditions of the intended stay and proof of sufficient means of subsistence, both for the period of the intended stay and for the return to their country of origin or transit to a third State into which they are certain to be admitted, or are in a position to acquire such means lawfully;
(d) that they are not persons for whom an alert has been issued in the Schengen Information System for the purposes of refusing entry;
(e) that they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert is issued in Member States' national databases for the purposes of refusing entry on the same grounds.

In the annex to the Code there is a list, albeit non-exhaustive, of supporting documents which the border guard may request to check the fulfilment of the conditions. These are as follows:

For business trips:

(i) an invitation from a firm or an authority to attend meetings, conferences or events connected with trade, industry or work;
(ii) other documents which show the existence of trade relations or relations for work purposes;
(iii) entry tickets for fairs and congresses if attending one.

For journeys undertaken for the purposes of study or other types of training:

(i) a certificate of enrolment at a teaching institute for the purposes of attending vocational or theoretical courses in the framework of basic and further training;
(ii) student cards or certificates for the courses attended.

For journeys undertaken for the purposes of tourism or for private reasons:

(i) supporting documents as regards the lodging:
— an invitation from the host, if staying with one;
— a supporting document from the establishment providing lodging or any other appropriate document indicating the accommodation envisaged;
(ii) supporting documents as regards the itinerary:

— confirmation of the booking of an organised trip or any other appropriate document indicating the envisaged travel plans;
(iii) supporting documents as regards return:
— a return or round-trip ticket.

For journeys undertaken for political, scientific, cultural, sports or religious events or other reasons:

> invitations, entry tickets, enrolments or programmes stating, wherever possible, the name of the host organisation and the length of stay or any other appropriate document indicating the purpose of the visit.

The Code provides that the means of subsistence *shall* be assessed in accordance with the duration and purpose of the trip, not only by means of a check of the cash which the passenger has, but also his or her credit cards. Further, the Code states that declarations of sponsorship, where such declarations are provided for by national legislation, and letters of guarantee from hosts, as defined by national legislation, where the third country national is staying with a host, may also constitute evidence of sufficient means of subsistence.

Three exceptional circumstances are provided for: first, where the individual has a residence or re-entry permit issued by another Member State, he or she *shall* be authorised to transit (unless there are serious security reasons to the contrary); secondly, where all the above requirements are fulfilled but the individual does not have the required visa he or she can be issued with a visa at the border under the procedure provided for by Regulation 415/2003[55]. While the Regulation is entitled 'visas at the border for seamen', it is not expressly limited to that group but applies to anyone who is not in a position to apply for a visa in advance but fulfils the conditions for issue; is able to submit, if requested, supporting documents which substantiate the unforeseeable and imperative reasons for entry; and return to the country of origin or a third country is assured. It may take two forms: a transit visa, which is valid for five days, and a travel visa valid for 15 days. The visas can either be territorially limited to one Member State or apply to all. Thirdly, the Code maintains the possibility for Member States to admit on humanitarian grounds:

> [T]hird country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter into its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is subject

[55] Council Reg (EC) No 415/2003 of 27 Feb 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, [2003] OJ L 64/1.

> to an alert as referred to in paragraph 1 (d) [ie the SIS], the Member State authorising his or her entry into its territory shall inform the other Member States accordingly.[56]

Entry and exit controls are mandatory, as are stamps both on entry and exit. As one of the sources of friction on the external border has been the failure of systematic stamping of passports to show that a third country national has left during the period of his or her permitted stay, a new provision has been inserted. This provides that while there is a presumption that the person has remained beyond his or her permitted period where there is no exit stamp, that presumption may be rebutted where the third country national provides, by any means, credible evidence such as transport tickets or proof of his or her presence outside the territory of the Member States which shows that he or she has respected the conditions relating to the duration of a short stay.[57]

The refusal of entry is now subject to a number of important conditions which strengthen the rule of law and the foreseeability of EU law in this field. However, there is still plenty of scope for uncertainty. The Code provides:

> A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.[58]

The problem is the width of Article 5(1)(e):

> [T]hreat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

While the term 'public policy' has been interpreted by the ECJ as regards the right of free movement of persons, and the concept of public health is clearly specified (for EU citizens' free movement rights) in Directive 64/221 as the list of diseases set out there, the term 'internal security' has not been defined either in the legislation or by the Court. Further, the Code raises the possibility that Member States could introduce health tests for third country nationals even when coming to the EU for three-month family visits. Additionally, how is the individual to fulfil the requirement *not* to be a threat to the international relations of any Member State where no alert has been issued in a Member State's national database for refusing entry? It

[56] Art 4(c) of Reg 562/2006, above n 51.
[57] *Ibid,* Art 11(1) and (2).
[58] *Ibid,* Art 13(1).

will be difficult to test whether there is any substance to an allegation that the individual is a threat unless a robust approach is adopted by the national courts and ombudsmen, should the issue arise before them.

The decision to refuse entry must be by way of a substantiated decision stating the precise reasons for the refusal. Additionally, precise reasons for the refusal must be given by means of a standard form, as set out in an annex to the Code. This must be done by the authority empowered by national law to refuse entry. For the sake of clarity, the Code then specifies that 'the completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form'.[59] One of the questions which arises as regards business trips is the meaning of a business trip. What is the third country national permitted to do when coming to the EU for three months on a business visit? For instance, if the individual is coming to discuss a deal with a potential client, how far is he or she permitted actually to carry out some of the activities of the deal during the visit? The Code does not deal with this question. However, the more precision there is in the documents which must be produced to justify the visit and the grounds on which the individual can be refused the more clarity there is as regards this question. If one looks at the standard form for refusal of entry at the border, which is an integral part of the Code, one finds nine boxes, at least one of which must be ticked as the ground for refusal. These are that the individual: (i) has no valid travel document; (ii) has a false/counterfeit/forged travel document; (iii) has no valid visa or residence permit; (iv) has a false/counterfeit/forged visa or residence permit; (v) has no appropriate documentation justifying the purpose and conditions of the stay; alternatively, the individual could not provide document(s) showing that he or she has: (vi) already stayed three months during a six-month period on the territory of the Member States of the European Union; (vii) sufficient means of subsistence in relation to the period and form of stay, or the means to return to the country of origin or transit; or that the person (viii) is one for whom an alert has been issued for the purposes of refusing entry in the SIS; or in the national register; (ix) is considered to be a threat to public policy, internal security, public health or the international relations of one or more of the Member States of the European Union (there must be here a reference to national law). Through an increase in the specificity of the documents required and the manner in which entry can be refused, the individual begins to get a better idea of what he or she may and may not do when in the EU on a short stay. Much of this development is thanks to the European Parliament.

[59] *Ibid*, Art 13(2) second indent.

Having provided for a reasoned decision of refusal, it is not surprising that the Code states that persons refused entry shall have the right to appeal, though it is perhaps surprising that this right of appeal was inserted only at the insistence of the European Parliament. But these appeals are to be carried out in accordance with national legislation. This means that the appeal right is at risk of being rather different depending on which Member State refuses entry. The key elements of any appeal, apart from suspensive effect (which is specifically excluded by the Code: 'lodging such an appeal shall not have suspensive effect on a decision to refuse entry'[60]), include: the scope of the appeal, that is to say what the court or tribunal is entitled to review; time limits for the appeal; the right to representation (and legal aid if needed); and any further appeal rights. If the court or tribunal is one against whose decisions there is no further appeal, then it will be a court which is required to refer any question regarding the correct interpretation of Community law to the ECJ in accordance with Article 68 EC Treaty. Although the ECJ is excluded from jurisdiction to rule on any measure or decision taken in relation to the maintenance of law and order and the safeguarding of internal security as regards the crossing of intra-Member State borders, it is under no such inhibition as regards the external border in respect of which these provisions apply. However, the rules of ECJ interpretation of those parts of the Schengen *acquis* which are within the third pillar (here the Schengen Information System) are governed by the separate rules contained in the third pillar provisions of the EU Treaty. Most notably there is a requirement that the Member State concerned must make a declaration accepting the jurisdiction of the ECJ and designate the level of court competent to make references (Article 35(2) and (3) EU Treaty). The Code requires the third country national to be given, as regards the matter of representation, a written indication on contact points able to provide information on representatives competent to act on behalf of the third country national in accordance with national legislation. As the decision is specifically deprived of suspensive effect, the individual will not be present at his or her case at the appeal. Thus, the centrality of representation is obvious. Whether this list will be sufficient is uncertain, particularly if the individual is poor. At the insistence, again, of the European Parliament, we will finally have statistics on the numbers of persons refused entry, the grounds for refusal, the nationality of the persons refused and the type of border (land, air, sea) at which they were refused entry for all the Member States, which will be compiled by the Commission and published every two years.

There are substantial weaknesses in the Code, which will undoubtedly prove to be a source of friction between persons seeking to enter the EU

[60] *Ibid,* Art 13(3) second indent.

and Member States' authorities. The effectiveness of the remedies will be very important to resolving these problems.

Crossing the Internal Border

The Community Code also covers movement of persons across the internal borders of the EU (except those Member States which have opted out). The right of movement across the intra-Member State borders is one which, in the context of the Schengen *acquis*, was subject to exception on the basis of Article 2(2) of the Schengen Implementing Agreement, which permits Member States to re-introduce border controls at the internal borders on a fairly loosely regulated basis. The basis for the reintroduction of border controls at intra-Member State borders in the Code repeats the grounds permitted in Article 2(2) of the Schengen Implementing Agreement (a serious threat to public policy and public security). The Commission proposed the addition of a new ground, public health, but this did not find its way into the Code. It is interesting to note, though, from an analysis of the use of Article 2(2) by the Member States that in fact public health has been used as a ground on more than one occasion.[61] Except in the case of urgent action, there is a procedure for the reintroduction of intra-Member State border controls, which requires the Member State seeking to reintroduce the controls to notify both the Council and the Commission of: (i) the reasons for the proposed decision; (ii) the events which constitute a serious threat; (iii) the scope of the proposed decision; (iv) where the controls will be introduced; (v) the names of the authorised crossing points; (vi) the date and duration of the decision; and (vii) where appropriate, the measures to be taken by other Member States. Border controls so introduced must not exceed 30 days unless there is a need for urgent action.

An issue of intra-Member State border controls which has given rise to a number of complaints has been the retention by the Member States of controls just inside the border. Under the Schengen *acquis*, while Member States were obliged to abandon controls at the border, they were permitted to retain identity controls within a geographic radius specified in national law inside their borders. The Commission was particularly concerned about the operation of this type of control, which has been criticised on the basis of its application to ethnic minorities.[62] It proposed that such controls be excluded, while permitting Member States to continue to apply national law permitting identity controls within the whole of their territory. In other words, the discriminatory application of controls within a

[61] K Groenendijk, 'New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Border and Inside the Netherlands and Germany' in Groenendijk, Guild and Minderhoud (eds), above n 52, 131–46.

[62] *Ibid.*

border zone would be excluded. The final text is more nuanced. The right of Member States' competent authorities to exercise powers with equivalent effect to border checks is excluded, though other checks are not. Police measures are limited to those which do not have border control as an objective, are based on general police information and, in particular, the fight against cross-border crime, are devised and executed in a manner clearly distinct from systematic checks and are carried out on the basis of spot checks, not systematic controls. Identity checks at ports and airports for security purposes are still permitted, as is legislation requiring the holding of identity documents. Member States may also require third country nationals to report their presence on the territory.

It is unclear, with all the exceptions to the abolition of checks at the intra-Member State borders, whether there is really as much progress in this area as the Commission sought. Further, by agreement with the European Parliament a provision has been included permitting border guards to consult national and European databases (but only on a non-systematic basis) to ensure that the individual does not represent a real threat to internal security. Thus, the mechanisms of control and the power for border officials to detain an individual at the intra-EU border for substantial periods of time to carry out database searches is retained.

The Virtual Border—The Visa Regime

The physical external border of the Member States is the only point of main control for nationals of those countries which are not on the visa blacklist.[63] For nationals of those states which are on the blacklist, the combination of the mandatory visa requirement and carrier sanctions means that they encounter the control of the EU border before they leave their country of origin. They cannot get on a means of transport to the EU unless they have a visa and, in order to obtain a visa, they must fulfil a control which is at least as onerous as that which they will meet at the territorial border. Elsewhere I have examined in some depth the effect of the visa requirement.[64] It remains in the Schengen *acquis*, not yet having been replaced by EU legislation. Thus, for instance, there is no clear right of appeal in EU law against the refusal to issue a short stay visa. Many of the problems which third country nationals complain about are related to the issue of visas which, notwithstanding efforts to achieve a more

[63] Council Reg (EC) No 851/2005 of 2 June 2005 amending Reg (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism [2005] OJ L 141/3.

[64] D Bigo and E Guild, *La mise a l'écart des étrangers: la logique du visa Schengen* (Paris, Cultures et Conflits, l'Harmattan, 2003).

integrated system, remains embedded in national practices. Among the more problematic issues relating to the mandatory visa list is that it includes virtually all countries the populations of which are primarily Muslim and all of the least developed countries. The impression is that visa requirements, which represent an intensified form of control of people seeking to move, are primarily applied to poor and Muslim countries. The creation of the Visa Information System (VIS),[65] which is intended to be an integrated database which will contain all relevant information about applications for visas and the circumstances of their use, is planned to provide greater certainty about the issue of visas.

It is intended that all the visa issuing consulates of the participating states will have access to the information on the VIS. Thus, any individual who has sought a Schengen visa before, anywhere in the world, will be identifiable when he or she next applies for a visa (or otherwise comes into contact with officials who have the right of access to the VIS). The database will provide all the details of the individual and his or her visa application (including the result—approval or refusal). Access to the VIS is also anticipated for the border guards and specified posts in national ministries.

The VIS proposal has only recently been accompanied by a Commission proposal for a Regulation to replace the Common Consular Instructions (CCI),[66] the Schengen inheritance on visa application processing. The CCI, which was published in its majority (but not entirety) in the Official Journal, was subject to a similar Council Regulation as the Borders Manual.[67] This Regulation was also challenged by the Commission before the ECJ and the Court's decision and reasoning mirror those of the Borders Manual.[68] With the creation of the VIS there is now a pressing need for a regulation on the issue of short stay visas. The information on the VIS must be correlated to and limited by a Regulation on what information is relevant to a visa application and how a request is processed. Key to the individual will be the clear statement of the basis for refusal of a visa and a right of appeal against any refusal.

[65] Council Dec (EC) 2004/512 of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L 213/5.

[66] Above n 42.

[67] Council Reg (EC) No 789/2001 of 24 Apr 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications [2001] OJ L 116/2. See above n 44.

[68] Above n 45.

CONCLUSIONS

One of the aspects of the field of free movement of persons in EU law which is most surprising is the degree of movement there is in the law itself. In this chapter, I have outlined the key issues which have arisen as points of conflict between the individual seeking to move and the Member States' authorities. In most of these areas not only are there new legislative measures under consideration, or recently adopted, but there is also important new case law from the ECJ on a regular basis. This dynamism is indicative of the uncertainties which surround the transfer of sovereignty from the Member States to the EU as regards movement of persons and the control of borders.

There are a number of important issues which I have not dealt with in this chapter—first, refugees, a group of very vulnerable people in respect of whom EU legislation is now beginning to apply. Similarly, data protection has become an issue of substantial concern as databases are being created and access to them widened on what seems to be a daily basis. The European Parliament's concerns about the transfer of airline passenger name records to foreign authorities does not seem to have been noted by the Council in its Conclusions of July 2005.[69] These remain issues of very substantial importance to the field of movement of persons, though beyond the scope of this chapter.

The realisation of rights of free movement depends on the aggrieved individual having the opportunity to realise those rights in practice and the right to remedies where Member States fail in their duty to secure them. The issues which have been covered include the transition of nationals of the Member States from immigrants in other Member States to citizens of the Union, but without a single written constitutional document which guarantees equality among citizens. The EU legislator has adopted important and comprehensive new secondary legislation which clarifies rights, but the underlying basis of citizenship remains cloudy. However, the treatment of third country national family members remains problematic. Secondly, as EU nationals exercise their free movement rights they encounter four obstacles which lead them to take legal action ending up in the ECJ. The first is detention, exclusion and expulsion. The ECJ has severely limited, and in many cases excluded, this type of action by Member States against citizens of the Union exercising their rights. Further, it has set the barrier very low for the citizen to establish that he or she is exercising a free movement right.

[69] The issue of transfer of passenger name records (PNR), including the recent ECJ judgment following a challenge brought by the Parliament to a Council Decision authorising the conclusion of an EU/US PNR Agreement (Joined Cases C–317 and 318/04 [2006] OJ C178/1), is examined in Ch 12 in this volume.

The second set of obstacles concerns recognition of diplomas and professional experience. Here the legislator has been active; a new Directive was adopted on 6 June 2005 on recognition of diplomas, which maintains automatic recognition in numerous fields (ie doctors and dentists) and provides for simplified certification in all. In addition, the ECJ has sought to protect the migrant citizen of the Union from unjustified action by state authorities in this area. Other administrative obstacles to economic activity have also been found contrary to EU law by the ECJ. Finally, in the delicate field of social benefits, the ECJ has established the primacy of the principle of equality of treatment among citizens of the Union, but tempered that principle by allowing a market integration test (and for students a residence test) to be applied.

Thirdly, the exercise of EU competences for third country nationals has given rise to substantial legislation providing for long-term resident third country nationals to move and reside anywhere in the Union and to be protected from expulsion. In addition, they now have an EU right to family reunification. Undoubtedly, transposition will create teething troubles for Member States' administrations. Finally, an EU Regulation has been agreed on the crossing of the external border and the lifting of intra-Member State border controls on movement of persons. Together with the European Border Agency, this measure changes dramatically the relationship of the individual seeking to cross an internal or external border and the Member States' authorities. The law which these authorities are now required to apply is EU, not national, and it includes an obligatory right of appeal for a person refused at the external border. The abolition of border controls at the intra-Member State borders is now firmly set in EU secondary legislation. The virtual border—that of the visa national before the Member State's consulate in his or her country of origin—remains untamed for the moment. But the decision to create the Visa Information System must be accompanied by an EU regulation on the issue of short stay visas so that there is a proper link between information collected and maintained on the database and the relevance to the visa rules. The EU principle of proportionality cannot be complied with unless this step is taken.

The citizens remain without their constitution and the borders without their state, but the institutional treatment of both has slipped away from national control and is now firmly in the hands of the European Union.

However, in the hands of the EU institutions, what happens to the principle of citizenship? Since the French Revolution, the principle of equality among citizens has become a foundation of the modern state. In the EU, however, citizenship has been created based on the principle of discrimination between classes of citizens. The mechanism by which this takes place is the fracturing of citizenship into national and EU, with different rights applying to each. Whether this model of citizenship based on discrimination can ultimately be tenable is unclear. For third country

nationals, the dividing line between citizenship rights and discrimination against the alien is also blurred. As nationals of neighbouring states await tomorrow to become citizens of the Union, the justification, both in law and practice, of discriminatory measures against them is increasingly fragile. When the border between citizen and foreigner seems permeable on a collective basis, discrimination against the individual seems increasingly invidious. Of course, the European Commission has stated that enlargement of the Union will end, but exactly where that end will be, and who will be in and who out when this happens, is still politically uncertain. But before a hard line between the citizen and foreigner can be drawn, there needs to be certainty over a foreseeable future about who is on which side of the line.

Over the tangle of citizenship, foreign status and borders in the EU hangs the cloud of sovereignty. How is sovereignty to be understood in such a changing landscape? As has been outlined in this chapter, sovereignty among the Member States is clearly moving away from the border. This is no longer the place at which sovereignty is enacted. However, this does not mean that sovereignty is ceasing to play a role in EU affairs. In the constitutional settlement which is gradually emerging in the EU, the points at which Member States seek to defend their right to discriminate against the EU citizen appear to be the sites of a mobile concept of sovereignty. Thus, it is no longer security, in the sense of coercive security maintained by the army at the border, which is the heartland of sovereignty in the EU. It appears that it is now security in its social form, defended by the administrators at the social benefits office, which is at the heart of Member States' sovereignty.

2

Effective Remedies in Immigration and Asylum Law Procedures: A Matter of General Principles of EU Law

EVELIEN BROUWER

INTRODUCTION

THE TREATY OF Amsterdam of 1997 included the basis for a new objective of EU policy: the establishment of an area of freedom, security and justice. According to the new Article 2 EU Treaty, one of the objectives of the Union would be 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[1] In July 1998, in its Communication *Towards an Area of Freedom, Security and Justice*, the European Commission acknowledged the importance of the legal protection of individuals as one of the purposes of an area of freedom, security and justice.[2] A five-year programme was developed in the so-called Tampere Conclusions, adopted in October 1999 by the heads of the EU governments. According to these Conclusions, the challenge of the Amsterdam Treaty would be 'to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in 'conditions of security and justice accessible to all'.[3] The European Council emphasised that this freedom should not be regarded as the exclusive preserve of the Union's own citizens. According to the Conclusions, it 'would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to

[1] [2002] OJ C 325/1.
[2] COM(1998)459.
[3] Presidency Conclusions, Tampere European Council, 15–16 Oct 1999, para 2.

seek access to our territory'.[4] The Conclusions went further by stating that common policies on asylum and immigration 'must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in *or access to* the European Union'.[5] With this phrase, the European Council explicitly recognised the obligation of the EU legislator to provide procedural guarantees not only for those residing lawfully in the EU, but also for those applying for a residence permit or visa in one of the EU Member States.

What has been achieved since the Tampere Conclusions with regard to the right of judicial protection in the different instruments adopted in the field of immigration and asylum law?[6] Is there a right for individuals to have access to courts with regard to immigration law decisions which apply indiscriminately to third country nationals residing in, or seeking access to, the EU? Or it is fair to state, in the words of Cholewinski, that, compared to EU citizens and their family members, third country nationals still 'are subject to an underdeveloped legal regime at the EU level'?[7]

In the first section of this chapter, I will describe the relevant provisions of immigration law instruments adopted on the basis of Title IV EC Treaty and compare these with the rules which apply to more privileged categories of persons, including EU citizens, their family members and Turkish migrant workers. In the second section, I will go into the general sources of EU law in search of a more fundamental basis for the right to legal remedies. I will argue, on the basis of three basic principles of EU law, that there is a general obligation for national legislators to include in their immigration law procedures effective remedies for third country nationals. I will try to convey that this obligation goes beyond the often vague and open norms which are included in the Title IV instruments.

[4] *Ibid*, para 3.

[5] *Ibid* (emphasis added).

[6] See for an elaborated study on effective remedies in European immigration law in the period before the Tampere Conclusions P Boeles, *Fair Immigration Proceedings in Europe* (The Hague/Boston/London, Martinus Nijhoff, 1997).

[7] R Cholewinski, 'The Need for Effective Individual Legal Protection in Immigration Matters' (2005) 7 *European Journal of Migration and Law* 237 at 238. Also E Brouwer, 'Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All' (2005) 7 *European Journal of Migration and Law* 219.

EFFECTIVE REMEDIES FOR EU CITIZENS, FAMILY MEMBERS AND TURKISH WORKERS: FROM DIRECTIVE 64/221 TO DIRECTIVE 2004/38

Protecting the Free Movement of EU Citizens and their Family Members

One of the fundamental principles of Community law is the freedom of movement of EU citizens. This principle was laid down at an early stage. Rules were included in Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.[8] Based on case law of the European Court of Justice (ECJ), it has been recognised that to enable EU citizens to enjoy their freedom of movement, this protection should also apply to their family members with a third country nationality.[9] According to these rules, and based on the criteria developed by the ECJ on the basis of this Directive, the power of Member States to restrict the right of free movement and residence of EU citizens and their family members is limited. One of the basic principles, as defined by the ECJ, is that Member States may only in exceptional situations invoke reasons of security, public order or health against EU citizens and family members. Their right to enter the territory of another Member State, to stay there and to move within it can be limited only when they 'represent a genuine and sufficiently serious threat affecting one of the fundamental interests of society'.[10] This principle was reaffirmed more recently in *Commission v Spain*.[11] In this judgment, the ECJ ruled that Spain infringed the right to free movement, as protected under EC law, by refusing spouses of EU nationals entry or a visa on the sole ground that they had been reported in the Schengen Information System for the purpose of refusing entry to the territory. The Court ruled that before refusing entry or a visa the authorities should have verified first whether the presence of those persons constituted a genuine, present and sufficiently serious threat.

On 30 April 2006, Directive 64/221 was replaced by a new Directive 2004/38 on the right of citizens and their family members to move and reside freely within the territory of the Member States.[12] This Directive codifies the principles formulated by the ECJ on the basis of the former Directive 64/221. It also integrates the different existing instruments with

[8] Council Dir 64/221/EEC of 25 Feb 1964 [1964] OJ 56/850.
[9] See the judgment of the ECJ in Case C–60/00 *Carpenter* [2002] ECR I–6279.
[10] Cases 36/75 *Rutili* [1975] ECR 1219 at 28, and 30/77 *Bouchereau* [1977] ECR 1999 at 35.
[11] Case C–503/03, judgment of 31 Jan 2006.
[12] Adopted on 29 Apr 2004. [2004] OJ L 229/35.

regard to the protection of EU citizens in Community law.[13] On the basis of the former Directive 64/221, the ECJ had already concluded that the procedural rights in this Directive also apply to third country nationals married to EU nationals, including those persons not in possession of an identity document, or requiring a visa, having entered the territory of a Member State without such a document or having remained there after its expiry.[14]

For our purposes, the importance of Directive 2004/38 lies in Articles 30 and 31. These provisions describe the procedural guarantees with regard to the right to legal remedies against decisions concerning entry or the refusal to issue or renew a residence permit, or expulsion decisions. Compared to the rules in Articles 8 and 9 of the former Directive 64/221, the new rules enhance the procedural rights of EU citizens and their family members. Amongst others, Article 30 of Directive 2004/38 puts more emphasis on procedural guarantees improving the accessibility of legal remedies. According to Article 31(1), the person concerned should 'have access to judicial and, where appropriate, administrative redress procedures in the host member state to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or health'. This seems to allow national legislators to provide for non-judicial procedures. However, Recital 26 of the Preamble to this Directive makes it clear that 'in all events, judicial redress procedures should be available to Union citizens and their family members refused leave to enter and reside in another EU Member State'.

In its judgment in the *Orfanopoulos* case, the ECJ declared that the intervention on the part of the 'competent authority' as referred to in Article 9(1) of the former Directive 64/221 means that this authority must be able to make an exhaustive examination of all the facts and circumstances, including the expediency of the measure in question, before the decision is definitively adopted.[15] This requirement with regard to the scope of review by the judicial authority has been codified in Article 31(3) of Directive 2004/38. This provision requires that the redress procedures allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. The procedure should further ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28. Article

[13] See also S Carrera, *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, CEPS Working Document no 208, Oct 2004, available at www.ceps.be.

[14] Case C–459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgium* [2002] ECR I–6591.

[15] Joined Cases C–482 and 493/01 *Orfanopoulos* [2004] ECR I–5257. See also Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665 at para 15.

28(1) of the Directive obliges Member States to take different considerations into account before reaching a decision on expulsion. This means that the new Directive explicitly obliges Member States to provide for legal remedies in which courts (or competent authorities) are able to examine the substance of the case and to weigh the different interests at stake with regard to decisions on expulsion of EU citizens and their family members.

In *Adoui and Cornuaille*, the ECJ established, on the basis of Directive 64/221, that the person concerned should be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based, unless this is contrary to the security of the state.[16] According to this judgment, the notification of the grounds must be sufficiently detailed and precise to enable the person to defend his interests. Further, the notification should be made in such a way as to enable the person concerned to comprehend the content and effect of the decision. This requirement has been codified in Article 30 of Directive 2004/38, on the basis of which the persons concerned should be notified in writing of any decision restricting their right of entry or residence on public policy, public security or public order grounds. Based on Article 30(3), this notification should specify the court or administrative authority with which the person concerned may lodge an appeal and, where applicable, the time allowed for the person to leave the territory of the Member State.

Extending the Scope of Protection: *Cetinkaya* and *Dörr-Ünal*

Based on the Association Agreements between the EU Member States and third countries, nationals of those third countries enjoy a privileged position with regard to the right to work, the right to social benefits and the right to stay within EU territory. In the early 1960s, an Association Agreement was concluded between the European Communities and Turkey with a view to the future accession of Turkey to the Communities. The Association Council, set up on the basis of this Agreement, in 1980 adopted Decision 1/80 on the rights of Turkish migrant workers. This Decision includes the general principle that Turkish migrant workers should receive, in the country in which they are legally residing, the same treatment as EU workers. Based on this general principle of equal treatment, the ECJ ruled that individuals enjoying rights under Decision 1/80 should have the same procedural guarantees with regard to these rights as EU citizens, under Directive 64/221, even if this Directive does not explicitly refer to this category of persons.

In 2004, in the *Cetinkaya* case, the ECJ recognised the applicability of Directive 64/221 with regard to procedures reviewing the legality of an

[16] *Ibid,* at para 13.

expulsion order against a Turkish worker.[17] In this judgment, the ECJ ruled that the national courts should have applied the principles of Article 3 of Directive 64/221 with regard to measures based on public order and security grounds against the applicant. This meant, according to the ECJ, that the courts should have taken into consideration circumstances which occurred after the final expulsion decision of the national authorities in order to assess the presence of an actual threat to public order caused by the personal conduct of the applicant. In the *Dörr-Ünal* judgment of 2 June 2005, the ECJ ruled on the scope of Directive 64/221 with regard to the rights of an EU and a Turkish national.[18] In this case, the Court made an explicit link between the rights protected by Community law and the ability to invoke these rights before a court. The ECJ concluded that in order to ensure the effectiveness of the substantive rights, as protected in Decision 1/80, it is essential to grant those workers and their family members the same procedural guarantees as those granted by Community law to nationals of Member States and, therefore, to permit those workers to take advantage of the guarantees laid down in Articles 8 and 9 of Directive 64/221. On the basis of the reasoning of the ECJ in these judgments, it is to be expected that the Court will continue the same line of argument with regard to Directive 2004/38. Therefore, Member States will have to apply the procedural guarantees, included in this Directive, to Turkish migrant workers as well as their family members.[19]

The consequence of this seems to be that the rights of workers of a country which has no immediate prospect of accession to the EU are better protected than those of nationals of other third countries, such as Bulgaria and Romania, where the negotiations on accession to the EC were more advanced. The EC had also signed Association Agreements with those countries but deliberately omitted the principle of equality from those treaties. However, as we will see below, this differential treatment has become less relevant since the *Panayotova* judgment of 2004. In this judgment, which concerned the rights of Bulgarian nationals under the Association Agreement between the EC and Bulgaria, the ECJ formulated a more general approach on effective remedies with regard to rights protected under Community law.

[17] Case C–467/02 *Cetinkaya* [2004] ECR I–10895.

[18] Case C–136/03 *Dörr-Ünal* [2005] ECR I–4759. See for an early analysis of this judgment S Peers, *ILPA European Update*, June 2005, available at www.ilpa.org.uk.

[19] K Groenendijk, 'Citizens and Third Country Nationals: Differential Treatment or Discrimination?' in JY Carlier and E Guild (eds), *The Future of Free Movement of Persons in the EU* (Brussels, Bruylant, 2006) 99. See also his annotation to the *Dörr-Ünal* judgment, in *Jurisprudentie Vreemdelingenrech*, 3 Aug 2005, no 276, at 926.

LEGAL REMEDIES IN IMMIGRATION AND ASYLUM LAW BASED ON TITLE IV OF THE EC TREATY

The following sections will explore the main instruments which have been adopted in the field of immigration and asylum law, based on Title IV of the EC Treaty. In this short overview, I will focus on the provisions on legal remedies.[20]

Directive on Long-term Resident Third Country Nationals

In 2003, the Council adopted Directive 2003/109/EC concerning the status of third country nationals who are long-term residents.[21] This Directive differentiates between decisions of expulsion and decisions concerning applications for long-term residence permits. Article 20(2) provides that, with regard to the refusal of long-term resident status, the withdrawal of status or the refusal to renew a residence permit, third country nationals should have 'the right to mount a legal challenge in the Member State concerned'. It is unclear what precisely is meant by 'legal challenge'. Member States, when adopting this text, explicitly wanted to maintain the option of procedures other than judicial redress by rejecting the Commission's earlier proposal, which had included an explicit right of access to courts.[22] A second proposal of the Council of 2002 referred to the right to apply 'to the administrative bodies and courts of the Member States concerned'.[23] This option was then replaced by the much vaguer definition of 'the right to mount a legal challenge'.

Only with regard to expulsion decisions does the Directive on long-term residents explicitly require the availability of judicial remedies. Article 12(4) states that where an expulsion decision has been adopted, 'a judicial redress procedure shall be available to the long-term resident in the Member State concerned'. Article 12(5) further provides for a right to legal aid for long-term residents lacking adequate resources on the same terms as nationals of the Member State in which they reside. The importance of reinforced protection of long-term residents against expulsion is emphasised in Recital 16 of the Preamble to this Directive. Referring to the

[20] For more detailed analysis of the history and meaning of these instruments, I refer to E Guild, *The Legal Elements of European Identity. EU Citizenship and Migration Law* (The Hague, Kluwer Law International, 2004) and the legislative overviews by S Peers, 'Key Legislative Developments on Migration in the European Union' [2001] *European Journal of Migration and Law* 231 and [2003] *European Journal of Migration and Law* 107.

[21] [2004] OJ L 16/44. This Dir was to be implemented by 23 Jan 2006.

[22] See Arts 11(3) and 22(2) of the Commission's proposal, COM(2001)127, 13 Mar 2001.

[23] Art 22 of the amended text of the draft Dir of 3 Feb 2003, Council doc 5533/03. See also the draft of 4 June 2003, doc 10009/03.

decisions of the European Court of Human Rights, this Recital urges Member States to provide for 'effective legal redress' in order to ensure this protection.

An important development is the inclusion of Article 20(1) in the Directive on long-term residents, which obliges national authorities to give reasons for any decision rejecting an application for a residence permit. The decision should be notified to the third country national 'in accordance with the notification procedures under the relevant national legislation'. Article 20(1) explicitly requires that the notification specify the possible redress procedures available and the time limit for taking action.

Directive on the Right to Family Reunification

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification includes a similarly vague provision on legal remedies as that in the Directive on long-term residents. According to Article 18 of the Directive on family reunification, Member States should ensure that the sponsor and/or the members of his/her family have 'the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered'.[24] Earlier drafts of the Family Reunification Directive included an explicit right of the applicant and family members to apply to a national court whenever an application for family reunification is rejected, or a residence permit is withdrawn or not renewed or when removal is ordered.[25] A second proposal of the Commission, in 2002, even included for the applicant and/or family members 'a de facto and de jure right to apply to courts'.[26] On the basis of this proposal, national courts would have the task not only of assessing the lawfulness of the administrative decision, but also of considering the factual circumstances within which the decision was taken. Unlike the wording in the Directive on long-term residents, Article 18(2) of the Directive on family reunification mentions that the procedure and the competence according to which the right to appeal is to be exercised are to be regulated by the Member States concerned. However, the omission of this provision in the former Directive does not seem to have any practical consequences. Lacking any specific

[24] [2003] OJ L 251/12. The implementation deadline was 3 Oct 2005. The lawfulness of this Dir has been challenged by the European Parliament before the ECJ: Case C–540/03 *Parliament v Council* (not yet reported). The judgment, rejecting the challenge but emphasising the importance of compliance with fundamental rights and also the importance of remedies, was delivered on 27 June 2006.

[25] See Art 16 of the initial proposal of the Commission, COM(1999)638 of 11 Jan 2000 and Art 18 of the amended proposal, COM(2002)225, Council doc 10857/02, 9 Aug 2002.

[26] See *ibid*.

criteria, the implementation of the applicable procedures based on the Directive on long-term residents is also left to the scrutiny of the national legislator.

Finally, Article 5(4) of this Directive requires Member States to provide decisions in writing and within nine months, which period may be extended. Decisions should include the reasons for rejection.

Dublin II Regulation

Regulation 343/2003 of 18 February 2003 on responsibility for the application of asylum in the EU Member States (Dublin II Regulation) provides criteria to establish which Member State is responsible for the examination of an asylum application submitted in one of the Member States.[27] The Dublin II Regulation is based on the so-called 'single application' principle, prohibiting a person from applying for asylum in more than one country. Based on these criteria, Member States may decide to refuse an asylum application and to refer the asylum applicant to the authorities of another Member State. According to Article 19(2) of the Regulation, the decision not to examine an asylum application *may* be subject to an appeal or review. This review or appeal does not have an automatically suspensive effect. The competent court or bodies may decide to suspend the implementation of the transfer on a case-by-case basis only if national law so provides. The decision not to examine an asylum application and the decision to return an asylum seeker to another Member State should be reasoned.

Directive on Minimum Standards for Asylum Procedures[28]

Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, which was adopted in December 2005, includes an explicit right to an effective remedy before a court or tribunal.[29] According to Article 39 of the Directive, asylum seekers may exercise this right not only against decisions on their asylum applications or against refusals to re-open the examination of their applications, but also with regard to refusal of entry at the borders or in transit zones where they applied for asylum and with regard to decisions to

[27] [2003] OJ L 50/1.

[28] See for a more extended analysis of this Directive H Battjes, *European Asylum Law and its Relation to International Law* (Leiden/Boston, Mass, Martinus Nijhoff, 2006).

[29] [2005] OJ L 326/13. The implementation deadline is 1 Dec 2007. See for the original proposal of this Dir COM(2000)578 and the amended proposal COM(2002)326. See for the Council negotiations documents 10279/02; 10235/03; 15198/03.

withdraw refugee status. Again, the text of the provision, as finally adopted by the Council, offers weaker protection, compared to earlier proposals of the Commission. These proposals included an explicit right to effective remedies before a court and also made clear that this remedy should entail the possibility of an examination on both facts and points of law.[30] Further, the initial proposals included the obligation under certain circumstances to grant suspensive effect to the appeal proceedings.[31] The LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs) of the European Parliament proposed to ensure that legal remedies against a refusal of asylum should always have the effect of allowing the applicant to remain in the Member State, pending its outcome.[32] According to the LIBE Committee, the suspensive effect of asylum appeals would be a critical safeguard, as many refugees are recognised only during the appeal process and an erroneous determination at first instance would have serious consequences. However, the actual text of Article 39(2), as finally adopted in 2005, leaves it to the discretion of Member States whether and in which situations asylum seekers should be allowed to remain in their territory pending the outcome of their asylum proceedings. The only condition formulated in Article 39(2) is that these rules should be in accordance with Member States' international obligations.

With regard to decision-making, Article 38(2) of the Directive on asylum procedures provides that a decision on the withdrawal of refugee status should include the reasons for refusal and information on how to challenge the decision. The decision and the information referred to should be given in writing.

Schengen Common Consular Instructions

The rules to be applied by EU consulates and embassies with regard to visa applications are laid down in the Schengen Common Consular Instructions of 14 December 1993 for diplomatic missions and consular posts. These Instructions, as amended by a decision of the Executive Committee on 28 April 1999, became public only when they were incorporated in the Schengen *acquis*.[33] The Instructions include procedural provisions with regard to the refusal of a visa application at the consulates or embassies of

[30] See Art 38 of the proposal in COM(2000)578, above n 29, and Art 38 of the proposal in COM(2002)326, above n 29.

[31] Art 33 of the proposal in COM(2000)578 and Art 39(3) and (4) of the proposal in COM(2002)326.

[32] See Report A6–0222/2005 of 29 June 2005, amendment 45.

[33] The Common Consular Instructions of 14 Dec 1993, amended and incorporated in EU law by Council Dec 1999/435/EC [1999] OJ L 176/1. See for an amended version [2002] OJ C 313 and [2004] OJ L 5/74.

the Schengen states. These provisions do not oblige Member States to provide for remedies against a visa refusal or to give reasons for such decision. However, if national law provides a duty to give reasons for a visa refusal, the Instructions require that this refusal should refer to the reasons listed in Articles 5 and 15 of the Convention Implementing the Schengen Agreement (CISA).

Community Code Governing the Movement of Persons at the Borders (Schengen Borders Code)

The Regulation on the Community Code governing the movement of persons at the borders (Schengen Borders Code) replaces the Schengen Common Manual on Border Control.[34] The Regulation was finally adopted by a Decision of the Council on 21 February 2006. It includes rules on the measures and powers of authorities controlling the movement of persons at the external borders of the EU.[35] The adopted text is based entirely on the proposal agreed in Spring 2005 by the European Parliament (EP), the Commission and the Council on the basis of the co-decision procedure of Article 251 EC Treaty. The close co-ordination between the three institutions, or the tripartite agreement which was reached during the negotiations on the Schengen Borders Code, made it possible to adopt the Regulation during the first reading in the Council.[36] During these negotiations in 2005, the rapporteur of the EP, Mr Cashman, dropped some of his initial amendments which would have improved the legal status of persons crossing EU borders. On the other hand, other EP proposals extending the rights of individuals have been accepted by the Council and the Commission.

Article 13(2) of the final text of the Regulation provides that entry may be refused to a third country national only by a substantiated decision, which should state the procedures for appeal. Article 13(3) then explicitly states that persons refused entry shall have the right to appeal. This appeal is to be carried out in accordance with national legislation. It is a very important achievement that this right to appeal, proposed by the rapporteur of the EP survived the negotiations between the three EU institutions. A proposal to include in the Community Code a right to obtain financial compensation for possible damage suffered from ill-founded refusals has,

[34] Reg 562/2006 of 15 Mar 2006 [2006] OJ L 105/1, which came into force on 13 Oct 2006. Hungary voted against and Slovenia abstained.

[35] The Reg is examined in Ch 1.

[36] See for the Commission proposal COM(2004)391, 26 May 2004, and as concerns the report adopted by the European Parliament, A6–0188/2005, 13 June 2005.

however, been deleted from the final text.[37] It was further proposed that Member States could suspend the entry into force of a refusal of entry if they considered it appropriate to do so. This proposal has also been rejected. Article 13(3) now even states that initiating an appeal process shall *not* suspend the decision to refuse entry.

The Inclusion of a Standard Refusal Form

By a Council Decision of 2004, a standard refusal form was included in the former Common Manual on Border Control.[38] This Decision was incorporated into part B of the Schengen Borders Code of 2006, mentioned above. As from 1 June 2004, border guards are obliged to hand out a refusal form to third country nationals refused entry at the borders. The decision on the standard refusal form is important for two reasons. First, the text of the standard refusal form explicitly provides that the third country national 'may appeal against the refusal of entry as provided for in national law.' Secondly, according to the refusal form, Member States should substantiate the decision of refusal and indicate references to national legislation with regard to the available remedies. The grounds for refusal are listed in the standard refusal form. These grounds include, for example, the lack of valid travel documents, visa or residence permits, the fact of carrying false or falsified visa or residence permits, public order and security grounds, as well as registration in the Schengen Information System (SIS) or a national database for the purpose of refusal of entry. The exhaustive enumeration of grounds for refusal means that a refusal at the borders may not be based on any other grounds. This allows the person concerned to know the reasons for refusal and subsequently to appeal against the decision.

Summary: Different Laws, Different Regimes?

In EU law, different legal regimes apply to different categories of persons. Not only someone's nationality but also his or her legal status of residence determines the right to free movement, the right to work, the right to reside and access to social welfare, health care or education.[39] This differentiation in rights seems to be reflected in the applicable rules on legal remedies in EU immigration law. On the one hand, EU citizens and their family

[37] Draft report, provisional version 2004/0127 (COD), 15 Mar 2005, which included a right to financial compensation in the case of a wrongful decision.

[38] Council Dec 2004/574/EC [2004] OJ L261/36.

[39] See E Guild, 'The Legal Framework: Who is Entitled to Move?' in D Bigo and E Guild (eds), *Controlling Frontiers. Free movement into and within Europe* (London, Ashgate, 2005).

members were in a stronger position than non-EU citizens. The new Directive 2004/38 on freedom of movement of EU citizens and their family members includes more explicit rights and procedural guarantees for the persons falling within its scope. However, on the basis of the jurisprudence of the ECJ, these procedural guarantees also apply to Turkish migrant workers enjoying their freedom of movement under the Association Agreement between Turkey and the EU.

The EC instruments on immigration and asylum law, based on Title IV of the EC Treaty, include only vague references to the right of appeal for third country nationals. Some instruments, for example, the Dublin II Regulation and the Consular Instructions on visa applications, do not even require legal remedies. With regard to other instruments, the original proposals of the Commission (and European Parliament) have been watered down considerably by the Council when adopting the final text. An important improvement has been the inclusion of a right to appeal against a refusal of entry at the borders and the obligation of informed decision-making in the new Community Code on border control. Additionally, other EC instruments of asylum and immigration law have incorporated the duty of national authorities to inform the person concerned of the reasons for the decision. However, with regard to the availability of legal remedies, these instruments do not offer clear or detailed procedural guarantees. They cannot be considered a strong incentive for national legislators to provide for effective legal procedures through which individuals may enforce their rights. In the following sections, I will try to make clear why, despite the vague norms in the instruments described above, Member States should offer effective remedies on the basis of general principles of EU law.

THE FIRST PRINCIPLE: PROTECTION OF FUNDAMENTAL RIGHTS

Incorporation of Human Rights in EU Law

Initially, co-operation in the framework of the European Community started as a purely economic matter. The founding treaties of this co-operation included no reference to the protection of human rights or the rule of law. However, based on both the jurisprudence of the ECJ and the amended texts of the EU Treaties, there can no longer be any doubt that, today, the EU is based on the rule of law and respect for human rights, as protected in the European Convention on Human Rights (ECHR).[40] The

[40] TC Hartley, *The Foundations of European Community Law,* 5th edn (Oxford, OUP, 2003).

emphasis on human rights and the rule of law in the judgments of the ECJ is generally seen as an answer to the concerns of Member States with regard to the protection of human rights within the legal order of the Communities.[41] Safeguarding human rights and the rule of law is considered a prerequisite for the legitimacy of the European Union and the loyalty of its Member States to this legal framework.

The first judgment in which the ECJ explicitly established that the implementation of Community law should respect fundamental human rights was in the *Stauder v City of Ulm* case in 1969.[42] In that judgment, the ECJ made its famous reference to the meaning of human rights principles for EC law: '[i]nterpreted this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'. A year later, the ECJ repeated this general principle in the *Internationale Handelsgesellschaft* judgment.[43] Here the ECJ explicitly referred to the constitutional traditions of the Member States as the inspiration for the protection of these rights. In the *Nold II* case of 1974, the ECJ went further by stating that, as well as the constitutional traditions of the Member States, international treaties for the protection of human rights should be used as guidelines for the interpretation of Community law by the ECJ.[44] With this judgment, the ECJ confirmed the relevance of the ECHR within the legal framework of the Communities.

With the Maastricht Treaty of 1992, the binding role of human rights, as protected in the ECHR, and the importance of the constitutional traditions of Member States for EU law were explicitly recognised in the EU Treaty. The new Article F(2) of that Treaty stated:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[45]

The inclusion of the rule of law and human rights as one of the requirements of EU membership in the so-called Copenhagen criteria confirmed its importance as a basic principle for the legal order of the EU.[46] With the Amsterdam Treaty of 1997 entering into force on 1 May

[41] See more generally R Lawson, *Het EVRM en de Europese Gemeenschappen,* European Monographs no 61 (The Hague, Kluwer, 1999) and P Alston (ed), *The EU and Human Rights* (Oxford, OUP, 1999).
[42] Case 29/69 *Stauder* [1969] ECR 419.
[43] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1146.
[44] Case 4/73 *Nold II* [1974] ECR 507.
[45] This is now Art 6(2) EU Treaty.
[46] European Council, 21–22 June 1993, SN 180/1/93 Rev 1.

1999, a new Article 6(1) was added to the EU Treaty, which stated that 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' are the founding principles of the Union and principles which are common to the Member States. Finally, with the adoption of the EU Charter of fundamental rights in 2000 (see further below), the European Council not only confirmed the importance of the ECHR for the legal framework of the EU, but also developed its own set of human rights.[47]

In its case law, the ECJ dealt on different occasions with the human rights protected by the ECHR. For example, the right to freedom of information under Article 10 ECHR played a role in the judgments in *Hoechst* (21 September 1989), the *Grogan* case (4 October 1991) and *ERT* (18 June 1991).[48] In both the *Lindqvist* and *Österreichischer Rundfunk* judgments, the ECJ emphasised the importance of the protection of the fundamental right to privacy under Article 8 ECHR. In these judgments, the ECJ affirmed that this fundamental right formed the basis of the data protection rules included in EC Directive 95/46 on the protection of personal data.[49] With regard to immigration law procedures and the protection of freedom of movement, the ECJ considered the right to family life to be an important factor in assessing the lawfulness of the refuted measures. For example, in the judgments in *Carpenter* (11 July 2002), *Akrich* (23 September 2003) and *Orfanopoulos* (29 April 2004), the ECJ applied Article 8 ECHR to emphasise the obligation on national authorities to take into account the right to family life and to respect the principle of proportionality.[50] The second Recital of the Preamble to EC Directive 2003/86 on family reunification explicitly refers to the duty of Member States to adopt measures with regard to family reunification in accordance with the right to family life under Article 8 ECHR. In its judgment of 27 June 2006 dealing with this Directive, the ECJ confirmed that this should be applied by the Member States 'in a manner consistent with the requirements flowing from the protection of fundamental rights'.[51]

[47] Treaty of Nice [2001] OJ C 80/1.

[48] Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, C–159/90 *Grogan* [1991] ECR I–4685, and C-260/89 *ERT* [1991] ECR I–2925.

[49] Cases C–101/01 *Lindqvist* [2003] ECR I–12971 and C–465/00 *Österreichischer Rundfunk* [2003] ECR I–4989.

[50] Case C–60/00 *Carpenter* [2002] ECR I–6279; Case C–109/01 *Akrich* [2003] ECR I–9607; and *Orfanopoulos*, above n 15. See for a more limited view on the significance of Art 8 ECHR in Community law, the Opinion of Geelhoed AG in Case C–1/05, *Jia*, judgment of 27 April 2006 (not yet reported), paras 72–73.

[51] Case C–540/03 *European Parliament v Council*, judgment of 27 June 2006 (not yet reported), paras 104–105.

Effective Remedies Under Articles 6 and 13 ECHR

The incorporation of human rights, as protected in the ECHR, into the legal framework of the EU implies the applicability of the legal mechanism of the ECHR in protecting these human rights within the scope of the EC Treaty and the application of EC law. This mechanism consists of two important provisions with regard to the right to legal remedies: Articles 6(1) and 13 ECHR.

Article 6(1) ECHR includes the general right of the individual to have access to judicial remedies 'in the determination of his civil rights or of any criminal charge against him'. In the *Maaouia* case of 2000, the European Court of Human Rights (ECtHR) concluded that the content and the extent of immigration procedural law are not bound by the standards of Article 6 ECHR:

> Decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of criminal charge against him, within the meaning of Article 6(1) of the Convention.[52]

This limited interpretation was especially based on the relationship between Article 6(1) ECHR and the Seventh Protocol to the ECHR on the protection of aliens in expulsion cases. According to the (majority) judgment of the ECtHR, the rights provided in this Protocol reflected the intention of the contracting parties with regard to the restricted scope of Article 6(1) ECHR.[53]

Although it remains to be seen whether the ECtHR will stick to this limited interpretation of Article 6(1) ECHR, its non-applicability is less relevant in the light of the important criteria established on the basis of Article 13 ECHR. Article 13 includes the right to an effective remedy before a national authority for everyone whose rights and freedoms protected in this Convention are violated, even if 'the violation has been committed by persons acting in an official capacity'. The Strasbourg Court made clear on several occasions that measures taken in the field of immigration law are subject to treaty obligations and the refusal of entry to an individual may cause an infringement of the guarantees required by the ECHR.[54] A limited opportunity to challenge such refusal constitutes a violation of the right to an effective remedy, as provided in Article 13

[52] App No 39652/98, *Maaouia v France*, 5 Oct 2000, Reports 2000-X, para 40.

[53] This interpretation has been criticised not only in the dissenting opinions, but also by different scholars: see N Blake and R Husain, *Immigration, Asylum and Human Rights* (Oxford, Oxford University Press, 2003) 241.

[54] App Nos 9214/80; 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v UK*, 28 May 1995, Series A no 94.

ECHR.[55] The ECtHR applied Article 13 in conjunction with Article 3 in expulsion cases (*Al-Nashif*[56]), with Article 5 with regard to the detention of immigrants (*Čonka*[57]), and with Article 8 with regard to the right to family life (*Sen*[58]). In an expulsion case, the ECtHR even applied Article 10, finding that expulsion would be an infringement of the applicant's freedom of speech.[59]

Applying Article 13 ECHR, the ECtHR formulated important criteria on 'effective remedies', including criteria with regard to the accessibility of these remedies, the scope of review by the judicial or independent authority and the competences of such authority to order appropriate measures to protect the rights of individuals or to restore the damage caused. These criteria should be taken into account when implementing the EC asylum and immigration law described above.

Accessibility

In its famous *Čonka* judgment, which concerned the detention and deportation of a Roma family by the Belgian authorities, the ECtHR defined certain factors which in this case 'undoubtedly affected the accessibility of remedies'.[60] These factors included the lack of proper communication of the reasons for detention, the absence of an interpreter and the lack of readable and understandable information on available remedies.

Scope of Review

In general, in cases not related to immigration law procedures, the ECtHR made clear that the scope of review by national courts is important for the assessment of whether national remedies meet the Article 13 ECHR standards of effective remedies.[61] In the *Al-Nashif* judgment, the ECtHR considered that a court or authority should be able properly to balance the rights of individuals against the general interests of the government. In

[55] See also R Cholewinski, 'No Right of Entry' in K Groenendijk, E Guild and PE Minderhoud (eds), *In Search of Europe's Borders* (The Hague, Kluwer 2003) at 108–9.

[56] App No 50963/99, *Al-Nashif v Bulgaria,* 20 June 2002 (not yet reported). See the annotation by E Guild in (2002) 239 *Jurisprudentie Vreemdelingenrech*t.

[57] App No 51564/99, *Čonka v Belgium,* 5 Feb 2002, Reports 2001-I.

[58] App No 31465/96, *Sen v the Netherlands,* 21 Dec 2001, (2003) 36 EHRR 7.

[59] App Nos 15773/89 and 15774/89, *Piermont,* 27 Apr 1995, Series A No 314.

[60] In this judgment, the ECtHR applied the criteria of Art 5(1)(f) and (4) ECHR, which offers a separate legal basis for the right to effective remedies in the field of detention of persons for immigration law purposes: either for the prevention of unauthorised entry or in view of a planned deportation.

[61] App No 36022/97, *Hatton and others v the United Kingdom*, 8 July 2003, Reports 2003-VIII.

those cases where the government invokes national security grounds, the court or authority should be able to make an assessment of the risks at stake or to value the credibility of the governmental motive of national security.[62]

Competences

The ECtHR further made it clear that the right to effective remedies includes the ability of national courts or authorities to suspend measures with irreversible effects. In the *Čonka* judgment, the ECtHR ruled:

> [T]he notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible …[63]

In another judgment, the Strasbourg Court held that it would be inconsistent with Article 13 if expulsion measures were executed before the national authorities had examined whether they were compatible with the Convention. Where a person claims that there is a real risk of treatment in breach of Article 3 ECHR, the requirement of a remedy which is 'as effective as can be' is not appropriate.[64] In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance attached to Article 3, the ECtHR made it clear that the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.

THE SECOND PRINCIPLE: EFFECTIVE REMEDIES TO SECURE RIGHTS CONFERRED BY EU LAW

The Johnston Principle

With the second principle on effective remedies, I refer to the general principle of EU law that, in order to safeguard the rights protected by Community law, individuals should be able to invoke these rights before national courts or authorities. This principle was formulated in the *Johnston* judgment of 1986.[65] This case dealt with a challenge by a female police officer against the decision of the Northern Ireland police force not

[62] *Al-Nashif*, above n 56, para 137.
[63] *Čonka*, above n 57, para 79.
[64] App No 22414/93, *Chahal v United Kingdom*, 15 Nov 1996, Reports 1996-V, and *Al-Nashif*, above n 56.
[65] Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, para 18. See also Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339, para 23.

to renew her employment contract. This decision was based on a temporary policy which excluded women from certain operations requiring police officers to carry firearms. Mrs Johnston claimed that the decision violated her right to equal treatment, as protected in EC Directive 76/207 on equal treatment of men and women in employment. The preliminary question, forwarded by the national court to the ECJ, concerned the scope of the judicial remedies provided for in Article 6 of that Directive. This Article requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves discriminated against 'to pursue their claims by judicial process'. According the the ECJ, it followed from that provision that:

> Member States should take measures which are sufficiently effective to achieve the aim of this directive and that the rights thus conferred may be effectively relied upon before the national courts by the person concerned.[66]

Based on this provision and rejecting the applicable procedure which prevented Mrs Johnston from challenging the refuted decision, the ECJ concluded that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law. According to the ECJ, this reflects a general principle of law underlying the constitutional traditions common to the Member States, which is also laid down in Articles 6 and 13 of the ECHR.[67] Here the ECJ uses Articles 6 and 13 ECHR to support the general principle of providing effective remedies to protect Community rights. This is to be distinguished from the meaning of Articles 6 and 13 ECHR, dealt with in the previous section, which referred to the duty of EU institutions and Member States to protect the human rights included in the ECHR .

In its *Heylens* judgment, the ECJ applied the principle of effective remedies directly to the right to freedom of movement of workers.[68] The *Heylens* case concerned the refusal of the French authorities to recognise the foreign diploma of a Belgian football trainer, which prevented him from working for a French football club. According to the ECJ:

> [T]he existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of [the right of free access to employment] is essential in order to secure for the individual effective protection for his right.[69]

The ECJ held that this would be a fundamental right which the Treaty conferred individually on each migrant worker in the Community. The ECJ

[66] *Johnston,* above n 65, para 17.
[67] *Ibid,* para 18.
[68] Case 222/86 *Unectef* v *Heylens* [1987] ECR 4097.
[69] *Ibid,* para 2.

further stated that this requirement reflects a general principle of Community law which stems from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 ECHR. In *Heylens*, the ECJ also confirmed the obligation for national authorities to state the reasons for national decisions affecting the fundamental rights of individuals conferred by the EC Treaty.[70] This obligation to state the reasons for individual decisions has been repeated in later judgments.[71]

Applying the Johnston Principle to EU Immigration Law: the *Panayotova* Case

With the *Panayotova* case of 16 November 2004 the ECJ made it clear that the general principles of effective remedies in relation to Community rights also apply in the field of immigration law procedures. This case concerned the Dutch immigration law system in which the granting of a residence permit is made dependent on a long-term visa ('*mvv-vereiste*') being obtained before the person concerned enters Dutch territory.[72] The question arose whether this Dutch requirement could be invoked against the applicants, Bulgarian nationals, who enjoy special protection under the EC–Bulgaria Agreement of 1994. The ECJ concluded that in principle the Association Agreements (including the Agreements with Poland and Slovakia) do not preclude a system of prior control on the issue of a residence permit. However, according to the ECJ, this would depend on whether 'the procedural rules governing the issuing of such a temporary residence permit' would not make the exercise of the rights conferred by the Association Agreements impossible or excessively difficult. Referring, in paragraph 27, to its earlier ruling in the *Johnston* case, the ECJ added the more general consideration that 'Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law'. In *Panayotova*, the ECJ further stated::

> [T]he scheme applicable to [such long term visa] must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings.[73]

[70] *Ibid,* paras 14–17.
[71] Case C–70/95 *Sodemare* [1997] ECR I–3395, para 19. See M Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation* (Oxford and Portland Oregon, Hart, 2004) at 11.
[72] Case C–327/02 *Panayotova* [2004] ECR I–11055.
[73] *Ibid,* para 27.

As we saw above, in the *Dörr-Ünal* judgment of 2 June 2005, the ECJ ruled on the scope of Directive 64/221 with regard to the rights of a Turkish national.[74] In this case, the Court made an explicit link between the rights protected by Community law and the possibility of invoking these rights before a court. The difference between the *Dörr-Ünal* judgment and the *Panayotova* case is that, where in the former case the ECJ derived the right to legal remedies for Turkish workers from the procedural guarantees of the former Directive 64/221, in the *Panayotova* case the Court based this right directly on the constitutional principles of EU law, including the ECHR.[75]

Article 47 of the EU Charter of Fundamental Rights

In 2000, the European Council adopted the EU Charter of fundamental rights.[76] This Charter provides, in Article 47, a general right to effective judicial remedies, which incorporates the jurisprudence of the ECJ as described above. Article 47 of the Charter states:

1 Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

2 Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

3 Legal aid shall be made available to those who lack sufficient resources insofar as such is necessary to ensure effective access to justice.

Article 47 is important because it combines the criteria of Articles 6 and 13 ECHR. As mentioned above, the ECtHR refused in 2000 explicitly to apply Article 6 ECHR to immigration law procedures.[77] The explanatory memorandum to Article 47 now states that in Community law the right to a fair hearing is not confined to disputes relating to civil law rights and obligations, as one of the consequences of the principle is that 'the Community is a community based on the rule of law as stated by the ECJ in *Les Verts v European Parliament* in 1986'.[78] Further, the explanatory memorandum confirms what was concluded in earlier judgments of the ECJ, namely that the implementation of the right to effective remedies should be in accordance with the criteria developed by the ECtHR on

[74] *Dörr-Ünal,* above n 18.
[75] Cf *ibid,* at paras 64–65.
[76] [2000] OJ C 364/1.
[77] *Maaouia,* above n 52.
[78] *Les Verts*, above n 65.

Article 13 ECHR.[79] Article 47 thus not only widens the applicability of Article 6 ECHR, as it is not restricted to civil and criminal law cases, but also incorporates the more explicit criteria defined in Article 13 ECHR.[80] This means that the criteria developed by the Strasbourg Court on the basis of Article 13 apply equally to national procedures in which national authorities have applied or should have applied Community law.

The inclusion of the right to an effective remedy as a human right is important because it includes the right of possible advice, defence or representation for the person concerned. Further, on the basis of Article 47(3) legal aid should be made available to those who lack sufficient resources insofar as such is necessary 'to ensure effective access to justice'.

The EU Charter of fundamental rights was meant to become legally binding within the EU Member States with the entry into force of the EU Constitutional Treaty. Since the negative result of the referenda in France and the Netherlands in 2005, the future of this Constitutional Treaty has become uncertain. However, this uncertainty about the Constitutional Treaty is unlikely to affect the meaning of the Charter or its Article 47. In the first place, should the Constitutional Treaty be redrafted, it is not expected that EU Member States will amend the text of the Charter. As we have seen above, the content of Article 47 was based on the jurisprudence of the ECJ and, therefore, can already be considered a codification of existing EU law. Secondly, the EU Charter has already achieved a certain status within EU law, regardless of whether or not it is inserted into the Constitutional Treaty. Aside from the references to this Charter made in literature and by the Advocates-General in Opinions before the ECJ, the Charter is quoted in two judgments of the Court of First Instance (CFI).[81] In these judgments, of 2002 and 2003 respectively, the CFI referred not only to the earlier jurisprudence of the ECJ with regard to the right to an effective remedy as a general principle of Community law, but also to Article 47 of the EU Charter. In June 2005, the LIBE Committee of the European Parliament referred to Article 47 of the EU Charter to support its proposal to include suspensive effect of the proceedings in the draft Directive on minimum standards in asylum procedures.[82] Finally, in June 2006, in the judgment on the Family Reunification Directive (Directive

[79] See, eg, *Johnston*, above n 65; MRAX, above n 14, and Case C–50/00 *Unión de Pequeños Agricultores* [2002] ECR I–6677.

[80] See also S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' [2001] *European Journal of Migration and Law* 141.

[81] See the Opinions of Kokott AG in Case C–503/03 *Commission v Spain*, above n 11, at para 42 and of Ruiz-Jarabo Colomer AG in Case C–176/03, *Commission v Council* [2005] ECR I-7879, at para 68. See also the CFI in Case T–177/01 *Jégo-Quéré* [2002] ECR II–2365, at paras 41–42, and Case T–116/01 P&O *European Ferries v European Commission* [2003] ECR II–2957, at para 209.

[82] Amendment 45 to the Kreissl-Dörfler Report, A6–0222/2005, 29 June 2005.

2003/86), the ECJ made it clear that Member States are bound to observe the principles as recognised in the EU Charter, including the right to family life as protected in Article 7.[83] The ECJ referred in this judgment to the fact that in the second recital of the preamble to the Family Reunification Directive, the EC legislator itself acknowledged the importance of the Charter.

Relationship between the General Principle and Secondary Legislation

The principle that the enjoyment of Community rights requires the Member States to provide for effective judicial scrutiny of decisions affecting those rights is important for the assessment of the national implementation of EC immigration and asylum law. The mere availability of legal remedies will not be sufficient to meet the criteria set by the ECJ and included in Article 47 of the EU Charter. The general principle and criteria on effective remedies may overrule the provisions in specific EC instruments if these offer less protection to the individual concerned. This was clarified by the ECJ in the *Siples* judgment of 2001, which concerned the interpretation of Article 243 of the Community Customs Code (Regulation 2913/92).[84] This provision conferred the power to suspend implementation of contested decisions exclusively on the national customs authorities. National courts were excluded from granting interim relief. The ECJ concluded that weaker provisions in the EC Customs Code should be interpreted in accordance with the more general principle on legal protection. In its judgment, the ECJ explicitly stated that the provision in the Community Code 'cannot limit the right to effective judicial protection'. According to the ECJ, a court having to decide on a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. In this judgment, the ECJ repeats that this requirement of judicial review of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR. Further, it was confirmed by the ECJ in the *Factortame* case that effective protection of Community rights generally requires the availability of interim relief before national courts against measures of Member States alleged to infringe Treaty norms.[85]

[83] Case C–540/03, *European Parliament v Council* (not yet reported but see information in [2006] OJ C 190/1), at paras 38 and 58

[84] Case C–226/99 *Siples Sr,* judgment of 11 Jan 2001 (not yet reported), paras 17–19.

[85] Case C–213/89 *Factortame* [1990] ECR I-2433. See further Cases C–92/89 *Zuckerfabrik* [1991] ECR I–415 and C–465/93 *Atlanta* [1995] ECR I–3761.

THE THIRD PRINCIPLE: EFFECTIVE REMEDIES TO ENSURE A UNIFORM AND CLEAR INTERPRETATION OF EU LAW

Preliminary Proceedings: the Responsibility of National Judges and Legislators

On the basis of Article 234 EC Treaty, the ECJ has jurisdiction to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of Community acts. National courts may request the ECJ to give such a preliminary ruling if they consider this necessary for their own judgments. National courts against whose decision there is no judicial remedy should in this case on the basis of Article 234(2) always forward a preliminary request to the ECJ. Article 68 EC Treaty applies to the instruments adopted under Title IV EC Treaty.[86]

The system of preliminary references ensures a clear and coherent interpretation of Community law. On the one hand, this system requires the ECJ to analyse the legal problems under Community law, submitted by national courts, and to provide a generally applicable interpretation. On the other hand, it places an obligation on national courts to ensure that when an issue of Community law is at stake and needs to be clarified, this issue is referred to the Community Court. For national courts this 'principle of effectiveness' means a duty to ensure full application and uniform interpretation of Community law and to eliminate the unlawful consequences of a breach of Community law either directly or by ensuring effective compensation for the damage resulting from it.[87]

The legal system envisaged in Article 234 also implies the duty of Member States to establish a system of legal remedies and procedures which ensures respect for the right to effective judicial protection. In the judgment in *Unión de Pequeños Agricultores* (25 July 2002), the ECJ explicitly emphasised that the communitarian system of judicial control, in which national courts can or should refer a preliminary question to the ECJ on the validity of acts of the institutions, requires Member States to provide for legal remedies and procedures.[88] Referring to the provisions in Articles 173 (now Article 230) and 184 (now Article 241) of the EC Treaty on the one hand, and Article 177 (now Article 234) of the EC Treaty on the other, the ECJ reasoned that the Treaty has established a 'complete system of legal remedies and procedures designed to ensure judicial review

[86] For a detailed analysis of the ECJ jurisdiction over measures adopted under Ttitle IV EC Treaty see Ch 3.

[87] J Temple Lang, 'The Principle of Effective Protection of Community Law Rights' in D O'Keeffe (ed), *Judicial Review in European Union Law* (The Hague, Kluwer, 2000) at 136–8 and 235.

[88] *Unión de Pequeños Agricultores*, above n 79.

of the legality of acts of the institutions, and has entrusted such review to the Community Courts'. This obligation of national courts and authorities to ensure that the system of legal remedies described by the ECJ works can also be based on the principle of co-operation, as provided for in Article 10 (formerly Article 5) of the EC Treaty.[89] According to Article 10, Member States should take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community and facilitate the achievement of the Community's tasks. Under certain circumstances, the failure of a national court to use its power to make a preliminary reference under Article 234 EC Treaty could give rise to a right to reparation against the Member State concerned.[90]

The judgment in *Unión de Pequeños Agricultores* has led to the inclusion of a new provision in Article I-29 of the draft Constitutional Treaty on the tasks and organisation of the Court of Justice. This new provision links the competence of national courts to forward preliminary questions to the ECJ to the obligation of Member States to provide judicial remedies. The first sentence of Article I-29(1) describes the general task of the ECJ to 'ensure that in the interpretation and the application of the Constitution the law is observed'. The second sentence of Article I-29(1) codifies the case law of the ECJ requiring the Member States to provide 'rights of appeal sufficient to ensure effective legal protection in the field of Union law'.

The necessity of effective remedies to safeguard the mechanism of preliminary references has been acknowledged with regard to the implementation of EC immigration and asylum law in the Recitals of Directive 2005/85 on minimum standards in asylum procedures (see above). In Recital 27 of the Directive, the drafters explicitly linked the availability of effective remedies at national level to the requirements of Article 234 EC Treaty. According to the Recital:

> It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State as a whole.

The reasoning of the Recital is not limited to asylum procedures, but also applies to procedures concerning the rights and obligations in other instruments adopted under Title IV of the EC Treaty. In its judgment of June 2006 on the Family Reunification Directive, mentioned above, the

[89] *Factortame*, above n 85, para 19.
[90] See Case C–224/01 *Köbler* [2003] ECR I–10239.

ECJ explicitly urged national courts to forward preliminary questions whenever they encounter difficulties relating to the interpretation or validity of the Directive.[91]

National Courts which Fall within the Meaning of Article 234 EC Treaty

In different judgments in which the ECJ had to deal with the question of the admissibility of a preliminary request by a national authority, the Court applied a number of factors to assess whether the national authority had to be considered a 'court or tribunal' within the meaning of Article 234, formerly Article 177, EC Treaty.[92] These factors can be considered a minimum set of criteria for what the ECJ considers to be an authority or body which is able to offer the effective judicial protection required in the EU legal system described above. They include:

— that the authority or body should be established by law;
— the permanence of the authority or body;
— compulsory jurisdiction;
— adversarial proceedings (inter partes);
— the application of the rule of law; and
— the independence of the authority or body.

In *Commission v Austria*, the ECJ further emphasised the importance of the right to judicial remedies..[93] In this case, in which the refuted decision of the Austrian authorities was reviewed only by an independent advisory board of experts, the ECJ concluded that the criteria of Article 234 were not met as this board lacked true decision-making powers. Finally, in different judgments the ECJ has held that national courts should be able to suspend the refuted national measure when the legality of this measure is challenged through preliminary proceedings:

> The coherence of the system of interim legal protection requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community Regulation, the legality of which is contested.[94]

[91] *Parliament v Council*, above n 24, para 106.
[92] See amongst others Cases C–195/98 *Österreichischer Gewerkschaftbund* [2002] ECR I–10497; C–54/96 *Dorsch Consult* [1997] ECR I–4961; and C–407/98 *Abrahamsson* [2000] ECR I–05539.
[93] Case C–424/99 [2001] ECR I–9285.
[94] *Zuckerfabrik*, above n 85. See Dougan, above n 72, at 321.

CONCLUSIONS

Since the adoption of the Tampere Conclusions in 1999, EU law has gone through developments which have influenced the field of immigration and asylum law significantly. National legislators can no longer claim that this field of law is a matter of national sovereignty only. Member States are obliged to adapt their national legislation to the provisions of Directives adopted on the basis of Title IV of the EC Treaty, the implementation deadlines of most of which have now passed. In general, these instruments on immigration and asylum law include a right to legal remedies. However, the wording of these provisions is not very precise and the implementation of these rights is, therefore, dependent on the 'goodwill' of national legislators.

In the previous sections, I have argued that the vague references to 'the right to legal remedies' or 'to mount a legal challenge' in EC instruments on immigration and asylum law should not be considered an empty box. They have to be implemented in accordance with the general principles of EU law. The first principle is based on the incorporation of human rights, and in particular the ECHR, into the legal framework of the EU. The criteria developed by the ECtHR on the right to effective legal remedies, and which have been incorporated into Article 47 of the EU Charter of fundamental rights, are to be considered guidelines for the implementation of EU immigration and asylum law whenever these rights are at stake. Secondly, in its case law, the ECJ explicitly linked the right to judicial protection to the principle that individuals should be able to enforce their rights as conferred by Community law. To recall the conclusion of the ECJ in the *Panayotova* case, Member States should, therefore, provide for 'effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law'.

Thirdly, the legal system of the Community, including the mechanism of preliminary proceedings, is closely connected to the duty of Member States to provide for effective judicial procedures in order to enable both national courts and the ECJ to safeguard a coherent and clear interpretation of Community law. As we have seen above, the criteria developed by the ECJ on the basis of these general principles go much further than the rules adopted in the Title IV instruments. National legislators should take *these* criteria, and not the vague wordings in the Title IV instruments, into account when implementing EC law or adopting new measures.

3

The Jurisdiction of the Court of Justice Over EC Immigration and Asylum Law: Time For a Change?

STEVE PEERS

INTRODUCTION

THE EFFECTIVE APPLICATION in practice of any set of legal rules depends to a large degree on the judicial system established (if one is established) to rule on the interpretation, validity, legal effect and enforcement of those rules. This is particularly true of immigration and asylum law, where the tension between executive discretion and popular indignation on the one hand, and judicial independence and effective protection of individual rights on the other hand has often become acute.

Within the EU's legal order, an increasingly complex judicial system has been created to ensure the uniform interpretation, effective enforcement and sufficient judicial review of EU measures. But this system has, to date, been curtailed as regards EC immigration and asylum law. The purpose of this chapter is to analyse and critique the current judicial system established to govern the interpretation, enforcement and review of EC immigration and asylum law. It will be seen that there is an enforceable legal obligation to amend the current rules on the Court of Justice's jurisdiction over immigration and asylum law, and that there is no sufficient justification for the current curtailment of the Court's jurisdiction in this area.

Admittedly, any change in the Court's current jurisdiction is likely to lead to an increased number of cases, which will need to be judged relatively quickly. In a companion paper, I argue that it is possible that the EU can accomplish this objective with relatively modest reforms to the current judicial system, but if not, there are more radical options available that can accomplish the objective of ensuring a speedy resolution of asylum

and immigration cases without fragmenting the EU judicial system or damaging the unformity and effective enforcement of EU law.[1]

THE CURRENT JUDICIAL FRAMEWORK

The EU Judicial System: An Overview

The EU's Courts have three core areas of jurisdiction under the EC Treaty: the power to answer questions sent from national courts requesting preliminary rulings on the validity or interpretation of EC law;[2] the power to rule in infringement actions brought by the Commission against Member States alleging breaches of EC law;[3] and the power to rule on the legality of EC law in direct actions, arguing for the annulment of EC institutions' acts and/or claiming damages as a consequence of the EC institutions' breach of their contractual or non-contractual liability.[4]

Jurisdiction in all these cases was initially awarded to a single Court, the Court of Justice.[5] By the 1980s this Court was overloaded with cases, and so the Single European Act authorised the Council to establish a Court of First Instance (CFI) to assist with the Court of Justice's workload. At present, the CFI (established in 1989) has jurisdiction (subject to an appeal against its judgments to the Court of Justice) over all cases brought by natural or legal persons against EC institutions or bodies (and by EC institutions against natural or legal persons), and most actions brought by Member States against acts of the Commission and the Council adopting implementing measures.[6] The Court of Justice retains jurisdiction over references from national courts, infringment actions, appeals from judgments of the CFI, and annulment actions brought between EU institutions or bodies (such as the Commission suing the Council) or brought by Member States against essentially legislative acts adopted by the Council (or by the Council and the European Parliament jointly). Also, pursuant to the most recent amendments to the EU courts' jurisdiction made by the Treaty of Nice, the Council can establish 'judicial panels' with jurisdiction 'to hear and determine at first instance certain classes of action or

[1] S Peers, 'The Future of the EU Judicial System and EC Immigration and Asylum Law' [2005] *European Journal of Migration and* Law 263.

[2] Art 234 EC Treaty.

[3] Art 226 EC Treaty.

[4] Arts 230, 235 and 288 EC Treaty.

[5] I refrain from referring to the Court of Justice as the 'European Court of Justice' or 'ECJ' because, although those terms are in wide practical use, they are not legally accurate. The Treaties refer instead to the 'Court of Justice' or the 'Court of Justice of the European Communities'.

[6] Art 225 EC Treaty; see the most recent amendments to the Court Statute ([2004] OJ L 132/5).

proceeding brought in specific areas'.[7] Only one such panel has so far been established: the European Civil Service Tribunal, with jurisdiction over staff disputes.[8] Appeals from the judicial panels go to the CFI, and the CFI's judgments as an appeal court can be reviewed by the Court of Justice only 'exceptionally … where there is a serious risk of the unity or consistency of Community law being affected'.[9] The Council also has the power to transfer jurisdiction from the Court of Justice to the CFI over all remaining direct actions, and over preliminary rulings in 'specific areas'.

As for the Court's jurisdiction over Justice and Home Affairs (JHA), the Maastricht Treaty initially gave the Court potential jurisdiction (to be negotiated on a case-by-case basis) over treaties concluded by the Member States on JHA matters;[10] this came on top of the Court's jurisdiction over previous civil law treaties (the Brussels Convention on conflicts of jurisdiction and recognition of judgments, where the Court had had jurisdiction since 1975,[11] and the Rome Convention on conflict of law in contract, where Protocols awarding the Court jurisdiction had been signed in 1989).[12] Subsequently, the Treaty of Amsterdam gave the Court jurisdiction over all JHA measures, split between the issues of immigration, asylum and civil law, dealt with as Community law from the entry into force of the new Treaty,[13] and the issues of policing and criminal law.[14] But jurisdiction over each of these matters was subject to special rules.

The proposed Constitutional Treaty would, if ratified, extend the EU Courts' 'normal' jurisdiction to all JHA matters (apart from a limited restriction retained for policing issues).[15] But, of course, its ratification does not look likely for the foreseeable future.

[7] Arts 225(3) and 225a EC Treaty, as amended and inserted by the Treaty of Nice. On these and the other reforms to the EC judicial system resulting from the Treaty of Nice see A Dashwood and A Johnston (eds), *The Future of the Judicial System of the European Union* (Oxford, Hart, 2001); A Johnston, 'Judicial Reform and the Treaty of Nice' (2001) 38 *CML Rev* 499; and P Kapteyn, 'Reflections on the Future of the Judicial System of the European Union after Nice' (2001) 20 *Yearbook of European Law* 173.

[8] [2004] OJ L 333/7; the Tribunal began operations in Dec 2005 ([2005] OJ L 325/1).

[9] Arts 225(2) and (3) and 225a EC Treaty.

[10] Art K.3(2)(c) of the EU Treaty (subsequently repealed by the Treaty of Amsterdam).

[11] See consolidated text of the Convention and Protocols [1998] OJ C 27/1.

[12] See the consolidated text of the Convention ([1998]OJ C 27/34) and the relevant Protocols ([1989] OJ L 48/1).

[13] Art 68 EC Treaty.

[14] Art 35 EU Treaty.

[15] Art III-377 of the Constitutional Treaty [2004] OJ C 310/1.

The Judicial System for EC Immigration and Asylum Law[16]

The special rules governing the EU Courts' jurisdiction over immigration, asylum and civil law are presently set out in Article 68 EC Treaty. Article 68(1) provides that Article 234 EC Treaty, concerning preliminary rulings from national courts, applies in the following way to these issues, which fall within the scope of a special Title in the EC Treaty ('Title IV'):

> [W]here a question on the interpretation of this title or on the validity or the interpretation of the acts of the institutions of the Community based on this title is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on a question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

This compares with Article 234, the second and third paragraphs of which provide as follows:

> Where a question [on the interpretation of this Treaty or on the validity or the interpretation of the acts of the Community institutions and of the European Central Bank] is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on a question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Furthermore, Article 68(2) and (3) provide that:

> In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) [EC Treaty] relating to the maintenance of law and order and the safeguarding of internal security.
>
> The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of the acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

[16] On the specific rules applicable to the Court's jurisdiction in this area see particularly E Guild and S Peers, 'Deference or Defiance? The Court of Justice's Jurisdiction over Immigration and Asylum' in E Guild and C Harlow (eds), *Implementing Amsterdam* (Oxford, Hart, 2001) 267; S Peers, 'Who's Judging the Watchmen?: The Judicial System of the Area of Freedom Security and Justice' (1998) 18 *Yearbook of European Law* 337; and P Eeckhout, 'The European Court of Justice and the "Area of Freedom, Security and Justice": Challenges and Problems' in D O'Keeffe (ed), *Liber Americorum in Honour of Lord Slynn of Hadley, Volume 1* (The Hague, Kluwer, 2001) 153.

These rules are unique, as there are no similar special rules relating to the Court of Justice in the EC Treaty. However, Article 67(2) provides that:

> After this period of five years:
>
> —the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;
>
> —the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

Furthermore, a Declaration in the Final Act of the Treaty of Amsterdam stated:

> The [inter-governmental] Conference agrees that the Council will examine the elements of the decision referred to in Article [67(2)], second indent, of the [EC] Treaty … before the end of the five year period referred to in Article [67] with a view to taking and applying this decision immediately after the end of that period.

Although the judicial system applicable to immigration and asylum law was discussed during the negotiation of the Treaty of Nice, the final text of that Treaty made no amendments to the rules.[17] Declaration 5 in the Final Act to that Treaty sets out political commitments relating to Council decisions to be adopted pursuant to Article 67(2) relating to decision-making on Title IV measures, but made no reference to the Court's jurisdiction.

No Council Decision amending the jurisdiction of the Court of Justice was made on 1 May 2004 or at any point up to 1 February 2007. The issue was discussed during negotiations for the 'Hague Programme' for the future of JHA law, adopted by the European Council on 5 November 2004, which called upon the Council to change the decision-making rules regarding all issues except legal migration by 1 April 2005.[18] But the Dutch Presidency of the Council rejected any move to change the jurisdiction of the Court of Justice, on the ground that 'at the moment the Court's workload would not allow for treatment of asylum cases within acceptable delays'.[19] The Hague Programme does state that the European Council is 'satisfied that the Constitutional Treaty greatly increases the powers' of the

[17] [2001] OJ C 80/1. On the Treaty of Nice negotiations, see ch 2 of S Peers and N Rogers, *EU Immigration and Asylum Law: Text and Commentary* (Leiden, Martinus Nijhoff, 2006).

[18] [2005] OJ C 53/1. In fact, the Council implemented this change by 1 Jan 2005: see [2004] OJ L 396/45. On the changes to decision-making rules see S Peers, 'Transforming Decision-Making on EC Immigration and Asylum Law' (2005) 30 *EL Rev* 283.

[19] Summary of remarks of the Dutch Justice Minister, Council doc 13502/04, 18 Oct 2004.

Court of Justice on JHA matters, and observes that 'it is necessary to enable the Court to respond quickly as required by Article III-369' of that Treaty.

> In this context, with the Constitutional Treaty in prospect, thought should be given to creating a solution for the speedy and appropriate handling for requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes [*sic*] of the Court. The Commission is invited to bring forward—after consultation of the Court of Justice—a proposal to that effect.[20]

No date was given for this, and it was not clear whether this would take place before or after the Constitutional Treaty came into force.

Subsequently, the Action Plan on implementation of the Hague Programme stated that the Commission will make a proposal on this issue in 2006,[21] and the Commission issued a proposal in summer 2006 for a Council Decision which would apply the normal rules on the Court's jurisdiction to EC visas, borders, immigration, asylum and civil law.[22] It remains to be seen whether the Council will adopt this Decision.

The EC Judicial System in Practice

The Court had, by 15 October 2006, received only three references from national courts concerning Title IV immigration or asylum measures. The first two of these cases were inadmissible, as they were referred from lower national courts (in fact, it was not even established whether the referring body in *Dem'Yanenko* was a 'court or tribunal' for the purposes of EC law at all).[23] The third case was the subject of a judgment in the second half of 2006.[24] By the same date, the Court had received 14 references on Title IV

[20] Above n 18, point 3.1.
[21] [2005] OJ C 198/1, point 1.3.
[22] COM(2006)346, 28 June 2006.
[23] Cases C–51/03 *Georgescu*, concerning the visa list Reg, [2004] ECR I–3203, and C–45/03 *Dem'Yanenko*, concerning the procedural rights during explusion of a person holding a Schengen visa, order of 18 Mar 2004 (unreported). The questions were referred respectively by the Amtsgericht Löbau and the Tribunale di Catania.
[24] Case C–241/05 *Bot*, judgment of 3 Oct 2006, referred by the Conseil d'Etat (France), concerning the Schengen freedom to travel rules.

civil law matters, of which six had already resulted in judgments,[25] one was withdrawn,[26] five were pending,[27] and two had been found inadmissible because they had been referred by lower courts.[28] The Court had also received a reference from a Belgian court incidentally concerning the 1995 version of the visa list Regulation.[29]

As for infringement proceedings, in late 2004 the Commission brought 13 cases to the Court concerning various Member States' failure to implement the first three Title IV Directives,[30] resulting in six judgments against Member States;[31] the other seven cases were withdrawn, presumably because the relevant Member States finally implemented the Directives.[32] Five further infringement proceedings were brought before the

[25] Cases C–443/03 *Leffler* [2005] ECR I–9611; C–1/04 *Staubitz-Schreiber,* judgment of 17 Jan 2006 (not yet reported); C–234/04 *Kapferer,* judgment of 16 Mar 2006 (not yet reported); C–341/04 *Eurofood,* judgment of 2 May 2006 (not yet reported); C–473/04 *Plumex,* judgment of 9 Feb 2006 (not yet reported); and C–103/05 *Reisch Montage,* judgment of 13 July 2006 (not yet reported). They were referred respectively by the Hoge Raad van Nederlanden, the Bundesgeritschof, the Landesgericht Innsbruck, the Supreme Court of Ireland, the Belgian Cour de Cassation, and the Austrian Oberster Gerichtshof. *Leffler* and *Plumex* concerned Council Reg 1348/2000 on service of documents [2004] OJ L 160/37; *Kapferer* and *Reisch Montage* concerned Council Reg 44/2001 on jurisdiction over civil and commercial disputes [2001] OJ L 12/1; and *Staubitz-Schreiber* and *Eurofood* concerned the interpretation of Council Reg 1346/2000 on conflict of law and jurisdiction in insolvency cases [2004] OJ L 160/1.

[26] Case C–387/04 *Donath,* referred by the Amstgericht Dresden, concerning the interpretation of *ibid* Council Reg 1346/2000

[27] Cases C–283/05 *ASML*, C–386/05 *Color Drack*, C–98/06 *Freeport*, C–175/06 *Tedesco and* C–180/06 *Ilsinger*. All except *Tedesco* concern Reg 44/2001, above n 25; *Tedesco* concerns the interpretation of Council Reg 1206/2001 on obtaining civil evidence [2001] OJ L 174/1. The first two cases were referred by the Austrian Oberster Gerichtshof; *Freeport* was referred by Sweden's Högsta Domstolen; *Tedesco* was referred by Italy's Tribunale Civile di Genova; and *Ilsinger* was referred by the Oberlandesgericht Wien.

[28] Cases C–24/02 *Marseille Fret* [2002] ECR I–3383 and C–555/03 *Ryanair* [2004] ECR I–6041. They were referred respectively by the Tribunal de Commerce de Marseilles and the Tribunal du Travail de Charleroi, and both concerned Council Reg 44/2001, above n 25.

[29] Case C–459/99 *MRAX* [2002] ECR I–6591.

[30] The relevant deadlines for implementation were (for the 'old' Member States) Dec 2002 for Dir 2001/40 on mutual recognition of explusion decisions [2001] OJ L 149/34 and Dir 2001/55 on temporary protection [2001] OJ L 212/12 and Feb 2003 for Dir 2001/51 on carrier sanctions [2001] OJ L 187/45.

[31] Cases C–454/04 *Commission v Luxembourg*, judgment of 2 June 2005, concerning Dir 2001/55; C–449/04 *Commission v Luxembourg,* judgment of 21 July 2005, concerning Dir 2001/51; C–462/04 *Commission v Italy*, judgment of 8 Sept 2005, concerning Dir 2001/40; C–448/04 *Commission v Luxembourg*, judgment of 8 Sept 2005, concerning Dir 2001/40; C–476/04 *Commission v Greece*, judgment of 17 Nov 2005, concerning Dir 2001/55; and C–455/04 *Commission v UK*, judgment of 23 Feb 2006, concerning Dir 2001/55, above n 30 (all not yet reported).

[32] Cases C–450/04 *Commission v France* (Dir 2001/40); C–451/04 *Commission v France* (Dir 2001/55); C–460/04 *Commission v Netherlands* (Dir 2001/51); C–461/04 *Commission v Netherlands* (Dir 2001/55); C–474/04 *Commission v Greece* (Dir 2001/40); C–515/04 *Commission v Belgium* (Dir 2001/55); and C–516/04 *Commission v Belgium* (Dir 2001/51).

Court early in 2006.[33] Three infringement proceedings on EC free movement law have incidentally concerned Title IV issues.[34] Annulment proceedings in this area to date consist of litigation between the EC institutions,[35] by the United Kingdom against the Council,[36] and by a private company against the Commission regarding its issue of a tender.[37] Several staff cases relating to integration of the Schengen Secretariat staff into the Council Secretariat were decided by the CFI.[38] Finally, the Court has delivered a ruling on a request for an Opinion pursuant to Article 300 EC Treaty on the question of EC external competence over a proposed civil law Convention.[39] But the Court has not received any 'requests for interpretation' pursuant to Article 68(3) EC Treaty, and no cases have raised the question of how to interpret the restriction on the Court's jurisdiction set out in Article 68(2) EC Treaty.

Interpreting the EC Judicial System

Of course, the special rules on the Court's jurisdiction set out in Article 68 EC Treaty have relevance only until the Constitutional Treaty is ratified, *if* it is ratified. But since, as observed above, the ratification of this Treaty appears unlikely, the current rules take on greater importance, and so a detailed interpretation of them is justified.

[33] Cases C–47/06 *Commission v Luxembourg*, C–72/06 *Commission v Greece*, C–75/06 *Commission v Portugal*, and C–102/06 *Commission v Austria* (on Dir 2003/9 on asylum-seekers' reception conditions [2003] OJ L 31/18), and C–48/06 *Commission v Luxembourg* (on Dir 2002/90 on facilitation of irregular entry and residence [2002] OJ L 328/17). In the meantime, deadlines have passed to implement the Dirs on family reunion (Oct 2005) and long-term residents (Jan 2006). By 15 Oct 2006, Case C–47/06 had been withdrawn, but the Commission had sued Belgium for failure to apply the Reception Conditions Dir (Case C–389/06, pending).

[34] See Cases C–157/03 *Commission v Spain* [2005] ECR I–2911, C–503/03 *Commission v Spain*, judgment of 31 Jan 2006 (not yet reported) and C–168/04 *Commission v Austria*, judgment of 21 Sept 2006 (not yet reported).

[35] Case C–257/01 *Commission v Council* [2005] ECR I–345 (upholding the validity of Regs 789/2001 and 790/2001 [2001] OJ L 116/2 and 5); Case C–540/03 *EP v Council*, judgment of 27 June 2006 (not yet reported) (upholding the validity of 3 provisions of Dir 2003/86 on family reunion [2003] OJ L 251/12); and Case C–133/06 *EP v Council*, pending (concerning the validity of 2 provisions of Dir 2005/85 on asylum procedures [2005] OJ L 326/13).

[36] Cases C–77 and 137/05, concerning the validity of the UK's exclusion from participation in Reg 2007/2004 [2004] OJ L 349/1 establishing an EU Borders Agency and Reg 2252/2004 [2004] OJ L 385/1 on inclusion of biometric details in passports.

[37] Case T–447/04 R *Cap Gemini v Commission*, Order of 31 Jan 2005. The case was subsequently withdrawn.

[38] Case T–107/99 R *Garcia de Retortillo v Council* [1999] ECR II–1939; Joined Cases T–164/99, 37/00 and 38/00 *Leroy and others v Council* [2001] ECR II–1819; and Case T–166/99 *Andres de Dios v Council* [2001] ECR II–1857.

[39] Opinion 1/2003, judgment of 7 Feb 2006 (not yet reported), concerning the proposed Lugano Convention.

I have already commented on the interpretation of Article 68 at length, when the Treaty of Amsterdam initially entered into force.[40] But given developments in the last seven years, it is time to examine the interpretation of the Article again. The focus is on Article 68(1), the limitation of references from national courts, given that Article 68(2) and (3) have not been relevant to date.

Five key questions concerning Article 68(1) arise. First, which courts or tribunals are covered by Article 68(1)? Secondly, do those courts have an *obligation* to refer questions, and in which circumstances? Thirdly, is (or was) the Council obliged to adapt the jurisdictional rules of the Court of Justice and, if so, at what point? Fourthly, if the Council is or was obliged to take such a decision, how can its obligation be enforced? Finally, how should the Court deal with cases that fall within more than one jurisdictional regime?

Which Courts or Tribunals?

On the first point, the underlying question is whether only the 'top' court (or courts) in each national judicial system is covered, or whether the court which is the final jurisdiction in each specific case is covered. The distinction is particularly important as regards immigration and asylum cases, in light of restrictions which Member States impose, or could impose in future, upon appeals from lower courts and tribunals. Furthermore, it is obviously particularly important for such cases because the lower courts and tribunals cannot send questions at all.

It seems clear from the case law of the Court of Justice that the national court with an obligation to refer under Article 234 EC Treaty is the final court in practice, even if that court is not a 'supreme' court within the relevant judicial system.[41] In recent years, the Court has made it clear that even a court which sits at first instance is obliged to refer questions to the Court of Justice, if it also sits at *last* instance.[42] However, the Court has also made it clear that where a system of leave to appeal to a supreme court is in place, the 'final' court is the court deciding upon the leave to

[40] Peers, above n 16.

[41] This conclusion is implied by the judgments in Joined Cases 28–30/62 *Da Costa* [1963] ECR 31 and Case 6/64 *Costa* [1964] ECR 565.

[42] Case C–18/02 *DFDS Torline* [2004] ECR I–1417. This case concerned the Brussels Convention, but it is clear from para 26 of the Opinion of Jacobs AG that the principle has broader relevance, for Art 68 in particular. See also the judgment in Case C–99/00 *Lyckeskog* [2002] ECR I–4839, para 15: 'supreme courts are bound by this obligation to refer … as is any other national court or tribunal against whose decisions there is no judicial remedy under national law', and paras 32–38 of the AG's Opinion in that case.

appeal.[43] There is no reason to doubt the application of these principles to Article 68, since that Article refers expressly to Article 234.[44]

An Obligation to Refer?

The second question is whether courts of last instance are obliged to refer questions which come before them to the Court of Justice under Article 68, just as they are under Article 234. Here it seems clear that the answer is yes, in particular because of the imperative word 'shall'. This interpretation is supported by the express cross-reference to Artice 234 in Article 68, by the underlying principle that no body of national case law inconsistent with EC law should come into being,[45] a ruling of the Court and the comments of an Advocate-General,[46] and the interpretation of this provision in academic literature.[47] It might be objected that the words 'where necessary', which appear in Article 68 but not in Article 234, require a different interpretation of the former provision.[48] However, this argument should be rejected because the Court of Justice has in any event ruled that the 'if necessary' condition already applies to Article 234.[49]

It might also be argued that the possibility of a 'request for interpretation' pursuant to Article 68(3) should affect the interpretation of Article 68(1), because divergence in the case law of national courts could be corrected by the means of such a request. But this argument should also be rejected, because there is no guarantee that the Commission, the Council

[43] *Ibid*, paras 16–19 of the judgment. The Opinion of the AG applies the principle more broadly: see paras 39–48.

[44] This interpretation is also confirmed by the literature: see K Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (The Hague, Kluwer, 2000) at 95; Peers, above n 16, at 356–7.

[45] See in particular para 15 of the *Lyckeskog* judgment, above n 42, with further references to Cases C–337/95 *Parfums Christian Dior* [1997] ECR I–6013 and 107/76 *Hoffmann-La Roche* [1977] ECR 577. See also Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] ECR 3723.

[46] Respectively *EP v Council*, above n 35, para 106 ('[i]f [national] courts encounter difficulties relating to the interpretation or validity of the [family reunion] Directive, it is incumbent upon them to refer a question to the Court of Justice …'), and n 74 of the Opinion in Case C–224/01 *Kobler* [2003] ECR I–10239. However, n 33 of the Opinion in Case C–50/00 P *UPA* [2002] ECR I–6677 and para 26 of the Opinion in *DFDS Torline*, n 42 above, are more ambiguous.

[47] S Da Lomba, *The Right to Seek Refugee Status in the European Union* (The Hague, Intersentia, 2004) 45; A Arnull, 'Taming the Beast? The Treaty of Amsterdam and the Court of Justice' in D O'Keeffe and P Twomey, *Legal Issues of the Amsterdam Treaty* (Oxford, Hart, 1999) 109, at 115–16; G Gaja, 'The Growing Variety of Procedures Concerning Preliminary Rulings' in *ibid*, 143, at 146–7; Eeckhout, above n 16, 155; A Albors-Llorens, 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam' (1998) 35 *CML Rev* 1273, at 1287; and Peers, above n 16, at 353.

[48] This argument is suggested by Hailbronner, above n 44, who nonetheless recognises an underlying obligation to refer.

[49] Case 283/81 *CILFIT* [1983] ECR 3415, para 10. Hailbronner, above n 48, does not consider the relevance of this point.

or a Member State will seek to correct such divergences by means of a request for interpretation.[50] Moreover, a request for interpretation, even if sent, is an inferior method of ensuring uniform interpretation of EC law, because it is less likely to *prevent* divergences in case law,[51] and the Court's answer to requests will not affect judgments which have become *res judicata*. In practical terms, this could mean that some persons might already have been returned to face persecution, torture or death, and the national judgments upholding such returns, while incorrect in light of the Court's interpretation of EC law, must still stand. This would be unacceptable in a Union founded on democracy, the rule of law and human rights.[52] For an individual, the use of Article 68(3) would, therefore, clearly not be an effective remedy from the perspective of the European Convention on Human Rights (ECHR) and the general principles of EC law. To avoid this, it is necessary to confirm the application to Title IV, in spite of the 'request for interpretation' power, of the Court's recent case law on Member States' liability for judicial error and that the possibility to reconsider incorrect administrative decisions in light of subsequent judgments of the Court of Justice equally applies to Title IV of the EC Treaty.[53] If anything, given the inability of lower courts to refer Title IV questions, the EC rules on liability for judicial error and on the ability to reopen administrative decisions after an erroneous judgment upholding them apply a fortiori in this area.[54]

Finally on the second question, what is the intensity of the obligation placed upon final courts? Although the Court of Justice, in its *CILFIT* judgment, set out limited circumstances according to which a final national court was not obliged to send references to the Court,[55] this discretion is subject to strict conditions which have not been weakened by the Court since.[56] There is no reason to doubt that the limits on this discretion apply

[50] See by analogy Case C–70/88 *EP v Council (Chernobyl)* [1990] ECR I–2041.

[51] There is nothing to limit the use of Art 68(3) to cases where divergent judgments have already been given, but the experience to date suggests that use of this power in advance of national judgments concerning EC legislation is unlikely.

[52] Art 6(1) and (2) EU Treaty.

[53] See *Kobler,* above n 46, Case C–129/00 *Commission v Italy* [2003] ECR I–14637 and Case C–453/00 *Kuhne and Heitz* [2004] ECR I–837.

[54] In fact it is clear from the Opinion in *Kobler,* above n 46, that the AG believes that state liability for judicial error applies equally to Art 68 (see paras 71–76 of the Opinion and related notes).

[55] *CILFIT,* above n 49, paras 11–21. See also *Da Costa*, *Hoffmann-La Roche* and *Parfums Christian Dior,* above nn 41 and 45 respectively.

[56] The question of weakening the conditions was raised in *Lyckeskog,* above n 42, and rejected by the AG, (paras 49–76 of the Opinion); it was not considered by the Court. The idea was also considered by the Working Group which considered the EU's judicial system prior to the negotiations of the Treaty of Nice (see the Group's Report published in Dashwood and Johnston, above n 7), but that Treaty did not amend Art 234. Nor would the Consitutional Treaty amend Art 234 on this point: see Art III-369 of that Treaty, above n 15.

equally to Article 68. Again, if anything, given the inability of lower courts to refer questions, this discretion should be even further limited in the case of Article 68.

An Obligation to Adapt Jurisdictional Rules?

This brings us to the third question: is the Council obliged to change the provisions of Article 67 and, if so, when? It appears clear from the use of the imperative word 'shall' that the Council has a legal obligation to act to amend the rules on the Court's jurisdiction pursuant to Article 67(2). This interpretation is supported by comparison with other provisions in the EC Treaty conferring power to change decision-making rules or altering the jurisdiction of the EU Courts, which use the word 'may',[57] and by Declaration 5 in the Final Act of the Treaty of Nice, which states expressly that the Council is obliged to act pursuant to Article 67(2) to change the decision-making rules. It cannot plausibly be argued that the word 'shall' in Article 67(2) simultaneously has two different meanings: obligatory as regards decision-making rules and permissive as regards the Court's jurisdiction.

Suprisingly, this apparently obvious interpretation was apparently called into question recently by the Court of Justice itself, which stated that the Council 'may' take a decision pursuant to Article 67(2).[58] This was not a translation error, as the French version of the Court's judgment also deviates from the text of the Treaty.[59] If the Court was purporting to interpret Article 67(2) in its judgment, then, with the greatest respect, the Court's interpretation is simply wrong, as a matter of fact, not opinion. The Court has no more jurisdiction to amend the EC Treaty than it does to rule that Luxembourg is the centre of the universe.

What is the material scope of the Council's obligation? The Treaty does not specify precisely what form the 'adapt(ation)' of the Court's jurisdiction must take. It would, arguably, be open to the Council to change the rules relating to civil law but not immigration or asylum law, although the better view is that, in the absence of any exceptions to the obligation to 'adapt' the rules, those rules must be amended as regards all of the subject-matter of Title IV. But it does seem open to the Council to change the rules to a system falling short of the 'normal' rules applying to the

[57] See Arts 137(2) and 175(2) EC Treaty (decision-making) and Arts 225(1) and 225a EC Treaty (Court jurisdiction). Also see Art 42 EU Treaty, also concerning JHA decision-making rules and drafted at the same time as Art 67(2) EC Treaty, according to which the Council 'may', not 'shall', act.

[58] Para 55 of the judgment in Case C–257/01 *Commission v Council*, above n 35.

[59] The judgment uses the word '*peut*', while the Treaty uses the words '*prend une décision*'. Compare with Arts 137(2), 175(2), 225(1) and 225a EC Treaty, and Art 42 EU Treaty; in all these cases the Treaties use the word '*peut*'.

Court's jurisdiction, perhaps by giving Member States discretion as to whether some or all lower courts have the facility to send references or by extending the possibility to refer to appeal courts only.

Next, what is the temporal scope of the Council's obligation? Could it be argued that the obligation to act '[a]fter' the five-year period is not subject to a precise deadline? This argument should be rejected because it contradicts the letter and context of the Treaty. Starting with the literal interpretation, as noted above, the five-year period referred to in Article 67(2) can only mean the 'transitional period of five years following the entry into force of the Treaty of Amsterdam' in Article 67(1), the provision which set out the decision-making rules which were applicable during that period. Next, Article 67(2) has two indents. It is the second indent which provides that the Council 'shall' change the decision-making procedure and 'adapt' the provisions on the Court of Justice 'after this period of five years'. The first indent provides for a default decision-making procedure for Title IV matters 'after this period of five years'. It is not plausible to argue, in the absence of any indication from the text or context of Article 67(2), that the words 'after this period of five years', which clearly apply to both indents, have an entirely different meaning in the context of the first indent from the one they have in the context of the second indent.

In practice, the Council, European Parliament (EP) and Commission have already interpreted the first indent to mean that the words 'after this period of five years' mean that, as from 1 May 2004, the institutions can adopt Title IV measures only in accordance with the rules in the first indent (except where a derogation from the decision-making rules as set out in Article 67(3), 67(4), 67(5) or the protocol on Article 67 applies). This is demonstrated by the consistent practice since 1 May 2004 of adopting only measures which were proposed by the Commission. In particular, the Council's interpretation is expressly set out in the preambles to the Directive on passenger data and the decision on joint expulsion flights (points 4 and 5 in the respective preambles), explaining the Council's reasons for not awaiting the opinion of the EP on those two proposals, and in the documentation leading up to the adoption of those measures.[60] There is no information to indicate that any Member State objected to this interpretation—in fact, these two measures, including their preambles interpreting Article 67(2), were adopted by the Council unanimously (although without the participation of Denmark).

Of course, it is true that mere practice by the institutions and the Member States does not constitute an authoritative interpretation of the Community Treaties.[61] However, there are overwhelmingly strong legal

[60] [2004] OJ L 261/ 24 and 28.
[61] Opinion 1/94 [1994] ECR I–5267.

arguments to support their interpretation of the first indent of Article 67(2). The strongest of these arguments is that, as already noted, the words '[a]fter this period of five years' in Article 67(2) can only refer to the words 'a transitional period of five years following the entry into force of the Treaty of Amsterdam' in Article 67(1). If the words '[a]fter this period of five years' meant that Article 67(2) applied only at *some time* after 1 May 2004, rather than *immediately* after 1 May 2004, then the words 'a transitional period of five years' in Article 67(1), which governs the interpretation of Article 67(2), would be deprived of their only plausible interpretation, because in that case the 'transitional period' would clearly last *longer* than five years.

This interpretation of the text is supported by the overall context of Article 67(2), which can be assessed, at least in part, by examining the intention of the drafters of the Treaty of Amsterdam.[62] It is arguable that in order to examine the intentions of the drafters, the Declarations in the Final Act of the Treaty can be taken into account. Although the Court of Justice has ruled that statements made in connection with EC legislation should not normally be taken into account when interpreting that legislation, the Court has, on the contrary, been willing to take into account declarations in the Final Act of Treaty amendments when assessing the origin of legislation in order to determine its context, with a view to interpreting that legislation.[63]

The first Declaration that should, therefore, be taken into account is Declaration 21 in the Final Act of the Treaty of Amsterdam. The second Declaration to take into account is Declaration 5 in the Final Act of the Treaty of Nice 'on Article 67 of the [EC] Treaty', considering that in the negotiation of the Treaty of Nice Article 67 EC was extensively discussed and eventually amended. This Declaration refers to 'the decision that [the Council] is required to take pursuant to the second indent of Article 67(2)', providing that the Council 'will decide, from 1 May 2004', to change the decision-making rules in certain areas, that it 'will' change the rules on decision-making as regards external borders conditional on certain developments, and that it 'will, moreover, endeavour' to change the decision-making rules applicable to other Title IV matters 'from 1 May 2004 or as soon as possible thereafter'.

Neither Declaration states unequivocally that the Council is bound to take a decision on 1 May 2004, although the latter Declaration assumes

[62] See paras 99–105 of the judgment in Case C–11/00 *Commission v ECB* [2003] ECR I–7147 and para 36 of the judgment in Case C–103/05 *Pupino* [2005] ECR I–5285.

[63] See paras 22 and 23 of the judgment in Case C–353/99 P *Hautala* [2001] ECR I–9565, which moreover endorsed the approach to Treaty declarations which the CFI has repeatedly applied in access to documents cases; see also Case C–192/99 *Kaur* [2001] ECR I–1237, where the Court took into account declarations to an Accession Treaty.

that the Council is obliged to act. However, both Declarations are consistent with that interpretation, and neither of them states unequivocally that the Council does not have to act at all on that date. In particular, both Declarations establish that in the context of the Treaties of Amsterdam and Nice, the Member States intended that the Council take a decision pursuant to Article 67(2) on 1 May 2004. Although the latter Declaration does refer to possible further use of Article 67(2) after 1 May 2004, this reference, in the context, suggests only that the Member States took the view that the powers in Article 67(2) remain open for further use after that date, following their initial obligatory use on that date.

This interpretation is further supported by Article 67(4) and (5) of the Treaty, and the Protocol on Article 67 inserted by the Treaty of Nice, which provides for qualified majority voting (QMV) to apply to Article 66 (which confers a power to adopt measures on administrative co-operation) '[f]rom 1 May 2004'. Article 67(4) refers to the adoption of certain visa rules pursuant to the co-decision procedure 'by derogation from paragraph 2, after a period of five years following the entry into force of the Treaty of Amsterdam'. The derogation from paragraph 2 can only mean a derogation from both indents of paragraph 2, in the absence of indication to the contrary; and the words 'a period of five years' must be interpreted consistently with the definition of the five-year period in paragraph 2 (as discussed above), since those words are defined by reference to paragraph 2. It follows that the Council must adopt legislation on those visa rules by use of the co-decision procedure immediately following 1 May 2004 without having to take a decision pursuant to Article 67(2), and indeed this is the interpretation of the Council, Commission and EP in practice.[64] Since Article 67(4) applies as from 1 May 2004, it would be inconsistent if the second indent of Article 67(2) did not apply as of the same date. Moreover, Article 67(4) informs the overall context of Article 67, in particular Article 67(2): the context is an intention and obligation to move to normal decision-making and jurisdictional procedures as soon as possible; and the earliest date possible is 1 May 2004.

Article 67(5), which concerns changes to decision-making concerning asylum and civil law, and the Protocol on Article 67, both inserted by the Treaty of Nice, also confirm that the context of Article 67(2) is an intention and obligation to move toward the application of the regular EC decision-making and jurisdiction rules as soon as possible. Interpreting Article 67(2) to require a decision from 1 May 2004 would be the interpretation most consistent with this overall context (and it would be

[64] Since 1 May 2004, a number of acts have been adopted pursuant to the co-decision procedure, starting with a Rec on the issue of short-term visas to researchers ([2005] OJ L 289/23) and Reg 2046/2005 on special rules for the Turin Winter Olympics ([2005] OJ L 334/1).

consistent with the Protocol in particular). Finally, an obligation to take an immediate decision under Article 67(2) is consistent with the five-year deadline for adoption of measures referred to at various points in Articles 61, 62 and 63, which set out the objectives of EC measures in this area and confer competence upon the EC to act. It follows that the Council was (and is) still obliged by Article 67(2) EC to adapt the role of the Court after 1 May 2004.

How Could that Obligation be Enforced?

This brings us to the fourth point: how can the Council's legal obligation be enforced? The only method to enforce the obligation appears to be an action for failure to act pursuant to Article 232 EC Treaty; the plaintiffs could be a Member State, the Commission or the European Parliament.[65] Such a dispute would be similar to the EP's essentially successful action concerning the Council's failure to adopt a common transport policy.[66] Following the interpretation of Article 67(2) advanced above, such a case should be both admissible and successful on the merits.

Cases of Overlapping Jurisdiction

Finally, on the fifth point, it is obvious that multiple jurisdictional regimes for references to the Court of Justice run the risk of fragmenting EC law at the national level.[67] It would be awkward for the Court, or its Advocates-General, to avoid taking all EU measures into account in their opinions or judgments, even if they do not, strictly speaking, have jurisdiction to consider some of those measures in the particular proceedings. In practice, they do not avoid such an approach, and several judgments or opinions have referred to Title IV acts, even though the cases were referred by lower courts, and/or by the courts of Member States which have opted out of some Title IV measures.[68]

[65] Natural or legal persons would lack standing since they need to show 'direct and individual concern' to invoke Art 232 EC Treaty: Case C–68/95 *T Port* [1996] ECR I–6065. Moreover, the EU Courts have exclusive jurisdiction over failure to act, ruling out a role for national courts: *ibid*.

[66] Case 13/83 *EP v Council* [1985] ECR 1513. See also Case C–445/93 *EP v Commission*, concerning the Commission's failure to propose measures implementing Art 7a EC Treaty (now Art 14), which was withdrawn after it was successful *politically* in inducing the Commission to propose such measures.

[67] There is also fragmentation at *EU* level to the extent that the judicial regime applicable to the 'third pillar' differs from the EC rules on annulment actions and dispute settlement/infringement.

[68] As regards immigration and asylum law, see the Opinions in Cases C–416/96 *El-Yassini* [1999] ECR I–1209; C–387/97 *Wijsenbeek* [1999] ECR I–3207; C–70/99 *Commission v Portugal* [2001] ECR I–4845; C–109/01 *Akrich* [2003] ECR I–9607; C–467/02 *Cetinkaya* [2004] ECR I–10895; and C–1/05 *Jia*, Judgment of 9 Jan 2007. See earlier references to

Is this appropriate?[69] Certainly it is in genuine cases of 'mixed jurisdiction', where the issues to be decided are interconnected and fall within the scope of more than one judicial regime, where it is arguable that a 'most favourable jurisdiction' rule applies to ensure that the Court of Justice is not prevented from dealing with cases which it would normally have the competence to address.[70] Also, the different rules on the Court's jurisdiction should not prevent the Court considering ancillary matters outside its jurisdiction where this is necessary to give judgment in a case which falls within its jurisdiction. Otherwise, the Court would be precluded from fully taking account of the relevant legal context when giving a ruling on cases over which it has jurisdiction. But the Court must take care that the main focus of its judgment in such cases remains the issue over which it has jurisdiction, and that the matters outside its jurisdiction are genuinely relevant to the matters within it. As for the differences in territorial scope of measures, there can be no objection to the Court of Justice interpreting general rules in light of specific rules applicable to some Member States only, as long as this does not have the effect of imposing the specific rules upon Member States which would otherwise not be covered by them. In such cases, the Court must make clear when its interpretation of a general EC measure in light of a specific measure is relevant to all Member States.

Critique of the Current EC Judicial System

The very limited numbers of references from national courts received by the Court of Justice to date concerning immigration and asylum law is not surprising, because as of February 2007, only a few EC measures in this field had been applicable for more than two years But nevertheless, the near-absence of cases is more surprising as regards the Schengen *acquis*, where a considerable body of law already exists, the Court has had jurisdiction to receive references as from May 1999 and there have already been a number of references concerning the criminal law aspects of the Schengen *acquis*.[71] It is also surprising as regards the 'Dublin II' asylum

pre-Amsterdam JHA measures in the Opinions in Cases C–257/99 *Barkoci and Malik* [2001] ECR I–6557and C–235/99 *Kondova* [2001] ECR I–6427. In Case C–237/02 *Panayatova* [2004] ECR I–11055, the AG asserted in a 'normal' EC law case that in principle he had jurisdiction to interpret the Schengen *acquis*. There are also examples of such references in civil law cases: see S Peers, *EU Justice and Home Affairs Law,* 2nd edn (Oxford, OUP, 2006), ch 2, s 4.2.

[69] See further *ibid*.

[70] On 'mixed jurisdiction' see Peers, above n 16, 397–9.

[71] Joined Cases C–187/01 *Gözütok* and C–385/01 *Brugge* [2003] ECR I–1345; Case C–469/03 *Miraglia* [2005] ECR I–2009; Case C–436/04 *Van Esbroek*, judgment of 9 Mar 2006 (not yet reported); pending Cases C–467/04 *Gaspardini* (Opinion of 15 June 2006), C–150/05 *Van Staten* (Opinion of 8 June 2006), C–288/05 *Kretzinger* and C–367/05

allocation rules, applicable since 1 September 2003. It can only be concluded that the limitation of reference powers to final courts has obviously substantially restricted access to the Court of Justice in practice.

This is confirmed by the statistics on the overall functioning of the procedure for references for a preliminary ruling, which confirm that a large majority of cases reaching the Court are referred from the lower national courts.[72] On the other hand, it could be argued that the absence of an ability for lower courts to refer questions to the Court of Justice should have limited impact, as long as it is possible for final courts to refer questions. But common sense suggests that the cost and delay of pursuing cases to the final courts in order to obtain a reference to the Court will deter many applicants from pursuing this course. This thesis can be tested empirically by examining the one issue which has been subject to different rules on the jurisdiction of the Court of Justice over the years: jurisidiction over civil and commercial matters and the related recognition of judgments. In this area, the Court's ability to receive references from final *and appeal* courts as regards the Brussels Convention, which governs these issues of civil and commercial jurisdiction and recognition of judgments, was replaced, as from 1 March 2002, with jurisdiction to receive references from final courts only on the replacement Regulation.[73] The results speak for themselves: from 1998 to 2005, the Court delivered an average of 4.9 judgments a year on the Convention.[74] In comparison, in the four years since the entry into force of the Regulation, the Court has received only six admissible references.[75] This is a rate of 1.5 cases a year, or less than one-third of the prior rate. It should also be recalled that since 1 May 2004, the Regulation has applied to 24 Member States, not 14. Of course, since the Regulation applies only to proceedings which were brought after its entry into force, the numbers of admissible references may well increase in future. But even if, improbably, the number of references on the replacement Regulation eventually matches that on the prior Convention (after making an adjustment for enlargement of the EU), all of the parties and national court systems in the relevant countries will have incurred extra costs and delays as a result of the current system.

Kraaijenbrink; and withdrawn Cases C–491/03 *Hiebeler* and C–272/05 *Bowens*, all concerning cross-border double jeopardy. The Court has also received references on third pillar Framework Decisions: *Pupino,* above n 62, Case C–303/05 *Advocaten voor de Wereld* and Case C–467/05 *Dell'Orto,* available at http://www.curia.europa.eu/en/transitpage.htm.

[72] See the 2004 Annual Report of the Court (available at http://www.curia.europa.eu/en/instit/presentationfr/index.htm), at 186–7.

[73] See above n 11 (Convention) and above n 25 (Reg 44/2001).

[74] This figure was derived from the 39 judgments and the one order on an admissible reference concerning the 'Judgments Convention' dated between 1 Feb 1998 and 31 Dec 2005, available at http://www.curia.europa.eu/en/transitpage.htm

[75] Above nn 25 and 27.

Of course, it can obviously be expected that the volume of cases reaching the Court from national courts will increase as more time passes after the deadlines for the implementation of important legislation, in particular the Directives on reception conditions for asylum seekers and family reunion (2005 deadline), on long-term residents and refugee/subsidiary protection status (2006 deadline) and on asylum procedures (2007 deadline). Again, this can be shown empirically by comparison with EC civil law measures, where the higher number of references to the Court of Justice can be explained by the earlier date of application of the relevant measures and the subsequent passage of time.[76]

So it is surely clear from the evidence to date that the Court will not receive significant numbers of references from national courts on immigration and asylum law until all national courts and tribunals can send references to it. Any thought that the jurisdiction over 'requests for interpretation' would make up for the limits on preliminary rulings jurisdiction has obviously also been disappointed to date, although it is possible that this power will be used in future as more legislation passes its date for transposition. As a result, there is no prospect that the Court can play a significant role in ensuring the uniform interpretation, effective enforcement and sufficient judicial review of EC immigration and asylum law until its jurisdiction is reformed.

What are the arguments against reform of its jurisdiction? In a paper written in the spring of 2000, Elspeth Guild and I considered this issue in detail.[77] Shortly beforehand, the two EU Courts had submitted a paper to EU justice ministers in 1999, in view of the then upcoming negotiations on the Treaty of Nice, suggesting potential changes to the EU judicial system in light of the Courts' then current workload and their anticipated future workload, which the Courts estimated would increase dramatically. The Courts' paper had stated that 'the specific nature of the rules in Title IV … justif[y] derogations from the principle that all courts and tribunals are to have the power to make references to the Court of Justice …'.[78] Neither the 'specific nature' of Title IV measures nor the reasons for justification of such 'derogations' was explained by the Courts. Our view was then that the case for allowing all national courts or tribunals to refer questions to the Court of Justice in order to ensure uniform intepretation of EC law and effective judicial protection, which had been identified by the Court of Justice as the main rationale for allowing all courts or tribunals to send it

[76] The references concern Reg 44/2001, in force since 1 Mar 2002; Reg 1348/2000, in force since 31 May 2001; Reg 1346/2000, in force since 31 May 2002 (above n 25); and most recently, Reg 1206/2001, in force since 1 Jan 2004 (above n 27).

[77] See Guild and Peers, above n 16, particularly at 284–7.

[78] *Report on The Future of the Judicial System of the European Union*, reprinted in Dashwood and Johnston, above n 7.

questions on EC law, was as strong as (or stronger than) the case for allowing such references in other cases. Furthermore, the Court's additional arguments for permitting all courts to refer, namely the need to establish case law ensuring uniform interpretation at an early stage and to avoid proceedings being appealed to final courts solely to get a reference to the Court, also applies equally to Title IV cases. The Courts' stress on the need to ensure uniform interpretation in the area of the internal market was also relevant to Title IV matters, and we also pointed out the potential difficulties arising from fragmented rules on the Court's jurisdiction.

Finally, we took issue with the discourse concerning a potential deluge of cases relating to immigration and asylum, which appeared to be the Courts' main concern, considering the stress in their paper on solving their current and (perceived) future overload of work. Such a discourse was inherently objectionable because of its similarity to the political arguments about immigrants 'swamping' natives, and in any event the reform of the EU's judicial system, then on the agenda of the Treaty of Nice negotiations, offered the opportunity to address the issue. First of all, in our view, the normal rules on the Court's jurisdiction should apply to Title IV cases, 'to see whether a "deluge" of cases is really going to happen', or 'whether the prospect is … mythical'. Following that, a special tribunal for immigration and asylum cases could be created 'only if there is genuine evidence of a build-up of immigration and asylum cases before the Court'.

Six years on, the sky has indeed not fallen. The Court's dire predictions from 1999 about the unmanageable flood of cases expected under its then current jurisdiction have proven to be wholly inaccurate,[79] with a *reduction* in the Court's case load between 1999 and 2002,[80] followed by a modest upturn in 2003 and 2004,[81] a further drop in 2005, and a modest upturn again in 2006.[82] The previous predictions, based on past trends continuing indefinitely, could now simply be reversed.[83] However, the workload of the CFI initially increased to some extent, although not to the same degree as predicted, and it has dropped in 2006, because the Civil

[79] See the Courts' paper, above n 78, at 117–22.

[80] Leaving aside a small number of special proceedings, there were 542 new cases registered in 1999, 501 cases in 2000, 502 cases in 2001 and only 472 cases in 2002, the lowest case load since 1997 (there were 443 cases in 1997 and 482 in 1998).

[81] There were 555 new cases registered in 2003 and 526 in 2004.

[82] There were 467 new cases registered in 2005 and 535 in 2006.

[83] Comparing 2003 (the high point to date for new cases) with 1999, the rate of increase was 0.6% a year, or 3.2 more cases a year. At this rate, it would be 2017 before the Court had to deal with 600 cases a year. Comparing 2005 with 1999, the case load *dropped* 13.8% from 1999 to 2005 (a rate of decline of 2.3% a year). Arithmetically if the Court continues to *lose* cases at the rate lost from 1999 to 2005 (12.5 cases a year), it would receive *no* cases by the year 2043! Even compared to 1997, the rate of increase to 2004 was only 3.2% annually, or 14.1 more cases each year.

Service Tribunal began operations at the end of 2005.[84] Although it is best, in light of this experience, not to make any predictions about the future of the Court's workload, it is manifestly clear that the workload stabilised from 1999 to at least 2006. In particular, the number of references for a preliminary ruling, which had reached a record in 1998 just before submission of the Courts' joint paper, has stabilised.[85] While the Court pointed to an 85 per cent increase in references from 1990 to 1998, we can see a 0.1 per cent decrease from 1995 to 2004 (or, comparing over an identical eight-year period, a 0.4 per cent decrease from 1996 to 2004).

Why did the deluge of cases (like the weapons of mass destruction or, more appropriately, the millions of scrounging Eastern Europeans) never arrive? A particular reason is that most of the 'growth areas' for litigation foreseen by the Courts and commentators in 1999 have yielded few or no cases since that date for the Court of Justice[86] or the CFI.[87] In particular,

[84] 361 cases in 1999, 389 in 2000, 336 in 2001, 402 in 2002, 443 in 2003, 507 in 2004, 462 in 2005, and 416 in 2006.

[85] The Court's 2004 annual report (at 183) lists the following figures for references since 1995: 251 (1995); 256 (1996); 239 (1997); 264 (1998); 255 (1999); 224 (2000); 237 (2001); 216 (2002); 210 (2003); and 249 (2004). The 2005 report (at 199) lists 221 references sent in 2005.

[86] The Courts' paper predicted that Title IV, monetary union, the post-Amsterdam third pillar and third pillar Conventions would be 'growth areas', along with fraud cases, the Central Bank and Court of Auditors' power to bring proceedings. By 31 May 2006, the Court had received few cases relating to any of these matters: 3 anti-fraud cases (Case C–167/02 P *Rothley v EP* [2004] ECR I–3149; Cases C–11/00 *Commission* v *ECB* and C–15/00 *Commission v European Investment Bank* [2003] ECR I–7147 and I–7281; and Case C–521/04 P *Tillack*, [2005] ECR I–3103); three monetary union cases (Case C–27/04 *Commission v Council* [2004] ECR I–6649, Case C–19/03 *VerbraucheR-Zentrale Hamburg* [2004] ECR I–8183 and C–359/05 *Estrager*, pending); and 10 references on the Schengen Convention criminal law provisions, one of which had been withdrawn (see n 71 above). It also received one appeal in a case against the ECB in 2000, one in 2001, three in 2002, one in 2003 (along with one case with the ECB as a plaintiff: Case C–220/03 *ECB v Germany*, judgment of 8 Dec 2005, not yet reported), and none in 2004, 2005 or 2006 (up to 31 May 2006). There were no cases on any other third pillar Conventions. In fact, only two of these Conventions entered into force before 2005 (the Europol Convention, in 1998, and the Convention on the EC's financial interests, in 2002), and the Conventions on the Customs Information System, mutual criminal assistance (with its Protocol) and corruption all entered into force only throughout the last half of 2005. Nor were there cases resulting from the Court of Auditors' power to bring proceedings. There were also no third pillar dispute settlement proceedings launched by Member States (an area noted by the Court as a potential source of workload). As for two specific civil law Conventions mentioned by the Court as a source of future workload, it has received no reference on either of them (the Brussels II Convention, converted into Reg 1347/2000 ([2000] OJ L 160/19), in force since 1 Mar 2001; and the Rome Convention on conflict of contract law, which became subject to the Court's jurisdiction only when the relevant Protocols to that Convention entered into force on 1 Aug 2004 (see [2004] OJ C 277/1).

[87] To 31 May 2006, there have been no cases concerning audits by the Court of Auditors; a small number of cases concerning the fight against fraud (apart from a handful of staff cases: see Case T–17/00 *Rothley and others v EP* [2002] ECR II–579; see interim measures ruling in [2000] ECR II–2085; Case T–29/03 *Comunidad Autonoma de Andulcia*, order of 13 July 2004, not yet reported; and order of 15 Oct 2004 in Case T–193/04 R, *Tillack*, not yet

the predictions of the volume of trade mark cases lodged before the CFI were far from realised.[88]

Furthermore, in addition to the stabilisation of *demand* for judgments of the Court of Justice, there has been a considerable increase in its capacity to *supply* judgments. The Court's entire 'wish-list' set out in its 1999 discussion paper as regards amendments to the Treaties and the two Courts' Rules of Procedure has been satisfied,[89] except for the appointment of additional judges to the CFI (although, of course, enlargement resulted in the appointment of 10 extra judges to that Court, and the European Civil Service Tribunal consists of seven judges who have taken over a portion of that Court's jurisdiction). In particular, as noted above, following the entry into force of the Treaty of Nice, the Council has the power to create first instance tribunals in specialised areas, with a decision on a staff tribunal already adopted,[90] and others could be created. These tribunals will reduce the first instance case load of the CFI, which will only hear appeals from such bodies, as well as the appellate case load of the Court of Justice, because further appeals to the Court of Justice in such cases will be permitted only 'exceptionally … where there is a serious risk of the unity or consistency of Community law being affected', according to the revised Article 225(2) EC Treaty. Furthermore, both Courts benefited from a 67 per cent increase in judges from spring 2004, following enlargement of the EU; it will be a long time, if ever, before enlargement by itself results in a 67 per cent increase in either Court's workload.[91] Remarkably, the Courts' 1999 paper had referred to enlargement only as a problem (a source of future workload), rather than part of the solution.

reported, confirmed by the ECJ Order in Case C–521/04 P, *ibid*, which suggests that challenges should be brought against national decisions in the national courts, not against OLAF in the EC courts); a handful of cases against the Central Bank (6 in 2000, 9 in 2001, 6 in 2002, 1 in 2003, 1 in 2004, 4 in 2005 and none in 2006 up to 31 May), almost entirely consisting of staff cases; 12 staff cases brought by Europol officials, 8 of which had been withdrawn and 4 of which had resulted in judgments (for further details see Peers, n 68 above, ch 2, sect 2.1.2.3); and 24 judgments of the CFI on access to documents in the 12 years since the relevant rules were first introduced (two judgments a year).

[88] A separate Court paper of 27 Apr 1999 (on file with author) on the impact of intellectual property litigation states 'it must . . . be expected that as from the year 2000 approximately 100 [trade mark] actions will be brought before the Court of First Instance', with 200–400 cases a year eventually. There were 34 cases brought in 2000, 37 in 2001, 83 in 2002, 100 in 2003 and 110 in 2004 (according to the Court's 2004 Annual Report, above n 72, at 193). According to the list of CFI cases on the ECJ website, 87 trade mark actions were brought in 2005 and 131 actions were brought in 2006.

[89] In addition to the Treaty of Nice amendments, see amendments to the ECJ Rules [2000] OJ L 122/41 and L 322/1, and the CFI rules [2000] OJ L 322/4. See further Part One, documents C.1 and C.2 and Part Two of Dashwood and Johnston, above n 7.

[90] Above n 8. It should be kept in mind that the Civil Service Tribunal now has jurisdiction as regards the staff cases against Europol and the ECB, two particular 'growth areas' of litigation which worried the Court in 1999.

[91] It should be recalled that although the number of Member States (and therefore judges on each Court) increased by 67%, the population of the enlarged Union increased by far less.

The combination of the stable flow of new cases, the increase in judges and the changes in its operation brought about by amendments to its Statute and its rules of procedure and changes in its working procedures resulted in the Court of Justice considerably increasing its efficiency in 2004. In particular, it was able to complete 30 per cent more cases and, for the first time in years, to reduce significantly the time taken to deliver its judgments for all types of proceedings.[92] However, the CFI did not achieve a parallel increase in its efficiency.[93] These trends were strengthened in 2005.[94]

So we can conclude from the evidence that the anticipated overload of the Court of Justice has not happened, and that, indeed, the Court's management of its case load is apparently improving significantly. The Court should, therefore, be able to cope with any modest increase in its workload that could result from asylum and immigration cases. But, of course, it is possible that the increase will *not* be modest, particularly if the 'normal' rules on the Court's jurisdiction are applied; and/or that a surge in the number of other cases reaching the Court will entail a resumption of steady increases in the burden of work it faces. In any event, even with the improvements of recent years, the Court is still far from able to give judgments within anywhere near the period of one year that many observers believe to be an acceptable time frame for its judgments, and it could further be argued that even a one-year delay is unacceptable in at least some cases concerning asylum and criminal law. There is, therefore, a need to examine possible changes in the EU's judicial framework to see how these concerns could be addressed.

As set out in the companion paper,[95] the best way forward on this point is to try first of all an ad hoc system of special procedures for JHA cases in the Court of Justice, such as simplified rules on translation of documents, coupled with general reforms to the judicial architecture to reduce the Court's workload, such as the creation of further specialist lower-tier courts, the transfer of further jurisdiction from the Court of Justice to the CFI, and the development of default judgment procedures for infringement proceedings. This could be followed, if genuinely necessary, by a transfer of some JHA cases to the CFI, a more radical reform of the EU judicial system (entailing particularly the replacement of the current infringement procedures by a system of Commission decisions, and the curtailment of Advocates-General), or the creation of specialist JHA courts at EU level whose decisions are subject to review by the Court of Justice.

[92] See particularly the Court's 2004 annual report, above n 74, 11–13.
[93] See *ibid*, 79.
[94] See Court press release 14/06, 13 Feb 2006.
[95] Above n 1.

CONCLUSIONS

The practice since 1999 shows that, due to the current restrictions upon its jurisdiction, the Court of Justice cannot make an effective contribution to the ensuring of uniform interpretation, effective enforcement or control of the legality of EC immigration and asylum law. As the then Advocate-General Jacobs has observed, 'the limitations on the jurisdiction of the Court under Article 68 EC Treaty and under Title VI of the Treaty on European Union—areas where the need for fundamental rights is of special importance—raise serious questions about the compatibility of the current status with the Charter and the ECHR'.[96] Other observers have raised comparable concerns.[97] The current position cannot be justified because of concerns about the EU Courts' workload, given the stabilisation of that workload since 1999, the effective measures which have been taken already to address it, and the further measures which could be taken to address it (or any further increase in workload) without sacrificing the basic principles upon which the Community legal order is founded. Moreover, the Council was legally obliged to amend the jurisdiction rules as of 1 May 2004, and has illegally failed to act for over two years.

It can only be concluded that, quite frankly, the current restrictions on the Court's jurisdiction are a disgraceful anomaly that must be corrected as soon as possible.

[96] F Jacobs 'Effective Judicial Protection of Individuals in the European Union, Now and in the Future' in M Andenas and J Usher (eds), *The Treaty of Nice, Enlargement and Constitutional Reform* (Oxford, Hart, 2003) 335, at 343.

[97] Da Lomba, above n 47, 45; Arnull, above n 47, 116; Eeckhout, above n 16, 155; Albors-Llorens, above n 47, at 1288 and 1292.

4

Impact Assessments: A Useful Tool for 'Better Lawmaking' in EU Migration Policy?

HELEN TONER*

INTRODUCTION

MUCH OF THIS volume focuses on and subjects to critical scrutiny and analysis many of the major legal instruments adopted since 1999, as well as considering associated policy plans, communications and such like. However, it is not just the final outcome of the legislation passed since 1999 that has been subject to critical scrutiny. The process of lawmaking itself has been the subject of significant discussion and critique. In particular, the exclusion of the European Parliament from co-decision in the lawmaking process was criticised as undemocratic, and has led to the exclusion and disempowerment of the Parliament during a critical time when the foundations of the EU's new framework of migration law was being laid in the passage of a number of key Directives and Regulations. The frequency of discussion throughout the rest of this volume and in other academic analysis of instances where Parliament had proposed amendments but was unsuccessful in pressing the point home into the final legislative text bears witness to this point. The use of unanimity voting in the Council has perhaps

* I am pleased to acknowledge the generosity of Warwick University in granting me study leave during which this work was finally completed, and to the Centre for Migration Law at the Radboud University, Nijmegen, for hosting me as a visiting researcher during that time. I am also grateful to several Commission and Parliament officials and administrators who took time to discuss some of these issues with me, both in specific interviews and more informally and spontaneously during academic conferences. Thanks go to Anne Meuwese for sharing her work with me, and for providing me, as a migration scholar, with some interesting insights into the rather separate world of Impact Assessment and comments on a draft of this chapter, and to Evelien Brouwer who helpfully shared some of her expertise on the Visa Information System with me.

justifiably been the subject of rather more mixed views: some feeling that it has slowed progress unnecessarily and enabled a few states to hold out and impose unacceptably low minimum standards simply in order to get agreement. On the other hand, it could equally be seen as a potential safeguard to be exercised by those few states wishing to hold out against a majority but not unanimous view in favour of regrettably low standards of rights and protection for third country nationals. There are also undeniable constitutional sensitivities involved in transferring legislative power to the EU over matters of immigration and asylum to be exercised on this Qualified Majority Voting (QMV) basis. These issues have largely been addressed however, and now most future decision-making[1] will be on the basis of QMV and co-decision,[2] and it is not the intention of this chapter to dwell on this at great length. Suffice it to say that whilst the greater involvement of Parliament certainly is, and the move to QMV may well be, changes that can be welcomed as long overdue improvements in the legislative process, it remains to be seen what, if anything, will change as a result of these altered lawmaking procedures. The completed Border Code[3] and almost completed Visa Information System (VIS)[4] Regulations may be encouraging early indications that Parliament is increasingly able to make some modest but significant improvements to legislation. The pending proposals on the Returns Directive,[5] Visa Code Regulation[6] and 'RABITs' (Rapid Border Intervention Teams) Regulation,[7] which remain at an earlier stage of consideration, as well as the next stage of the Common European Asylum System and any of the reviews of existing legislation which may come up with proposals for amendments to the existing legislative *acquis* in the coming years, will provide further tests of whether the potential of these procedures will be borne out in practice as they work their way through the scrutiny process.

[1] The main exception being legal migration.

[2] S Peers, 'Transforming Decision-making on EC Immigration and Asylum Law' (2005) 30 *ELRev* 283.

[3] Reg (EC) 562/2006 of the European Parliament and of the Council Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders [2006] OJ L 105/1.

[4] Proposal for a Reg of the European Parliament and of the Council Concerning the Visa Information System (VIS) and the exchange of Data Between Member States on Short-Stay Visas. The latest partially accessible Council document is 11632/06 of 13 July 2006. Two later documents concerning this draft are currently not accessible on the Council document registry: docs 12190/06 and 13861/06.

[5] Proposal for a Dir of the European Parliament and Council on Common Standards and Procedures in the Member States or Returning Illegally Staying Third Country Nationals, COM(2005)391.

[6] Proposal for a Reg of the European Parliament and of the Council Establishing a Community Code on Visas, COM(2006)403.

[7] Proposal for a Reg of the European Parliament and of the Council Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation (EC) 2007/2004 as Regards that Mechanism, COM(2006)401.

The main subject of this chapter is a somewhat different aspect of the lawmaking process. Readers of EU migration law may have noticed in the last few years the appearance of an entirely new kind of document—the 'Impact Assessment' accompanying draft legislative proposals and policy communications.[8] Impact Assessment and Better Regulation are very much central to the agenda in Brussels at the present time, and are 'buzz words' of the moment around the corridors of the EU Institutions. Striking up a conversation with the words 'Impact Assessment' almost always provokes a reaction: sometimes a surprisingly strong one. The new 'Integrated Impact Assessment' procedure is intended to bring together a wide range of assessment variables in one single document during the early stages of the legislative or policy-making process so that the final result is well informed as to the implications of the various options before any final choice is made between them. This technique, and its adoption by the Commission, has been the subject of increasing attention by academics and others since the inception of the 'Integrated' Impact Assessment programme from 2002,[9] but as yet little or no attention has been specifically directed to their use in

[8] The fact that an Impact Assessment has been carried out, and the reference to find the document, will be disclosed by the presence of an accompanying 'SEC' document. These are usually Impact Assessment documents, but not always, as other Commission staff working papers also appear as SEC documents.

[9] The literature might helpfully be split into three groups. First, general literature on the EU's Impact Assessment process and its links to the EU's 'better regulation' agenda: N Lee and C Kirkpatrick, 'A Pilot Study on the Quality of European Commission Extended Impact Assessments', Impact Assessment Research Centre Working Paper 8, Oct 2004; N Lee and C Kirkpatrick, 'Evidence-based Policy-making in Europe: an Evaluation of European Commission Integrated Impact Assessments' (2006) 24(1) *Impact Assessment and Project Appraisal* 23; A Meuwese, *Informing the EU Legislator through Impact Assessments*, paper presented at ECPR/CRI conference 'Frontiers of Regulation: Assessing Scholarly Debates and Policy Challenges', University of Bath, Sept 2006, forthcoming as 'Inter-institutionalising Impact Assessments'; A Renda, *Impact Assessment in the EU: The State of the Art and the Art of the State* (Brussels, Centre for European Policy Studies, 2006); G Mather and F Vibert, City Research Series from the European Policy Forum: No 2, *Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis* (July 2004); No 5, *Rebalancing UK and EU Regulation* (Apr 2005); No 9, *Evaluating Better Regulation* (Sept 2006); Institute for Miljøvurdering (Danish Environmental Assessment Institute), *Getting Proportions Right: How Far Should EU Impact Assessments Go?* (Copenhagen , Danish Enviromental Assessment Institute, 2006). Secondly, literature examining these issues specifically from an environmental perspective: C Opoku and A Jordan, 'Impact Assessment in the EU: a Global Sustainable Development Perspective', paper presented at the Berlin Conference on the Human Dimension of Global Environmental Change, Berlin, Dec 2004; D Wilkinson *et al, For Better or Worse? The EU's 'Better Regulation' Agenda and the Environment* (London/Brussles, Institute for European Environmental Policy, 2005). Finally, there is also a strand of literature focusing less on the EU's own Integrated Impact Assessment Procedure and more on a comparative perspective taking in different national Impact Assessment procedures also: see, eg, C Radaelli, 'The Diffusion of Regulatory Impact Analysis: Best Practice or Lesson-Drawing? (2004) 43 *European Journal of Political Research* 723.

the area of Freedom Security and Justice (FSJ)[10]—most of the literature is either general or concerns environmental protection. This chapter is intended to begin to bridge the gap between these two disciplines by explaining what these documents are, why and how they are being produced, how they fit into the broader picture of EU lawmaking processes and of the development of EU migration law. Fundamentally, they are a tool for 'better lawmaking', and this chapter will provide a brief but critical introductory assessment of whether and to what extent they have achieved or are likely to achieve this aim in the context of EU migration law and policy. The chapter begins with a brief introduction to the technique of Impact Assessment and its introduction by the Commission since 2002. It identifies in outline some criteria that may be used to evaluate Impact Assessment processes and reports. It then illustrates some of these points in more detail using, amongst others, some of the migration law Impact Assessments to do so. The chapter also reflects on the concept of 'better regulation'—the agenda underlying the Impact Assessment programme. It considers what this might mean in the context of migration law and policy and considers what, if any, role Impact Assessments may have to play in furthering 'better regulation' and 'better lawmaking' in the field of EU migration law and policy.

THE EU'S INTEGRATED IMPACT ASSESSMENT PROCEDURE

Impact Assessments: An Introduction

Many readers will not necessarily yet be fully familiar with the concept of Impact Assessment and its application in European Community law, so this introductory section gives an outline of developments so far, as of late 2006.

Impact Assessment is a mechanism whereby all the potential impacts of a wide range of proposed actions (whether building or other land use development, aid, legislation, regulation or policy measures) may be considered during the legislative and policy development process. EU Impact Assessment has had some history in a narrower, sectoral sense, with Impact Assessments being used to examine, for example, business or gender impact. The entire process entered a new era, however, with the

[10] For further rather more detailed discussion of the role of Impact Assessments in securing compliance with fundamental rights see H Toner 'Impact Assessments and Fundamental Rights Protection in EU Law' (2006) 31 *EL Rev* 316. Although there is clearly some significant overlap, in that securing compliance with fundamental rights is of particular importance in immigration and asylum law, that paper deals specifically with fundamental rights protection rather than migration law as such.

initial phased development of the programme of Integrated Impact Assessments in 2002,[11] and has continued to mature since then with an initial review and further development of the framework in 2004–5,[12] including new guidelines for the conduct of Impact Assessments,[13] and the full implementation of the programme in the legislative and policy drafting process from 2005. At this stage it is important to note that an Impact Assessment can now be expected for legislative proposals contained in the Work Programme, and for most significant policy communications, unless, for example, the primary document is a Green Paper intended to be the very earliest exploratory state of policy formation opening the agenda for a wide discussion before any concrete policy proposals are developed. The programme is, therefore, extensive, with each Directorate-General involved and significant numbers of Impact Assessments published each year.[14] The Impact Assessments themselves obviously vary in details of style and content but are carried out to a common general framework. They are intended to clarify the problem to be addressed, identify possible options, and evaluate the impacts of these various options across three different categories—economic, environmental and social. The 2002 Communication sets out the basic 'reporting format' covering (i) the issue/problem to be tackled; (ii) identification of the main objective(s); (iii) identification of the main possible policy options; (iv) what main impacts, both positive and negative, may be expected from pursuing each of these options; (v) how might the impacts be evaluated and monitored after implementation; (vi) stakeholder consultation; and (vii) the drafting of the legislative proposal or policy communication. The 2005 guidelines follow a very similar pattern although they include comparison of the options as step (v) and omit the final two issues of stakeholder consultation and drafting.[15] As noted, there had previously been some Impact Assessment work done at EU level, although split into particular sectoral schemes identifying particular types of impact (business, gender, equality, environment, etc).

[11] The main document setting out the aims and methods of the Commission's Impact Assessment procedure is the Commission Communication on Impact Assessment, COM(2002)276. It was accompanied by a *Handbook for Impact Assessment in the Commission* (Brussels, European Commission, 2002) which itself was accompanied by technical annexes to guide policy-makers.

[12] There was a review in 2004: Impact Assessment: Next Steps. In support of Competitiveness and Sustainable Development, SEC(2004)1377.

[13] The review resulted in updated guidelines in 2005—Impact Assessment Guidelines, SEC(2005)791, with accompanying annexes. A framework for administrative costs was discussed in 2005, and the guidelines updated in 2006 with an additional annexe addressing this point.

[14] The central Commission's Impact Assessment website can be found at www.ec.europa.eu/governance/impact/index_en.html, and a list of each year's Impact Assessment work is available at www.ec.europa.eu/governance/impact/practice_en.html.

[15] This however is not to say that consultation is not expected or that drafting the proposal or communication is not the culmination of the Impact Assessment process.

The aim of 'integrating' these impact assessments into one single document is to ensure that policy-makers and legislators have the fullest possible information on all of these potential impacts in one single document and can identify cross-cutting impacts or trade-offs that may have to be made between different costs and benefits. Immediately one might think perhaps of the possible 'trade-offs' between the benefit of minimising environmental impact versus the potentially negative economic impact on competitiveness of regulation to achieve this end, or proposed regulatory requirements suggested for the purposes of consumer protection[16] or health and safety,[17] which would have to be 'traded off' or balanced against the potential impact on businesses—often perceived in terms of negative impacts of compliance costs which may impair competitiveness. The Impact Assessment process and the resulting Impact Assessment Report are prepared by the Commission, sometimes with the assistance of reports compiled by external expert policy consultant agencies. Consultation with civil society (in particular NGOs and industry as appropriate) is intended to make sure that the widest possible range of views and voices is heard at an appropriately early stage in the drafting process, and this process of consultation should comply with the Commission's standards on consultation set out in its Communication on Consultation. The lead Directorate-General (DG) will vary with the subject-matter of the Impact Assessment, but with particularly high profile significant or 'cross-cutting' proposals (where significant aspects fall within areas of responsibility of different DGs) an Inter-Departmental steering group may be set up. There may indeed be some tension within the Commission if more than one DG wishes to be the 'lead' DG in relation to a cross-cutting proposal: this may have some significant consequences as it is to some extent inevitable that the way the problem is approached and formulated from the earliest stage may vary depending on the lead DG, and, despite inter-service consultation, this may have implications for how the Impact Assessment process proceeds. The Impact Assessment analysis and report are prepared and drafted by desk officers working on the particular dossier in question in the lead DG, but there is both a central Impact Assessment Unit (within the secretariat-general) performing a co-ordinating role and individual officials within DGs whose role is to provide support to those writing the Impact Assessment reports.

The Impact Assessment document is *not* intended to be a definitive decision on the shape or direction of policy or legislation; rather it is aimed

[16] A high profile consumer issue that has arisen is the Impact Assessment on Mobile Phone roaming charges, where the intention of the Reg is to protect consumers against what are seen as excessive charges for this 'cross-border' service.

[17] A high profile health and safety issue—also an environmental one—that has been subject to a heavily contested Impact Assessment process is the REACH Dir on chemicals.

at assisting those who make the final decisions, mainly in the Commission but also further on in the policy and legislative process. This kind of distinction is crucial to maintaining the proper channels of political accountability—especially in cases in which fundamental rights are affected, where it is important to have democratic legitimation of restrictive measures as well as independent judicial oversight. However, it is clear that the Impact Assessment may (indeed it usually does) identify a 'preferred' or 'optimal' option or approach. It has indeed been envisaged that this preferred approach (at least in a broad general sense) may even emerge at quite an early stage and that a significant part of the process then may be refining the details of that broad preferred policy approach.[18] The document then informs the process of legislative and policy drafting, in particular the process of drawing up Commission policy communications or proposals for legislation. It should be noted, however, that although the Impact Assessment process is to some extent meant to be a dynamic one through the policy development process, the Impact Assessment documents are published at the same time as the proposed Regulation, Directive or policy Communication, and the two are, therefore, presented externally as a single package. The Impact Assessment reports are all publicly available from the Commission document registry.[19]

Their relevance is not, however, exhausted at this stage. It is intended that Impact Assessments should be used and even produced by other institutions.[20] They may also be used to inform subsequent scrutiny of any legislative proposal by the Council, the European Parliament or national parliaments, and indeed by civil society, NGOs and industry and so on. The institutions have formulated a common approach to IA,[21] and there are indications that the Parliament and Council are both becoming increasingly aware of the need to engage with Commission Impact Assessments later in the legislative process. In terms of the subsequent use of Impact Assessment during parliamentary scrutiny, the Environment Committee seems to be something of a leader on this issue, certainly the most active so far. It currently operates a framework contract which involves preparation of policy briefs providing a summary analysis/critique of the Impact Assessment documents. This kind of mechanism has some interesting potential to act as a source of counter-expertise and to ensure that the Impact Assessment report is subjected to independent and, if necessary,

[18] Commission Communication on Impact Assessment, COM(2002)276 s 4 at 9.

[19] See the website addresses at n 14 above. Individual DGs may have individual webpages collecting together their own IA activities: see the DG FSJ page on Evaluation and Impact Assessment Activities.

[20] See Meuwese, above n 9, which discusses some of these issues further and is the source of some of the references and examples that follow.

[21] Inter-Institutional Common Approach to Impact Assessment, available at http://ec.europa.eu/governance/impact/docs/key_docs/ii_common_approach_to_ia_en.pdf.

critical analysis by suitably qualified experts, but there are obvious resource implications of rolling out this kind of approach more comprehensively. The LIBE Committee[22] is currently working on a report on the 'Fundamental Rights Monitoring Strategy' Communication[23] (which includes the use of Impact Assessments) which may address some of these issues and signal some discussion of practical steps to enhance engagement with Impact Assessments on the part of this particular Committee. This would be a welcome development both in terms of the potential for input into the work of other Committees to evaluate the adequacy of treatment of fundamental rights issues in other areas and in terms of the policy areas where it is the lead Committee including, of course, the FSJ agenda. It remains to be seen what the conclusions of this report will be. The Employment and Social Affairs Committee has also shown some interest in this issue, commissioning a report, published in January 2006,[24] on the analysis of Social Impacts within the Commission's Impact Assessment process in response to a perception that social impacts were under-analysed and not dealt with as well as economic impacts in the first years of the Impact Assessment programme. The Council has recently produced a document to guide working party chairs in the use of Impact Assessment reports.[25] It should be noted, however, that there is no formal mechanism for recourse back to the Commission in the event that the Impact Assessment should prove inadequate or incomplete. The Council and Parliament are also considerably behind the Commission in production of Impact Assessments, even though the Common Approach envisages that the Parliament and Council should prepare their own Impact Assessments of substantive amendments. Precisely what this means is unclear and likely to be politicised, and may be subject to far more difficulties in relation to resources and expertise than is the case within the Commission. Also, it could be observed that if the Commission has undertaken a comprehensive Impact Assessment this may (indeed perhaps should) already consider some of the more obvious directions which subsequent amendments might take. It should finally be noted that where Member States do retain their right to initiate legislation in the third pillar, there is no obligation to conduct an Impact Assessment when a Member State presents an initiative, although the Commission hopes that they will do so, and where the

[22] Committee on Civil Liberties, Justice and Home Affairs.

[23] Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: Methodology for Systematic and Rigorous Monitoring, COM(2005)172.

[24] C Crepaldi *et al, The Inclusion of Social Elements in Impact Assessment* (Milan, Istituto per la Ricerca Sociale, 2006). Published online as a meeting document for the European Parliament Employment and Social Affairs, Committee and available at http://www.europarl.europa.eu/meetdocs/2004_2009/organes/empl/empl_20060125_1500.htm.

[25] Council doc 9382/06, Handling Impact Assessments in Council: Indicative Guidance for Working Party Chairs.

Commission presents a third pillar measure in the Work Programme, the expectation of an Impact Assessment remains. Now that the first transitional period of shared initiative has reverted to the normal position that legislative proposals in immigration and asylum law will be presented by the Commission, this is of less direct relevance for these areas, although of course the relationship between first and third pillar issues when law enforcement enters the picture remains an interesting one.[26]

Impact Assessments and Better Regulation

The impetus for the development of the Commission's Impact Assessment programme is firmly grounded in the 'Better Regulation' initiative, and the drive both for better regulation and sustainability. It has been clear from the beginning that the aims of this programme are to promote 'better' regulation and competitiveness and also to ensure that sustainability concerns are built into the legislative and policy programmes. The process originated in commitments made by the European Council at the Laeken and Gotteborg summits, and is intended to be a key plank of the implementation of the 'Lisbon Agenda', responding to the challenges of globalisation and making the EU the most competitive and dynamic knowledge-driven world economy. Thus although there is, perhaps particularly now as the IA process matures, increasing awareness of and even some enthusiasm for it in some parts of the Commission, it is essentially an initiative that has its origins outside the Commission and was to some extent 'imposed' rather than genuinely 'home-grown'. The aims of Impact Assessment have been described by the Commission in the following manner:

> First of all it will guide and justify the choice of the right instrument at the appropriate level of intensity of European action. Secondly, it will provide the legislator with more accurate and better-structured information on the positive and negative impacts, having regard to economic, social and environmental aspects. Thirdly, it will constitute a means of selecting, during the work programming phase, the initiatives that are really necessary.[27]

Most recently, this emphasis on better regulation has been underlined by sharpening emphasis on competitiveness that is contained in IA documents in the new guidelines published in 2005, and also by the introduction of guidelines on assessing administrative costs in 2006.[28] The next section of

[26] Note in the context of data protection the judgment concerning the EU–USA PNR data transfer agreement: Case C–317/04 *Parliament v Council*, judgment of 30 May 2006.

[27] See http://ec.europa.eu/governance/law_making/law_making_en.htm.

[28] Communication from the Commission on a common EU Methodology for Assessing Administrative Costs Imposed by Legislation, COM(2005)518, together with Staff Working

the chapter will consider what exactly 'better regulation' means and what underlies this agenda, and consider whether this Impact Assessment process may have any useful role to play in promoting 'better' EU migration lawmaking. For the present, however, we may note that some—particularly environmental lobbyists—have criticised the 'better regulation' agenda for being too focused on *reducing* regulation, seeming to be rather too quick to equate *better* regulation and *de*regulation, at the expense of environmental protection and other similar values. Some of these commentators have suggested that the Impact Assessment process has done little to challenge this and have been disappointing in their ability to bring out clearly and effectively the *benefits*—especially non-monetary—of regulation that may be weighed against any costs. In particular the current effectiveness in evaluating non-monetary impacts has been questioned. From the environmental point of view one may, however, see the *potential* utility of the process—an opportunity to evaluate proposed regulatory mechanisms or environmental standards that might place burdens on businesses as well as having potential environmental costs or benefits of regulation or non-regulation.[29] One of the critical questions from the point of view of migration law is whether this tool of Impact Assessment, with its origins in evaluating proposed business regulation and environmental concerns, has any useful role to play in the rather different area of migration law and policy.

The Concept of 'Better Regulation'

The concept of better regulation is intimately connected with Impact Assessments, as the fundamental premise behind the Impact Assessment process is that it is part of a strategy that should lead to 'better regulation'. What then does this concept mean *generally* in EU law—particularly from the point of view of the institutions (without losing sight of the fact that regulatory or legislative quality are not terms that are free from doubt or dispute and that different observers may have different perspectives on indicators of quality)?[30] If we have little understanding of what is meant by 'better regulation' or 'better lawmaking' then we are not in a good position to assess whether Impact Assessments are leading to this. In order to understand this it may be helpful to turn to the 2001 White Paper on

Paper Outline of the Proposed EU Common Methodology and Report on the Pilot Phase (Apr–Sept 2005), SEC(2005)1329. An updated Annex to the Commission's Guidelines on assessing administrative costs was added to the Impact Assessment Guidelines in Mar 2006.

[29] See from an environmental perspective Okopu and Jordan, and Wilkinson, both above n 9.

[30] C Radaelli, 'Getting to Grips with Quality in the Diffusion of Regulatory Impact Assessment in Europe' [2004] *Public Money and Management* 271 (Oct).

Governance[31] and the report of the working group on 'Better Regulation'.[32] The White Paper suggests five principles of 'good governance': Openness, Participation, Accountability, Effectiveness, and Coherence, underpinned by another two, Proportionality and Subsidiarity. In the report of the 'Better Regulation' working group we find an overlapping but slightly different list of considerations setting out its working assumptions about what 'better regulation' means. These are Proportionality: 'regulation which achieves the stated public policy objectives without imposing unnecessary or disproportionate regulatory burdens'; Proximity: 'regulation which is recognisable to and recognised by stakeholders'; Coherence: 'regulation which fits in with other parts of the regulatory picture'; Legal Certainty; Timeliness: 'regulation which is adopted in good time and which can be adapted efficiently so that it is not overtaken by technological and other events'; High Standards: 'regulation which picks the solution offering the best protection for the public interest at stake, not just the one that represents the lowest common denominator of Member State positions' and, finally, Enforceability: 'regulation which is capable of achieving high levels of compliance'. It also adds—almost as a postscript—that it '(almost) goes without saying' that regulation should be 'subject to the appropriate measure of democratic control'.

The Relevance of 'Better Regulation' for EU Migration Law

What particular relevance then might better regulation and better lawmaking have in EU migration law? The agenda set out above—particularly in relation to the Impact Assessment programme—seems to be closely connected to the Lisbon Agenda of competitiveness and sustainable development. At first sight it may seem to relate primarily to regulation of economic/business or other private sector activities, and much of what is of central concern in migration law—regulation of flows of persons across borders, asylum law and policy, terms and conditions on which migrants are granted residence, the bureaucratic and operational activities, procedures and institutions that are necessary to implement all of this—may seen to be quite far away from this. Nonetheless, migration control and migration law clearly is a regulatory phenomenon of a kind in the sense that all lawmaking is regulation of a kind. Even non-legal policy may be seen to be a regulatory phenomenon in that it is an attempt, albeit not using legal mechanisms, to influence behaviour and/or to control the effects of certain behaviours or natural phenomena in order to achieve

[31] White Paper on Governance, COM(2001)428.

[32] *Report of the Working Group on 'Better Regulation'* (Brussels, EC, 2001), available at http://ec.europa.eu/governance/areas/group5/report_en.pdf.

certain desired policy goals, whether it be promoting desired or minimising undesired effects and consequences. It may well be sensible in some ways to talk of 'better regulation' or 'better lawmaking' applied to migration law, and this becomes all the more apparent when looking at some of the indicators of 'better regulation' set out above.

Each of the indicators above may have some relevance for migration law and policy. Proportionality *might* indicate a hard look at whether the burdens imposed on migrants—in terms of increased securitisation and strict conditions of entry—are justified. This, however, would necessitate a shift in thinking away from the current paradigm which all too often views would-be migrants as outsiders and with suspicion rather than as fully legitimate stakeholders in the process. Subsidiarity also is of importance and will point us towards seeking a sensible balance between what is legitimately the subject of EU harmonisation or common standards and what is legitimately left in the hands of Member States to determine. Proximity in the sense of the term above implies accessibility and transparency and some degree of ownership of the process and outcome by stakeholders—the role of civil society and NGOs is critical here, as well as that of the tourist and travel industry, and universities and industry which may view at least some migrants positively as potential students and workers. The 'boundedness' of the polity does seem to be re-emerging at the EU level and indeed the creation of EU citizenship has, arguably, done as much to underline the exclusion of third country nationals as it has to foster solidarity amongst and inclusion of EU citizens. So, despite the involvement of some NGOs at EU level, the status of migrants as full stakeholders in the political process of lawmaking and policy development remains open to question. Coherence is key to ensuring that policy objectives in one area are not undermined by other EU initiatives—the Group of Commissioners on Migration[33] may have some valuable co-ordinating role to play here (that is certainly the intention), but as this is a very new initiative this remains to be seen. Legal certainty is important to signal clearly to migrants and to Member States their respective rights and obligations—this aspect of 'better lawmaking' can often suffer where messy political compromises have to be made to reach agreement on a text, and the chapters in this volume examining some of the legal instruments illustrate this all too well. High standards are obviously a critical point, and of particular interest in migration law where all too often the lowest common denominator is all that the Member States have been able to agree. Yet what exactly are the public interests to be pursued when dealing with migration law and how best to pursue them is not necessarily always

[33] Commission Press Release 30 Aug 2006, 'Setting Up a Commissioners Group on Migration Issues, Chaired by Vice-President Franco Frattini'. The group apparently was first due to meet before the Sept 2006 Council Meeting.

evident or widely agreed, and this can make both inter-institutional agreement on legislative texts and evaluation of legislation and policy problematic. This particular aspect would also have to be amplified by noting in particular that a critical and central indicator of high standards in immigration and asylum law has be full and unambiguous compliance with relevant standards of international refugee and human rights law, and with the Refugee Convention, the ECHR and the EU Charter of fundamental rights in particular. Again, plenty of evidence of the difficulties faced in this area is apparent both in the concerns raised by authors in other chapters in this book and elsewhere. Enforceability is also a real issue, as both the enforcement of migration control and the enforcement of migrants' rights come up against considerable difficulties in practice, and the EU is not likely to be immune from this when it steps into the arena of attempting to build common minimum standards. Unfortunately, at times it can seem that more attention is paid to enforcement of controls than to enforcement of rights. Democratic control is clearly a cornerstone of accountable and legitimate migration law and policy: we have already noted above the difficulties with the marginalisation of the European Parliament. It remains to be seen to what extent the Impact Assessment process is able to enhance democratic scrutiny and oversight of the process through parliament, whether at the EU or national level.

Are there any other issues that may be relevant in assessing the quality of EU law and policy in this area? It may to some extent be linked to fulfilment of the guidance set out by the European Council: the EU should be seen to be living up to its own commitments and delivering on its own self-proclaimed agenda. It should also lead to regulation that is fair to all those involved, to migrants and would-be migrants as well as to those already resident in the EU, and in this respect it should be both morally and ethically defensible and agreed in a manner that is open to different points of view being expressed. Of course, there may be some reasonable differences as to what an ethical immigration and asylum policy might look like and what moral obligations states (and by implication the collectivity of EU Member States acting together) have to existing and would-be immigrants and refugees, and therefore, I say, ethically defensible rather than ethical *as such*. However, full good-faith compliance with agreed international standards has to be a basic starting point.

So which of these indicators of good governance or 'better regulation' or 'better lawmaking' might one see as the most pressing problems in EU migration lawmaking at the present time? Arguably, it would have to be full compliance with international law standards and fundamental rights, and the difficulty of Member States to compromise on anything beyond the lowest common denominator—the two being linked and traceable back to Member State governments' defensive and increasingly restrictive and

security-driven policy agendas. Could Impact Assessments have any relevance to these issues? Initially, one may be somewhat sceptical—it seems unlikely to have any fundamental impact on policy preferences and strategies of the Member States. As regards fundamental rights, Commission President Barroso indicated his intention that legislative proposals be screened for compliance with the Charter of fundamental rights in particular at an early stage in the process, and indicated that the use of Impact Assessments were to be a significant tool in order to achieve this—a process which could indeed be of relevance and importance in the immigration and asylum context. Yet, in an Impact Assessment agenda dominated by 'better regulation', competitiveness and sustainable development, one may be forgiven for a degree of scepticism in this respect. Whilst there may indeed be potential for the Impact Assessment process to be helpful in this respect, it is not yet clear that it is designed and operated in an optimum way to do so, and more attention may be needed on this issue.[34]

Different Roles for Impact Assessment?

Even if we accept, however, that Impact Assessments are intended to pursue 'better regulation' or 'better lawmaking' and are intended to do so by informing the legislator, that in itself is not necessarily self-explanatory or without ambiguity. Digging more deeply into the process, Meuwese[35] identifies five different typologies of Impact Assessment, using four different verbs that we have seen above being used to describe what Impact Assessment should do—guide, justify, inform and select. The first function she identifies is 'speaking truth to power' in the sense of the Impact Assessment containing some kind of objective truth to inform the legislator of the 'correct' approach, although this does not fit with many aspects of the EU's Impact Assessment process and its insistence that it is not a substitute for political decision-making. Her second is 'reason-giving for legislative decisions', in the sense of 'help[ing] politicians to convince stakeholders and citizens of the virtues of the legislation or policy at hand'. Again, this does not fit with the approach which is aimed at more than mere justification of decisions already taken—although it may be that some Impact Assessments seem to pursue this function more than others, particularly if conducted at a relatively late stage in the policy process once certain strategic decisions have been made. Her third is 'providing a forum for stakeholder input'—which could be a valuable function, but, as she

[34] See Toner, above n 10. See also the House of Lords European Union Committee, *Human Rights-Proofing EU Legislation*, 16th Report of Session 2005–06, HL Paper 67.

[35] Meuwese, above n 9.

points out, one may rightly be sceptical of the added value of such a process which may add up to little more than summarising the results of consultation with little evidence that this consultation is having a significant impact on the decision-making process. It is also worth noting that consultation should already take place, so the added value of this function can also be questioned in this respect. The remaining two, she suggests, are 'more convincing because they are more comprehensive and more refined', yet not necessarily mutually exclusive. Her fourth is 'highlighting trade-offs' which emerges from the Impact Assessment Communication as central to the aim of the entire process and perhaps may be primarily what some within the EU institutions may be expecting or anticipating. Yet, as she points out, 'what happens when the European Parliament or the Council want to use a different decision-making criterion from the Commission?' Trade-offs depend critically on the relative value that the decision-maker places on particular issues. When does environmental protection become too costly to business? If it will save lives, is the cost of a certain safety precaution relevant and, if so, when does it become too costly? When, and if so how, are measures restricting liberty and freedom to be traded off against apparently increased security? What, if any, is too high a price to pay for providing a secure refuge from persecution in accordance with international obligations by providing high-quality asylum decision-making, or for providing effective access to justice and effective remedies for all migrants? The extent to which Impact Assessments are able to *inform* such decisions without *prejudging* them and to make the trading-off process *transparent* will be critical if this is their main function. What happens when the Impact Assessment process proceeds on the basis of assumptions about the relative values of various 'goods' or 'impacts' to be 'traded off' against each other in selecting the optimum or preferred policy option that are later questioned by other EU institutions or by civil society will be an interesting question. Her fifth is 'structuring the discourse' in providing a structure for the discourse during the course of the passage of legislation to ensure that the information in the Impact Assessment is taken into account. In this way she suggests that Impact Assessments may contribute to the proceduralisation of the legislative process. As she goes on to discuss, individual case studies may show different Impact Assessments tending towards various of these functions, and even perhaps different actors in the process having different visions of which of these functions the Impact Assessment process is intended to fulfil, and each of these functions may necessitate or suggest different institutional frameworks for the process to operate. Different actors having different visions of the function of the Impact Assessment process may also lead to a high degree of politicisation of the procedure where, for example, stakeholders have greater expectations in terms of steering the policy or legislative process in their desired direction than the Impact Assessment

delivers,[36] or have different expectations about the use to which the report will subsequently be put. There does not yet seem to be a single model that Impact Assessment follows. Later we will return to consider whether any identifiable pattern emerges from the Impact Assessments associated with migration law, and whether any of these functions could prove particularly relevant or valuable to remedy defects or shortcomings in the existing legislative process in this field.

Criteria for Evaluating Impact Assessments

Can we, therefore, move towards some criteria for evaluating the quality, effectiveness and utility of the Impact Assessment process and the resulting Impact Assessment reports? There is now some helpful literature emerging specifically dealing with the EU's Integrated Impact Assessments and making some preliminary assessments. Wilkinson,[37] Renda,[38] Lee and Kirkpatrick[39] and Mather and Vibert[40] are some of those who have provided analysis, commentary and critique. Some construct very specific quantitative scoreboard-type arrangements for evaluating Impact Assessments, allocating marks for particular variables; others make more general and descriptive or subjective assessments whilst presenting the results in a scoreboard-type format. Precisely how the Commission's Impact Assessment programme should be evaluated and monitored remains somewhat contentious, especially in relation to the question of any action to be taken in the event of an Impact Assessment being judged inadequate or incomplete. Nonetheless, drawing on a range of these sources, some of the most important indicators of quality and effectiveness of Impact Assessment documents and processes may be suggested—although it must be stressed that it is not the intention of this chapter to provide or to use any kind of quasi-quantitative 'scorecard' as such, or indeed to carry out an entirely comprehensive evaluation. This would be impossible at this stage, both because of the relatively small number of migration law Impact Assessments and the fact that many of the resulting legislative proposals have not yet been adopted, so the ultimate impact on the outcome will not be clear

[36] The REACH and Roaming Impact Assessments are quite well-known examples of contested Impact Assessment processes, both of which came in for serious criticism from industry in particular. See Meuwese on the REACH Directive, above n 9, and T Leggett, 'EU Under Fire on Mobile Fee Cap', *BBC News Online*, 18 Sept 2006. They are admittedly somewhat different, as in the case of REACH various other Impact Assessments were prepared by stakeholders and eventually the Commission revised its own IA work: this has not yet happened with the Roaming Reg.

[37] Wilkinson, above n 9.

[38] Renda, above n 9.

[39] Lee and Kirkpatrick (2004), above n 9.

[40] Mather and Vibert, above n 9.

at this stage. At the outset it should be noted that evaluation is commonly subdivided into three as follows:[41] *compliance tests* which focus on formal compliance with the overarching framework governing the process and are concerned more with process than outcome; *performance tests* focus on the quality of analysis contained in the document, such as accuracy of prediction, comprehensiveness or at least adequacy of any analysis of alternative options. Again, these are focused more on the process than the legislative outcome, but pay more attention to the substantive quality of the report. *Function tests* are focused on assessing the impact on the final legislative or policy document, and are more focused on outcome than processes. Clearly, this final approach cannot be completed until more legislative measures for which Impact Assessments have been prepared have completed their passage through the legislative process. It should also be noted that one should not necessarily assume that a deviation from the 'recommended' option in the Impact Assessment report undermines its quality or value. The analysis may have been highly expert, accurate, relevant and complete, but different political priorities may ultimately result in a different balance being struck from that recommended in the Impact Assessment report. The Impact Assessment process and report may nonetheless have been of high quality, the process may have been valuable and informative, and the report may have acted effectively as a focus for stakeholder input and in structuring the subsequent debate that resulted in a different option finally being settled on.

In evaluating Impact Assessment procedures and reports, I will suggest that comprehensiveness, proportionality, soundness and quality of analysis including issues of cost-benefit analysis and quantification, openness of procedure, accessibility and transparency, and subject-sensitivity (appropriate adaptation of the general framework to the particular issue) will be key criteria, and that sufficient training, expertise and resourcing will be important practical underpinnings to ensure adequate performance on these indicators. In suggesting that these are key criteria, I am drawing on existing Impact Assessment literature[42] as well as returning to first principles mapping out some of the obvious qualities needed to achieve the stated aims of the Impact Assessment programme discussed above. I shall return below to discuss and illustrate each of these criteria in more detail with specific reference to some of the migration law Impact Assessments.

[41] *Regulatory Performance: ex Post Evaluation of Regulatory Tools and Institutions*, (Paris, OECD, Oct 2004).

[42] Above n 9.

General Evaluations of Early Impact Assessment Work

The evaluation of Impact Assessments so far has been distinctly mixed. Many evaluations paint a picture of Impact Assessment reports and processes that are distinctly variable in quality—at best moderately good, at worst of poor quality, and without any clear preponderance towards the good rather than the poor. Experience does tell us that there may be potential for improvement in a relatively short period of time—an often quoted example is one noted by Lee and Kirkpatrick in relation to Environmental Impact Assessments in Ireland. In the first year of operation of the EIA Directive, less than 30 per cent were assessed as satisfactory, whereas three years later the figure was more than 60 per cent.[43] Whether there is any hope of anything like this rapid improvement in quality being replicated in the case of the Commission's Impact Assessments programme rather depends on several factors: the extent to which subsequent Impact Assessments implementing the common framework are able to build on experiences of previous ones and gain from lessons learned; the extent to which staff are able to build up significant expertise by carrying out sufficient Impact Assessment work over time; the resources available to desk officers compiling the reports and to the administrators responsible for providing support to them in conducting Impact Assessment work; and the ability of the forthcoming review to provide an effective opportunity for reflection and evaluation of existing practice drawing on a wide range of perspectives. There are as yet fewer indications of such rapid improvements in quality of Impact Assessments over time in respect of the EU's framework.[44] This should certainly encourage observers to persevere and give constructive comment on how the process can be improved in the hope that the next few years may see some significant improvement in quality. The Commission is right to monitor and evaluate the process, and that it should be open to constructive critique and not adopt an approach of complacency. The forthcoming review in 2006, which is underway as this chapter is completed, will be an important focus for lessons to be learned.

[43] Lee and Kirkpatrick (2004), above n 9, at s 5.

[44] Indeed on some indicators the quality is in fact deteriorating (see Renda, above n 9) although focusing excessively on quantification, and cost-benefit analysis may be misleading as the increasing number of IAs may lead to many being conducted in which quantification and economic analysis are far from central to the issues at stake. This of course is particularly the case in the FSJ area, and so one should be reluctant to condemn the quality of IAs too quickly on this basis without proper analysis of whether the IAs deal with the issue at hand adequately, despite the absence of quantification.

IMPACT ASSESSMENTS IN EU MIGRATION LAW

At this stage there is not (yet) a 'classic' legislative instrument in the field of migration law that has been completely finalised after a legislative process that included an Impact Assessment.[45] At this stage in the process of development of Impact Assessment work, this is probably not surprising and need not prevent some preliminary comments on some of these documents. In this next section of the chapter, I shall return to consider the criteria identified above relating to the quality of the Impact Assessment process and reports, using in particular several of the migration law Impact Assessments as examples to illustrate where instances of good and less good practice may be identified, and instances in which Impact Assessments tend towards one or other of the models discussed by Meuwese.

The migration law-related Impact Assessments are still relatively few, but growing in number year by year. In 2003[46] there was one, in 2004 two, one of which related to a financial Decision (the European Refugee Fund).[47] In 2005 there were three legislative/policy Impact Assessments[48] and one particular and several general dealing with budgetary matters.[49] Already in 2006 there are four: two policy Impact Assessments and two relating to legislative instruments.[50] Several are general policy plans indicating that there will be or are likely to be further specific measures following, so more Impact Assessments may be envisaged in the future.[51]

[45] Council Dec 2006/668 EC on the Establishment of a Mutual Information System Concerning Member State Measures in the Areas of Immigration and Asylum was adopted on 5 Oct 2006 [2006] OJ L 283/40. Other than this, the Visa Information System is the furthest advanced, but at the time of writing has not been finally adopted.

[46] Communication on Immigration, Integration and Employment, COM(2003)336, Impact Assessment, SEC(2003)694.

[47] Proposal for a Reg Establishing the Visa Information System, COM(2004)835, Impact Assessment, SEC(2004)1628 and Proposal for a Council Decision Establishing a European Refugee Fund for the period 2005–10, COM(2004)102, Impact Assessment, SEC(2004)161.

[48] Proposed Returns Dir, COM(2005)391, Impact Assessment, SEC(2005)1057, Establishment of an Information Procedure concerning Member Sates' Measures in the Areas of Asylum and Immigration, COM(2005)480, Impact Assessment, SEC(2005)1233, and Policy Plan on Legal Migration, COM(2005)669, Impact Assessment, SEC(2005)1680.

[49] General Programme Solidarity and Management of Migration Flows, COM(2005)123, Impact Assessment, SEC(2005)435.

[50] Evaluation of EU Policies on Freedom, Security and Justice, COM(2006)332, Impact Assessment, SEC(2006)815, Reg Establishing a Mechanism for Creating Rapid Border Intervention Teams, COM(2006)401, Impact Assessment, SEC(2006)953, 954 and 955, Policy Priorities in the Fight Against Illegal Immigration of Third Country Nationals, COM(2006)402, Impact Assessment, SEC(2006)664/5 and SEC(2006)1010, and finally Proposed Reg Establishing a Community Code on Visas, COM(2004)403, Impact Assessment, SEC(2006)957.

[51] Significantly, dealing with the further development of the Common European Asylum System, and measures implementing the policy plan on legal migration and the fight against illegal immigration. Dirs on admission of highly skilled migrants, the 'horizontal' Dir on the status of those admitted for economic activities, and sanctions on businesses employing illegal

In passing, it is worth noting that these migration-focused Impact Assessments are not the only ones in the more general FSJ policy field,[52] so the questions raised here about the role of the Impact Assessment procedure outside what might be traditionally conceived of as 'business regulation' may well be of wider relevance. In line with the significant legislative activity in this field, the proportion of Impact Assessments that have to tackle such issues is significant.

Comprehensiveness

It is important that the Impact Assessments deal with all relevant issues and as far as possible contain no major or significant omissions: this is related to the quality of analysis below and an important aspect of it. In particular, it is important that a wide range of options is considered, as appropriate, and reasons given if not. Clearly, the range of options considered will vary depending at what stage of the process of policy development the Impact Assessment is carried out[53]—the earlier in the process the more options will remain live. The later in the process the Impact Assessment comes into play, the more likely it will be that certain options may have been ruled out for political or practical reasons. Conversely, it may be that with fewer 'live' options under consideration, more detailed analysis may be possible in terms of the ones that do remain under serious consideration. If Impact Assessment is, as it is intended to be, not a static event but to some extent a dynamic process through the initial stages of policy or legislative development, this should be reflected, if appropriate, in an initial wide-ranging discussion and subsequently in a more detailed analysis of one or more of the particular options. The Impact Assessment process may meet some difficulty and may seem rather superfluous if it turns into a process whereby the document merely surveys a range of broad approaches of which only one is realistically viable, but which still leaves unanswered some important questions about the implementation of that broad approach. In this particular respect, one does not have to look terribly far to find some questionable examples. It may perhaps be significant to note, when considering the Impact Assessment relating to the VIS Regulation, that the European Parliament's LIBE Committee commissioned a separate report on the social impact of

migrants may be anticipated to be early in the next wave of legislative Impact Assessments. The review of the existing legislation may also result in Impact Assessments if any amendments are suggested.

[52] The FSJ DG has a relevant website page on evaluation and Impact Assessment activities collecting all FSJ IAs together. This is available at http://ec.europa.eu/dgs/justice_home_evaluation/dg_coordination_evaluation_annexe_en.htm.

[53] Danish Environmental Assessment Institute, above n 9, at 49.

biometrics.[54] It might be suggested that the social impacts of such a development were not considered adequately in the Impact Assessment report, and this other study would perhaps have added value to the IA process. Although commissioned before the VIS Impact Assessment was completed, it was not published until later, so the two reports overlap in timescale, and it probably goes too far from these documents alone to say that the European Parliament's report was a direct result of perceived inadequacies of the Commission's Impact Assessment report. One might question whether the Impact Assessment on the proposed Returns Directive adequately assessed impacts on children and gender, for example (or on countries to which individuals are returned) or on the practical difficulties and consequences for the host societies and states of origin of an 'obligation' to return (the starting point of an 'obligation' to return in the proposed Directive seems to be taken for granted rather than questioned), and the Impact Assessment on the 'RABITs' Regulation, arguably, fails to engage properly with the issues of accountability and control *over* border guards, being more concerned with the contribution that these teams could make to control *of* borders.

Proportionality and Proportionate Analysis

Proportionality and proportionate analysis are two different concepts. The first essentially means that the report considers the proportionality of the measures to be taken, and the second is to some extent a development of the idea of comprehensiveness discussed above. Proportionate analysis suggests that the Impact Assessment should analyse the various options and impacts in a proportionate manner. In other words, excessive time and money should not be spent on proposals with minimal impacts, nor should proposals with significant potential impacts, or a potentially significant dimension of a specific proposal, be subject to a merely superficial analysis. In this respect, some critical comments may be made about the generality and lack of detail of some Impact Assessment reports. There does seem to be a trend for Impact Assessments in respect of both policy communications and legislative proposals to be prepared at quite a high level of generality, to the extent that one may begin to question the real utility of some of these documents associated with specific legislative proposals. This level of generality has another consequence: that whilst the Impact Assessments related to the *policy* documents may play some useful role in

[54] *Biometrics at the Frontiers: Assessing the Social Impact on Society*: this report was commissioned before the IA was completed, but completed and published in 2005, Institute for Prospective Technical Studes report for the European Commission, available at http://ec.europa.eu/justice_home/doc_centre/freetravel/doc/biometrics_eur21585_en.pdf

acting as a focus for stakeholder input and structuring discourse about the way the agenda is developed further, this approach has rather different consequences in the Impact Assessments related to the specific legislative proposals. Here, some Impact Assessments tend to operate at such a level of generality that it is difficult to see how the documents can realistically be of use in shaping the discourse from then on, unless there is a real live option of a significant strategic change of direction, which in some cases seems highly unlikely. (As we shall see below, certain strategic choices have sometimes been made by the Council before the Impact Assessment process by the Commission.) For example, contrast the Impact Assessments on legal immigration and the priorities in the fight against illegal immigration shaping general policy agendas and priorities in broad terms with those relating to the Visa Information System Regulation and the Returns Directive. In the Returns Directive Impact Assessment, only general issues are discussed relating to the type of legal instrument used: no action, soft law, full harmonisation by Regulation or partial harmonisation by Directive. It contains little in relation to the actual content of the Directive itself. Similar criticisms may be made of the 'RABITs' Regulation and Visa Code Regulation Impact Assessments. It may sometimes be useful to carry out such a general strategic Impact Assessment of broad policy approaches, as some may find the case for a particular legislative intervention not convincing. For example, the 2001 proposed Directive on Admission of Third Country Nationals for Employment met with little support from the Member States, and there remains some scepticism about the Returns Directive, at least in its present form. Some Impact Assessments may genuinely add value in terms of providing new information or analysis to demonstrate the scale or extent of a problem to highlight the need for regulation.[55] Yet it is often in the detail of *how* these general policy choices are to be implemented as much as anything that the real difficulties will lie. If experience of the first years of exercising the Community's new powers and competences in migration law have taught us anything, it is that the devil is in the detail. Perhaps they were never intended to do otherwise, but if Impact Assessments can operate only at this level of generality they will have a limited role to play in improving this aspect of lawmaking. The VIS Impact Assessment admittedly goes somewhat further and addresses not only the question whether the preferred option should be no action, entry-exit system, or a VIS, but also the critical question whether the proposed VIS should contain biometrics. But the consideration of this important issue in the Impact Assessment report can certainly be regarded

[55] The IA on pre-trial supervision might be an example of such a case: Impact Assessment accompanying the Proposal for a Council Framework Decision on the European Supervision Order in Pre-Trial Procedures between Member States of the European Union, SEC(2006)1079.

as somewhat superficial: one has to turn to the accompanying report prepared by the EPEC (European Policy Evaluation Consortium) for fuller discussion of this, and even then perhaps some more detailed treatment of social impacts and critical questioning of the reliability of biometrics could have been included.

Allied to the previous point but slightly separate is the lack of detail in the reports. Far more helpful are preliminary studies that are sometimes carried out by external policy consultants: an excellent example of this is in relation to the Visa Information System. This tackles the relevant questions in more detail, and recognises that the first two policy options can be discarded and that the latter two (VIS with or without biometrics) require much more detailed scrutiny. It addresses such issues as the information to be stored, period of time and data protection considerations. This emphasises the importance of some of the points discussed next: accessibility and transparency.

Accessibility and Transparency

It is important that the Impact Assessments are accessible generally in terms of systematic publication (which they are, on the websites of the relevant DGs, from the document registry of the Commission, or from the Commission's Impact Assessment website), but also that they are accessible *in content*. Particularly with technical subjects, it is important that—without excessive simplification or 'dumbing-down'—the documents deal with the subject in an accessible way to enable them to be of use to end-users. The results and methodology should be explained clearly. It is important, therefore, to note that these end-users may range from technical experts and well-resourced specialist organisations to lawmakers and some lobbyists and interest groups who may be less technically expert in the field and have fewer resources at their disposal, and even (although this may admittedly be wildly optimistic) the general public. Another issue is transparency. It is obvious from the Commission's programme and from reading some of the Impact Assessments that it is envisaged that external policy consultants may, and indeed do in some cases, carry out a significant amount of the actual research involved. If this is the case, then this should be made clear and any such significant document relied upon should be easily accessible. On the positive side, one can at least give a qualified welcome to the transparency and accessibility of migration law Impact Assessments. Indeed this is closely connected to the issue I discussed above—the simplicity, lack of detail and general nature of some of the reports do contribute to making them accessible. Many of these documents set out in a manner that is quite clear and simple a limited range of general policy approaches. Anyone looking for a rationalisation of or explanation

of the general policy approach taken will usually find it in these documents, with an idea of what evaluation was made of the various options and the criteria used to make the evaluation: often this is presented in the format of a 'grid' for ease of reference. Some attempt is often made to describe the potential intensity of impact (low, medium, high, etc) even where quantification, let alone monetarisation, is difficult or impossible. Yet, given the tendency to generalisation, it is helpful to know the evidential basis on which such generalisations are made, and there may be a difficult balance to be struck between accessibility and sufficient detail to conduct a proper analysis and to demonstrate sound methodology. The report on Including Social Impacts notes that the guidance suggests that 30 pages should be the maximum, and implicitly criticises some of the Impact Assessments it considers for being longer—sometimes significantly longer—than this (as well as some that are significantly shorter).[56] The key to this clearly lies in different levels of detail: executive summaries or Summary Impact Assessments, full Impact Assessment reports and extended background studies all have their place. Different end-users may need or wish to use one or other or all of these documents, and sometimes the same end-user may use different documents at different points and for different purposes. Sometimes, a report of 30 pages may be a helpful summary but may simply be too short to contain a full and rigorous analysis of the issues at stake. As we have seen, externally commissioned reports are sometimes used as the basis for Impact Assessment reports, and they are often significantly longer than these reports themselves. In such situations these studies provide valuable additional resources to enable lawmakers and researchers to evaluate both the Impact Assessment and the subsequent proposal or communication. Whilst it is often easy to identify when this has taken place, and there is usually little difficulty as a researcher getting access to the document on request, some increased transparency and accessibility might be helpful in terms of identifying the correct official to ask, or preferably ensuring that any such document is routinely made publicly available, perhaps as a separate SEC document on the registry or on the relevant DG website. One such study—on divorce—is on the DG FSJ website even in advance of the Impact Assessment report, which has not yet appeared.[57] This kind of transparency is to be encouraged as a more systematic practice. Transparency and accessibility might also be improved without overloading the Impact

[56] Crepaldi *et al*, above n 24, at 83.

[57] *Study to Inform a Subsequent Impact Assessment on the Commission's Proposal on Jurisdiction and Applicable Law in Divorce Matters* (Brussels, European Policy Evaulation Consortium, Apr 2006), available at http://ec.europa.eu/justice_home/news/consulting_pubvlic/divorce_matters/study.pdf. At the time of writing the subsequent IA and Proposal are not yet on the website.

Assessment reports too much by some clearer indication of what, if any, other significant documentation or evidence was relied upon in conducting the analysis and preparing the report—again the VIS extended study is helpful in this regard and can be seen as an example of relatively good practice as it contains a bibliography at the end to indicate the additional sources consulted. There are other examples indicating variable practice in this respect.

Soundness and Quality of Analysis

Soundness and quality of analysis is perhaps the most important core area. The quality of analysis of the subject matter is critical. Impact Assessments should be able to identify major areas of dispute, whether factual or otherwise, for example, different positions of principle and approach, different criteria being used to evaluate or significantly different priorities being attached to commonly accepted criteria, and the major reasons behind these different approaches. They should be able to guide the reader through the different points of view, advantages and disadvantages of different options, and should explain clearly whether and why there are any presuppositions or policy preferences taken for granted at the outset. Where the subject involves scientific, technical or any other kind of analysis, the methodology used should be made clear (as methodological issues may themselves be the source of contention and criticism, as was the case for example in the REACH/Mobile phone roaming Regulation Impact Assessments) and, as far as possible, should be sound. They should not misrepresent any relevant issue or, as noted above, fail to address clearly identifiable options or points of view or potential impacts. This is perhaps one of the more difficult aspects of the quality of Impact Assessments to analyse in the general literature, particularly when Impact Assessments cover such a wide range of policies as is the case in the EU, because in order to make any kind of realistic assessment of the quality of the analysis (beyond a simple check that is more one of transparency and clarity than accuracy and methodological or analytical soundness), a degree of knowledge and expertise in the subject matter is required. Indeed, it is interesting to note that some of the general studies deliberately avoid attempting any such analysis of the analytical quality of the reports they look at. This is why it is important, for example, that environmental experts examine environmental Impact Assessments and that migration lawyers begin to engage systematically with the quality of Impact Assessments in the migration policy area.

Openness of Procedure and Consultation

It is important that relevant voices from civil society and industry are included effectively in the process of drawing up Impact Assessments, and at an appropriate time. Although important in all areas, this is particularly so when the subject matter lies more in the area of what might be broadly described as social policy (including migration law) than rather more technical regulatory measures. The policy plan on legal migration is perhaps one of the best examples of consultation, even though it was prompted by the inability of Member States to reach agreement on a proposal that had been presented as far back as 2001 and eventually had to be withdrawn as it became clear there was no prospect of sufficient political support. The 2005 policy plan was preceded by a Green Paper and a significant consultation exercise,[58] and this emerges clearly in the Impact Assessment. Consultation is, of course, not a new exercise in the area of Freedom Security and Justice policy—as in many others—and perhaps the preliminary conclusion is that what is needed is not so much more consultation as more attention being paid to it. Again, the VIS and Returns Directive Impact Assessments demonstrate this vividly. To be fair, the VIS Impact Assessment and even more so the preliminary report are more thorough in their analysis of the concerns raised during consultation, but still one gets the impression that significant concerns about the necessity for biometrics and the adequacy of controls that had emerged during consultation were brushed aside rather lightly. The European Data Protection Supervisor (EDPS) indicated in his report on the Proposal that although he accepted—partly based on the Impact Assessment—that the case for a VIS had been demonstrated, he had to say:

> However useful biometrics may be for certain purposes, their widespread use will have a major impact on society, and should be subject to a wide and open debate. The EDPS must state that this debate has not really taken place before the development of the proposal. This underscores even more the need for stringent safeguards for the use of biometric data and for a careful reflection and debate in the course of the legislative process.[59]

The Impact Assessment and preliminary report seem to proceed rather more on the basis that mounting a PR campaign to persuade the public of the use of biometrics is the way forward rather than seeing the undoubted opposition and scepticism about the necessity for biometrics as a reason not to adopt it in the VIS.

[58] See on the background to this, and on employment admission policy more generally, Ch 16 in this volume.

[59] Opinion of the European Data Protection Supervisor on the Proposal for a Regulation Concerning the Visa Information System [2005] OJ C 181/13, at 3.4.1.

The Returns Directive Impact Assessment is even more concerning in this respect. A series of concerns were raised about the protection of migrants, issues surrounding the use of detention, protection of minors, access to justice and so on. It is indeed true that the final proposal was not without some limited safeguards, but the Impact Assessment report itself does precious little beyond simply recording the concerns briefly. The report is at such a level of generality (no action/soft law/partial or full harmonisation) that it fails to engage adequately with the issues of substance of what will actually go into the Directive. As we have seen, it effectively assumes rather than questions the starting point of an obligation to return, and contains little real discussion of the question of the conditions under which detention may or should be used, what if any should be the maximum permitted period of detention, the necessity for judicial oversight of such detention measures, and the issue of re-entry bans. The Impact Assessment fails to demonstrate in a convincing manner that the consultation and concerns expressed during it did have any significant relevance in shaping the detailed content of the Directive, if this was the case. Whilst it has to be acknowledged that not every comment will be followed or every point of view adopted, and it may be expected that these processes will to some degree be contentious and give rise to differences of opinion, an Impact Assessment process that systematically fails to engage the confidence of consultees that their views are listened to seriously is not without its dangers. One example already exists of an Impact Assessment process becoming so politicised that some civil society/environmental groups refused to participate further.[60]

Subject-sensitivity

The general structure of the IAs must be implemented in ways that are appropriate to the specific sector. It has even been suggested[61] that it could prove helpful or necessary to develop some different variations on the general Impact Assessment theme—different models of Impact Assessment for different kinds of legislative and policy measures, perhaps with each separate DG adopting a model particularly suited to its own area of work, partially reversing the streamlining into one single integrated framework in 2002. Whatever one thinks of the suggestion of deliberate construction of differently adapted models of the general Impact Assessment framework, it is certainly the case that care should be taken that Impact Assessments ask the right questions in the right ways to be of use to the particular context: whether by type of impact, such as ensuring that social impacts are

[60] The REACH Dir: Meuwese, above n 9.
[61] Renda, above n 9, at 96.

assessed adequately, or by policy area. Ultimately, if it turns out that the Impact Assessment tool is so focused towards business regulation, economic analysis and quantification of costs and benefits that it is unable effectively to deal with the rather different questions and issues that dominate the agenda of the FSJ DG, and immigration and asylum law in particular, it is necessary to be aware of this and to limit one's expectations accordingly. Another relatively positive aspect is that Impact Assessments in the migration law area and FSJ generally do not seem to have been overly hidebound by the structure of economic, environmental and social impacts at the expense of making some real attempt to address relevant issues. Although some focus on economic cost is apparent (for example in the VIS Impact Assessment in relation to the cost of the System), a wide range of other somewhat more relevant criteria is used, which indicates a welcome potential for flexibility to adapt the general Impact Assessment framework to the specific context of migration law even though one may on occasion take issue with the relative prioritisation of various evaluation criteria, or some perspective that might usefully have been added or elaborated upon. These questions and criticisms seem to relate rather more to the issue of quality of analysis—the extent to which this flexibility actually highlights and helps to address the most critical issues, rather than the extent to which the framework itself is flexible enough to adapt to different policy areas. There is certainly some awareness within the Commission of the need to think carefully about how to conduct Impact Assessments within the FSJ DG, evidenced by the production of a guide for Impact Assessments by FSJ DG for its staff conducting Impact Assessments in this policy area.[62] Since this document dates from September 2006, it seems likely that none of the existing Impact Assessments were prepared with this document in mind. It remains to be seen whether it will have a significant impact on future Impact Assessments as they emerge.

Fundamental Rights Impacts

One of the disappointments has to be the depth and rigour of treatment of fundamental rights impacts. As we have seen, Commission President Barroso specifically relied on Impact Assessments as part of his strategy to ensure a rigorous monitoring process from the outset of planning any legislation where fundamental rights were affected, specifically to ensure

[62] European Commission, *Guide on Impact Assessment Activities in Justice, Freedom and Security Policy Areas* (Brussels, European Commission, Sept 2006).

compliance with the EU Charter.[63] I have suggested elsewhere[64] that one can hardly object to well-informed and rigorous rights-awareness from the outset of the legislative process, yet a somewhat more sceptical view may be justified in respect of how effective the Impact Assessment process as currently operated is in ensuring this. The way the Impact Assessment process operates within the FSJ DG generally and migration law in particular will, of course, be a critical litmus test of whether the process has anything useful to add to fundamental rights protection. So, what does a closer examination from a fundamental rights perspective reveal? The relevant Impact Assessment reports are indeed peppered with fine-sounding words and commitments—many mention respect for fundamental rights or impact on fundamental rights, and some go as far as indicating the relative intensity of expected rights impacts of the various overall strategic options being considered and note the need for compensatory protective measures to offset potential negative rights impacts. In some contexts, where rights impacts may be less obvious and less well known within an area of expertise of the lead DG, this in itself may perform a valuable function in raising the profile of the issue and in ensuring that some attention is given to it. However, in the context of migration law and FSJ policy generally, it does not seem too harsh to suggest that such bland general statements go little further than stating the obvious. Of course, standards of rights protection are important in constructing migration law and policy. The *stated* commitment of the EU institutions and states is not in question, and it is quite obvious that forced returns of illegal immigrants or collection and retention of biometric data are issues that may have significant rights impacts: one certainly hopes that we have progressed beyond the need to establish the basic proposition that rights protection is an important aspect of Community lawmaking! Yet it is often in the messy and inconvenient business of thrashing out the *detailed* content of the Directives that standards have been compromised. Any effective monitoring and scrutiny process does have to take account of that reality, and of the reality that the nature of fundamental rights protection is precisely that it is at times inconvenient and may constrain government from pursuing particular courses of action that it might otherwise favour. If this edge of inconvenience is lost then some of the effectiveness of rights protection may be too. Admittedly, the Impact Assessment process occurs at an early stage in the process, and one cannot expect everything to be resolved at this stage. There may indeed be some trade-off to be made between proper consideration of a wide range of options and rigorous scrutiny of any one

[63] Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: Methodology for Systematic and Rigorous Monitoring, COM(2005)172.

[64] Toner, above n 10.

of them for fundamental rights. Yet, once a legislative proposal is published, it contains specific suggested provisions—from which any further negotiations proceed as a starting point. Thus, proper screening and scrutiny for rights compliance at this stage are important.

Some of the Impact Assessments dealing with specific legislative measures in the migration law field deal with this more effectively than others. In the VIS Regulation Impact Assessment, some attention is paid to compensatory protective safeguards, and the background report is even more encouraging, in that there is an annex that specifically deals with data protection considerations, and does actually introduce the relevant legal framework regarding privacy and data protection and its application to the VIS system. This kind of approach is to be welcomed, but the necessity for biometrics and the adequacy of privacy and data protection included in the proposal still remains contentious.[65] The Returns Directive is an example of an Impact Assessment which records concerns and commitments to act in accordance with fundamental rights, but does far less to further this aim in concrete terms. It does little to clarify exactly what the specific standards of protection might be in terms of access to justice, detention, *non-refoulement*, or the use of force or compulsion in securing returns. The Impact Assessment does list some of these concerns at the end, but in the overall context of the document this hardly qualifies as adequate and rigorous evaluation of the various issues at stake. As noted before, although the proposal that resulted was not without some safeguards, some serious concerns have been expressed about it.[66] This can hardly be seen as a resounding success in this respect. In terms of dealing with specific rights protection concerns and more detailed policy choices *within* the general direction chosen (to adopt a Directive), it is instructive to compare this with, for example, the Data Retention Directive and its Impact Assessment.[67] Whilst not suggesting that this was itself without its flaws or problems, at the very least, the Impact Assessment addresses such issues as the specific time period for which data should be retained, and addresses concerns expressed by NGOs, the EDPS and the Article 29

[65] See, eg, E Brouwer, 'Data Surveillance and Border Control in the EU: Balancing Efficiency and Legal Protection' in T Balzacq and S Carrera (eds), *Security vs Freedom, a Challenge for Europe's Future* (Aldershot, Ashgate, 2005), P De Hert, W Scheurs and E Brouwer, 'Machine-Readable Identity Documents with Biometrical Data in the EU—Critical Observations' *Keesings Journal of Documents and Identity* (2006, forthcoming).

[66] House of Lords European Union Committee, *Illegal Migrants: Proposals for a common EU returns policy*, 32nd Report of Session 2005–06, HL Paper 166.

[67] Commission Proposal, COM(2005)438, and the accompanying Impact Assessment, SEC(2005)1131. See now Dir 2006/24/EC on the Retention of Data Generated or Processed in connection with the Provision of Publicly Available Communication Services or of Public Communication Networks and Amending Dir 2002/58/EC [2006] OJ L 105/54.

Working Party.[68] Whatever the merits of the outcome,[69] at least one may say that the contentious *content* of the Directive was addressed in this report rather more successfully than one sees in some of the migration law Impact Assessments. Perhaps this was due to the fact that the demands here were on businesses, arguably a rather more classic use of regulatory Impact Assessment procedure, imposing regulatory burden on those conducting a telecoms or internet business? One wonders whether industry lobbying against the excessive burden of retaining data for long periods or those concerned with data protection and privacy were the critical voice here. A range of factors may be relevant in securing good practice: the availability of sufficient time and resources for the study, keen awareness of or commitment to investigating such questions on the part of the desk officer in the Commission with primary responsibility for the drafting of the Impact Assessment, and keeping the Impact Assessment process active into the stage of the process when the drafting of the details of the Proposal has begun may all help. The inclusion of references to specific views expressed during consultation on key points within the Impact Assessment is surely good practice, but views on specific points such as this may emerge only if consultees are asked key relevant questions, and this may only be possible after some element of preliminary drafting has taken place. This emphasises the importance of seeing the Impact Assessment as a dynamic process rather than a single one-off event. Whilst it would be premature to draw overly negative conclusions at such an early stage and with a relatively limited record of legislative Impact Assessment thus far concerning migration law, this is certainly something that should be taken into account in future Impact Assessments. It is also the case that adequate treatment of fundamental rights does require adequate legal expertise, and it may be that more attention needs to be paid to this.

The process will have to improve in this respect, following, building on and improving on examples of good practice dealing with the fundamental rights issues identified above. It remains to be seen whether the new guidance document issued by the FSJ DG may assist in addressing this issue. If this proves not to be possible, a more carefully targeted, focused—and transparent—legal screening for compatibility with fundamental rights may prove to be a necessary supplement to the Impact Assessment process if it is to provide the 'systematic and rigorous monitoring' that was

[68] The Art 29 Working Party is an advisory group set up under the EU Data Protection Dir to provide expert opinion and to advise the Commission and Member States on data protection issues. It consists of representatives of the data protection authorities of the Member States, the EDPS and of the Commission. See at http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm.

[69] The ultimate compromise was a 'window' specifying minimum and maximum periods rather than a single fixed time period. The time suggested in the original proposal is within that period.

promised by Commission President Barroso. General reluctance to make public any specific advice given on legal matters by the Commission's Legal Service may pose some difficulties for the transparency of any such separate scrutiny, which is arguably an important part of the process: raising the profile of rights issues and demonstrating publicly the steps being taken to ensure Charter compliance was part of Barroso's agenda in his 2005 Communication. Whilst a degree of confidentiality for some documents may be accepted, any separate screening process which is entirely secret will fail to convince in this respect. Similar sensitivities seem to be emerging as the role of the Fundamental Rights Agency is clarified[70] and may impact on the nature of its role in pre-legislative scrutiny.

Sufficient Resourcing

Underlying all of this is the question of resources, training, practical support and expertise. The quality of the Impact Assessment process will be undermined by a scheme which makes excessive and unrealistic demands in terms of Impact Assessment work, given the resources, training and expertise that are available. Ultimately, if the resources cannot stretch to conducting the required quantity of Impact Assessment work or if the time available is insufficient, the quality and credibility of Impact Assessments will suffer. Without wishing to jump to too many conclusions, one wonders whether the insistence on an Impact Assessment for every regulatory/legislative proposal in the Work Programme as well as many policy communications and the consequent increase in the number of Impact Assessments produced over 2004, 2005 and 2006 may be one factor that has contributed to the failure to demonstrate a clear upward trend in quality since the first Impact Assessments in 2003. It seems unjustified at this stage to draw any conclusions that Impact Assessments are not being given sufficient time or resources, but this should certainly be monitored. It is also interesting to note that on several of the indicators set out above, the VIS Impact Assessment is an example of relatively better practice and was compiled after an extended expert study. It may be the case that there is a link between the use of such extended studies and the quality of the resulting Impact Assessments, at least in the case of significant and complex projects. If this is the case, this will have obvious resource implications and is certainly an issue that will have to be the subject of some candid assessment during the review that is just getting underway.

[70] See Art 4(2) of the Proposed Reg on the Establishment of the Fundamental Rights Agency and the Parliament's proposed amendment in its report: A6–0306/2006.

SOME FURTHER OBSERVATIONS

So much for an outline evaluation of early Impact Assessment practice, with particular reference to the field of migration law. There are, however, some further observations to be made before concluding.

Continuation of Previous Practice

In some ways it is striking how this very specific Impact Assessment procedure builds on some existing elements of previous policy analysis. Migration law is certainly a subject on which there is considerable research now underway, and the DG was accustomed to conducting at least some process of research and evaluation of different possible options before acting. Even leaving aside the obvious point that the Impact Assessment programme systematised already existing albeit fragmented and partial Impact Assessment processes, the Commission and other Community institutions have in the past commissioned and used studies outside and independently of the Impact Assessment procedure, have weighed advantages and disadvantages of various options during the legislative and policy drafting process, and consultation with stakeholders is by no means a new departure. One is reminded of Molière's 'Bourgeois Gentilhomme' who spoke prose all his life without realising it: has the Commission been doing Impact Assessment all along without knowing it? In some form or other, it may be true to say that it has. We should certainly expect some continuity, consolidation and development of existing practices rather than an entirely new process. Certainly, the Impact Assessment now provides a structured mechanism for channelling analysis of options and consultation into the decision-making process in a particular format, and indeed one that may make it more systematic and transparent. This may indeed be welcomed, but it is rather too early to tell to what extent the process will be a significant improvement on what went before, and whether additional financial and administrative costs involved are actually reaping significant additional benefits.

The Pre-eminence of Political Imperatives

It is also important to be aware of how the Impact Assessment process fits into the development of a particular policy agenda over time, and to consider where the primary political impetus for particular initiatives comes from. It is interesting to note the highly politicised nature of migration policy and the extent to which it still remains dominated and driven to a significant extent by the Member States reflected in the Impact

Assessment process. Several of the Impact Assessments, unfortunately, seem to fall into the category of being extended explanatory memoranda elaborating on and justifying or explaining basic political orientations or commitments that have already been made. Again, the examples that have been examined before—the VIS Impact Assessment and the question of biometrics, the 'RABITs' Regulation, and the Returns Directive may all be seen to be examples of where the Commission is operating under constraints of prior political commitments and orientations—of the Member States through the Council as well as policy plans drawn up by the Commission.[71] Whilst recognising that these Council Conclusions are often worded as invitations to study and present proposals, one wonders whether is it really realistic to think that the Commission has significant and meaningful freedom, for example, to advise against the use of biometrics, or to suggest that there is no case for a Directive harmonising returns procedures. Something of a contrast might usefully be made with other Impact Assessments where the Commission is not acting under quite the same political constraints and may perhaps have more of a genuinely independent role in developing legislative proposals—within the FSJ area perhaps, pre-trial supervision measures might be an example[72] in which, although there had been previous discussion, the Impact Assessment and its associated study provided useful additional information to inform the choice of measure or, in an entirely different area, the mobile phone Roaming Directive.[73] As Meuwese points out, an explanatory memorandum already performs this 'justificatory' role, and it might be added that it does so without the veneer of what may be seen by some as the apparent added authority of 'objective' analysis of an Impact Assessment. There seems little to be gained from Impact Assessments turning into ex post facto justifications of pre-existing choices and orientations that essentially originate outside the Commission without adding significant new information into the process. Indeed, this risks simply fuelling disenchantment—whether with the Impact Assessment process or with the project of building the EU's 'Area of Freedom, Security and Justice'. Clearly, the Commission's mandate and instructions from the Council or guidance from the European Council may vary in urgency and level of detail, and it is not my intention to suggest that such guidance does not have a legitimate place in the policy development process. However, where there are pre-existing political

[71] The political orientations and background is set out at the beginning of each Impact Assessment.

[72] See above n 55.

[73] Reading the introduction to this Impact Assessment, SEC(2006)926, certainly gives the impression that this Reg is less clearly placed within a Council of Ministers or European Council framework of action than much of the FSJ agenda.

commitments and orientations, the extent and nature of these do need to be made clear at the outset—as indeed is the case in many of these Impact Assessments.

Further, if an option is ruled out for reasons that are to a significant extent political and related to the (lack of) support from Member States for a particular option, this should be made clear: as, for example, is the case in the legal migration policy Impact Assessment with the option of a comprehensive Directive similar to the Proposal in 2001 and in the 'RABITs' Regulation Impact Assessment with the option of establishing a corps of EU border guards at this stage. It would be encouraging to think that Impact Assessments could have some role in shaping these commitments and orientations, but this depends on their taking place at an appropriate stage in the policy process. One must look to Impact Assessments relating to policy plans for this to happen—such as that on legal migration or policy priorities in the fight against illegal immigration: but we should be realistic about how often this is likely to happen and how profoundly the Impact Assessment process will be able to shape these priorities. Realistically, the Impact Assessment process may most usefully proceed from there, less in justifying existing prior commitments and orientations and more in shaping the way they are implemented. Another constraint is that one manifestation of the highly politicised nature of migration policy is that political priorities may change fairly rapidly. If priorities change too quickly, it may become somewhat problematic for Impact Assessments to be produced in the time required in the level of depth and of quality that would be wished. Some candid evaluation of this, as well as the matter of resources and staffing, may be required.

Challenging the Prevailing Discourse and Portrayal of Migration and Migrants

One function that the Impact Assessment process, as with any consultation mechanism, may perform is to be a forum where the prevailing discourse surrounding migration and migrants may be shaped and challenged. The increasing criminalisation and stigmatisation of migrants and the pronounced link between migration, terrorism and law enforcement are well documented.[74] Can the Impact Assessment process be a forum in which

[74] See, eg, N Coleman, 'From Gulf War to Gulf War—Years of Security Concern in Immigration and Asylum Policies at European Level' in A Baldaccini and E Guild (eds), *Terrorism and the Foreigner: A Decade of Tension Around the Rule of Law in Europe* (Leiden, Brill, 2007); E Guild, 'Protection, Threat and Movement of Persons— Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001' in F Crepeau *et al* (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lexington, Mass, Lexington Books, 2005); and Chs 10 and 12 in this volume.

alternative voices are heard to challenge these discourses? The evidence thus far is, perhaps unsurprisingly, that expectations should be realistic. None of the Impact Assessments really seem to do this thoroughly and effectively: the closest is arguably that relating to the policy plan on legal migration discussing, amongst other things, the benefits of economic migration, Member States' varying needs for it, and the case for minimum standards of protection for those admitted for work.[75] Perhaps this is not surprising, given that these are Commission documents. Early evidence suggests that the best that may be hoped for may be some limited increase in transparency in revealing the underlying assumptions and priorities driving migration policy and in the criteria used to choose between various possible alternative approaches, rather than any significantly increased or more effective opportunities to challenge or shape these assumptions at any fundamental level. Nonetheless, for those wishing to engage in the policy process and have some input by way of contributing these alternative points of view into the policy and legislative process, the Impact Assessment procedure will become increasingly important as a focus for stakeholder consultation.

Is There a Predominant Model of Impact Assessment?

If we return to the various different functions of Impact Assessments outlined above, there does not seem to be a single predominant model. It is clear that the function of 'speaking truth to power' does not seem to predominate—not in the sense of finding the 'right' answer to a genuinely open question, although some seem to fall somewhat between this and 'reason-giving'. As to the provision of stakeholder input, this does certainly appear, but we have seen that the record is variable and one must ask, in any event, whether the process does anything to advance on the relatively systematic stakeholder input already established in the FSJ DG. In this respect what is, arguably, needed is not so much more input from civil society but more attention being paid to it. '[r]eason-giving for legislative decisions' arguably fits well with many of the legislative Impact Assessments, although this can be at an abstract and general level which, arguably, robs them of much purpose beyond being extended Explanatory Memoranda. It is also worth noting that many of these cases also have some hint of 'speaking truth to power' in terms of purporting to point to one clearly optimal policy approach (the VIS, Returns and RABITs Impact Assessments could all be seen in this way). However, I would tend to see them more as justification rather than containing some kind of objective truth to inform of a correct approach, largely because of the extent to

[75] See Ch 16 in this volume.

which there seem to be pre-existing policy orientations expressed by the Council of Ministers or the European Council, and the extent to which the 'truth' contained in these documents (preferred policy option) is to a significant degree a subjective, if persuasive, policy analysis rather than objective fact. As to 'highlighting trade-offs' and/or 'structuring the discourse', both functions can, arguably, be seen to some extent. Some Impact Assessments do contain useful indications at a basic level of the differing issues at stake, and some even contain brief indications of the relative level of importance attached to the various criteria being used and interests that must be balanced against each other in reaching a conclusion. The priority to be attached to competing interests, however, remains contestable, and the extent to which the Impact Assessment reports are able to move systematically beyond a simple enumeration of competing factors and act as a useful basis to structure the subsequent discussion as the proposals move through the legislative process remains to be seen. There is certainly potential for this to happen, even in the quite highly politicised migration law field, but a more systematic study of the existing and future Impact Assessments as they move through the legislative process will be necessary. Much will depend both on the quality of the Impact Assessment documents—we have seen this is mixed, some better than others—and the willingness of the European Parliament and national parliaments and their respective scrutiny Committees to engage with these documents in a constructive way.

Is There an Underlying Difficulty with Impact Assessments in Immigration and Asylum Law?

It is worth returning to contemplate briefly the different nature of various types of legislation. The Impact Assessment paradigm seems to be designed for—and thus perhaps may well work best with—what one might call the 'classic' regulatory pattern: regulatory authorities imposing rules which may have costs on businesses, or indeed on other not-for-profit or charitable organisations, but are intended to achieve certain environmental, safety, consumer protection or other social benefit. The purpose of Impact Assessments is to question in an adequately thorough manner, according to the issue at hand, the costs and benefits of these regulations before they are enacted. A freedom to operate in the business (or charity, educational, not-for-profit) sector with minimal interference, and such interference only when necessary, seems to be at the heart of this. Whilst it may not be entirely fair to suggest that 'better regulation' is necessarily equated simply to 'deregulation' or 'less regulation', cutting red tape and minimising regulatory and administrative costs and burdens on business and other enterprises is certainly a significant driving force behind it. We

have already noted the concern from the environmental perspective that the process may not yet be operating in such a way as to bring out sufficiently clearly the legitimate and beneficial reasons, sometimes not easily susceptible of quantification, let alone monetarisation, why regulation may be a good thing even if there are economic costs. It would be interesting and in many ways heartening, although perhaps unrealistic, to see the Impact Assessment process begin to apply this paradigm thoroughly to the movement of persons. And yet that approach seems to be very slow in arriving outside the arena of the free movement of EU citizens, and this will inevitably shape the fundamental assumptions on which the regulatory and legislative processes proceed. Far from being an inherently legitimate activity which should be interfered with in as minimal a way as possible (as is now broadly the case in theory and also increasingly in practice for free movement of EU citizens and their family members),[76] the surveillance and control of non-nationals in their entry to and residence in the state's territory remain deeply ingrained and a practically non-negotiable starting point. What then happens when the Impact Assessment process is used in an area where the underlying assumptions of the role of the state, the legitimacy of state power, and the justification for the use of the state's ultimately coercive regulatory power over the subjects of that regulation are turned on their head? The Impact Assessment process, perhaps understandably, does not seem to have any real aim or ambition to challenge or change these underlying assumptions in the context of migration law—however much some may wish that it could or would do so. Nor do they seem very likely to be able to have a significant impact in shaping Member States' fundamental underlying policy preferences in this highly politicised area, even if some influence on negotiation and deliberation during the lawmaking process is possible. This does not mean that Impact Assessments may not have a useful role to play in informing the legislative process, or that there is any insuperable difficulty in using them in this context. However, we should be aware that this political background will influence the way they are able to do so, just as it influences other aspects of the EU legislative process in this field.

[76] One might, interestingly, note the pre-trial supervision Impact Assessment (above n 55) as an interesting example in this field, where it could be suggested that the IA performed a valuable role in providing information to clarify the extent and cost of pre-trial detention and could be seen as significant in making the case for possible regulation to enhance the rights of migrant EU citizens when awaiting trial abroad.

CONCLUSION

Impact Assessments have thus far had a relatively low profile in the construction of the EU's immigration and asylum law and policy. Nonetheless, they are now taking an increasingly important role and are potentially of significant interest to anyone analysing, commenting on, evaluating or seeking to influence its future direction. This chapter has introduced some of the major issues with reference to several recent Impact Assessment documents relating to migration law and policy. This technique, while it may be welcomed for the greater transparency it brings and its potential to contribute to well-informed decision-making, does give rise to some interesting questions in its application to migration law no less than in other policy areas, and indeed perhaps more so. What can a technique, fundamentally designed around 'better regulation', competitiveness and sustainability, offer in a field that often seems quite distant from these particular concerns? What does 'better' migration lawmaking mean? Can Impact Assessments deliver any useful contribution to well-informed evidence-based policy in this field, and in particular can they assist in shaping migration law and policy which comply fully with fundamental rights and international obligations? If they may in principle be capable of making some useful contribution to 'better' lawmaking, are they doing so as they are currently being produced? We have seen that, both on the basis of other evaluations and on the basis of examination of recent Impact Assessments in the migration law field, the current Impact Assessment framework has some way to go before these questions can be answered systematically and confidently in the affirmative. Until these issues are addressed, expectations of what Impact Assessments can do to deliver 'better (migration) law-making' should be realistic, and relatively modest. Nonetheless, stakeholders and academics will have to engage with this process, both in relation to Impact Assessments dealing with individual policy and legislative measures, and more generally in the process of evaluating, and hopefully in time improving, the implementation of the Impact Assessment programme.

Part II

Access to Asylum and Refugee Protection

5

The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles

CATHRYN COSTELLO*

INTRODUCTION

IN THE TAMPERE Conclusions, the EU pledged itself to develop 'common standards for a fair and efficient asylum procedure'.[1] This chapter considers whether this commitment has been met in the Procedures Directive.[2] In this discussion, fairness is understood in a general sense, as familiar from administrative law, requiring adequate hearing and impartiality, albeit adapted to the specificities of the asylum process. Efficiency is a more difficult concept. It tends to be conceived of in a narrow state-centric manner, as the minimisation of the costs of providing protection, in a manner apt to undermine fairness.[3] The Tampere commitment in contrast implies that the notions must be conceived of as mutually reinforcing.

* The author would like to thank Dr Rosemary Byrne, Dr Catherine Donnelly and Professor Jens Vedsted-Hansen for most helpful and insightful comments. All errors remain of course her own.

[1] Presidency Conclusions, Tampere European Council, 15–16 Oct 1999, SN 200/99, 3.

[2] Council Dir 2005/85/EC of 1 Dec 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13. See further S Peers, 'Key Legislative Developments on Migration' [2006] *European Journal of Migration and Law* 97, at 98–107; C Costello, *ILPA Analysis and Critique of Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (30 April 2004)* (London, ILPA, July 2004), available at www.ilpa.org.uk, follow link for <submissions>; S Craig and M Fletcher, 'Deflecting Refugees: A Critique of the EC Asylum Procedures Directive' in P Shah (ed), *The Challenge of Asylum to Legal Systems* (London, Cavendish Publishing, 2005) 53.

[3] See further, A Betts, 'What does "Efficiency" Mean in the Context of the Global Refugee Regime?', *Centre on Migration, Policy and Society Working Paper No 5* (Oxford, COMPAS, 2005).

The particular question addressed is how the highly qualified and differentiated procedural guarantees in the Procedures Directive will interact with the robust procedural standards of the general principles of EC law,[4] which must be respected in the implementation and application of both the Procedures Directive and Qualification Directive.[5]

To this end, the next section contextualises the harmonisation process, in order to explain Member States' ambivalence towards the exercise, and hence the ambiguous outcomes. Then, I outline the highly qualified and differentiated procedural guarantees in the Procedures Directive, and the contrasting provisions in the Qualification Directive on evidential assessment. The role of various sources of fair procedures and fundamental rights is then explained, focusing in particular on the general principles of EC law. The next section examines four key procedural issues, where the apparent discretion afforded by the Procedures Directive is constrained by these general principles. These are the entitlements to an interview or hearing; a reasoned decision; legal aid; and effective judicial protection. The final section considers likely future procedural developments, as the EU enters a new phase of asylum policy development.

This account of EC general principles reveals a significant transformation of asylum law implicit in its integration into the framework of EC law. EC law is a unique system of law, with many federal features and strong enforcement mechanisms. With its own supranational court, the EC legal order permeates national ones, bringing well-established legal doctrines which empower national judges and indeed litigants. Many of these doctrines have been honed in different, largely economic contexts. Strategic litigation is required to test their application in the asylum context. The doctrinal analysis in this chapter provides some potentially fruitful arguments that such litigation should employ.

[4] See generally T Tridimas, *The General Principles of EU Law,* 2nd edn (Oxford, OUP, 2006); HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart, 1999); P Craig and G de Burca, *EU Law—Text, Cases and Materials,* 3rd edn (Oxford, OUP, 2002) chs 5 and 6; and Ch 2 in this volume.

[5] Dir 2004/83 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 [2004] OJ L 304/12. See generally Ch 7 in this volume; J McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' [2005] *International Journal of Refugee Law* 461; UNHCR, *Annotated Comments on the EC 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 304/12 of 30.9.2004)* (Geneva, UNHCR, Jan 2005); and ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Doc IN1/10/2004/ext/CN (Brussels, ECRE, Oct 2004).

ASYLUM PROCEDURES IN CONTEXT

Asylum decision-making poses unique challenges. At its core is the task of assessing fear of persecution and future risk of certain harms, which requires both sensitive communicative approaches and objective risk assessment. These methods may not sit easily together, in that the former privileges the asylum seekers' account and the latter objective country of origin information. Both elements are, however, crucial. Moreover, the context necessitates a particular non-adversarial approach to fact-finding, due to the fact that while the asylum seeker alone has the relevant personal knowledge, governmental authorities may be better placed to deal with general country conditions.[6] These may in turn be volatile and variable. In claims that warrant recognition, asylum seekers' testimony may nonetheless be inconsistent, incredible or even untruthful in respects, and the process marred by intercultural and linguistic misunderstanding. Thus, too hasty findings of incredibility are inevitably unfair,[7] and the applicant must be given the benefit of the doubt.[8] Deciding on refugee claims has accordingly been described as 'the single most complex adjudication function in contemporary Western societies'.[9] There is no analogous process, although useful lessons may be drawn from other areas of decision-making.[10]

Governments have yet to meet this unique challenge with procedures which are both fair and efficient. This is evidenced in the crude and

[6] See, eg, *Secretary of State for the Home Department v RK (obligation to investigate) Democratic Republic of Congo* [2004] UKIAT 00129, para 46, cited in R Thomas, 'Asylum Appeals: The Challenge of Asylum to the British Legal System' in Shah (ed), above n 2, at 201, 204–5.

[7] There is a growing literature on credibility issues in asylum procedures. See eg W Kalin, 'Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing' [1986] *International Migration Review* 230; M Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in the Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367; J Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' [2001] *International Journal of Refugee Law* 293 and material at nn 9 and 10 below.

[8] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (re-edited Geneva, UNHCR, Jan 1992), paras 203–204.

[9] C Rousseau, F Crépeau, P Foxen and F Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' [2002] 15 *Journal of Refugee Studies* 43, citing P Showler, Chair of the Canadian Immigration and Refugee Board, Oral Statement at the Spring Meeting of the Canadian Council for Refugees, Vancouver, (June 2000).

[10] See G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston, Mass, Martinus Nijhoff, 2005), in particular the contributions by H Zahle, 'Competing Patterns for Evidentiary Assessments' , at 31; A Popovic, 'Evidentiary Assessment and Non-refoulement: Insights from Criminal Procedure', at 27; N Doornboos, 'On Being Heard in Asylum Cases—Evidentiary Assessment through Asylum Interviews', at 103 and G Noll, 'Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear', at 141.

repeated alterations to asylum processes across Europe over the past two decades, as governments' primary response to the 'asylum crisis'. Recourse to procedural change is at least partly explained by the fact that, unlike the substantive guarantee in the Refugee Convention and other fundamental rights instruments, in particular *non-refoulement*, international law leaves room for divergent national procedures. As the UNHCR Handbook indicates:

> It is … left to each Contracting State to establish the procedure that it considers the most appropriate, having regard to its particular constitutional and administrative structure.[11]

So governments have taken this leeway and manipulated asylum procedures in order to pursue manifold objectives, from deterring and deflecting asylum seekers, to ensuring that failed asylum seekers will be deportable.[12] Globally, as Legomsky notes, 'it is … procedural issues that … tend to trigger the most controversial and the most long-lasting debates'.[13] Unsurprisingly, governments still jealously guard this perceived room to manipulate asylum systems through procedural change and, as will be seen, were thus reluctant to agree unequivocal binding standards in the Procedures Directive.[14]

However, institutional dynamics lead to informal convergence of procedural practices, as states share restrictive practices and thereby engage in a procedural race to the bottom. The most enduring and widespread common practices and shared understandings are those based on safe country, namely safe third country (STC) and safe country of origin (SCO), practices. The common assumption of both processes is that it is possible to make general assumptions of safety and truncate asylum examinations accordingly. STC also has a clear external dimension, and aims to deflect asylum seekers elsewhere, in a manner which undermines international

[11] UNHCR Handbook, above n 8, para 189.

[12] See discussion below concerning measure to ensure that asylum seekers hand over identity documentation.

[13] S Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' [2000] *Georgetown Immigration Law Journal* 619, 620.

[14] J Vedsted-Hansen, 'Common EU Standards on Asylum—Optional Harmonisation or Exclusive Procedures?' [2005] *European Journal of Migration and Law* 369, 374. He suggests that the reluctance fully to harmonise procedures reflects 'a combination of regulatory tradition and calculated evasion', in particular as procedural commitments are entered into less readily than substantive ones, as the former are more visible and easy to monitor than the latter. A purely rationalist account cannot explain all the features of the common European asylum policy. For instance, the Dublin Reg defies rationalist explanation. See further, J Aus, 'Logics of Decision-making on Community Asylum Policy: A Case Study in the Evolvement of the Dublin II Regulation', *ARENA Working Paper No 3* (Oslo, ARENA, 2006).

protection.[15] Over time, the procedural consequences of the application of these practices have deteriorated, for example, leading to the denial of an asylum interview or appeal in some countries. STC in particular is often treated as evidence of a weak substantive claim, rather than reflecting the fact that requisite protection was available elsewhere. This reflects the practice becoming unhinged from its original rationale. This phenomenon is reflected in the Procedures Directive, and discussed further in the next section below.

STC developed from the concept of first country of asylum (FCA), which refers to the situation where an asylum seeker has actually been afforded protection in a third country, and hence his or her application is not examined again. The STC concept emerged in 1986 in Denmark and the practice 'quickly gained ground … By the end of the 1990s, virtually every Western European state implemented a safe third country policy to transfer responsibility for receiving an asylum seeker and assessing their claim.'[16] The London Resolutions on a harmonised approach concerning host third countries[17] and the 1995 Resolution on minimum guarantees for asylum procedures[18] allowed derogations from basic procedural guarantees in STC cases. STC was included in the two legally binding European instruments—the Schengen and Dublin Conventions.[19] The erosion of access to protection through STC continues.[20]

[15] This issue is more thoroughly dealt with in C Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' [2005] *European Journal of Migration and Law* 30. See further Ch 9 in this volume.

[16] R Byrne, G Noll and J Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' [2004] *European Journal of International Law* 355, 360. See also N Lassen and J Hughes (eds), *Safe Third Country Policies in European Countries* (Copenhagen, Danish Refugee Council, 1997).

[17] In 1992, the Council adopted three resolutions, known as the London Resolutions: Council of the European Communities, Conclusions of the Ministers Responsible for Immigration, *Resolution on a Harmonised Approach to Questions Concerning Host Third Countries*; *Resolution on Manifestly Unfounded Applications for Asylum; Conclusions on Countries in which there is Generally no Risk of Persecution* (Council Doc 10579/92 IMMIG London, 30 Nov–1 Dec 1992).

[18] Council Resolution on minimum guarantees for asylum procedures [1996] OJ C 274/13.

[19] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990 [1997] OJ C 254/1. Art 3(5) provided that '[a]ny Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the [Refugee Convention].'

[20] See further, J Van Der Klaauw, 'Towards a Common Asylum Procedure' in E Guild and C Harlow (eds), *Implementing Amsterdam* (Oxford, Hart, 2001) 166, 183 and UNHCR, Background Paper No 2, *The Application of the 'Safe Third Country' Notion and its Impact on the Management of Flows and on the Protection of Refugees* (Geneva, UNHCR, May 2001).

SCO rules are even more recent and more controversial than STC. SCO has no legal basis in the Refugee Convention, and has been criticised as a violation of the Refugee Convention's non-discrimination guarantee.[21] The 1990 Swiss asylum law was the first to adopt an SCO rule.[22] Again, the concept spread initially through the administrative policy-sharing interactions characteristic of this field, followed by formal (if non-binding) harmonisation.[23] The 1992 London Resolutions reflected this process, with the Resolution on manifestly unfounded applications allowing applications to be so deemed if the asylum seekers came from a country 'in which in general terms no serious risk of persecution' existed.[24]

However, the domestic procedural race to the bottom has been impeded judicially.

Generally speaking, the European Court of Human Rights (ECtHR) has thwarted procedural deterioration and insists on careful factual assessment.[25] For instance, the *TI* case[26] illustrates that transfers to third countries without appropriate safeguards will violate the European Convention on Human Rights (ECHR). Strasbourg jurisprudence on Articles 3 and 13 has condemned various procedural practices, from the rigid application of time limits[27] to non-suspensive appeals.[28] In addition, many national judiciaries have been embroiled in asylum controversies, blunting political attempts to undermine procedural guarantees, based on Strasbourg principles or, indeed, more commonly, domestic administrative law. In the UK, few aspects of asylum procedures have been untouched by

[21] Art 3 of the Refugee Convention. Amnesty International, *Europe: Harmonization of Asylum-Policy, Accelerated Procedures for 'Manifestly Unfounded' Claims and the 'Safe Country' Concept* (Brussels, Amnesty International, 1992).

[22] Asylum Procedure Law, 22 June 1990.

[23] After Switzerland, many other European countries quickly followed suit: Austria, Finland, Luxembourg (1991); Germany (1992); Portugal (1993); Denmark (1994); Netherlands (1995); UK and France (1996).

[24] Above n 17. The later 1995 Resolution on Minimum Guarantees simply referred back to the latter Resolution as regards manifestly unfounded claims.

[25] Recently, the ECtHR has held that the UNHCR erred in its refugee status determination procedures in *D and Others v Turkey*. The case concerned an Iranian couple and their child whose applications for refugee status were refused by UNHCR's Ankara office. The woman had been sentenced by an Iranian Islamic court to 100 lashes for fornication. UNHCR's refusal was based on its assessment that she would be subject only to symbolic punishment. The ECtHR held that return would breach Art 3 ECHR, and in effect condemned UNHCR's risk assessment in the case, on which the Turkish government relied exclusively. The Court noted that there was no actual indication that Iranian authorities intended to reduce the 100 lashes punishment. Even if the sentence were reduced, Iranian law called for an alternative of one single blow with a special whip made of 100 separate woven strips, which would still amount to a violation of Art 3 ECHR: App No 24245/03, *D and Others v Turkey,* 22 June 2006, in particular para 51.

[26] App No 43844/98, *TI v UK,* 7 Mar 2000.

[27] App No 40035/98, *Jabari v Turkey,* 11 July 2000.

[28] *Ibid*; App No 00045276/99, *Hilal v UK,* 6 Mar 2001, (2001) 00 EHRR 2; App No 51564/99, *Conka v Belgium,* 5 Feb 2001 (2002) 34 EHRR 54, discussed in more detail below.

judicial intervention.[29] For instance, in *Ex parte Adan and Aitseguer*,[30] Dublin removals were precluded when onward removal to unsafe countries was likely. SCO designations have been impugned on 'irrationality' grounds.[31] Similarly, a Belgian court ended Belgium's particularly rigid SCO mechanism as a violation of the right to equality.[32]

However, across Europe, the role of the judiciary in asylum varies considerably. Some national judiciaries employ highly deferential approaches to judicial review in the asylum field, facilitating the erosion of procedural standards.[33] Moreover, the political reaction to judicial interventions also varies. For instance, the UK response to *Adan* was the introduction of an irrebuttable statutory presumption that EU Member States were 'safe' for the purposes of return, thus precluding judicial enquiry into whether those states would provide effective protection.[34] Governments may turn to various indirect means to reduce judicial intervention, such as restrictions on legal aid or strict time limits. Direct and explicit attempts to prevent access to courts tend to provoke judicial ire, with an attempt to oust judicial review altogether leading to a constitutional furore in the UK.[35]

[29] For accounts focusing on the UK see C Harvey, 'Judging Asylum' in Shah, above n 2, at 169; R Thomas, 'The Impact of Judicial Review on Asylum' [2003] *Public Law* 479; R Rawlings, 'Review, Revenge and Retreat' (2005) 68 *MLR* 378.

[30] *R v Secretary of State for the Home Dept ex parte Adan and Aitseguer* [2001] 2 AC 477. See, further, G Noll, 'Formalism v Empiricism. Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' [2001] *Nordic Journal of International Law* 161; A Nicol and S Harrison, 'The Law and Practice of the Application of the Dublin Convention in the UK' [1999] *European Journal of Migration and Law* 465; and from the point of view of international comity, T Endicott, '"International Meaning": Comity in Fundamental Rights Adjudication' [2002] *International Journal of Refugee Law* 280.

[31] *R v Secretary of State for the Home Department ex parte Javed (1) Asif Javed (2) Zulfiqar Ali and Abid Ali* [2001] EWCA Civ 789, cf *R (Balwinder Singh) v Secretary of State for the Home Department and Special Adjudicator* [2001] EWHC Admin 925.

[32] H Martenson and J McCarthy, '"In General, No Serious Risk of Persecution": Safe Country of Origin Practices in Nine European States' [1998] *Journal of Refugee Studies* 304, 306.

[33] See, eg, concerning the Netherlands S Essakkili, 'Marginal Judicial Review in the Dutch Asylum Procedure: An Assessment in Light of Articles 3 and 13 of the European Convention on Human Rights' with an afterword by T Spijkerboer, *Migration Law Papers* 2 (Amsterdam, Faculty of Law, June 2005) and, concerning Denmark, J Vedsted-Hansen, 'The Borderline between Questions of Fact and Questions of Law' in Noll (ed), above n 10, at 57.

[34] Immigration and Asylum Act 1999, s 11(1). As Thomas notes, '[t]he effect of the 1999 Act has been to nullify the effect of *Adan*', citing *R (on the application of Samer and Richi) v Secretary of State for the Home Department* [2001] EWHC Admin 545; *Ibrahim v Secretary of State for the Home Department* [2001] ImmAR 430; *R v Secretary of State for the Home Department ex parte Hatim* [2001] EWHC Admin 574; *R v Secretary of State for the Home Department ex parte Gashi and Kiche* [2001] EWHC Admin 662; *R (on the application of Yogathas and Thangarasa) v Secretary of State for the Home Department* [2002] UKHL 36: Thomas, above n 29, at 496–7.

[35] For an account of the 'ouster clause' in the Asylum and Immigration (Treatment of Claimants, etc) Bill 2004 see Rawlings, above n 29.

The Procedures Directive will inevitably lead to much further litigation. It reflects many controversial domestic practices, and appears to permit widespread acceleration and differentiation of procedures, conflating notions of admissibility and unfoundedness. In this, it apparently accords national administrations discretion that they had in some measure lost due to domestic and ECtHR rulings. However, the new legal context and the general principles it incorporates, as well as the inevitable intervention of another supranational jurisdiction, the European Court of Justice (ECJ), may well thwart the race to the bottom more than the negotiators anticipated. National judges look set to become key actors, with a new set of EC legal tools at their disposal.

Before this new context is considered, some important features of the Procedures Directive are set out in the next section, followed by an analysis of the provisions of the Qualification Directive on evidential assessment.

INTRODUCING THE PROCEDURES DIRECTIVE

Ambivalent Harmonisation

The Procedures Directive was the last measure adopted as part of the post-Amsterdam legislative programme in the asylum field. The Commission first proposed a Directive on asylum procedures in 2000[36] but, due to lack of political agreement, issued a much diluted revised proposal in 2002.[37] When it came to agreeing binding standards in a Directive, national governments or, more accurately, interior ministry officials legislated for discretion in a manner which reveals their ambivalence towards the harmonisation exercise.

The negotiations on the Directive were tortuous and the resulting drafts entailed a consistent erosion of procedural standards, such that in March 2004 an NGO Alliance called for the withdrawal of the Procedures Directive, noting that it was likely to lead to denial of access to protection.[38] UNHCR also made two unprecedented interventions, 'warning that

[36] Proposal for a Council Dir on minimum standards on procedures in Member States for granting and withdrawing refugee status, 24 Oct 2000 [2001] OJ C 62 E/231, hereafter the 'Original Proposal'.

[37] Amended Proposal for a Council Dir on minimum standards on procedures in Member States for granting and withdrawing refugee status, 18 June 2002 [2002] OJ C 291 E/143, hereafter the 'Revised Proposal'.

[38] ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants and Save the Children in Europe, *Call for Withdrawal of the Asylum Procedures Directive* (Brussels, 22 Mar 2004) available at http://www.statewatch.org/news/2004/mar/ngo-asylum-letter.pdf. Concerns were reiterated by

several provisions … would fall short of accepted international legal standards … [and] … could lead to an erosion of the global asylum system, jeopardizing the lives of future refugees'.[39] Nonetheless, the Directive was adopted on 1 December 2005.

There have been calls for the European Parliament (EP) to contest the Directive's validity on fundamental rights grounds,[40] as it did in the case of the Family Reunification Directive.[41] However, the Parliament chose to base its annulment action on institutional grounds only.[42] We await a decision in that case. The EP is not the only potential challenger. Indeed, any individual with domestic standing could bring a challenge via a national court of final instance,[43] provided he or she can convince the national court that there are serious grounds to doubt the Directive's validity.[44]

Exceptional Procedures Become the Norm

The Procedures Directive applies to 'applications for asylum'[45] made in the territory, including at the border. Member States are left a choice whether

ECRE, Amnesty International and Human Rights Watch Press Release, *Refugee and Human Rights Organisations across Europe Express their Concern at the Expected Agreement on Asylum Measures on breach of International Law* (Brussels, 28 Apr 2004) available at www.ecre,org/press/asylum_procedures.html.

[39] UNCHR Press Release, *Lubbers calls for EU asylum laws not to contravene international law* (29 Mar 2004); UNCHR Press Release, *UNHCR regrets missed opportunity to adopt high EU asylum standards (*30 Apr 2004).

[40] See, eg, Costello, above n 2.

[41] Case C–540/03 *Parliament v Council and Commission*, judgment of 27 June 2006 (not yet reported).

[42] Case C–133/06, *Parliament v Council*, action brought on 8 Mar 2006. Its main argument is that the procedure set out for agreeing common lists of STCs and SCOs should require co-decision with the EP, rather than mere consultation. Art 67(5) EC Treaty provides for the passage to co-decision in the asylum field, once legislation defining the basic principles and common rules in respect of the policy on asylum and refugees has been adopted.

[43] A final court is one whose decision is not subject to appeal: Case C–99/00 *Lyckeskog* [2002] ECR I–4839. It is arguable that although lower courts are not permitted at present to make preliminary references, they are empowered as a matter of EC law to grant interim relief against EC measures of dubious legality. See further S Peers, 'Who's Judging the Watchmen? The Judicial System of the "Area of Freedom, Security and Justice"' [1998] *Yearbook of European Law* 337, 354–6. (There is currently a proposal to allow all national courts to make preliminary references under Title IV EC Treaty: Commission Communication on the Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM(2006)346 final, 28 June 2006).

[44] Case 314/85 *Foto-frost* [1987] ECR 4199.

[45] Art 2(b) defines 'application for asylum' as 'an application by a third country national or stateless person which can be understood as a request for international protection from a Member State under the [Refugee Convention]. Any application for international protection is presumed to be an application for asylum, unless the person concerned requests another kind of protection that be applied for separately'.

to apply the Directive to subsidiary protection applications.[46] In addition, the Directive allows Member States to differentiate procedurally not only between refugee status and subsidiary protection applications, but also on the basis of the level, location and substance of the application. As regards the level of decision-maker, the basic guarantees apply only to 'responsible authorities',[47] meaning at the first instance stage. There is no requirement to have an administrative appeal, merely access to effective judicial protection.[48]

As regards substantive issues, Member States may siphon applications into different procedures, to be decided in some instances by different bodies. Outside the mainstream procedure, lower procedural standards may apply.[49] Such other bodies may be established, for instance for STC cases and preliminary examinations. Special bodies may also be established to deal with national security issues,[50] which is particularly worrying in light of the Qualification Directive's extensive provisions on exclusion from both subsidiary protection and refugee status on such grounds.[51] There are no explicit limits on which procedures may be accelerated.[52] In addition, claims may be regarded as 'manifestly unfounded' on a range of bases, many of which are unrelated to the substance of the claim.[53] While the Original Proposal had the laudable aim of restricting the scope and impact of manifestly unfounded procedures, it now allows applications to

[46] Art 3(3) and (4) Procedures Dir, above n 2.

[47] *Ibid*, Art 4 and 2(e). Thus, it requires all Member States to designate a 'determining authority', defined as 'any quasi-judicial or administrative body in a Member State responsible for examining asylum applications and competent to take decisions at first instance in such cases, subject to Annex I'. *Ibid,* Annex I applies only to Ireland, and clarifies that the designated authority is the Refugee Applications Commissioner, not the Refugee Appeals Tribunal, an administrative appellate body.

[48] *Ibid*, Art 39. See, further, the discussion below.

[49] *Ibid,* Art 4(3). Personnel are merely required to 'have the appropriate knowledge or receive necessary training to fulfil their obligations when implementing [the] Directive'.

[50] *Ibid*, Art 4(2)(b): Member States may provide that another authority is responsible for the purposes of 'taking a decision on the application in light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of [the Qualification Directive]'.

[51] Arts 12 and 17 of the Qualification Dir, above n 5. See ch 7 in this volume for a detailed account of the Qualification Dir's provisions on exclusion.

[52] Art 23(3) of the Procedures Dir, above n 2, states: 'Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees in Chapter II, including where the application is likely to be well-founded or where the applicant has special needs'.

[53] *Ibid*, Arts 28(2) and 23(4)(a) to (o).

be deemed unfounded on any of the 15 permissible grounds for accelerating procedures.[54] The main procedural guarantees still apply to some, but not all, manifestly unfounded claims.[55]

Border Procedures

The place of application will also determine the procedure which applies. Most notably, Member States are allowed to maintain special border procedures.[56] This is despite the fact that international law dictates that state responsibility for applicants at the border is the same as for those in the country. In particular, the Refugee Convention's *non-refoulement* guarantee is applicable to rejection at the border.[57]

The border procedure provision also appears to permit detention of asylum seekers without judicial review and without consideration of individual circumstances for a period of up to four weeks.[58]

Border procedures generally run counter to the acknowledged legal requirement to admit asylum seekers to the territory, in order to carry out a proper asylum process. It also defies logic and fairness to treat asylum applicants who apply at the border so differently. The provisions create incentives to enter countries illegally, rather than claim asylum at the frontier. They also discourage prompt application. This looks perverse in light of the fact that although the Directive provides that asylum applications are to be neither 'rejected nor excluded' 'on the sole ground' that the applications have not been made as soon as possible,[59] failure to apply

[54] *Ibid,* Art 23(4).

[55] In some cases, the Procedures Dir, above n 2, apparently permits Member States to dispense with the interview. See below.

[56] The safeguards for asylum seekers subject to such border procedures include the right to remain at the border or transit zones; access, if necessary, to an interpreter, and to be immediately informed of their rights and obligations. The normal interview guarantees apply, as regards the conduct of the interview, and consultation with legal advisers or counsellors. Any rejection must be reasoned.

[57] See E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law* (Cambridge, Cambridge University Press, 2003) 87, paras 76–86. The ECHR goes even further in that it not only creates obligations vis-à-vis those at the border, but also more broadly. See G Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' [2005] *International Refugee Law Journal* 542, in particular 564–70.

[58] Art 35(4) provides: 'Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 [decisions about granting access to territory from border or transit zones] is taken within a reasonable time. When a decision has not been taken within *four weeks*, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive' (emphasis added). Of course, the legality of detention raises complex legal questions which are outside the scope of this chapter, but see further Ch 13 in this volume.

[59] Art 8(1) of the Procedures Dir, above n 2.

earlier 'without reasonable cause . . . having had the opportunity to do so' is one of the grounds upon which Member States may lay down accelerated procedures.[60]

Safe Third Country (STC)

The Procedures Directive enshrines three forms of STC practice, namely STC *simpliciter*, first country of asylum (FCA) and supersafe third country. Each of these practices is based on the assumption that protection was available (in the case of STC and supersafe third country) or availed of (in the case of FCA) elsewhere.[61] As such, conceptually, they do not cast any doubts on the merits of the asylum claim, but rather assume that any protection required will be or has been afforded elsewhere.

However, the Procedures Directive conflates admissibility and unfoundedness. It expands the grounds upon which applications may be deemed inadmissible, introducing eight categories of applications which may be so regarded, on the basis that protection is either available[62] or has been granted[63] elsewhere, or that the application is already in effect under consideration.[64] The categorisation of even Dublin transfers as 'inadmissible' is problematic, as it runs counter to the ECtHR jurisprudence in *TI*,[65] which requires an examination of the individual claim in light of the standards applicable in the receiving state before such transfer is permissible. Nonetheless, at least it reflects the notion that under Dublin and STC it is foreseen that the application will undergo a full examination elsewhere. However, the Procedures Directive also includes STC as a ground for regarding claims as unfounded, 'if [they are] so defined under national

[60] *Ibid*, Art 23(4)(i).

[61] See generally UNHCR's EXCOM Conclusions Nos 15 (Refugees without an Asylum Country (1979)) and 58 (The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which they had already found protection (1989)). Legomsky, in contrast, has argued that STC and FCA returns should be regarded as 'two points on the same continuum' as in both cases, the acceptability of the return depends on the effectiveness of protection available at the time of return: S Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' [2003] *International Journal of Refugee Law* 567, 570. However, he acknowledges that from the point of view of the practicality of returns, there are significant differences.

[62] Dublin transfers (Art 25(1)); where a non-EU country is a 'safe third country' (Arts 25(2)(c) and 27).

[63] Another Member State has granted refugee status (Art 25(2)(a)); another Member State is examining an application for protection; a non-EU country is the 'first country of asylum' (Arts 25(2)(b) and 26); the Member State concerned has granted an analogous status (Art 25(2)(e)).

[64] An applicant has lodged an identical application after a final decision (Art 25(2)(f)); under certain conditions, where a relative has lodged an application on the applicant's behalf (Art 25(2)(g)).

[65] Above n 26.

legislation'.[66] The Original Proposal did include SCO as a basis for regarding applications as unfounded, but not STC.[67]

The generalised assessment of safety inherent in safe country practices is always likely to be controversial. Moreover, no matter how rigorous this general assessment, in all instances the key to the permissibility of the practice under fundamental rights rules is whether the third country is safe for the individual applicant, usually conceived of in terms of whether the third country will provide effective protection.[68]

Concerning the basic STC rule, the generalised assessment of safety is based on minimal criteria, namely that 'life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion'; respect for the principle of *non-refoulement* under the Refugee Convention and other international instruments; and the possibility to request refugee status and, if found to be a refugee, 'to receive protection in accordance with the [Refugee] Convention'.[69] There is thus no explicit requirement to demonstrate that the protection standards under the Refugee Convention are actually adhered to, merely that the possibility exists to seek and be accorded such protection. As regards individual assessment, the Original Proposal provided that a country could be regarded as safe for an individual application only if 'there are no grounds for considering that the country is not a safe third country in [the applicant's] particular circumstances'.[70] No agreement could be reached on this text, and the Directive requires Member States to set out 'rules on methodology' to determine whether the rule is applicable to 'a particular country or to a particular applicant'.[71] These rules must be:

> [I]n accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.[72]

The latter clause was inserted in the April 2004 draft of the Directive in order to avoid the violation of international law inherent in the previous draft, which denied access to the procedure altogether.[73] However, that

[66] Art 23(4)(c) of the Procedures Dir, above n 2.
[67] Art 28(1)(e) of the Original Proposal, above n 36.
[68] See further Legomsky, above n 61, and Costello, above n 15, at 57–9.
[69] Art 27(1)(a)–(d) of the Procedures Dir, above n 2.
[70] Art 22 of the Original Proposal, above n 36; Art 28 of the Amended Proposal, above n 37.
[71] Art 27(2)(b) of the Procedures Dir, above n 2.
[72] *Ibid*, Art 27(2)(c).
[73] G Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' [2004] *European Journal of International Law* 963, 981.

clause does not seem to go far enough, as it requires only a minimum assessment of Article 3 ECHR concerns, rather than wider human rights and effective protection issues.

As regards FCA, the Procedures Directive refers to applications being deemed inadmissible where the applicant has already been recognised as a refugee in another country or where he or she otherwise enjoys 'sufficient protection in that country, including benefiting from the principle of non-refoulement'.[74] The Original Proposal also included the FCA concept, but defined FCA as such where an applicant 'has been admitted to that country as a refugee or for other reasons justifying the granting of protection, and can still avail of that protection'.[75] The Revised Proposal contained a reference to protection in the FCA 'that is in accordance with the relevant standards laid down in international law'. Although none of these definitions is particularly elaborate, the final version, referring to 'sufficient protection', may well represent an attempt to dilute those international standards to which the Revised Proposal referred. It is regrettable that the evolving international legal term 'effective protection' was not used.[76]

The Procedures Directive's provisions on so-called 'supersafe third countries' in the European region allow Member States to deny access to the procedure to all asylum seekers who arrive 'illegally' from designated countries.[77] The underlying assumption is that these European countries 'observe particularly high human rights and refugee protection standards'.[78] The countries potentially at issue, neighbouring the enlarged European Union, include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia and Montenegro, Norway, Turkey, Ukraine and Switzerland. Many of these countries, although they may have adopted asylum laws, implement them only in a very limited fashion and in effect cannot provide access to a proper procedure. Accordingly, transferring applicants to these countries may amount to a denial of

[74] Art 26 of the Procedures Dir, above n 2. Recital 22 states that Member States 'should examine all applications in substance' except where the Dir provides otherwise. This is said to be so 'in particular where it can reasonably be assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country'.

[75] Original Proposal, above n 36, Art 20.

[76] See further Legomsky, above n 61.

[77] Art 36 of the Procedures Dir, above n 2. The practice may be applied either where the Council has agreed a common list of such supersafe countries (Art 36(3)) or, in the absence of such a list, Member States may maintain their own in force (Art 36(7)).

[78] Recital 24 of the Procedures Dir, above n 2.

international protection. Indeed, there is much evidence to rebut any generalised assumption of safety in relation to these countries.[79]

Safe Country of Origin (SCO)

The Directive creates a procedure to establish a common list of countries which all Member States must treat as SCOs.[80] The Commission originally proposed an optional list, subject to strict safeguards.[81] However, in October 2003 the Council agreed that Member States would be required to apply this principle, at least for a common list of states deemed 'safe'. It provides that the minimum common list '*shall* be regarded by Member States as safe countries of origin'.[82] Some Member States do not currently operate safe country of origin systems.[83] Accordingly, aside from the fundamental rights issues, this raises competence concerns, as the EU is entitled to establish only 'minimum standards' in this area.

Originally it was foreseen that the common list would be adopted with the Directive as an Annex thereto.[84] However, it proved impossible to reach the requisite unanimous agreement on the list, so the Directive now provides for later adoption of a common list.[85] (As previously mentioned, the procedure for agreeing the common list has been challenged by the European Parliament before the ECJ).[86] least two attempts to agree such a list have failed.[87] The more recent, in June 2006, floundered not only due to the absence of agreement in the Council, but also due to differences among the College of Commissioners.[88] One problem in agreeing the list is that an entire country must be deemed safe for its entire population. It is not possible to make group or geographically specific designations, in

[79] For instance, ECRE provides recent examples in relation to Turkey, the Russian Federation and Bulgaria, indicating a failure to provide refugee protection: ECRE, *Recommendations to the Justice and Home Affairs Council on the Safe Third Country Concept at its Meeting 22–23 January 2004* (Brussels, ECRE, 15 Jan 2004).

[80] Art 29(1) of the Procedures Dir, above n 2.

[81] Original Proposal, above n 36.

[82] Art 29(1) of the Procedures Dir, above n 2 (emphasis added). In addition, Recital 19 states that once a country is included on the list, 'Member States *should* be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the rebuttable presumption of the safety of that country' (emphasis added).

[83] See further ELENA, *The Application of The Safe Country of Origin Concept in Europe: An Overview* (Brussels, ECRE, 2005).

[84] European Commission Newsroom, Asylum Procedures—agreement on the principle of having a joint list of safe countries of origin, 3 Oct 2003, available at http://europa.eu.int/comm/justice_home/news/intro/wai/news_1003_en.htm.

[85] Council of the European Union doc 14383/04 ASILE 65 (2004).

[86] Above n 42.

[87] See http://www.statewatch.org/news/2004/sep/safe-countries.pdf, 3.

[88] Although the issue appears set to reappear on the agenda. See, further, 'Frattini set to come up with longer list of "safe" countries', *EU Observer*, 2 June 2006, available at http://euobserver.com/9/21764.

contrast to the practice of some Member States. As a result, Member States prefer to maintain their own more detailed context-sensitive lists, which are explicitly permitted under the Procedures Directive.[89]

The Procedures Directive fails to set out clear requirements concerning the examination of whether the particular country is safe for the individual applicant.[90] The Recitals display considerable ambivalence on this point,[91] with the text referring to the applicant submitting 'serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances'.[92] Most worrying, according to the text of the Procedures Directive, interviews may be dispensed with in SCO cases.[93] I will return below to the issue of interviews, and argue that they cannot be dispensed with in the discretionary manner the Procedures Directive suggests.

THE QUALIFICATION DIRECTIVE AND EVIDENTIAL ASSESSMENT

The Qualification Directive contains important common definitions of persecution, and serious harms for the purposes of subsidiary protection. In addition, the clarification regarding non-state actors of persecution should also lend itself to some convergence in outcomes in asylum applications across the EU. However, the Directive does not exhaustively harmonise the field, and some key issues remain to be addressed solely by international law. In this context, it is noteworthy that Article 4 thereof sets out important rules on evidential assessment which are of relevance to the present procedural discussion. Noll, on whose account I draw here,

[89] Art 30(1) of the Procedures Dir, above n 2, provides: '[w]ithout prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. *This may include the designation of part of a country as safe where the conditions set out in Annex II are fulfilled in relation to that part*' (emphasis added). Art 30(3) refers to retaining in force national legislation permitting SCO designation for 'a country or part of a country for a specified group of persons in that country'.

[90] *Ibid*, Art 31(1).

[91] *Ibid*, Recital 21 acknowledges that SCO designation 'cannot establish an absolute guarantee of safety for nationals of that country'. However, Recital 19 refers to the 'rebuttable presumption of the safety' of the SCO, and Recital 17 states that Member States should be able to presume safety for a particular applicant 'unless he/she presents serious counter-indications.'

[92] *Ibid*, Art 31(1).

[93] *Ibid*, Arts 12(2)(c) and 24(3)(c)(i).

argues that these will 'exceed present practice in the Member States'[94] and represent a 'unique contribution to the debate on assessing evidence'.[95]

Article 4(1) contains an optional provision permitting Member States to consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection.[96] However, this does not affect the basic duty whereby '[i]n cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application'.[97]

This key co-operative requirement applies in addition to the Procedures Directive's requirements that decisions be taken in an individual, objective, impartial[98] and expert[99] manner. Thus, the applicant must be afforded the opportunity to participate in the process.[100] Accordingly, it is doubtful whether it would be permissible to 'accelerate' or 'prioritise' cases, including STC and SCO cases, where the co-operative duty has not been complied with. This is the case notwithstanding the apparent *carte blanche* provided by the Procedures Directive for acceleration.[101] This argument turns on the acceptance of the Qualification Directive as applicable to all procedures which appears to be in keeping with its scope of application and mandatory nature. In contrast, the Procedures Directive is largely facilitatory, so Article 4 of the Qualification Directive would appear to be applicable even to cases to which Member States are entitled to apply special procedures under the Procedures Directive.

The assessment is confined to 'relevant' matters, which are exhaustively set out in Article 4(2). It refers to the 'reasons for applying for international protection' rather than 'reasons for being granted international protection'. Thus, the applicant cannot be obliged to make out his or her claim, but rather only to explain his or her reasons for applying.[102] The other specified information comprises the relevant applicant's statements, all documentation at the applicant's disposal regarding his or her age, background, identity, nationality, country and place of previous residence, previous asylum application, travel routes, identity and travel documents.

[94] G Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' [2006] *European Public Law* 295. See further R Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' [2006] *European Journal of Migration and Law* 79.

[95] Noll, above n 94, at 297.

[96] Art 4(1) first sentence of the Qualification Dir, above n 19.

[97] *Ibid*, second sentence.

[98] Art 8(2)(a) of the Procedures Dir, above n 2.

[99] *Ibid*, Art 8(2)(c): Decision-makers must 'have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law'.

[100] Noll, above n 94, at 299–301.

[101] Art 23(3) of the Procedures Dir, above n 2.

[102] Noll, above n 94, at 305.

Thus, it includes the information which may lead to decisions on SCO and the various forms of STC, so the co-operative obligation applies in these cases also.

Article 4(3) then lists (non-exhaustively) the issues to be taken into account, which include (i) country of origin information, as is confirmed by the Procedures Directive.[103] It also refers to (ii) the applicant's statements; and (iii) the individual position and personal circumstances of the applicant. The Qualification Directive adds (iv) information on the motive behind *sur place* activities and (v) whether the applicant could have availed him- or herself of citizenship elsewhere. This final issue is irrelevant, and should not form part of the assessment.[104]

Article 4(4) establishes that evidence of earlier persecution, serious harm or direct threat of such persecution or harm is a 'serious indication' that the requisite fear or risk exists for the purposes of warranting protection.

Article 4(5) then relieves the evidential burden on the applicant (if this has been imposed under Article 4(1)), in light of the fact that aspects of the claim will in all likelihood not be amenable to documentary or other evidential confirmation. Provided that five cumulative conditions are met, the asylum seeker's account alone must be accepted. These five conditions relate to the applicant's explanation for failure to substantiate all the relevant elements, and his or her general credibility.[105] The underlying assumption is that applicants may warrant recognition, despite the failure to support all aspects of the claim by such 'documentary or other

[103] Art 8(2)(b) of the Procedures Dir, above n 2: Member States must ensure that 'precise and up-to-date information is obtained from various sources, such as the [UNHCR], as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions'.

[104] See UNHCR comment: '[t]here is no obligation on the part of an applicant under international law to avail him- or herself of the protection of another country where s/he could "assert" nationality. The issue was explicitly discussed by the drafters of the [Refugee] Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual nationality, and in Article 1E of the 1951 Convention. There is no margin beyond the limits of these provisions': UNHCR, *Annotated Comments*, above n 5, 15.

[105] The conditions are: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established: Art 4(5) of the Qualification Dir, above n 5. Only items (a) to (c) reflect paras 203–204 of the UNHCR Handbook, above n 8.

evidence'. This general acknowledgement is welcome, although the individual criteria must be applied with caution, in light of international legal standards.[106]

Article 4 will clearly have different effects in different systems. It has the potential to purge asylum processes of rules which require decision-makers to reach negative credibility and substantive findings on the basis of irrelevant information. A full examination of this phenomenon is beyond the scope of this chapter, but one example illustrates some of the potential impact.

Several Member States treat the failure to produce identity and other documentation as evidence of a weak substantive claim. For example, in the Netherlands, asylum applications may be regarded as manifestly unfounded if an applicant has not submitted relevant documents, unless he or she can establish that she is not to blame for this. However, asylum seekers are generally held to blame,[107] such that, as Spijkerboer puts it, 'lack of documentation has become an independent ground for rejecting asylum application [sic]'.[108] Legislators see this as a means to discourage future applicants from destroying their documents, and in turn deter smugglers from advising asylum seekers to do so.[109] In a somewhat similar vein in the UK, a statutory provision requires decision-makers to draw negative credibility inferences from a range of unco-operative behaviour on the part of asylum seekers, including the failure to provide documentation.[110] However, the section's impact has been blunted by the appellate decision-making body, the Immigration Appeals Tribunal, which insists that the distortion of evidential assessment resulting from the section must be kept to a minimum.[111] In contrast, in the Netherlands, courts and adjudicators have largely facilitated the distortion.

Under the Procedures Directive, Member States may oblige asylum applicants to hand over their passports and other documentation.[112] Applications may be regarded as manifestly unfounded where identity

[106] For example, UNHCR maintains that Art 4(5)(d) concerning prompt application should have no impact on the assessment: UNHCR, *Annotated Comments,* above n 5, 16. See further Noll, above n 94, at 311–12.

[107] J Van Rooik, *Asylum Procedure* versus *Human Rights: Obstacles to Later Statements or Evidence in Light of the European Convention on Human Rights,* with an Afterword by T Spijkerboer (Amsterdam, Vrije Universiteit, Apr 2004) 58, available at www.rechten.vu.nl/dbfilestream.asp?id=1357.

[108] *Ibid*, 60.

[109] *Ibid*.

[110] Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 8.

[111] Thomas, above n 94, at 95, citing *SM v Secretary of State for the Home Department (Section 8: Judge's Process) Iran* [2005] UKIAT00116, para 8.

[112] Art 11(2)(b) of the Procedures Dir, above n 2, refers to 'documents in their possession relevant to the examination of the application, such as their passports'.

documents are withheld[113] or for failure to co-operate.[114] In these cases, the general procedural guarantees still apply,[115] but the procedure may be accelerated if failure to co-operate is 'without good reason'.[116] However, the Qualification Directive would seem to limit the inferences which may be drawn, and consequences which may be imposed on asylum seekers, for failure to co-operate. While Article 4 of the Qualification Directive permits Member States to require the applicant to produce various documents, including identity and travel documents, the Article 4(5) rule makes it clear that the failure to produce should not lead to negative inferences or decisions, provided that the five cumulative conditions are met. Moreover, the general co-operative obligation in Article 4(1) still applies, so automatic findings of unfoundedness will often be precluded, and the applicant must be given an opportunity to explain the failure to produce.

MINIMUM STANDARDS LEGISLATION AND THREE SOURCES OF FUNDAMENTAL RIGHTS AND FAIR PROCEDURES

Minimum Standards Legislation

The Procedures Directive and Qualification Directive purport to set down minimum standards only. This is inherent in the scope of the EC's competence under Title IV of the EC Treaty. In principle, this means that Member States are free to adopt higher standards of protection.[117] Many areas of EC competence are so constrained. Normally, legislation in these areas contains a standstill clause, explicitly precluding Member States from lowering their domestic standards in implementing the Directive.[118] This is notably absent in the Procedures Directive and Qualification Directive. Several exceptional provisions in the Procedures Directive do make reference to derogation only where 'existing legislation' so provides.[119] The scope of 'existing legislation' means at the time of the formal adoption of

[113] *Ibid*, Art 23(4)(d) and (f).
[114] *Ibid*, Art 23(4)(k).
[115] *Ibid*, Art 23(4).
[116] *Ibid*, Art 23(4)(k).
[117] See eg Cases C–84/94 *UK v Council* [1996] ECR I–5755, para 17, and C–2/97 *Borsana* [1998] ECR I–8597, para 35 concerning another minimum standards competence, namely that for health and safety of workers.
[118] See, eg, Council Dir 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation [2000] OJ L 303/16 and Council Dir 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. Both enshrine minimum standards, but contain the following standstill clause: '[t]he implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive' (Arts 8(2) and 6(2) respectively).
[119] Eg, Art 35(2) on border procedures.

the Directives. Many Member States amended their asylum laws in the course of the negotiation of the Procedures Directive,[120] arguably in order to exploit these exceptional provisions.

However, although the Title IV EC Treaty competence is confined to setting minimum standards, the text of the Directives betrays one of their more controversial and ambiguous features. Article 5 of the Procedures Directive provides:

> Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, *insofar as those standards are compatible with this Directive*.[121]

This appears to qualify the minimum standards guarantee, in that it suggests a limit to Member States' freedom to establish higher standards. Similarly, Article 3 of the Qualification Directive provides:

> Member States may introduce or maintain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, *insofar as those standards are compatible with this Directive*.[122]

This appears to be a contradiction in terms, and was much debated during the drafting. Clarification was sought from the Council Legal Service on Article 3 of the Qualification Directive.[123] It advised that in order not to 'annihilate' the objective of harmonisation, the capacity to introduce more favourable standards should have limits.[124] In particular, it suggested that the provisions determining the personal scope of the Qualification Directive should not be deviated from.[125] Accordingly, the definitions laid down in Article 2 of the Directive and related provisions had to be applied *stricto sensu*.[126]

[120] D Ackers, 'The Negotiations on the Asylum Procedures Directive' [2005] *European Journal of Migration and Law* 1, 2.

[121] (Emphasis added.) Recital 7 provides: '[i]t is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.'

[122] Emphasis added. Recital 8 provides: '[i]t is the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1A of the Geneva Convention, or a person who otherwise needs international protection.'

[123] Doc 14348/02 JUR 449 ASILE 67, 15 Nov 2002, available at http://www.statewatch.org/news/2002/dec/14348.02.doc.

[124] *Ibid*, para 5.

[125] *Ibid*, para 6.

[126] *Ibid*, para 7.

This interpretation appears excessively strict.[127] Although it describes the use of 'may' or 'shall' as only a 'rough indicator' of when the provisions of the Directive must be complied with *stricto sensu*,[128] even using these terms as such risks rendering the notion 'minimum standards' otiose. This is because the non-mandatory provisions of the Directive explicitly allow Member States a choice, irrespective of the competence constraint in Title IV of the EC Treaty. The better understanding of the concept of minimum standards is more nuanced and context-sensitive, and would allow higher standards in all areas, provided that this does not undermine the purpose of the measure, which cannot be conceived of baldly in terms of harmonisation (for then all deviation would undermine the purpose). Instead, the purpose of the Qualification Directive has to be conceived of, in accordance with its Preamble, as to 'ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'.[129] While certain common approaches are necessary, protecting better or more does not in itself undermine that core objective. The Procedures Directive has as its 'main objective' the introduction of a 'minimum framework … on procedures'.[130] As such, higher standards would seem to be permissible in all areas, as it is difficult to see how a 'minimum framework' could be undermined by higher standards.

Member States are not only entitled, but indeed may be required, to adopt higher standards than those set out in the Directive in certain instances. This is because three sources of fundamental rights law are binding. These are: first, national administrative law; secondly, the ECHR and other applicable norms of international human rights law; and, thirdly, the general principles of EC law. The bulk of the chapter focuses on the implications of this third source. At this point it is important to explain the scope of the three sources in turn.

National Administrative Law

First, the ECJ has consistently acknowledged that when implementing EC law, national authorities are still required to 'act in accordance with the procedural and substantive rules of their own national law'.[131] Thus national implementing actions are 'governed by the public law of the

[127] Cf Ch 7 in this volume.
[128] Above n 123, para 8.
[129] Recital 6 of the Qualification Dir, above n 5.
[130] Recital 5 of the Procedures Dir, above n 2. Again limiting secondary movements is merely something the Dir should help limit (Recital 6).
[131] Case C– 285/93 *Dominikanerinnen-Kloster Altenhohenau v Hauptzollamt Rosenheim* [1995] ECR I–4069, para 26; Case C–292/97 *Kjell Karlsson and others* [2000] ECR I–2737.

Member State in question'.[132] This is sometimes referred to as national procedural autonomy, but this is a misnomer, as it underestimates the impact of the EC context. The application of domestic standards is subject to two important EC caveats: that the national rules do not render the enforcement of EC law more difficult than that of analogous national law (the principle of equivalence),[133] or excessively difficult (the principle of effectiveness).[134] Moreover, as outlined below, the general principles must be complied with, although these are not exhaustive. Accordingly, national administrative law will continue to be of relevance, particularly in light of the Procedures Directive's broad facilitative provisions, but subject to the general principles. In practice, whether the general principles are invoked tends to depend on whether they provide some clear added value, in which case litigants tend to be keen to establish an EC dimension to their claim.[135]

ECHR Law and Other International Human Rights Instruments

Secondly, as Contracting Parties, Member States remain subject to their international legal obligations under the Refugee Convention, ECHR and United Nations Convention Against Torture (UNCAT). Although the ECtHR accommodates the autonomy of the EU legal order, it remains the case that even when Member States act on the basis of EU/EC law, their obligations under the Convention remain in all instances where they exercise discretion. In the context of giving effect to minimum standards Directives, discretion is invariably afforded to the Member States, so ECHR obligations remain pertinent.[136] This is so even in relation to

[132] Case 230/78 *Eridania v Minister for Agriculture and Forestry* [1979] ECR 2749, para 33.

[133] See, eg, Case 8/77 *Sagulo* [1977] ECR 1495.

[134] See, eg, Case 14/83 *Von Colson & Kamann* [1984] ECR 1891.

[135] See, eg, UK case law concering the general principle of non-discrimination, which reveals the tendency to expand the scope of EC law in order to avail of this principle, not recognised in the same manner in domestic administrative law. *R v Ministry of Agriculture, Fisheries and Food, ex parte First City Trading Ltd* [1997] 1 CMLR 250 (QBD). See further S Boyron, 'General Principles of Law and National Courts: Applying a *Jus Commune*' [1998] *European Law Review* 171–8 and Tridimas, above n 4, at 42–4.

[136] App No 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland* 30 June 2005, paras 155–156, (2006) 42 EHRR 1. See C Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' [2006] *Human Rights Law Review* 87.

Dublin Regulation transfers, as even here the sending Member State is afforded discretion to process the asylum claim itself.[137]

As regards fair procedures, the ECtHR does not apply the Article 6 ECHR guarantee in the asylum context, as asylum is deemed not to concern the determination of civil rights and obligations or criminal liability.[138] It has been convincingly argued that Article 6 should apply where someone is excluded from refugee status, as this is akin to a criminal finding in some respects.[139] Moreover, in a recent ruling, the ECtHR held that Article 6 did apply to an immigration-related matter, namely the issue of employment permits, as these determined the validity of any subsequent employment contract, and hence concerned civil rights. In this instance, Article 6 required an oral hearing.[140] Accordingly, in light of the evolving Strasbourg jurisprudence, Article 6 is of some relevance in the asylum context. However, as I outline in the next section, EC law guarantees fair procedures more broadly in any event, so this issue is of less pertinence in the EC context.

Despite its position on Article 6, as previously mentioned the ECtHR has developed a context-sensitive jurisprudence concerning appropriate procedures and remedies in the asylum context, based primarily on Articles 3 and 13 ECHR. Article 13 requires an effective remedy whenever an infringement of another Convention right is at issue. The jurisprudence is informed by the desire to ensure that Article 3 is practical and effective. This is relevant, as it binds the Member States directly, *and* decisively informs the general principles of EC law. Pertinent aspects of the Strasbourg case law are referred to in the final section below.

[137] Council Reg (EC) No 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 by a third-country national [2003] OJ L 222/1. See further Costello, above n 136, at 109.

[138] App No 39652/98, *Maaouia v France,* 5 Oct 2000, (2001) 33 EHRR 1037, and the Commission Decisions cited in para 35 of the judgment. Para 40 states: '[d]ecisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights and obligations or of a criminal charge against him, within the meaning of Article 6(1) ECHR.' See further (concerning extradition) App No 46827/99, *Mamatkulov v Turkey,* 8 Mar 2005.

[139] G Gilbert, 'Exclusion and Evidentiary Assessment' in G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston, Mass, Martinus Nijhoff, 2005) 161.

[140] App No 10523/02, *Coorplan-Jenni GmdH and Hascic v Austria,* and App No 62539/00, *Jurisic v Austria*, 27 July 2006.

General Principles of EC Law—Scope, Sources and Salience

Scope

EC general principles are now applicable in the asylum context, as a result of the communitarisation of law in this area. As agents of the EC in their implementation and application of EC Directives, Member States are bound to respect the general principles of EC law, which encompass administrative principles of fair procedures and fundamental rights law more generally.[141] This includes when they use the 'upwardly-flexible' area accorded by the Directive to establish higher standards.[142] The general principles thus come to influence national systems, over time even beyond the decentralised administration of EC law.[143]

The ECJ regards the general principles as embodied in EC law itself, regardless of the type of EC rights at stake.[144] This is evident in cases concerning so-called third country national family members of EU citizens[145] and third country nationals whose countries of origin have association agreements with the EC, such as *Panayotova,*[146] *Cetinkaya*[147] and *Dörr*.[148] Thus, it is already apparent that the general principles have procedural implications for the entry and residence rights of third country nationals, where they derive these rights from EC law. In *Panayotova*, the general principles necessitated a procedural system which was 'easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time'.[149]

[141] Joined Cases C–20 and 64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I–7411.

[142] See, further, F De Cecco, 'Room to Move? Minimum Harmonisation and Fundamental Rights' (2006) 43 *CML Rev* 9.

[143] See, further, J Schwarze (ed), *Administrative Law under European Influence: On the Convergence of the Administrative Laws of the EU Member States* (London/Baden-Baden, Sweet & Maxwell/Nomos Verlagsgesellschaft, 1995).

[144] E Brouwer, 'Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?' [2005] *European Journal of Migration and Law* 219.

[145] Case C–459/99 *MRAX* [2002] ECR I–6591; Case C–503/03 *Commission v Spain,* 31 Jan 2006.

[146] Case C–327/02 *Panayotova v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I–11055, para 27.

[147] Case 467/02 *Cetinkaya v Land Baden-Württemberg* [2004] ECR I–10895.

[148] Case C–136/03 *Dörr v Sicherheitsdirektion fur das Bundesland Kärnten* [2005] 3 CMLR 11.

[149] Above n 146, judgment, para 26: '[i]t should also be pointed out that the procedural rules governing issue of such a temporary residence permit must themselves be such as to ensure that exercise of the right of establishment conferred by the Association Agreements is not made impossible or excessively difficult.'

The right to effective judicial protection is also applicable, requiring that refusals 'must be capable of being challenged in judicial or quasi-judicial proceedings'.[150]

The application of these EC procedural general principles turns neither on membership of the polity, nor on presence in the territory, but rather reflects the vindication of the rule of law at the supranational level. Accordingly, once EC law sets out those entitled to asylum, it becomes difficult for the ECJ to find a doctrinal basis for indulgence in asylum exceptionalism. Admittedly, the ECJ *has* accepted that border issues may be subjected to unusual regulatory procedures, on the basis of the sector's peculiar characteristics.[151] However, the constitutionalisation of the general principles tends to expand their scope of application, and once the EC rights of individuals are at issue, the general principles apply.

Legal doctrine thus requires the robust application of the EC general principles to the asylum context. While doctrinally sound, this assertion will no doubt meet with some resistance. Governments (and perhaps also the Council and Commission) may raise legal arguments before the ECJ against the robust application of the general principles to the asylum context. The influence of national governments as strategic litigants before the ECJ is now well established.[152] Moreover, the general principles have not developed in a purely autopoetic manner, but, rather, have been subject to institutional and political sway over the years. The right to a hearing, for example, was incorporated from the common law as the European Commission came under pressure from powerful commercial interests, reluctant to adhere to the outcomes of competition law proceedings in the absence of such a right.[153] What this institutional account implies for the asylum context remains to be seen. In the absence of a powerful commercial lobby, or institutional ally, asylum seekers' rights remain precarious, dependent on careful test case strategies, legal ingenuity and national judicial receptivity to EC argumentation.

[150] *Ibid*, judgment, para 27, citing by analogy Case C–157/99 *Smits and Peerbooms* [2001] ECR I–5473, para 90.

[151] See Case C–257/01 *Commission v Council* [2005] ECR I–345 concerning Council Reg No 789/2001 of 24 Apr 2001 [2001] OJ L 116/2 which reserves to the Council implementing powers for examining visa applications, and Council Regulation No 790/2001 of 24 Apr 2001 [2001] OJ L 116/5, which reserves to the Council implementing powers for carrying out border checks and surveillance. See, further, C Costello, 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy' in H Hofmann and A Türk (eds), *EU Administrative Governance* (London, Elgar Publishing, 2006) 287.

[152] MP Granger, 'When Governments go to Luxembourg …: the Influence of Governments on the European Court of Justice' [2004] *European Law Review* 1 and 'The Future of Europe: Judicial Interference and Preferences' [2005] *Comparative European Politics* 155.

[153] F Bignami, 'Creating European Rights: National Values and Supranational Interests' [2005] *Columbia Journal of European Law* 241, 259–93.

Sources

The general principles derive their inspiration from international human rights instruments, in particular the ECHR, and the common constitutional traditions of the Member States.[154] On fundamental rights issues, the jurisprudence of the ECtHR is now the pre-eminent source and applied by the ECJ conscientiously, as has been recognised by the ECtHR.[155] The ECHR provides minimum standards and, in key areas, EC standards are higher.

This is partly explained by the fact that the general principles develop in dialogue with national judges, and so are also infused with elements from different national systems. Over time, they percolate back into the national systems, as they bind national authorities when they act within the scope of EC law. This is particularly so with regard to those general principles of administrative law. As Harlow puts it:

> [T]he constitutionalization of the basic administrative procedures as 'general principles of EC law' allowed them to be diffused through national administrations, at least in situations involving EC law, providing the opportunity, not always taken, for 'levelling up' of national law.[156]

The EU Charter of fundamental rights, drafted in 2000 and now Part II of the unratified Constitutional Treaty for the EU, is, despite its non-binding status, of legal relevance. An Advocate-General of the ECJ has characterised it as 'the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed in the Community legal order'.[157] For the first time in June 2006,[158] the ECJ cited the Charter. The EC legislation under review in that case contained a preambular reference to the Charter, which partly explains the citation, although more generally, the ECJ also took cognisance of the Charter's synthetic nature.[159] The Preambles to both the Procedures and Qualification Directives refer to the Charter, so even on the narrowest reading of the case, the Charter is now legally relevant in the asylum context.[160]

[154] See, eg, Case C–299/95 *Kremzow v Austria* [1997] ECR I–2629.

[155] See further Costello, above n 136.

[156] C Harlow 'Global Administrative Law: The Quest for Principles and Values' [2006] *European Journal of International Law* 187, 205.

[157] *Booker Aquaculture*, above n 141, Opinion, para 126.

[158] Case C–540/03 *European Parliament v Council*, 27 June 2006.

[159] *Ibid,* para 38. The Court referred to the Charter's principal aim as to reaffirm 'rights as they result, in particular, from the common constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court . . . and the European Court of Human Rights.'

[160] Recital 8 of the Procedures Dir, above n 2; Recital 10 of the Qualification Dir, above n 5.

It has been suggested that the Charter may result in a less creative fundamental rights jurisprudence from the ECJ. In Weiler's view, in the absence of a bill of rights, EU judges:

> [U]se the legal system of each Member State as a living laboratory of human rights protection which then, case by case, can be adapted and adopted for the needs of the Union by the European Court in dialogue with its national counterparts. A charter may not thwart this process, but it runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue.[161]

Certainly, the text of the Charter is detailed, and must be read in light of a range of sources. However, the institutional rationale which leads the ECJ to have recourse to national legal inspiration remains potent, and the general principles remain in parallel to the Charter.

The Charter is referred to in this chapter in order to elucidate the content of the general principles. Like them, it applies to the Member States when they implement EC law,[162] and takes the ECHR as a minimum guide only.[163]

Salience

The general principles pertaining to fair procedures have developed principally in the context of direct EC administration, very often in specialist fields such as competition law. Their application to domestic asylum procedures will require an adaptation to the very particular fairness concerns which arise in this context.

It is important to note that the general principles are broader in their scope of application than the procedural guarantees under the ECHR. As mentioned above, Article 6 ECHR is applicable only where a national authority is making a determination about a civil right or criminal liability, and Article 13 (effective remedies) applies when an infringement of another Convention right is at issue. In contrast, the EC general principles are treated as deriving from EC law's inherent features, namely its effectiveness and uniformity, and applicable whenever EC rights are at issue. Moreover,

[161] JHH Weiler, 'Does the European Union Truly Need a Charter of Rights?', Editorial [2000] *European Law Journal* 95.

[162] Art 51(1) provides: '[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

[163] Art 52(3) provides: '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down in the said Convention. This provision shall not prevent Union law providing more extensive protection.'

'right' is broadly understood in EC law, and legislative guarantees which create clear obligations are generally conceived of as creating rights for individuals. In the asylum context, the Qualification Directive, arguably, creates a right to asylum[164] and so, once this right is at issue, the EC general principles must be respected, including those which mirror Articles 6 and 13 ECHR.

This is reflected in the Charter's provisions on effective remedies and fair procedures. Article 47(1) provides:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Article 47(2) refers to the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. Article 47 is a complex provision, encompassing aspects of Articles 6 and 13 ECHR and EC law on the right to an effective remedy before a court. Unsurprisingly, its explanatory note is lengthy.[165] While the note describes Article 47(1) as 'based on' (rather than 'corresponding to') Article 13 ECHR, it quite correctly states that the EC protection is 'more extensive', citing ECJ case law.[166] It notes in particular that the right to an effective remedy before a court applies to 'all rights guaranteed by Union law'.[167] With regard to Article 47(2) of the Charter, the explantory note also provides that, although the Article corresponds to Article 6(1) ECHR, Article 47(2) is of broader application.

The Procedures and Qualification Directives must be interpreted and implemented in compliance with the general principles. In other fields, the ECJ has used the general principles to constrain the discretion afforded by Directives.[168] Below, salient general principles and their impact on asylum procedures are outlined.

[164] See Ch 7 in this volume.

[165] Updated Explanations issued by the Praesidium of the Constitutional Convention, doc CONV/828/1/03, Rev 1, 18 July 2003, 41. (This is the second set of Explanations to the Charter. See, further, Explanations relating to the text of the Charter of fundamental rights, provided by the Praesidium of the Charter Convention, doc CHARTE 4473/00, 11 Oct 2000).

[166] *Ibid,* citing Case 222/84 *Johnston* [1984] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097; and Case C–9/91 *Borelli* [1992] ECR I–6313.

[167] *Ibid.*

[168] See, eg, in the context of Citizenship of the Union Case C–209/03 *R (on the application of Bidar) v London Borough of Ealing, Secretary of State for Education and Skills,* as noted by C Barnard, Casenote (2005) 42 *CML Rev* 1465, in particular 1481–3 concerning its effects on the Citizenship Directive 2004/38 [2004] OJ L 158/77 and, in the context of the interpretation of the Biotechnology Directive, Case C–377/98 *Netherlands v Parliament and Council* [2001] ECR I–7079; and the Data Protection Directive, Cases C–465/00, 138/01 and 139/01 *Rechnungshof* [2003] ECR I–4989; Case C–101/01 *Lindqvist* [2003] ECR I–12971.

THE GENERAL PRINCIPLES IN ACTION

The Right to be Heard

Under the terms of the Procedures Directive, the interview may be dispensed with on a number of grounds, for example, where the applicant raises only submissions not relevant, or only minimally relevant, to a refugee claim;[169] or makes 'inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution'.[170] Both features are entirely common in genuine asylum applications and, if the apparent discretion afforded by the Directive were exploited by decision-makers, would lead to *refoulement*. The asylum seeker often receives no independent advice, legal or otherwise, when filling out the initial application, which generally takes the form of a long and complicated questionnaire. The interview is necessary in order to allow the applicant to clarify any discrepancies, inconsistencies or omissions in his or her initial account. However, the Directive allows Member States to deem applications containing such flaws 'clearly unconvincing,' and on this basis dispense with an interview. Should Member States exploit this apparent discretion to the full, it could signal the death knell of reliable asylum determinations.

The Procedures Directive does contain communicative guarantees, but these are less robust than one would have hoped. On the crucial issue of translation, it merely provides 'Member States may provide for rules concerning the translation of documents relevant for the examination of applications'.[171] Other communicative guarantees are cast in less than forceful terms. The right to be informed is merely in a language the asylum seekers 'may reasonably be supposed to understand'.[172] Similarly, the right to an interpreter is restricted to whenever this is 'necessary', an undefined term, save for the proviso that an interpreter is deemed necessary where there will be an interview, and 'appropriate communication cannot be ensured without such services'.[173] The interview need not necessarily take place in the applicant's preferred language, where there is 'another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in'.[174]

In contrast to this vision of procedural laxity in the Procedures Directive, Article 4 of the Qualification Directive sets out a generally applicable

[169] Art 23(4)(a) of the Procedures Dir, above n 2.
[170] *Ibid*, Art 23(4)(g).
[171] *Ibid*, Art 8(2).
[172] *Ibid*, Art 10(1)(a).
[173] *Ibid*, Art 10(1)(b).
[174] *Ibid*, Art 12(3)(b).

co-operative obligation, with clear communicative implications.[175] In light of the mandatory nature of that obligation, it must be respected over and above any facultative provisions in the Procedures Directive.

Moreover, binding fundamental rights authorities highlight the importance of a thorough assessment in light of the particular communicative challenges of the asylum process. For instance, in *Hatami v Sweden*,[176] the European Commission on Human Rights found a violation of Article 3 ECHR where the Swedish authorities denied an asylum application on the basis of negative credibility inferences reached on the basis of contradictions and inconsistencies in the applicant's account. The Commission stressed that 'no reliable information' could be deduced from the original peremptory interview[177] but that subsequent evidence did substantiate the applicant's claim. Of particular note is the fact that the Commission stated explicitly that 'complete accuracy [was] seldom to be expected by victims of torture'.[178] A similar formulation is used by the UNCAT Committee, which consistently states that 'complete accuracy is seldom to be expected in victims of torture, especially when the victim suffers from post-traumatic stress syndrome; … the principle of strict accuracy does not necessarily apply even when the inconsistencies are of a material nature'.[179]

Thus, these authorities cast doubt on whether it is legally permissible to dispense with interviews in the manner suggested by the Directive.

The general principles of EC law also contain a right to a hearing, which in some instances includes the right to an oral hearing. This right was incorporated into the general principles from UK law, although it now goes beyond the common law requirements in some respects.[180] Even if it is not explicitly provided for in the applicable EC law, the ECJ may infer such a right on the basis of 'the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known'.[181] First recognised in the context of disciplinary proceedings against EC staff members,[182] it is now acknowledged as of wide application in all procedures liable to culminate in a measure adversely affecting any person. Case law has not recognised an analogous right to a hearing when national authorities take

[175] See above, section titled 'The Qualification Directive and Evidential Assessment'.
[176] App No 32448/96, *Hatami v Sweden,* 23 Apr 1988.
[177] *Ibid,* para 104.
[178] *Ibid,* para 106.
[179] App 101/1997, *Haydin v Switzerland,* 16 Dec 1998; App 43/1996, *Tala v Sweden,* 15 Nov 1996; App 21/1995, *Alan v Switzerland,* 21 Jan 1995.
[180] Bignami, above n 153, at 259–93, in particular 291–3, outlining the manner in which the procedural guarantees in EC law were stronger than under UK law, at least as applied in the competition law context.
[181] Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, para 15. The British AG in the case, Warner AG, made the common law origins of the right clear.
[182] See, eg, the first such case, Case 32/62 *Alvis v Council* [1963] ECR 49.

such decisions, but the general principles should apply in the same way when domestic authorities give effect to EC law.[183]

This view is supported by Article 41 of the EU Charter of fundamental rights.[184] It provides a 'right to good administration' which includes the 'right of every individual to be heard, before any individual measure which would affect him or her adversely is taken'.[185] The Article is addressed explicitly to the 'institutions and bodies of the Union', but this does not prevent it being invoked where Member States implement EC law. The Court of First Instance (CFI) has cited Article 41 twice,[186] in judgments which suggest the development of a fundamental right to good administration. This development is significant, in that it means that, although context-sensitive in its application, the right to a hearing must be regarded as definitively constitutionalised.[187] Accordingly, its application in a robust manner to domestic authorities is apt.

As set out below, the right to a reasoned decision also creates communicative obligations, in particular when placed in the context of the Qualification Directive's co-operative obligation for the assessment of evidence.

The Right to a Reasoned Decision

Article 253 EC Treaty requires EC institutions to give reasons for their decisions.[188] It is also reflected in Article 41 of the EU Charter, although this is narrower in formulation. The rationale for the requirement is the enhancement of the individual's ability to vindicate his or her rights by facilitating judicial review (and hence is an aspect of the right to effective

[183] Tridimas, above n 4, at 415–17. He argues (at 416): '[s]o far . . . the Court has not recognized a general right to a hearing in national administrative proceedings where Community rights are at stake. . . . [S]uch a right should be recognized although its precise requirements will depend on the circumstances of the case. In principle, the rights of an individual should not differ depending on whether he or she is dealing with Community or national authorities.' The ECJ did apply Art 6 ECHR fair trial standards to national action in Case C–276/01 *Steffensen* [2003] ECR I–3735.

[184] For a full examination see K Kanska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights' [2004] *European Law Journal* 296.

[185] Art 41(2) EU Charter of fundamental rights.

[186] Case T–211/02 *Tideland Signal v Commission* [2002] ECR II–3781; *Case* T–*54/99 Max Mobil v Commission* [2002] ECR II–313.

[187] See further Nehl, above n 4, at 96–9. For criticism of this development see Harlow, above n 156, at 206–7. She argues: 'Article 41 … seemingly extends classical due process rights dramatically, upholding "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". And the article goes further still, guaranteeing the European citizen the "right to have his or her affairs handled impartially, fairly and within a reasonable time". This is a questionable development; it seems to elevate to the level of fundamental freedoms a bureaucratic failure to answer a letter.'

[188] See generally P Kapteyn and P VerLoren van Themaat, *Introduction to the Law of the European Communities,* 3rd edn (The Hague, Kluwer, 1998) 335–40; K Lenaerts and D Arts, *Procedural Law of the European Union* (London, Sweet & Maxwell, 1999) 193–6.

judicial protection discussed further below) and to enhance transparency generally. Accordingly, the decision-maker must state its reasoning clearly, so that the individual concerned may know the reasons and so that courts can exercise their judicial review function. Although the duty to give reasons is related to the right to be heard, the two requirements are distinct.[189] The level of detail of reasons required varies according to the context, with individual decisions requiring greater elaboration than generally applicable measures.[190] In the context of individual decisions, the decision-maker must give an account of its factual and legal assessment.[191] The requirement is context-sensitive, and the ECJ takes into account the applicable legislation, the degree of engagement the individual had in the process and time pressures.[192] Nonetheless the right to reasons, in particular reasoned individual decisions, is broader and stronger than in most Member States,[193] and so represents a clear addition to administrative fairness in this field. For instance, English law does not recognise a discrete right to reasons,[194] although, reasons are increasingly required as a general matter of fairness.[195]

The Procedures Directive requires that decisions are in writing, and that negative decisions generally contain 'the reasons in fact and in law … and information on how to challenge a negative decision'.[196] However, 'Member States need not provide information on how to challenge a negative decision in writing where the applicant has been informed at an earlier stage either in writing or by electronic means accessible to the applicant of how to challenge such a decision.'[197] This restriction seems at best petty, and at worst as an attempt to prevent the utilisation of appeals procedures. However, read in the light of the general principle, the Procedures

[189] Tridimas, above n 4, at 408–9 and the case cited therein.

[190] See, eg, Case 5/67 *Beus* [1968] ECR 83; Cases 142 and 156/84 *British American Tobacco Company v Commission* [1987] ECR 4487, 4585; Case 250/84 *Eridania* [1986] ECR 117 at 146.

[191] Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, 690. A statement of reasons (in the context of the Commission's competition law enforcement) must indicate 'clearly and coherently the considerations of fact and law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission's reasoning'.

[192] Eg, Case 350/88 *Delacre v Commission* [1990] ECR I–395, 422.

[193] Craig and De Burca, above n 4, 117. For a comparison between the EC and UK requirement see P Craig 'The Common Law, Reasons and Administrative Justice' [1994] *Cambridge Law Journal* 282.

[194] See further FG Jacobs, 'Public Law—The Impact of Europe' [1999] *Public Law* 232, 235–6.

[195] *Privy Council Appeal No 16 of 1998 Stefan v General Medical Council* [1999] 1 WLR 1293, 1301. The Privy Council stated that 'in all cases heard by the Health Committee there will be a common law obligation to give at least some brief statement of the reasons which form the basis for their decision': para 31.

[196] Above n 2, Art 9(1) and (2) first indent.

[197] *Ibid*, Art 9(2) third indent.

Directive's requirement may help move beyond the institutional practice of giving terse boilerplate rejections. As Shapiro notes, it is a requirement apt to take on substantive connotations as courts tend to 'start with the procedural requirement that an agency do something, give reasons [and] … end up with a substantive requirement, that the agency decision is reasonable'.[198]

The requirement to give reasons also has implications prior to the final decision of the asylum adjudicator. It requires the decision-maker to give reasons along the way, explaining its assessments of evidence. For example, in the competition law context, the CFI has combined the requirement to give reasons with the general duty of good administration to create an obligation on the Commission to engage in dialogue with the undertaking under examination, and to give reasons for each part of its assessment of evidence as the process unfurls.[199] The ECJ stepped back from such a formal dialogue requirement,[200] but emphasised the need to address all the main contents of complaints in its final decision. Thus, an implicit dialogue requirement still lurks in its judgment.[201] In particular, the co-operative requirement under Article 4 of the Qualification Directive would seem to suggest that a dialogue requirement is particularly apt in the asylum context, where the relevant evidence is obtainable only through sensitive and open communication with the asylum applicant him- or herself. Some diligence on the part of asylum advocates is called for in harnessing these diverse legal sources, but the doctrinal arguments are sound.

The Right to Effective Judicial Protection

The Procedures Directive amplifies the current trend towards restricting appeals and allowing deportation while appeals are pending. It provides not a right to appeal as such, but rather a 'right to an effective remedy, before a court or tribunal'.[202] Member States are required 'where appropriate' to adopt rules 'in accordance with their international obligations' dealing with whether the remedy has suspensive effect.[203] The text suggests that the right to remain is precarious. However, ECtHR case law on effective remedies clarifies that appeals must have suspensory effect. In

[198] M Shapiro, *The Institutionalization of European Administrative Space* (UC Berkeley, Center for Culture, Organization and Politics, Working Paper 2000–09, 2000) available at http://ist-socrates.berkeley.edu/~iir/culture/abstracts/Shapiro.html, 26.
[199] Case T–95/94 *Sytraval and Brink's France v Commission* [1995] ECR II–2651.
[200] Case C–367/95P *Commission v Sytraval and Brink's France* [1998] ECR I–1719.
[201] Shapiro, above n 198, at 43–4 and Nehl, above n 4, at 163–5.
[202] Above n 2, Art 39.
[203] *Ibid,* Art 39(3).

Jabari v Turkey,[204] an Article 13 violation was found where the applicant was refused asylum on procedural grounds. The only domestic remedy available was judicial review. However, this entitled the applicant neither to suspend the application of the deportation order nor to have her substantive claim of a risk of Article 3 violation examined. The ECtHR reiterated the robust nature of the Article 13 guarantee in this context, requiring 'independent and rigorous scrutiny' of the substantive claim *and* 'the possibility of suspending the implementation of the measure impugned'.[205] Going further in *Hilal v UK* the Court reiterated the rigorous Article 13 standards, requiring 'the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and grant some relief', a remedy that was effective 'in practice as well as in law'.[206]

Conka v Belgium[207] clarifies that suspensive effect is required not only in Article 3 cases, but also where other Convention guarantees are potentially infringed. The case concerned a violation of the prohibition of collective expulsion under Article 4, Protocol 4 ECHR. The ECtHR again stressed the potentially irreversible effects of removal decisions.[208] In light of the limited availability of the remedy of suspending deportation, the ECtHR found a violation of Article 13.[209] Article 13 required guarantees, not mere 'statements of intent' or 'practical arrangements' with regard to stays of deportation. Accordingly, a system which did not provide secure legal assurances that deportation would not take place could not be regarded as embodying the rule of law.[210] *Conka* represents an enhancement of the right to a suspensive appeal. While the ECtHR in *Jabari* spoke of the 'possibility' of such a remedy, in *Conka* it refers to the state's duty to provide the 'necessity' of such a guarantee, for a 'minimum reasonable period'.[211] Byrne's interpretation is noteworthy:

> While the Member States and UNHCR have integrated the principle of suspensive effect into a regime of relative rights to an effective remedy based upon classification criteria, the European Court of Human Rights appears to be incorporating the principle of full suspensive effect as an absolute safeguard based upon the potential effects of wrongful deportation under Article 3.[212]

[204] Above n 27.
[205] *Ibid*, para 50.
[206] *Ibid*, para 75.
[207] Above n 28.
[208] *Ibid*, para 79.
[209] *Ibid*, para 82.
[210] *Ibid*, para 83.
[211] *Ibid*, para 84.
[212] R Byrne, 'Remedies of Limited Effect' [2005] *European Journal of Migration and Law* 71, 80.

Under the EC general principles, the right to effective judicial protection is well established. Moreover, it applies in all instances where EC rights are at stake, and so is of broader scope than Article 13 ECHR. As the ECJ stated in the seminal *Johnston* case, 'Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law'.[213] Thus, it applies not only in the context of internal market guarantees,[214] but also when third country nationals have rights under EC law.[215] Even if national law purports to oust or restrict judicial review, these national provisions are simply ineffective in the EC law context. In particular, the right to effective judicial protection has taken shape in the context of the individual rights accorded by EC law. This is reflected by the fact that in *Johnston* the principle of effective judicial protection did not permit an official certificate, in that case derogating from the principle of equal treatment for men and women, to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts. Similarly, generalised determinations of 'safety' under STC and SCO must be open to judicial scrutiny in individual cases, in order to fulfil the right to effective judicial protection.[216]

Effective judicial protection does not require an appeal, as the ECJ recognises that 'it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law'.[217] However, this is subject to the principles of equivalence and effectiveness,[218] and it must be possible 'to apply the relevant principles and rules of Community law'[219] when reviewing national decisions implementing EC law. This is a loaded caveat, for it includes the general principles.

EC law does not impose any one particular standard of review, and the Community Courts themselves apply different standards in different contexts. For example, where the body under review has a wide discretion, for instance if it is making social policy choices, then a deferential standard

[213] Case 222/84 *Johnston* [1986] ECR 1651, para 18.

[214] Case 222/86 *UNECTF v Heylens* [1987] ECR 4097: 'the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of the right to free access to employment is essential in order to secure for the individual effective judicial protection for his right'.

[215] See discussion above around nn 144–149.

[216] Thanks go to Catherine Donnelly for this suggestion.

[217] Case C–120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECR I–223.

[218] *Ibid* para 32, citing Case C–312/93 *Peterbroeck v Belgian State* [1995] ECR I–4599, para 12, and para 18 of the judgment in Case C–326/96 *Levez* [1998] ECR I–7835.

[219] *Ibid* para 36.

will be employed.[220] In other contexts, where individual decisions are at stake, more rigorous review is required. For example, in merger cases the ECJ has emphasised the need for intensive review,[221] insisting that courts must be in a position to establish whether the evidence relied on by the decision-maker (in that case the Commission) was 'factually accurate, reliable and consistent', and also whether that evidence contained 'all the information' needed to assess a 'complex situation' and whether it was 'capable of substantiating' the Commission's conclusions.[222] Its reasoning has a striking, if unexpected, parallel with the asylum context. It stressed that as the merger assessment was concerned with future effects of the proposed merger, it must be carried out 'with great care', since it concerned, not an examination of past or current events, but rather a prediction of the future. Accordingly 'it [was] necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely'.[223] Accordingly, a particularly rigorous approach to fact-finding was apt, and a concomitant strict judicial review of the fact-finding process. The asylum process, with 'essays in prediction'[224] at its core, is similarly fraught, and this reasoning suggests that a strict standard of review should be demanded as a matter of EC law.

In the Netherlands, it has already been suggested that the deferent standard of review is incompatible with Article 13 ECHR.[225] It also seems incompatible with the EC requirement of effective judicial protection. With EC law, national judges themselves are obliged of their own motion to apply the appropriate standard of review and give full effect to EC law, notwithstanding any contrary national rules. UK judges thus apply proportionality as the applicable standard of review in cases with an EC dimension.[226] The UK judiciary's current standard of review in the asylum context, namely the most anxious scrutiny test,[227] appears to meet the requisite EC standard. However, EC law is nonetheless of added value.

[220] See, eg, Case C–25/02 *Rinke v Arztekammer Hamburg* [2003] ECR I–8349, paras 39–42.

[221] Case C–12/03P *Commission v Tetra Laval* [2005] ECR I–987.

[222] *Ibid,* para 39.

[223] *Ibid,* paras 42–43.

[224] The phrase is Goodwin-Gill's. He states, 'The debate regarding the standard of proof reveals some of the inherent weaknesses of a system of protection founded upon essays in prediction': GS Goodwin-Gill, *The Refugee in International Law,* 2nd edn (Oxford, OUP, 1996) 39.

[225] Essakkili, above n 33.

[226] See, eg, *Countryside Alliance* [2006] EWCA Civ 817 and [2005] EWHC 1677 (Admin).

[227] As Lord Bridge observed in the House of Lords, '[t]he most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny': *Bugdaycay v Secretary of State for the Home Department* [1987] ImmAR 250, 263.

Together with the EC principle of effective judicial protection, it empowers national judges to ignore ouster clauses or other domestic statutory attempts to restrict judicial review law. In addition, EC proportionality is particularly demanding when it comes to assessing the legitimacy of derogations from EC rights. This may well provide a legal tool to read exceptions in the Procedures and Qualification Directives narrowly. For instance, there is established jurisprudence limiting national security grounds for derogation from fundamental EC freedoms which require a high standard of proof.[228] When applying the Qualification Directive, the provisions on exclusion from refugee status and subsidiary protection should also be conceived of as derogations from rights afforded by EC law, and hence only applicable in a proportional manner.

An EC Right to Legal Aid?

The Directive does not provide for legal aid at the initial stage,[229] merely an entitlement to consult a lawyer at the applicant's own cost.[230] Member States are required to provide 'free legal assistance and/or representation' only for appeals before courts.[231] Member States are permitted to place restrictions on this entitlement.[232] This approach is counterproductive, and cost saving in a basically inefficient manner. Many errors made at first instance arise where claimants misunderstand procedures and processes. Correcting such errors requires recourse to costly appeals and judicial reviews. Legal advice at the initial stage can help avoid such errors and is thus an important aspect of the front-loading of procedural resources, which enhances efficiency *and* helps ensure fair and reliable determinations.[233] Investing at the initial stage is thus more efficient even from a governmental perspective, and the most apt means to meet the dual Tampere commitment to fairness and efficiency.

It is arguable that legal aid should be regarded as a fundamental right under EC law. This has not yet been recognised in EC law, but the

[228] See, eg, Joined Cases 115 and 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665; Case C–358/96 *Criminal Proceedings Against Calfa* [1999] ECR I–11.

[229] Above n 2, Art 16.

[230] *Ibid*, Art 15(1).

[231] *Ibid*, Art 15(2).

[232] *Ibid*, Art 15(3): Member States may provide free legal assistance and/or representation (a) only for procedures before a Court or tribunal under Chapter V and 'not for any onward appeals of reviews provided for under national law'. This would exclude legal aid for judicial review of administrative decisions; (b) only to those who lack sufficient resources; (c) only to legal advisers specifically dedicated to assisting asylum applicants; (d) only if the appeal or review is likely to succeed. This latter ground is subject to the caveat that legal assistance/representation is not 'arbitrarily restricted'.

[233] See further ECRE, *The Way Forward: Europe's Role in the Global Refugee Protection System: Towards Fair and Efficient Asylum Systems in Europe* (Brussels, ECRE, 2005) 38.

doctrinal argument is sound. As previously explained, the Strasbourg Article 6 case law is applicable to asylum determinations, where these involve the enforcement of EC rights. Although the ECtHR does not generally apply Article 6 in the asylum context, EC law incorporates Article 6 standards whenever EC rights are being invoked. This is evident in the formulation of Article 47 of the EU Charter, subparagraph 3 of which states:

> Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Very generally, Article 6 ECHR requires civil legal aid to be provided where the applicant has insufficient means, and the nature of the case means that legal assistance is required to make access to justice meaningful. In assessing whether this is so, the ECtHR takes into account the complexity of the case, the need to ensure equality of arms and the applicant's emotional involvement.[234] Thus, whether legal aid is required is dependent on the individual circumstances, rather than the sector concerned.[235] Application of these criteria to the asylum determination process leads to the conclusion that in many, if not most, instances legal aid would be a requirement.[236]

FUTURE DIRECTIONS—CONVERGENCE OR FRAGMENTATION?

The Procedures Directive suggests a differentiated, fragmented approach to asylum procedures across countries, levels and types of application. The general principles, in contrast, have a unifying logic. Taking them seriously should ideally prompt streamlining and convergence of procedures, as they must be respected in all instances where EC rights are at stake. At a minimum, they should lead to the application of a single procedure to refugee status and subsidiary protection cases. On the political front, in light of the legislative failures, the Commission places a single procedure at

[234] App No 6289/73, *Airey v Ireland* (1980) 2 EHRR 305; App No 00022924/93, *Ait-Mouhoub v France,* (1998) 30 EHRR 382; App No 38199/97, *Patel v United Kingdom* (1982) 4 EHRR 256; App No 00030308/96, *Faulkner v United Kingdom* (1998) 26 EHRR CD125; App No 00046800/99, *Del Sol v France* (2002) 35 EHRR 38; App No 00025357/94, *Aerts v Belgium* (2000) 29 EHRR 50 para 60.

[235] For instance, concerning defamation, the ECtHR held that Art 6 required legal aid in a case where the imbalance between the parties was significant and the legal issues highly complex (App No 68416/01, *Steel v United Kingdom*) although in other defamation cases there was no such entitlement (App No 46311/99, *McVicar v United Kingdom,* (2002) 35 EHRR 22; App No 35373/97, *A v United Kingdom,* (2003) 36 EHRR 51).

[236] If asylum applicants are in detention, App No 36670/97, *Duyonov v United Kingdom,* 7 Nov 2000, suggests that legal aid is also required under Art 5(4) of the Convention.

the centre of its hortatory policy[237] and also plans to propose legislation for just such a 'one-stop shop' procedure. Of note is the fact that the Commission appears to understate (perhaps tactically) the fact that the general principles require a degree of convergence between refugee status and subsidiary protection applications. In particular, the Commission sets out as a policy option that the Member States may pursue the extension of the right to an effective remedy, as enshrined in Chapter V of the Procedures Directive to subsidiary protection decisions.[238] However, as I have argued in this chapter, the EC right to effective judicial protection applies in any event to subsidiary protection determinations, even in the absence of an express EC legislative guarantee to this effect, as soon as subsidiary protection decisions fall within the scope of EC law. Admittedly, the Commission does also stress the fact that the right to effective judicial protection is also 'prescribed not only by the Court of Justice but also by the European Court of Human Rights',[239] perhaps a hint at the judicial outcome I suggest is doctrinally warranted.

Other institutional developments may also lead to convergence in procedural practices, in particular moves to enhance practical co-operation between asylum decision-makers. That practical co-operation is for the moment focused on country of origin information and burden sharing, described as how to respond to particular pressures.[240] In the Hague Programme, the European Council also requested the Commission to 'present a study on the appropriateness as well as the legal and political implications of joint processing of asylum applications within the Union'[241] and requested that a 'separate study' be conducted 'in close consultation with UNHCR' to examine 'the merits, appropriateness, and feasibility of the joint processing of asylum applications outside the EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards'.[242] The issues of external and joint processing seemed to have slipped from the agenda

[237] Commission Communication, Towards a common asylum procedure and a uniform status valid throughout the Union for persons granted asylum, COM(2000)755 final, 22 Nov 2000; Communication from the Commission to the Council and the European Parliament, A more efficient common European asylum system: the single procedure as the next step, COM(2004)503 final, 15 July 2004.

[238] *Ibid*, para 17.

[239] *Ibid*, para 20.

[240] Hague Programme, Strengthening Freedom Security and Justice in the European Union, Annex I to the European Council Conclusions 4–5 Nov 2004, 9. See, further, Commission Communication on Strengthening Practical Cooperation, New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System, COM(2006)67 final, 17 Feb 2006.

[241] *Ibid*.

[242] *Ibid*.

more recently, with the focus in the Commission's Communication on Regional Protection Programmes being on containing refugees, rather than external processing per se.[243]

From the outset, harmonisation of procedures was linked to the need to ensure that asylum applications would be handled similarly across the EU in order to ensure similar outcomes.[244] The current move toward practical co-operation shares this objective.[245] At present, stark divergences are evident. For example, UNHCR has stated that all those Chechens whose place of permanent residence was the Chechen Republic prior to their seeking asylum abroad should be considered in need of international protection, unless there are serious grounds to exclude them from refugee status under the Refugee Convention.[246] However, as ECRE notes:

> Throughout Europe the treatment of Chechens seeking protection varies considerably, with refugee recognition rates[247] in 2003[248] ranging from 0% (Slovakia) to 76.9% (Austria),[249] showing that for many Chechens, the outcome of the 'asylum lottery' will very much depend on the country in which they seek asylum.[250]

Convergence is thus a pressing protection issue. It remains to be seen whether these institutional moves to develop common approaches will lead to convergence around good practice or simply amplify the tendencies of the pre-Amsterdam era of informal sharing of deflective and restrictive strategies. The benign vision of co-operative practices in the Commissions Communications[251] belies not only the lessons of the intensive transgovernmentalism[252] of that era, but also the ongoing co-operation which takes place as part of the Dublin system. As Van Selm notes:

[243] Commission Communication on regional protection programmes, COM(2005)388 final, 1 Sept 2005.

[244] See, eg, Commission working document, Towards Common Standards on Asylum Procedures, SEC(1999)271 final, 3 Mar 1999, 6.

[245] Commission Communication, New Structures, New Approaches, above n 240, para 4.

[246] UNHCR, *Protection Guidelines regarding Asylum-Seekers and Refugees from the Chechan Republic, Russian Federation* (Geneva, UNHCR, 22 Oct 2004).

[247] Refugee recognition rate = number of recognised refugees divided by the total number of recognised refugees, number of persons granted other forms of protection, and persons rejected protection x 100%.

[248] Refugee recognition rates for 2004 were not available at time of writing.

[249] For more information on refugee recognition rates for Chechens in different European countries see Norwegian Refugee Council, *Whose Responsibility? Protection of Chechen Internally Displaced Persons and Refugees,* May 2005.

[250] ECRE, *Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe,* doc PP2/05/2005/Ext/CR (Brussels, June 2005) (footnotes in the original text).

[251] Above nn 237 and 240.

[252] The phrase is from H Wallace and W Wallace (eds), *Policymaking in the European Union,* 4th edn (Oxford, OUP, 2000) 28. See further Costello, above n 151.

> In order to implement the Dublin Regulation effectively, several Member States have exchanged, on a bi-lateral basis, liaison officers, who deal with the inter-state communication on the individual cases. Usually these exchanges are with neighbouring states, through which a 'Dublin case' may have passed in transit.[253]

Under the Dublin system, where states have a clear incentive, co-operation is pursued. Whether the Commission's new co-operative mechanisms will achieve their aims and lead to convergent practices and ultimately outcomes is doubtful, due to the absence of strong incentives or legal obligations. The Procedures Directive is unlikely in itself to promote convergent approaches. However, read in legal context, together with the Qualification Directive and the general principles, some legal inducements towards convergence of procedural standards may be proffered.

CONCLUSIONS

Of all the post-Amsterdam measures in the asylum field, the Procedures Directive has been the most controversial. This is at least partly explained by the context wherein national governments jealously guard their leeway to manipulate asylum procedures, in order to pursue various goals. Although the procedural changes of the past decades have proved legally controversial at the domestic and European level, many have become entrenched in the practices of the Member States. The highly qualified and differentiated procedural guarantees in the Procedures Directive are the result, and demonstrate a reluctance to commit to unequivocal procedural standards or maintain access to asylum within the EU. Thus, the critiques of the Procedures Directive are well-founded. In particular, the variety of procedures permitted reflects an assumption that it is possible to determine the cogency of claims on the basis of generalisations or cursory examination. This runs counter to any informed context-sensitive understanding of the asylum process. In the worst cases under the Procedures Directive, such as the supersafe third country provisions, the generalised assessment entirely substitutes for any individual process. In the Directive, we see the result of a legislative process which should have established clear minimal guarantees, but instead cast a negotiated settlement in law, apparently reinvesting national administrations with discretion that they had lost in some measure, due to domestic and ECtHR rulings.

However, the highly qualified and differentiated procedural guarantees in the Procedures Directive must be interpreted and applied in a manner compatible with the general principles of EC law and, indeed, applicable

[253] J Van Selm, 'European Refugee Policy: Is There Such a Thing?', *New Issues in Refugee Research*, UNHCR Working Paper No 115 (May 2005).

international norms. Indeed, the Directive's validity depends on compliance with the general principles. When it comes to actually implementing and applying the Directive, the main task is to reassert those domestic and ECtHR principles of fundamental rights and fair procedures, but the medium through which this is best accomplished is the general principles of EC law. Thus, national judges are empowered to reassert national administrations' legal accountability.

The general principles of EC law and the provisions of the Qualification Directive on evidential assessment require careful individual assessment of asylum claims. In four key areas, I suggest that the apparent discretion afforded by the Procedures Directive is limited. The right to a hearing and the co-operative obligations in the Qualification Directive preclude Member States from deciding asylum claims without interviewing the asylum applicant, in spite of the wording of the Procedures Directive on this matter. The requirement of a reasoned decision applied in the asylum context will require more than the all-too-common boilerplate refusal. Moreover, the requirement has implications for the decision-making process as well as the form of the final decision, and is ripe for evolution into a dialogic obligation. The right to judicial protection has long been recognised in EC law, precluding ouster of judicial review. It is also likely to require a robust standard of review in the asylum context to ensure that rights granted under EC law are practical and effective. It may also include a right to legal aid going beyond the text of the Procedures Directive.

However, there is much to regret in the turn to judicial salvation. Litigation is inevitably costly and time-consuming. A fitful, piecemeal process, it involves impugning practices in individual cases and ultimately depends on appropriate institutional reforms. It also raises concerns about strain on judicial resources and independence. Moreover, the ECJ currently lacks full jurisdiction over immigration and asylum matters and, as a proposal has been issued to grant it full preliminary ruling jurisdiction over these matters,[254] it is unclear whether its institutional position is as secure as in other fields. Although the ECJ will have a crucial role to play, it is initially and ultimately national judges who must vivify the general principles in this new context.

[254] Above n 43.

6

Directive 2003/9 on Reception Conditions of Asylum Seekers: Ensuring 'Mere Subsistence' or a 'Dignified Standard of Living'?

JOHN HANDOLL*

INTRODUCTION

General

IF, LIKE THE author, one favours a generous and non-judgmental approach to the support of asylum seekers (based on a sense that one should do as one would like to be done by), it is important to understand what factors (whether they are well or misconceived) can lead the governments of the EU Member States and their electorates to adopt less generous attitudes.

There seem to be two principal factors which can be linked to the asylum system. Other factors—such as racist or xenophobic attitudes—are not discussed here.

In the first place, even if there are no doubts about the bona fide nature of the asylum claim (or at least the presumption that the claim is genuine is maintained), the sheer numbers of applicants and/or the time taken to process claims can result in a heavy financial burden for states. In such circumstances, states may feel it necessary to discourage asylum seekers by reducing the levels of reception conditions.

In the second place, the fact that many asylum applications are rejected suggests that there are many asylum seekers whose claims for protection are unfounded. Whilst such asylum seekers are not 'bogus', given that an

* This paper is a substantially revised version of a paper published in 2004. See below n 15.

application for protection is 'genuine' even if it is not successful, the fact that there are large numbers of rejected claimants may result in a feeling that asylum seekers in general are 'scroungers' (as a tabloid media stereotype would have it), not deserving of generous levels of support and, somewhat perversely, in a perception that 'genuine' claimants will be prepared, given their bona fide need for protection, to accept low levels of reception conditions.

These problems can be, and to a certain extent have been, addressed. The 2002 UNHCR Conclusion on reception of asylum seekers:

> Recognizes the need to establish and apply fair and expeditious asylum procedures, so as to identify promptly those in need of international protection and those who are not, which will avoid protracted periods of uncertainty for the asylum-seekers, discourage misuse of the asylum system and decrease the overall demands on the asylum system.[1]

It also:

> Stresses that responsibility and burden-sharing and the availability of durable solutions promote and strengthen the capacity of host States with limited resources to receive asylum-seekers and to promote adequate reception arrangements, under the supervision of UNHCR.[2]

Instruments forming part of the Common European Asylum System are clearly designed to improve and speed up procedures, to identify early those with spurious claims and to share the burden.

If asylum seekers with dubious claims could be excluded early on from the process, if procedures could be fully streamlined and if public spending concerns could thereby be alleviated, this should result in reception states ceasing to use reception conditions as a tool to discourage the entry of asylum seekers. Nonetheless, it has to be recognised that the status of the asylum seekers will remain a rather ambiguous one since, even if misuse of the system can be eliminated, there will always be some claimants who succeed and others who do not. In the case of success, it will be hard to begrudge the successful applicant a decent level of support during the process of determining the claim; in the case of failure, it is easy enough to understand the sense that scarce resources have been wasted.

Stress has nonetheless to be laid on the special, rather than ambiguous, nature of the status. The status is a *special* one since it marks the individual concerned as a claimant for protection with a right to refuge for the duration of the claim and, if it is accepted, later on. It is also special

[1] UNHCR Executive Committee, Conclusion on reception of asylum-seekers in the context of individual asylum systems (No 93 (LIII)—2002), para (a).

[2] *Ibid,* para (c).

because the claim for protection carries with it a moral—and a legally endorsed—right to support while that claim is being considered.

This leaves the difficult issue of the level of support. It is easy enough to provide a checklist of the areas where support is needed. Shelter, food, clothing and healthcare are obvious examples of material support. More critical, however, is the way in which this support is provided. If emphasis is placed on enabling subsistence, on providing the basic needs of life or on preventing poverty, levels of support could be really quite low, and not very costly. The idea of dignity—which elevates the human condition of the provider of support as much as that of the asylum seeker—demands a higher level of understanding and support. The demand for dignity infuses ideas about, for example, freedom of movement, the appropriateness of detention, the use of vouchers, the type of accommodation provided, access to work and training, and even the conditions under which support can be withdrawn or reduced. Dignity is not about luxury. It does not require accommodation in four-star hotels, but it does require considerable attention to be paid to housing needs. In essence, it is a principle underlying the giving of support which, in concrete terms and the way in which it is provided, enables the asylum seeker to hold his or her head high and have the material and psychological ability to pursue a claim to refugee status.

Member State Practice

This chapter does not address the question of implementation in the individual 23 Member States bound to transpose Directive 2003/9 by, at the latest, 6 February 2005.[3]

Even within international human rights and other constraints, there have been significant variations in Member State practice: indeed, a margin of appreciation in meeting these requirements is to be expected and will continue even with the Directive. Various studies have documented the differences in Member State practice, with no fewer than three important

[3] This exercise is currently being undertaken for the European Commission by the Odysseus Network, and a report is expected for late 2006 (see http://www.ulb.ac.be/assoc/odysseus/AccueilUK.html). It is, however, unclear whether the results of the report will be made public. In 2005, ECRE produced a report on implementation of 3 Arts of the Dir (Arts 11, 13 and 16) in 15 of the Member States, which provides some useful, if sometimes discouraging, pointers. See ECRE, *The EC Directive on the Reception of Asylum Seekers: Are Asylum Seekers in Europe Receiving Material Support and Access to Employment in Accordance with European Legislation (*AD3/11/2005/EXT/SH, 2005). In relation to the UK and the EC legal framework, see the valuable study by A Baldaccini, *Asylum Support: A Practitioners' Guide to the EU Reception Directive* (London, JUSTICE, 2005).

and well-informed reports appearing in 2000[4] and reports for some Member States appearing in 2003–4.[5]

The situation is changing fast and there have been significant recent developments in several Member States, responding in part to the requirements of the Directive. By way of a brief and skeletal overview, it can be stated that material support—covering accommodation, food and healthcare—can be provided in kind or in the form of financial allowances (and/or vouchers). There are differences in the type of accommodation provided and in the freedom of movement extended to applicants for asylum. Although access to primary and secondary education is provided by all, there are different waiting periods and age limits. Whilst emergency healthcare is provided by all, there are clear differences in the level of, and means of delivering, psychological care and counselling. There is a clear, and almost ideological, divide between Member States granting access to work (with differing waiting periods and conditions of access) and those which do not. In virtually all cases, free movement in the Member State is permitted, but detention is becoming more frequently resorted to, and there are other direct or indirect restrictions on residence. There are, as might be expected, widely different levels of funding and commitment to the task. Finally, the underlying approach to reception conditions—ranging from subsistence regimes to a more dignity-based approach—varies between Member States: in some of them, such as Austria and the UK, recent years have seen a shift to a less generous approach, largely reflecting concerns about the numbers and motives of asylum seekers.

International and Regional Rights Regimes

The freedom of states to decide on reception conditions for asylum seekers is constrained not only by internal rules and value-systems but also by international and regional human rights rules and, of course, by international refugee law. In the case of the European Union, there is a particular fundamental rights regime, reflecting the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the constitutional traditions of its Member States.

[4] Danish Refugee Council, *Report on Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*, 4th edn (Copenhagen, DRC, May 2000); European Commission DG for Justice and Home Affairs, *Study on the Legal Framework and Administrative Practices in the Member States of the European Communities regarding Reception Conditions for Persons seeking International Protection* (the 'Ramboll Study') (Nov 2000, available at www.europa.eu), and UNHCR, *Reception Standards for Asylum Seekers in the European Union* (Geneva, UNHCR, July 2000).

[5] The Danish Refugee Council and ECRE have produced updated reports on the situation in 8 Member States (see www.ecre.org/conditions).

A number of provisions in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights are relevant to the question of reception conditions generally, and the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child each contains provisions relevant to the reception of members of vulnerable groups. All the European Union Member States are signatories to the ECHR, which contains provisions on inhuman or degrading treatment, the right to liberty, the right to privacy and family life and the right to an effective remedy.

The Member States all subscribe to a European Union rights system. The Union is stated to be founded on a number of principles—including respect for human rights and fundamental freedoms—which are common to the Member States.[6] Fundamental rights—as guaranteed by the ECHR and 'as they result from the constitutional traditions common to the Member States'—are to be respected by the Union as general principles of Community law.[7] The Charter of fundamental rights of the Union is designed to give greater visibility to fundamental rights and may, in due course, strengthen protection: of particular note in the current context are provisions on the protection of human dignity, the prohibition of inhuman or degrading treatment, the right to liberty, respect for private and family life, and the rights of the child. The EU Treaty also contains a mechanism for addressing actual or potential serious breaches of core principles including respect for human rights by Member States, even in areas within their own competence.[8]

In relation to international refugee law, the Refugee Convention and 1967 Protocol contain no specific provisions on reception of asylum seekers: nonetheless, since the asylum seeker may be a refugee (and, in a sense, must be taken to be one pending determination of his or her status), certain provisions of the Convention and Protocol apply to refugees before a formal recognition of their status, and thus have to be applied to all persons seeking protection under the Convention. Under the auspices of UNHCR, a body of 'soft law' is emerging. Over the years, a number of guidelines have been issued in specific areas, such as detention,[9] the protection and care of refugee children,[10] and the protection of refugee women.[11] There have also been a large number of Executive Committee Conclusions in particular areas. The elaboration of a basic framework for

[6] Art 6(1) of the EU Treaty.
[7] *Ibid*, Art 6(2).
[8] *Ibid*, Art 7.
[9] See UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (Feb 1999).
[10] See UNHCR Guidelines on Protection and Care of Refugee Children (1994).
[11] See UNHCR Guidelines on the Protection of Refugee Women (1991).

reception policies was the subject of the 2001 Global Consultations on International Protection.[12] In October 2002, the UNHCR Executive Committee adopted a Conclusion on reception of asylum seekers in the context of individual asylum systems,[13] setting out nine general considerations which should guide the reception of asylum seekers. The 2001 Global Consultations also resulted in a number of recommended measures for reception which it was anticipated would be contained in UNHCR guidelines.[14] Such guidelines have yet to emerge.

RECEPTION CONDITIONS AND THE EUROPEAN UNION[15]

The Maastricht Treaty

Article K.1 and K.3(2)(b) of the Maastricht Treaty, which entered into force in November 1993, provided for co-operation and action by Member States in relation to a number of matters of common interest, including asylum policy. This provided the basis for inter-governmental measures in relation to reception of asylum seekers and, in 1995, the Spanish Presidency tabled a draft Joint Action on the minimum conditions for the reception of asylum seekers:[16] this is now of largely historical interest, though some of its provisions anticipate provisions of the current Directive. The 1997 Council Resolution on unaccompanied minors who are nationals of third countries[17] contained a number of provisions relevant to the reception of such minors seeking asylum, reflecting the UN Convention on the Rights of the Child.

The Amsterdam Treaty

The Amsterdam Treaty, entering into force on 1 May 1999, brought asylum policy into the EC Treaty. Article 63(1)(b) of the EC Treaty provides that the Council, acting in accordance with the procedure in

[12] Global Consultations on International Protection (3rd Meeting), *Reception of Asylum Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems,* EC/GC/01/17, 4 Sept 2001. See, generally, the Dec 2001 Declaration of States Parties and the Agenda for Protection (UN General Assembly, A/AC.96/965/Add.1, 26 June 2002).

[13] Above n 1.

[14] See Global Consultations, above n 12, para 24 and Annex.

[15] For a more detailed treatment see J Handoll, 'Reception Conditions of Asylum Seekers' in CD Urbano de Sousa and P De Bruycker (eds), *The Emergence of a European Asylum Policy* (Brussels, Bruylant, 2004) 113–48.

[16] Council doc 9489/95 (wad/STCS/at).

[17] [1997] OJ C 121/23.

Article 67, shall within five years after the Amsterdam Treaty's entry into force (that is, 1 May 2004) adopt measures on minimum standards on the reception of asylum seekers. Such measures are to be in accordance with the Refugee Convention, the 1967 Protocol and other relevant treaties.

Anticipating the Amsterdam Treaty's entry into force, the December 1998 Vienna Action Plan[18] stated that measures under Article 63(1)(b) were to be taken within two years of the new Treaty's entry into force—by the end of April 2001—thereby cutting this five-year limit to two. The October 1999 Tampere Summit stated that common minimum conditions of reception of asylum seekers were to be included in the short term as an element of a Common European Asylum System.[19] The Council was urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set out in the Amsterdam Treaty and the Vienna Action Plan. The twice-yearly 'Scoreboard'[20] only reluctantly conceded slippage. Such slippages—which were not unique to the proposed reception Directive—resulted in the December 2001 Laeken European Council taking a new approach to the establishment of a *true* common asylum and immigration policy,[21] which was taken forward by the June 2002 Seville European Council.[22]

PROPOSING AND NEGOTIATING THE DIRECTIVE

The 2000 Conclusions on Conditions for the Reception of Asylum Seekers

The effective starting point for the Directive on reception conditions was a discussion paper presented by the French delegation in June 2000.[23] An initial exchange of views by the Asylum Working Party[24] exposed a number of differences between the delegations on personal scope, conditions for movement, financial and material assistance, work and the treatment of vulnerable individuals.

[18] Adopted by the JHA Council of 3 Dec 1998 and published at [1999] OJ C 19/1.
[19] Council Press Release 200/99, especially section A.I.
[20] COM(2000)167 final, COM(2000)782 final, COM(2001)278 final, COM(2001)628 final, COM(2002)261 final, COM(2002)738 final.
[21] Council Press Release SN 300/1/01 REV 1, paras 37–41. See also the Belgian Presidency report evaluating the conclusions of the Tampere European Council (Council doc 14926/01).
[22] Council Press Release SN 200/1/02 REV1, Part III.
[23] Council doc 9730/00 ASILE 28.
[24] Council doc 10242/00 ASILE 30.

A French Presidency note of 18 September 2000[25] proposed that the Justice and Home Affairs (JHA) Council should discuss three points on which it would be useful to have policy guidelines:

(1) the level of harmonisation to be achieved with regard to financial and material assistance for asylum seekers;
(2) conditions applicable to movement of asylum seekers;
(3) access to employment for asylum seekers.

These issues were addressed in the meeting of the JHA Council of 28 September. A rather anodyne paragraph in the Council minutes records:

> Ministers' replies generally emphasised that the Union should confine itself to laying down general principles regarding the conditions for the reception of asylum seekers, leaving the practicalities of the required detailed measures to the Member States.[26]

The Permanent Representatives Committee was instructed to continue work in the light of the ministerial deliberations and to submit draft conclusions to the JHA Council for adoption at its 30 November/1 December meeting.[27]

The JHA Council meeting from 30 November to 1 December 2000 adopted Conclusions for the Reception of Asylum Seekers,[28] setting out the general principles underlying minimum standards of reception and providing a set of 'guidelines' for the future Community instrument. The Conclusions pointed to the need that asylum seekers be received in conditions of dignity, to the importance of affording comparable living conditions in all Member States and to the need to limit secondary movement of those influenced by the variety of reception conditions. It was stated that the application of the subsidiarity and proportionality principles would leave Member States 'some room for manoeuvre'. The prior discussions and the guidelines themselves exposed some important points of difference, especially in relation to the personal scope of any instrument, freedom of movement and access to work.

[25] Council doc 11472/00 ASILE 40.
[26] Council doc 11705/00 (Presse 341).
[27] For the sequence of events until the adoption of the Conclusions and Guidelines see Council docs 11585/00 ASILE 43, 11651/00 ASILE 48, 12431/00 ASILE 51, 13117/00 ASILE 52 and 13117/1/00 REV 1 ASILE 52.
[28] Council doc 13865/00 (Presse 457).

The Commission Proposal

In December 2000, the Commission held bilateral discussions with the Member States, on the basis of a discussion paper on the future Community instrument on reception conditions for applicants for asylum in the EU.[29] The Commission specifically consulted the UNHCR and some NGOs.

On 3 April 2001, the Commission presented its proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States.[30] According to Section 1 of the Explanatory Memorandum, the December 2000 Council Conclusions, the Ramboll Report,[31] and the comments on the Commission's discussion paper provided the 'foundation' material for drafting, with account also taken of the UNHCR Study,[32] the Danish Refugee Council's 4th Report,[33] the existing 'soft law' (including the 1997 Council Resolution[34]) and the 1995 draft Joint Action.[35]

The Consultation Process

The proposal was transmitted by the Commission to the Council and European Parliament on 18 May 2001. By letter of 6 June 2001, the Council consulted the European Parliament, as it was required to do under Article 67 of the EC Treaty. In the European Parliament, the matter was referred to the Committee on Citizens' Freedom and Rights, Justice and Home Affairs as the Committee responsible, and a number of other Committees were asked to provide their opinions. The final Report, with Mr Hernández Mollar as Rapporteur, was tabled on 15 April 2002.[36] The matter was debated and a legislative resolution and amended proposal approved by the European Parliament on 25 April 2002 (the same day, as will be seen, that the Council defined its 'general approach').[37] On 6 June 2001, the Council also decided to consult the Economic and Social

[29] Discussion Paper of 27 Nov 2000 (DG JHA/A/2 SV D 2000).
[30] COM(2001)181 final (2001/0091 (CNS)).
[31] See above n 4.
[32] *Ibid.*
[33] *Ibid.*
[34] See above n 17.
[35] See above n 16.
[36] A5–0112/2002.
[37] P5-TA(2002)0202.

Committee and the Committee of the Regions, and Opinions of both of these bodies were adopted in November 2001.[38]

In July 2001, UNHCR also commented on the proposal.[39] Since most of the proposed provisions were in line with the recommended standards it set out in its July 2000 study,[40] it confined itself to commenting on those few aspects which required clarification or amendment.

The Legislative Process

The Asylum Working Party started to examine the proposal in July 2001 and met on several occasions after this.[41] The Spanish Presidency issued 'compromise texts' on the proposal in December 2001 and January 2002[42] and the Working Party issued a number of revised texts between January and February.[43] In February, the Working Party received a reply from the Council's Legal Service to the question whether the proposed Article on schooling and education of minors could be dealt with under the Directive and whether Articles 149 and 150 of the EC Treaty should not be added to the legal basis: the conclusion appears to have been that such provisions could be included on the basis of Article 63(1)(b) alone.[44]

In January 2002, the thorny political issue of access to work and vocational training was referred to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), where some progress was made before the matter was referred back to the Working Party.[45] A revised text was referred to the Strategic Committee in early March for discussions on a number of issues, including personal scope, residence and free movement, as well as employment and vocational training.[46]

At the end of March, the matter was taken up by the Permanent Representatives' Committee[47] and, at its meeting of 25 to 26 April 2002, the JHA Council was able to define a 'general approach', subject to consideration of the European Parliament's Opinion (which was, coincidentally, being adopted on the same day) and the lifting of Dutch and UK

[38] See the Economic and Social Committee Opinion of 28 Nov 2001 (CES 1482/2001, [2002] OJ C 48/63) and the Committee of the Regions Opinion of 15 Nov 2001 (CdR 214/2001, [2002] OJ C 107/85).

[39] The UNHCR Comments are to be found in Council doc 11347/01 (ASILE 40).

[40] See above n 4.

[41] Council docs 11320/01 (ASILE 39), 11541/01 (ASILE 43) and 12839/01 (ASILE 49).

[42] Council docs 15190/01 (ASILE 60) and 5300/02 (ASILE 1).

[43] Council docs 5444/02 (ASILE 3), 6253/02 (ASILE 8), 6467/02 (ASILE 11).

[44] See, for the only partially accessible opinion, Council doc 6072/02 (ASILE 7).

[45] Council docs 5430/02 (ASILE 2) and 5791/02 (ASILE 5).

[46] Council doc 6907/02 (ASILE 14).

[47] See Council docs 7307/02 (ASILE 16), 7439/02 (ASILE 17), 7802/02 (ASILE 19), 8090/02 (ASILE 21) and 8090/1/02 REV 1 (ASILE 21).

parliamentary scrutiny reservations.[48] The apparently 'complete' nature of the draft Directive was seen in the statement that the Directive was to be 'formally adopted' at one of the Council's forthcoming sessions. On 26 April 2002, UNHCR—somewhat jumping the gun—welcomed the adoption of the Directive. The 'general approach' resulting from the Council discussions was set out in a document dated 29 April 2002[49] and, on 17 June 2002, the 'Council Directive' was published as a Council document with no reference to it being a draft.[50] The Seville European Council of 21 and 22 June 2002 welcomed the reception Directive as an achieved result.[51] The UNHCR's congratulations (and the European Council's self-congratulations) were perhaps a little premature. There were still sticking points on the draft Directive—especially in relation to access to employment—and a new problem was about to arise: the wish of the UK government to deny reception conditions to asylum seekers who did not register on their arrival. In the 25–26 April Council meeting, the German government entered a statement to the Council minutes asking for a Council Legal Service Opinion on whether the Community enjoyed powers to regulate the access of asylum seekers to the labour market:[52] by the end of May, the Council Legal Service was able to reply in the affirmative.[53]

These difficulties notwithstanding, the JHA Ministers meeting on 14–15 October envisaged that the Directive would be adopted by the JHA Council meeting on 28–29 November.[54] The Presidency issued the text of the draft Directive and draft statements to the Council minutes on 22 November[55] and the Permanent Representatives' meeting on 27 November was able to reach agreement on draft provisions on employment (proposed Article 11) and reduction or withdrawal of reception conditions (Article 16).[56] The JHA Council meeting on 28–29 November, pending final confirmation by one delegation (the Swedish delegation), reached agreement on the draft with a view to enabling the Council to adopt the Directive at a forthcoming meeting.[57] At a meeting on 17 December 2002, the Permanent Representatives' Committee confirmed the agreement on

[48] Council doc 7991/02 (Presse 104). For the draft text, see Council doc 8351/02 (ASILE 23).
[49] Council doc 8351/02 (ASILE 23).
[50] Council doc 9098/02 (ASILE 28).
[51] Council doc SN 200/02, para 27.
[52] The German concern appears to have stemmed from the division of tasks between the Federal government and the *Länder*, with the *Bundesrat* challenging Community competence.
[53] See, for the partially accessible opinion, Council doc 9077/02 (ASILE 26).
[54] Council doc 12894/02 (Presse 308).
[55] Council doc 14658/02 (ASILE 70).
[56] Council doc 14658/02 ADD 1 (ASILE 70).
[57] Council doc 14817/02 (Presse 375).

the text of the Directive[58] and the statements to be entered into the Council minutes: a Dutch parliamentary scrutiny reservation was made, but later withdrawn.[59]

The Directive was formally adopted as Council Directive 2003/9/EC by the General Affairs and External Relations Council meeting on 27 January 2003,[60] and entered into force on its publication on 6 February 2003.[61]

ANALYSIS OF DIRECTIVE 2003/9

The purpose of this section is to outline the key provisions of Directive 2003/9 and to comment on a number of issues relating to its interpretation. Reference is also made to the comments of the UNHCR and ECRE, which have both published documents critical of many elements of the Directive.[62]

Purpose of the Directive

The *purpose* of the Directive is 'to lay down minimum standards for the reception of asylum seekers in Member States'.[63] A Recital makes it clear that such minimum standards 'will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States'.[64] Another Recital states:

> The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception.[65]

Neither of these two statements (or aspirations) is very strong, at least applying normal English language canons of interpretation. In suggesting that minimum standards will 'normally' suffice to ensure a dignified standard of living, it seems to be implied that there can be cases where they

[58] For the agreed text see Council doc 15398/02 (ASILE 78).
[59] See Council docs 15444/02 (ASILE 80) and 15722/02 (ASILE 83).
[60] Council doc 5396/03 (Presse 8).
[61] [2003] OJ L 31/18.
[62] UNHCR, *Annotated Comments on Council Directive 2003/9/EC* (2003); ECRE, *Information Note (n 63) on the Council Directive 2003/9 of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers* (IN1/06/2003/EXT/HM) (2003); ECRE, *The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe Receiving Material Support and Access to Employment in Accordance with European Legislation?* (AD3/11/2005/EXT/SH) (2005).
[63] Dir 2003/9, above n 61, Art 1.
[64] *Ibid*, Preamble, Recital 7.
[65] *Ibid*, Preamble, Recital 8.

will not so suffice. In relation to the secondary movements of asylum seekers, the words 'should help' suggest a certain lack of conviction.

Notwithstanding this apparent lack of robustness, these recitals are critical to understanding and interpreting the Directive. It seems clear that the setting of minimum standards cannot, given the reference to 'a dignified standard of living', involve a 'race to the bottom'. The 'comparable living conditions in all Member States'—the need for which is reinforced by Recital 8—should be set at a level corresponding to the requirement for a dignified standard of living. Indeed, it could be argued that Recital 7 provides the basis for a teleological interpretation of reception conditions favouring 'a dignified standard of living'.

Scope

The Directive applies to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers.[66] There are thus a number of limiting conditions.

First, the applicant must be a third country national or stateless person. Nationals of EU Member States are thus not entitled to receive support under the Directive. It should be observed that in a Statement to the Council minutes it is noted that 'Austria may regard, for all legal and practical purposes in connection with asylum matters, nationals of the candidate countries as equal to EU citizens'.[67]

Secondly, the application must be made at the border or in the territory of a Member State.

Thirdly, the application must be for 'asylum', which is limited to claims under the Refugee Convention. Notwithstanding that an application for international protection is presumed to be an application for asylum, unless there is an explicit request for another form of protection that can be separately applied for, the fact is that seekers of subsidiary or complementary forms of protection are not entitled to support under the Directive (though Member States *may* opt to provide support[68]). This conclusion has, not surprisingly, been challenged by the UNHCR, which takes the view that an application for asylum is not linked to a request for international protection under the Refugee Convention, but includes a request for international protection under subsidiary or complementary forms of action.[69]

[66] *Ibid,* Art 3(1). See, for definitions, Art 2(b) and (c).
[67] Statement 3 to the Council Minutes (Council doc 5738/03 ADD 1).
[68] See above n 61, Art 3(4).
[69] UNHCR, *Annotated Comments*, above n 62, *ad* Art 2(b).

Fourthly, the Directive applies to an asylum seeker for only as long as he or she is allowed to remain on the territory of the Member State as such. The right to reception conditions obtains for as long as the application process is in train *and* the permission to remain as asylum seeker continues. This will, in any case, mean that the Directive will not apply once the 'final decision' is taken. However, the condition of being allowed to remain means that the Directive may cease to apply to persons earlier in the process. An applicant to be transferred under the Dublin II Regulation will cease to be covered by the Directive in the transferring Member State once the receiving Member State has taken him or her in charge. The position of applicants who are unsuccessful at first instance and then seek to appeal this is not entirely clear. However, it seems that support should be given at least for the time provided for seeking a remedy and that, where the appeal has a suspensive effect, support should continue.

The UNHCR has raised the question of the extent to which reception conditions will be limited to the first instance procedure and has made it clear that they should be provided to asylum seekers until the final outcome of the asylum process.[70] It considers that appeals should have suspensive effect, and that there should be the right to stay—and to be supported—until a final decision is reached on the application.

Application to Family Members

The Directive will also apply to family members if they are covered by the asylum application under national law.[71] 'Family members' means:

> [I]nsofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:
>
> (i) the spouse of the asylum seeker or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;
>
> (ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law.[72]

Although it allows (and requires) more liberal Member States to include unmarried partners, this definition of family members is quite restrictive in its application to minor children and its exclusion of other dependants. The UNHCR has pointed to the need for liberal criteria in identifying those

[70] *Ibid*, *ad* Art 3.
[71] Above n 61, Art 3(1).
[72] *Ibid*, Art 2(d).

family members who can be admitted with a view to promoting a comprehensive reunification of the family.[73]

More Favourable Provisions

It is also made clear that Member States may introduce or retain *more favourable provisions* in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or her or for humanitarian reasons, in so far as these provisions are compatible with the Directive.[74] A Recital to the Preamble states:

> It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third country nationals and stateless persons who ask for international protection from a Member State.[75]

This provision is welcome, since it permits Member States to provide a higher level of protection. However, it is a conceptually problematic one. All the EC Treaty permits is legislation which lays down minimum standards: there is no Community competence to require any higher standards. The question of higher standards is thus a matter for the individual Member States, which can have regard to national conditions and international standards, including UNHCR *desiderata*. The *only* interest of the Community is that more favourable provisions do not conflict with the Directive. In this light all that Article 4 does is to confirm *original* Member State competence in relation to higher than the prescribed minimum levels.

It is tempting to argue that Article 4 enables Member States to remedy the international legal shortcomings of the Directive. Indeed, the UNHCR and ECRE approaches appear to be to encourage Member States to adopt more favourable provisions in order to remedy the deficiencies in the Directive. It is, however, uncertain whether the Community should be 'let off the hook' in this way: the 'minimum standards' as applied by the Member States have to satisfy the applicable international and regional refugee protection and human rights rules and, if called upon, it is for the Court of Justice to secure that the Community has done so.

[73] UNHCR, *Annotated Comments*, above n 62, *ad* Art 2(d).
[74] Above n 61, Art 4.
[75] *Ibid,* Preamble, Recital 15.

General Provisions on Reception Conditions

The Directive contains a number of general provisions on reception conditions, defined as 'the full set of measures that Member States grant to asylum seekers in accordance with this Directive'.[76] These are set out below.

Information

Member States are to inform asylum seekers, within a reasonable period not exceeding 15 days after the lodging of the application for asylum, of at least any established benefits and of their obligations relating to reception conditions. Member States are to ensure that applicants are provided with information on organisations or groups of persons providing specific legal assistance and organisations that may be able to help or inform them in relation to available reception conditions, including health care.[77] Such information is to be in writing and, as far as possible, in a language that the applicants may 'reasonably be supposed to understand': where appropriate, this information may also be supplied orally.[78]

These provisions differ from what the Commission originally proposed. ECRE has criticised the Council for not requiring asylum seekers to be informed *immediately*,[79] whilst both ECRE and the UNHCR have stated that an asylum seeker should be provided with information in a language he or she understands.[80] The use of the words 'reasonably be supposed to understand', when read with 'as far as possible', is not conducive to effective communication.

Documentation

An applicant is, within three days of lodging an application, to be provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the Member State's territory whilst the application is pending or is being examined: if the asylum seeker is not free to move within all or a part of the territory, the document must certify this fact.[81] Such a document,

[76] *Ibid,* Art 2(i).
[77] *Ibid,* Art 5(1). See Preamble, Recital 11.
[78] *Ibid,* Art 5(2).
[79] ECRE, *Information Note*, above n 62, at 3.
[80] *Ibid,* and UNHCR, *Annotated Comments*, above n 62, *ad* Art 5.
[81] Above n 61, Art 6(1).

which need not certify the asylum seeker's identity,[82] must be valid for as long as he or she is authorised to remain in the territory of the Member State or at its border.[83]

Application of these provisions may be excluded when the asylum seeker is in detention[84] or 'during the examination of an application for asylum made at the border or within the context of a procedure to decide on the right of an applicant legally to enter the territory of a Member State': in specific cases, during the examination of an asylum application, Member States may provide the applicant with other evidence equivalent to the above document.[85] In addition, asylum seekers *may* be provided with a travel document where serious humanitarian reasons arise requiring their presence in another state.[86]

The Council did not take up the Commission's proposal that information on health entitlements and access to the labour market might be included in the document: the UNHCR has stated that such documentation should also contain information on the holder's entitlements and benefits.[87] It has been pointed out that the failure to require that the document certify the asylum seeker's identity may lead to difficulties in accessing services such as banking.[88]

The permissive exclusion of these provisions when the asylum seeker is in detention or during the examination of an application made at the border raises the question whether detention or border procedures should be used in the first place.[89] There are also concerns that the absence of documentation may result in a failure to prevent *refoulement*.[90] The exclusion for applications made 'within the context of a procedure to decide on the right of an applicant legally to enter the territory of a Member State' is not very clear: the UNHCR points out that it may cover considerable numbers of applicants and that concerns with regard to documentation should be addressed in national legislation.[91]

[82] *Ibid,* Art 6(3).
[83] *Ibid,* Art 6(4).
[84] Under, Art 2(k), 'detention' shall mean 'confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'.
[85] *Ibid,* Art 6(2).
[86] *Ibid,* Art 6(5).
[87] UNHCR, *Annotated Comments*, above n 62, *ad* Art 6(4).
[88] ECRE, *Information Note*, above n 62, at 4.
[89] *Ibid.*
[90] *Ibid.*
[91] UNHCR, *Annotated Comments*, above n 62, *ad* Art 6(2).

Residence and Freedom of Movement

Asylum seekers may move freely within the whole territory of the host Member State or an assigned area thereof (which cannot affect the inalienable sphere of private life and 'shall allow sufficient scope for guaranteeing access to all benefits' under the Directive).[92] Residence may be decided on public interest or public order grounds or, where necessary, to ensure the swift processing and effective monitoring of the application.[93]

Where it proves necessary, for example, for legal reasons or reasons of public order, applicants may be confined to a particular place under national law—that is, detained.[94] This should be read in light of the definition of 'detention' in Article 2(k): 'confinement of an asylum seeker by a Member State within a particular place where the applicant is deprived of his or her freedom of movement'.

The provision of the material reception conditions may be made subject to actual residence in a specific place to be determined by the Member State: such a decision, which may be of a general nature, is to be taken individually and established by national legislation.[95]

Member States are to provide for the possibility of granting temporary permission to leave the prescribed place of residence or the assigned area (though not a place of confinement). Decisions are to be taken individually, objectively and impartially, and reasons given for negative decisions. Such permission is not to be required for keeping appointments with authorities and courts where the applicant's appearance is necessary.[96] Furthermore, Member States are to require applicants to inform the competent authorities of their current address and notify any changes as soon as possible.[97]

These provisions on free movement and residence are problematic.[98] The right to free movement is to be within the whole of a Member State or an assigned area within it. There appears to be no minimum limit on the size of the 'assigned area' and the need to assure 'the unalienable sphere of private life' (which is left undefined) and 'the possibility to access all benefits' (what is meant by 'possibility'?) does not remove the risk that such free movement may not really exist.[99] The link between 'free movement' and 'residence' is also not made clear. The Member State may

[92] Above n 61, Art 7(1).
[93] *Ibid*, Art 7(2).
[94] *Ibid*, Art 7(3).
[95] *Ibid*, Art 7(4).
[96] *Ibid*, Art 7(5).
[97] *Ibid*, Art 7(6).
[98] See, generally, ECRE, *Setting Limits* (Research paper on the effects of limits on the freedom of movement of asylum seekers within the borders of European Union Member States), Jan 2002.
[99] It appears that a Member State could require applicants to reside on an island and still satisfy this provision.

decide on residence, or may link 'actual residence in a specific place' and provision of material reception conditions: in both cases the need for permission to leave may, in practice, qualify the right of free movement, since travel in the Member State may be limited by the requirement to reside in a particular (perhaps remote) place. It seems clear that *actual* residence is envisaged.

Both the UNHCR and ECRE have expressed concerns about restricting free movement to a part of a Member State. The UNHCR has recommended that national legislation should take account of a number of factors for determining the area or location of residence: (i) the presence of NGOs, legal aid providers, language training facilities and, where possible, an established community of the asylum seeker's national or ethnic group; (ii) the possibilities for harmonious relations with the surrounding communities; and (iii) the need for supplementary financial support to cover the costs of travelling to the assigned area.[100] For its part, ECRE has stated its opposition to limiting areas of movement, as this could hinder access to employment and deprive asylum seekers of the support of their communities: more generally, it is concerned that Member States enjoy wide-ranging powers to control the movement and residence of applicants with few safeguards allowing them to choose their place of residence or to leave it.[101]

'Confinement' (that is, detention) may be imposed where it proves necessary. To provide for such confinement 'for legal reasons' or reasons of public order in itself almost implies a 'carte blanche' approach: the fact that these are only *examples* suggests an area of state discretion—limited only by the requirement to show necessity—which is quite disturbing. Just what such 'confinement' can involve is unclear: there are many ways of depriving an applicant of his or her freedom of movement, and the UNHCR has stated its understanding that 'detention may include confinement within a narrowly bounded or restricted location, where freedom of movement is substantially curtailed'.[102] The UNHCR has also affirmed that detention should be resorted to as an exceptional measure, to be applied in accordance with international standards.[103]

[100] UNHCR, *Annotated Comments*, above n 62, *ad* Art 7(1) and (2).
[101] ECRE, *Information Note*, above n 62, at 4.
[102] UNHCR, *Annotated Comments*, above n 62, *ad* Art 7(3).
[103] *Ibid*, referring specifically to Executive Committee Conclusion No 44 (XXXVII), the 1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment and the 1999 UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum seekers. The UNHCR goes on to address issues relating to detention in criminal justice institutions, segregation of the sexes (save in family situations), and the position of women, children and other vulnerable persons.

Family Unity

Member States are to take appropriate measures to maintain, as far as possible, family unity, if applicants are provided with housing by the Member State concerned: such measures are to be implemented with the asylum seeker's agreement.[104]

The concrete obligation to maintain family unity is diluted by the reference to 'appropriate' measures, by the qualification 'as far as possible' and by the limitation to applicants who are provided with housing by the Member State. The UNHCR has commented that family unity and privacy should also be respected in cases of detention or reception at the border.[105]

Medical Screening

Medical screening may be required for applicants on public health grounds.[106] This is a permissive, and rather sparse, provision. The Commission's proposal that competent bodies carrying out screening should use methods that are safe and respect human dignity was not followed through in the Directive.[107] The term 'public health grounds' is not defined, and the conditions under which such testing may take place and the consequences of screening are not addressed. These questions could, of course, be addressed in the light of rules relating to the public health derogation applying to free movers.

The UNHCR has stated that screening should not include mandatory HIV screening.[108] ECRE has argued that the consent of applicants to screening must be sought, that it should be subject to strict rules of confidentiality and ethics and that those carrying out the screening should be trained to recognise special needs and to act with cultural sensitivity.[109]

Schooling and Education of Minors

Minor children of asylum seekers and asylum seekers who are minors are to be granted access to schooling and education under similar conditions as host nationals for so long as an expulsion measure against them or their parents is not actually enforced. Such education, which may be provided in accommodation centres, may be confined to the state education system.[110]

[104] Above n 61, Art 8.
[105] UNHCR, *Annotated Comments*, above n 62, *ad* Art 8. See, also UNHCR Executive Committee Conclusion, above n 1, para (b) iv.
[106] Above n 61, Art 9.
[107] See ECRE, *Information Note*, above n 62, at 4.
[108] UNHCR, *Annotated Comments*, above n 62, *ad* Art 9.
[109] See ECRE, *Information Note*, above n 62, at 5.
[110] Above n 61, Art 10(1), paras 1 and 2.

Minors are to be younger than the age of legal majority in the Member State concerned, but secondary education may not be withdrawn for the sole reason that the minor has reached the age of majority.[111]

Access to the education system shall not be postponed for more than three months from the date of lodging the asylum application, though this period may be extended to one year where specific education is provided in order to facilitate access to the education system.[112] Where access to the education system as above is not possible, due to the specific situation of the minor, the Member State may offer other education arrangements.[113]

The UNHCR and ECRE are both concerned about the provision in accommodation centres since this can lead to marginalisation.[114] The UNHCR has also argued that, on joining local schools, children require induction into the new education system and additional support to meet linguistic and psycho-social needs: in addition, *all* asylum seekers should be entitled to basic training in the host language since this 'may facilitate good relations with the local population'.[115]

Employment

In relation to employment, Member States are to determine a period of time, starting from the date on which an asylum application is lodged, during which an applicant is not to have access to the labour market.[116] Where a first instance decision has not been taken within one year of the application and this delay cannot be attributed to the applicant, the Member State is to decide the conditions for granting access to the labour market for the applicant.[117] Access cannot be withdrawn during an appeal in a regular procedure having suspensive effect until notification of a negative decision.[118] In any case, for reasons of labour market policies, Member States *may* give priority to EU citizens, EEA nationals and legally resident third country nationals.[119]

The question of access to employment was one of the most vexed during the negotiations in the Council. What has resulted is a mandatory provision, with flexibility given to the Member State. The right involved is not to work, but to have access to the labour market. An element of discretion is given as regards 'conditions for granting access to the labour

[111] *Ibid,* Art 10(1), para 3.
[112] *Ibid,* Art 10(2).
[113] *Ibid,* Art 10(3).
[114] UNHCR, *Annotated Comments*, *ad* Art 10, and ECRE, *Information Note*, above n 62, at 5.
[115] UNHCR, above n 114, *ad* Art 10.
[116] Above n 61, Art 11(1).
[117] *Ibid,* Art 11(2).
[118] *Ibid,* Art 11(3).
[119] *Ibid,* Art 11(4).

market'. These should, however, not be imposed in order to defeat the basic right of access to the labour market. In terms of timing, the initial period in which the asylum seeker is *not* to have access—that is, an absolute bar—is *up to* one year: several Member States will provide access within six months. The opportunity to give preference to EU citizens, EEA nationals and even 'legally resident third country nationals' could prove critical where there is unemployment, or labour protection standards are under threat: in such circumstances, access to employment for asylum seekers could be theoretical rather than real. Both the UNHCR and ECRE have argued that access to employment should be granted after six months and that such access can reduce dependence and increase self-reliance.[120] It is hardly surprising that the UNHCR has concluded that this provision allows considerable scope for exceptions and restrictive application by the Member States.[121]

Vocational Training

Access to vocational training may be allowed irrespective of access to the labour market, save for access to such training relating to an employment contract, which shall depend on the extent to which the applicant has access to the labour market in accordance with Article 11.[122]

It appears that, as a general rule, access to vocational training is optional for the Member State. However, this option is limited in relation to training in relation to an employment contract, with such training permitted only 'to the extent' to which there is access to the labour market. The words 'to the extent' could suggest that such training must be commensurate with the terms upon which access to the labour market is to be granted.[123] However, other language versions, such as the French and Italian, suggest that the right to vocational training is subordinated to access to the labour market and the provision may simply be designed to ensure that the rules on access to employment are not undermined. On either interpretation, it appears that there is no *obligation* to provide vocational training,[124] and this result has been criticised by both the UNHCR and ECRE.[125] The lack of a concrete obligation is particularly unfortunate in light of the fact that many asylum seekers already have

[120] UNHCR, *Annotated Comments*, *ad* Art 11, and ECRE, *Information Note*, above n 62, at 5.

[121] UNHCR, above n 120, *ad* Art 11.

[122] Above n 61, Art 12.

[123] See *ibid,* Art 11(2).

[124] I am aware of arguments that the second para of Art 12 *does* impose an obligation to provide employment contract-related training to those enjoying access to employment, but the wording of the provisions does not seem to support this conclusion.

[125] UNHCR, *Annotated Comments*, *ad* Art 12, and ECRE, *Information Note*, above n 62, at 5–6.

skills which could be easily put to good use if training enabling them to adapt to local conditions were provided.

General Rules on Material Reception Conditions and Health Care

Material reception conditions—including housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance[126]—are to be made available to applicants when they make their application for asylum.[127] National provisions are to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. That standard is to be met in the specific situation of persons having special needs in accordance with Article 17, as well as in relation to the situation of persons in detention.[128]

Provision of all or some of the *material conditions* and *health care* may be made subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.[129] Member States may require applicants to cover or contribute to the cost if they have sufficient resources, for example, if they have worked for a reasonable period of time: and, if it transpires that the applicant had sufficient means at the time of cover, Member States may ask the asylum seeker for a refund.[130]

Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers, or in a combination of these provisions. The amount of any financial allowances or vouchers is to be determined in accordance with the principles set out in the above provisions.[131]

The definition of 'material reception conditions' in Article 13 is not an all-embracing one: it is not clear what elements may be covered other than those identified. It is also clear that Article 13 prescribes a rather minimalist standard which does not fit well with the 'dignified standard of living' referred to in Recital 7 of the Preamble. The UNHCR has regretted the failure to follow the original Commission proposal which referred to a 'standard of living adequate for the health and well-being of applicants and their accompanying family members as well as the protection of their fundamental rights', reflecting Article 11 of the International Covenant on Economic and Social Rights.[132] ECRE has argued that the standard of 'adequate for health and to enable subsistence' could be subject to wide

[126] Above n 61, Art 2(j).
[127] *Ibid*, Art 13(1).
[128] *Ibid*, Art 13(2).
[129] *Ibid*, Art 13(3).
[130] *Ibid*, Art 13(4).
[131] *Ibid*, Art 13(5).
[132] UNHCR, *Annotated Comments*, above n 62, *ad* Art 13.

interpretation and compromise human rights unless there is a reference to poverty or to parity with provision for nationals.[133]

The recent ECRE Report suggests that in several Member States 'conditions offered are too low to say that Member States are providing asylum seekers with an adequate standard of living': particular difficulties with clothing, housing and financial allowances have been identified.[134] It should also be noted that access to material reception conditions may in practice be more difficult outside accommodation centres. Although a popular conception is that 'asylum applicants can't be choosers', it is clear that the use of vouchers can raise dignity issues, since applicants may be singled out in the community.[135] The provision of benefits in kind—especially of food—can also cause difficulty if cultural or specific individual needs are not taken into account.

Modalities for Material Reception Conditions

Housing is, where provided in kind, to take one or a combination of three forms: (i) premises used for housing applicants during the examination of border applications; (ii) accommodation centres[136] guaranteeing an adequate standard of living; and (iii) private houses, flats, hotels or other premises adapted for housing applicants.[137] Applicants provided with such housing are to be assured protection of family life and the possibility of communicating with relatives, legal advisers and UNHCR and recognised NGO representatives: Member States are to pay particular attention to the prevention of assault within the premises and the accommodation centres in (i) and (ii).[138]

Modalities for reception conditions different from those set out above may, for specified reasons, exceptionally be set for a reasonable and as short a period as possible: in any case, basic needs are to be covered.[139] This may arise where: (i) an initial assessment of the specific needs of the applicant is required; (ii) material reception conditions are not available in a certain geographic area; (iii) housing capacities normally available are temporarily exhausted; or (iv) the asylum seeker is in detention or confined to a border post.

[133] ECRE, *Information Note*, above n 62, at 6.
[134] *Ibid*.
[135] See UNHCR, *Annotated Comments*, *ad* Art 13, and ECRE, *Information Note*, above n 62, at 6.
[136] Defined in above n 61, Art 2(l), as meaning 'any place used for collective housing of asylum seekers'.
[137] *Ibid*, Art 14(1).
[138] *Ibid*, Art 14(2).
[139] *Ibid*, Art 14(8).

Particular concerns have been raised in relation to the use of accommodation centres. The UNHCR has argued that, whilst housing in such centres may have some advantages at the start in disseminating information and providing advice, such accommodation should, given the risk of marginalisation, be for the shortest possible period.[140] It is concerned that families be housed together and single men and women be housed separately. There should be respect for privacy and the basic necessities of life, including sanitary and health facilities. Other UNHCR recommendations cover access to an arbitrator for resolving disputes, the size of centres, participation of residents in the management of material resources and aspects of life, cooking facilities and the delivery of services (to be integrated into existing community services, rather than self-contained), the transfer of unsuccessful asylum seekers to other facilities and the opportunity to stay with friends or family outside collective centres should the opportunity arise.

In relation to the setting of different modalities for asylum seekers in border areas, the UNHCR has commented that reception facilities there should include all necessary assistance and the provision of the basic necessities of life, including food, shelter and basic sanitary and health facilities: family unity and privacy are to be respected throughout.[141]

Health Care

In relation to health care, applicants are to receive the necessary health care to include, at least, emergency care and essential treatment of illness.[142] Applicants with special needs are to be provided with necessary medical or other assistance.[143]

The definition of minimum health care is quite lean and mean. The UNHCR considers that minimum standards should also include counselling on reproductive health matters, a confidentiality requirement for medical examination and psychological counselling, availability of psychological care and counselling free of charge, and training and sensitisation for those dealing with patients of different cultural backgrounds.[144] ECRE has argued that access to emergency health care alone is insufficient for meeting the complex health needs of asylum seekers: it sees mental health and primary health care as key concerns.[145]

[140] UNHCR, *Annotated Comments*, above n 62, *ad* Art 14(1)(b).
[141] *Ibid*, *ad* Art 14(8). See, also, ECRE, *Information Note*, above n 62, at 6.
[142] Above n 61, Art 15(1).
[143] *Ibid,* Art 15(2).
[144] UNHCR, *Annotated Comments*, above n 62, *ad* Art 15(1).
[145] ECRE, *Information Note*, above n 62, at 6–7.

Reduction or Withdrawal of Reception Conditions

Article 16 specifies, apparently exhaustively, a number of grounds under which Member States can reduce, withdraw or refuse reception conditions. These are where the applicant:

(a) abandons a prescribed place of residence without informing the competent authority or, if requested, without permission;
(b) does not comply with reporting duties, with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down by national law; or
(c) has already lodged an application in the same Member State.[146]

When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, is to be taken on the reinstallation of the grant of some or all of the reception conditions.[147]

Reception conditions can also be reduced or withdrawn where the applicant has concealed financial resources, therefore unduly benefiting from material reception conditions. If it transpires that an applicant had sufficient means to cover material reception conditions and health care when these basic needs were being covered, Member States may ask the asylum seeker for a refund.[148]

Conditions may be refused in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in the Member State.[149] Member States may also determine sanctions applicable to serious breach of accommodation centre rules and seriously violent behaviour.[150]

It is not clear what constitutes a serious breach of accommodation centre rules. Is not performing prescribed 'household' tasks or not taking part in compulsory work or study activities a serious breach? How should we regard peacefully demonstrating against conditions in centres, rather than following prescribed dispute-resolution procedures? In all these cases, a serious breach of the rules has been alleged.[151] It is also unclear to what extent sanctions can include expulsion from accommodation centres.

Decisions to reduce or withdraw reception conditions or to impose sanctions as above are to be taken individually, objectively and impartially

[146] Above n 61, Art 16(1)(a).
[147] *Ibid*, Art 16(1)(a), final para.
[148] *Ibid*, Art 16(1)(b).
[149] *Ibid*, Art 16(2).
[150] *Ibid*, Art 16(3).
[151] See ECRE, *Report on Implementation*, above n 62.

with reasons to be given; they are to be based on the particular situation of the person concerned (especially where he or she has special needs under Article 17), and take into account the principle of proportionality; access to emergency health care is to be ensured in all cases.[152] Material reception conditions are not to be withdrawn or reduced before a negative decision is taken.[153]

In a Statement to the Council Minutes, the Council has confirmed that, in relation to the application of Article 16(2) and (4) (refusal of conditions where the asylum application has not been made as soon as reasonably practicable and conditions for the taking of decisions), Member States are, in all cases, to: (i) comply with their international obligations on human dignity, including the ECHR, and, in particular, the obligations under Article 3 to ensure that no one is subject to inhuman or degrading treatment; (ii) take account of the situation of the person concerned, in particular the general principle in Article 17 regarding the specific situation of vulnerable persons in providing access to material benefits including food and housing; and (iii) ensure that as a minimum access to emergency health care is guaranteed under all circumstances.[154]

Particular concerns have arisen in relation to the possibility of refusing conditions where the asylum seeker has failed to show that the asylum claim was made as soon as reasonably practicable after arrival. The UNHCR states that this might hinder access to fair procedures, since asylum seekers could lack basic information on the procedure and be unable to state their claims properly without adequate guidance; such difficulties would be exacerbated where asylum seekers with insufficient means were denied assistance through a rigid application of the 'reasonably practicable' criterion.[155] This provision was introduced at the behest of the UK, which had introduced such a provision in the Nationality Immigration and Asylum Act 2002. That statutory provision was substantially undermined by a House of Lords judgement in 2005, which held that Article 3 ECHR required support to be given to asylum seekers who were on the verge of destitution, even though they had not claimed asylum as soon as reasonably practicable after entering the UK.[156]

It has been suggested that, in addition to the permitted grounds, some Member States in fact reduce or withdraw conditions for other reasons: for

[152] Above n 61, Art 16(4).
[153] *Ibid,* Art 16(5).
[154] Statement 4 to the Council Minutes, above n 67.
[155] UNHCR, *Annotated Comments*, above n 62, *ad* Art 16(2).
[156] *R (Limbuela) v Secretary of State for the Home Department*, House of Lords [2005] UKHL 66, judgment of 3 Nov 2005.

example, a refusal to undertake necessary work or study activities in reception centres or to take advantage of 'charitable' job opportunities at a low hourly rate.[157]

The very idea of withdrawing or reducing reception conditions has been challenged by the UNHCR and ECRE. The UNHCR regrets the provision, stating that, where there is real abuse, this should be redressed within established asylum procedures.[158] Pointing out that the core content of human rights applies to everyone in all situations (including asylum seekers infringing regulations in relation to the processing of their claims), that family members—including children—may be affected and that adequate reception conditions are a necessary component of fair procedures, UNHCR states that, if a reduction in the level of reception conditions has to be made, this should be only in cases of emergency or *force majeure* and for a short period. ECRE has argued that the withdrawal or reduction of what are already minimum reception conditions are not consistent with the requirements of basic human rights law.[159]

Provisions for Persons with Special Needs

In national legislation implementing the Chapter II provisions relating to material reception conditions and health care, Member States are to take into account the specific situation of vulnerable persons—such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.[160] This is to apply only to persons found to have special needs after an individual evaluation of their situation.[161]

A natural concern, voiced by the UNHCR, is that asylum seekers with special needs and vulnerabilities need to be identified early.[162]

Minors

In relation to *minors*, the best interests of the child is to be a primary consideration for Member States when implementing the provisions of the

[157] ECRE, *Report on Implementation*, above n 62.
[158] UNHCR, *Annotated Comments*, above n 62, *ad* Art 16.
[159] ECRE, *Information Note*, above n 62, at 7.
[160] Above n 61, Art 17(1).
[161] *Ibid*, Art 17(2).
[162] UNHCR, *Annotated Comments*, above n 62, *ad* Art 17.

Directive that involve minors.[163] This is a clear reflection of Article 3 of the 1989 Convention on the Rights of the Child, though no specific reference is made to this Convention.

Member States are to ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling provided where needed.[164]

Unaccompanied Minors

Member States are as soon as possible to take measures to ensure that unaccompanied minors[165] have necessary representation by means of legal guardianship, or, where necessary, representation by an organisation responsible for the care and well-being of minors, or any other appropriate representation. Regular assessments are to be made by the appropriate authorities.[166] It is unclear what is meant by 'necessary representation', and considerable flexibility is given to the Member State in determining the mode of representation.[167]

Such minors are, from admission to the territory to the time when they are obliged to leave it, to be placed with adult relatives, with a foster family, in accommodation centres with special provision for minors or in other accommodation suitable for minors. Unaccompanied minors aged 16 or over may be placed in accommodation centres for adult asylum seekers; siblings are as far as possible to be kept together (taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity) and changes of residence are to be limited to a minimum.[168]

Member States are—protecting the minor's best interests—to endeavour to trace family members: where there may be a threat to the life or integrity of the minor/close relatives, in particular where they have remained in the country of origin, care is to be taken to ensure that the collection,

[163] Above n 61, Art 18(1).

[164] *Ibid,* Art 18(2).

[165] 'Unaccompanied minors' is defined, in *ibid,* Art 2(h), to 'mean persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States'. The commonly used term 'separated children' is perhaps more evocative than 'unaccompanied minors'.

[166] *Ibid,* Art 19(1).

[167] In UNHCR, *Annotated Comments*, above n 62, *ad* Art 19, the UNHCR states that, when dealing with separated children, Member States' authorities should endeavour to be guided by the 1997 UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum.

[168] Above n 61, Art 19(2).

processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.[169]

Those working with such minors are to have had or receive appropriate training and are to be bound by the confidentiality principle as defined in national law in relation to any information they receive in the course of their work.[170]

There is considerable flexibility on the alternatives for placement. The implications of the possibility for Member States to place those over 16 in accommodation centres for adult asylum seekers are unclear and a little unsettling. One should also note UNHCR concerns about the risks of trafficking, especially in female children, requiring, in its view, special accommodation, counselling and protection arrangements.[171]

Victims of Torture and Violence

Victims of torture, rape or other serious acts of violence are, if necessary, to receive the necessary treatment of damage caused by such acts.[172] The repeated use of the word 'necessary' is a little confusing and may prove limiting: the requirement to provide 'necessary' treatment 'if necessary' suggests that minimum levels only are required. The Directive does not specify the use of *specialised* medical personnel and institutions and does not address the question of mechanisms to identify such victims, which could be applied as early as the point of entry.[173]

Appeals

Negative decisions in relation to the grant of benefits or on residence and free movement individually affecting asylum seekers are to be the subject of an appeal within the procedures laid down in national law: the possibility of an appeal or review before a judicial body is to be granted at least in the last instance.[174] Procedures for access to legal assistance in such cases shall be laid down in national law.[175]

The need for appeal procedures to be effective and timely is not expressly addressed. Considerable discretion is left to the Member State as regards access to legal assistance. Whether the cost—actual or feared—of

[169] *Ibid*, Art 19(3).
[170] *Ibid*, Art 19(4).
[171] UNHCR, *Annotated Comments*, above n 62, *ad* Art 19(2).
[172] Above n 61, Art 20.
[173] See UNHCR, *Annotated Comments*, above n 62, *ad* Art 20.
[174] Above n 61, Art 21(1).
[175] *Ibid*, Art 21(2).

going to law will discourage appeals is a perennial issue relating to legal assistance, but vulnerable asylum seekers could be hit hard.[176]

Actions to Improve the Efficiency of the Reception System

Two Recitals to the Preamble contain provisions which find no, or inadequate, concrete expression in the operative part of the Directive. First, it is provided that '[t]he efficiency of national reception systems and co-operation among Member States in the field of reception of asylum seekers should be secured'.[177] Secondly, it is stated:

> Appropriate coordination should be encouraged between the competent authorities as regards the reception of asylum seekers, and harmonious relationships between local communities and accommodation centres should therefore be promoted.[178]

The Commission proposal for operative provisions promoting relationships between local communities and accommodation centres 'with a view to preventing acts of racism, sex discrimination and xenophobia against applicants for asylum' was not taken up in the Directive. As it stands, the Recital suggests that harmonious relationships between local communities and accommodation centres are promoted by appropriate co-ordination between competent authorities. This is a very narrow approach, in contrast to the broader approach taken by the UNHCR Executive Committee in its 2002 Conclusion:[179]

> Urges States and UNHCR, in collaboration with other relevant actors, to combat acts of racism, racial discrimination, xenophobia, and related intolerance directed against asylum seekers and to take appropriate measures to create or enhance harmonious relationships with the local communities, inter alia, by promoting respect for asylum seekers and refugees, by creating awareness of their needs, as well as of promoting respect for the local culture, customs and religions among asylum seekers.

More generally, the UNHCR has regretted the deletion of previously proposed provisions aimed at improving the efficiency of the reception systems, such as the need for improving exchange and co-ordination between the relevant actors.[180]

[176] See ECRE, *Information Note*, above n 62, at 8.
[177] Above n 61, Preamble, Recital 13.
[178] *Ibid*, Preamble, Recital 14.
[179] UNHCR Executive Committee Conclusion, above n 1, para (d).
[180] See UNHCR, *Annotated Comments*, above n 62, *ad* Art 24, and ECRE, *Information Note*, above n 62, at 8.

CONCLUSION: PROTECTING DIGNITY?

It has been assumed that the European Union, and all its Member States, all formally subscribe to the basic principle that asylum seekers need the material and non-material support that enables them to live in dignity whilst their claims for protection are being considered.

Life would be easier for all concerned if all adopted a non-judgemental approach to the treatment of asylum seekers, granting a generous level of support to all applicants irrespective of the apparent strength of the claim until a determination was made; it would then be for those deciding on the substance of asylum claims—acting within sensibly conceived procedural frameworks, rather than rules on reception—to distinguish between those with genuine claims to protection and those without. However, the Member States have tended to see generous reception conditions as attracting asylum seekers, and a less generous attitude to reception conditions (mitigated perhaps by a promise to speed up determination procedures) may be seen as a means of discouraging asylum seekers. The prospect of a truly dignified standard of living for those seeking protection risks being replaced by a less welcoming regime of austerity and the provision of minimum standards of reception, designed as much to discourage future asylum seekers as to satisfy the basic needs of the already-arrived applicant.

Whether we like it or not, negative sentiments based on the inadequacy of the asylum system—not, one hopes, on racist or xenophobic considerations—have played their part in the conception, gestation and birth of the Directive. It is good that baser instincts have not generally prevailed, although the Directive is considerably less generous than the Commission originally proposed.

It has been seen that the Directive is based on Article 63(1)(b) of the EC Treaty, which requires the adoption of measures on minimum standards on the reception of asylum seekers, in accordance with the Refugee Convention, the 1967 Protocol and other relevant treaties. We are stuck with the idea of *minimum* standards: the Community is, quite simply, not competent to prescribe a higher level of standards which can be set by individual Member States exercising retained powers, to the extent that the objectives of the Directive are not compromised. It is key to the achievement of higher standards—to encouraging best practice—that the Member States have the power (and maybe even the obligation in some cases) to maintain or introduce more favourable rules.

The Directive nonetheless sets minimum standards, and these must mean something. The critical question is whether they are aimed 'high' or 'low'. There is an obvious distinction between 'minimum' standards and 'low'

standards, and the requirement to legislate for the former should not lead to the latter, or, put differently, result in a race between Member States to the bottom.

The stated objectives of the Directive do not really support the idea that the Member States are seeking lower standards. They do not support the contrary conclusion either. This can be seen in the wording of the relevant objectives in the Preamble.

At first sight, fears that the adoption of minimum standards could result in the adoption of low standards are displaced by the statement, in the Preamble to the Directive, that such minimum standards 'will normally suffice to ensure them [asylum seekers] a dignified standard of living and comparable living conditions in all Member States'. This apparently encouraging statement is, on careful reading, less than encouraging, and one person's understanding of a 'dignified standard of living' may be another's idea of mere subsistence. The reference to 'comparable living conditions' could be read positively (as driving standards up) or negatively (as driving them down).

Taken at face value, however, the statement is positive in that it promotes human dignity. At least in relation to material reception conditions, this suggests that provisions of the Directive should be applied in a way that is favourable to the asylum seeker and that high 'minimum' standards should be common to the Member States. It is certainly conceivable that the Court of Justice could, in interpreting the Directive, favour a teleological approach and interpret its provisions generously in the light of the stated aims of the Directive.

Securing the other objective—that is, helping to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception— appears to have a positive effect on levels. It seems to reflect concerns that low levels of protection in one Member State have the effect of encouraging movement of asylum seekers to Member States with higher levels of protection. If it is designed to reassure the latter Member States that their generosity will not result in an influx from the former, the effect is to *increase* standards. Indeed, there are areas—such as access to employment—where Member States have been required to improve reception conditions in order to comply with the Directive.

Another approach is to look at what has been achieved by the Directive in the light of applicable human rights and international refugee law and policy requirements. As seen in the above analysis of the Directive, the UNHCR and ECRE have argued that the Directive fails to address a number of concerns. To the extent that these concerns are justified, it can be argued that the level of protection afforded by the Directive is less than the desired minimum.

There are doubtless a number of respects in which concrete provisions of the Directive fall below the standards desired by the UNHCR and others.

This is the case, for example, in relation to access to employment and withdrawal/reduction of reception conditions. However, in most, if not all, of these instances, these shortcomings constitute a failure to follow best practice rather than a breach of binding legal requirements.

Some comfort can be obtained from the fact that the Directive is based on an EC Treaty provision which requires the measure to accord with the Refugee Convention, the 1967 Protocol and other relevant Treaties. A greater level should result from the fact that the Community and its Member States are bound to respect fundamental rights rules. Both these factors suggest that fundamental rights considerations will be key in the interpretation of the Directive's provisions. In addition, in implementing the Directive, the Member States should respect such rules, and their failure to do so could expose them not only to sanctions under international and regional protection regimes, but also to censure before the European Court of Justice.

It is instructive in this regard that the UK, which sought and obtained a provision (Article 16(2)) enabling the refusal of reception conditions to those who do not make an asylum claim 'as soon as reasonably practicable' after arrival, was told by its highest Court that Article 3 ECHR was an obstacle to such refusal.[181] Member States, and if necessary their national courts, can thus also do much to raise the bar.

[181] See above n 156.

7

Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum

MARÍA-TERESA GIL-BAZO*

INTRODUCTION

ON 29 APRIL 2004, the Council of the European Union adopted Directive 2004/83 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[1] (the Directive).

The Preamble states that 'the main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States'.[2] The Directive, therefore, constitutes the first legally binding supranational instrument of regional scope in Europe that establishes the criteria that individuals need to meet in order to qualify as refugees or as persons otherwise in need of international protection and the rights attached to that status.

The Directive contributes to the clarification of some of the elements of the refugee definition in the UN Convention on the Status of Refugees[3] (the Refugee Convention)[4] that had been interpreted differently by the Member

* The author would like to thank Mr José Ramón Canedo Arrillaga, Ms Cathryn Costello, and Professor Steve Peers for their useful comments regarding the issues discussed in this chapter.

1 [2004] OJ L 304/12.

2 *Ibid,* Recital 6.

3 Adopted 28 July 1951, entered into force 22 Apr 1954, 189 UNTS 137.

4 The Dir in Art 2(b) refers to this instrument as the Geneva Convention.

States, such as the recognition that persecution can arise from non-state actors (Article 6),[5] as well as the recognition of gender- and child-specific forms of persecution (Article 9(2)). The Directive also contains controversial provisions, such as the understanding that refugee status may not arise when an internal flight alternative exists (Article 8) and when protection can be provided by non-state actors (Article 7(1)). Furthermore, in order to ascertain the existence of protection (and, therefore, the lack of refugee status), it is enough that the state or non-state actors take 'reasonable steps to prevent the persecution' (Article 7(2)), regardless of whether those steps lead to the *effective* protection of individuals or not. Other controversial elements of the Directive include the subtle, yet significant, modifications of the wording of the Refugee Convention on matters of cessation and exclusion, as well as provisions on revocation and the definition and minimum rights guaranteed to persons granted subsidiary protection.

A matter that deserves particular attention is the limited legal competence to adopt Community legislation in the field of asylum. Article 63(1)(c) and (2)(a) of the Treaty Establishing the European Community[6] (TEC)—which constitute two of the legal bases for this Directive—confer powers on the Community only for the adoption of *minimum standards*, therefore leaving a wider margin of discretion to Member States than if EC law were to harmonise these matters more fully. As I shall explain in the pages that follow, some of the provisions in the Directive raise issues in relation to their compatibility with the requirement for 'minimum standards' in Article 63 TEC.

It is not the purpose of this chapter to provide a detailed commentary on the provisions of the Directive,[7] but rather to undertake an overall assessment of the value of this instrument for refugee protection in Europe by addressing some of the key issues raised by it in light of international

[5] For a commentary on the judicial interpretation of persecution by non-state actors in France and Germany see C Phuong, 'Persecution by Non-state Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention' (2003) 4 *European Journal of Migration and Law* 521.

[6] [2002] OJ C 325/33 (consolidated version).

[7] For detailed commentaries on the Dir see UNHCR, *Annotated Comments on the EC 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 304/12 of 30.9.2004*, (Jan 2005) available at http://www.unhcr.org/home/RSDLEGAL/4200d8354.pdf; and ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Doc IN1/10/2004/ext/CN, Oct 2004. For an analysis of the Dir in relation to subsidiary protection see J McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461; and R Piotrowicz and C van Eck, 'Subsidiary Protection and Primary Rights' (2004) 53 *International and Ccomparative Law Quarterly* 107.

refugee and human rights law. I shall argue here that by virtue of its incorporation in an instrument of EC legislation, the obligation of Member States to grant protection (and to recognise socio-economic rights) to refugees and to other persons in need of international protection confers upon these individuals a subjective right to be granted asylum, protected by the Community legal order and enforceable before national courts and the European Court of Justice (ECJ). Accordingly, its scope of application and the limitations and derogations to which it may be subjected on security or other grounds are to be interpreted by reference to the Community's legal order and, in particular, in light of the general principles of Community law, including human rights.

I shall first address the relationship between the Directive and the Refugee Convention, and other relevant international instruments, thus establishing the legal framework within which the Directive is to be interpreted and applied. I will then analyse the legal nature of the right of refugees and other persons to be granted protection and the scope of application of that right *ratione personae*. I shall then look at the limitations that may be placed upon this right within the Community legal order, in particular on security grounds and in relation to the effective enjoyment of the status granted.

THE DIRECTIVE'S REFUGEE AND HUMAN RIGHTS LAW FRAMEWORK

The Directive is an instrument of secondary EC legislation. Given the primacy of EC law[8] and the fact that Member States are required to take all appropriate steps to eliminate the incompatibilities between their obligations under EC law and under public international law (including by amending or denouncing pre-existing international treaties that may be incompatible with EC law), as well as the obligation for EC law to comply with human rights as general principles of Community law, the question, therefore, arises how the Directive may relate to international refugee and human rights law.

The Relationship Between EC Law and International Human Rights Treaties Concluded by the Member States

The relationship between the Directive and international refugee and human rights treaties for the purposes of establishing the obligations of

[8] The ECJ established the primacy of Community law over the law of the Member States in Case 6/64 *Costa v Enel* [1964] ECR 585.

Member States,[9] is governed by Article 307 TEC. This provision regulates the relationship between EC law and international treaties concluded by Member States *prior* to the entry into force of the TEC or, for acceding states, before the date of their accession. Paragraph 1 of Article 307 establishes that the rights and obligations arising from those treaties shall not be affected by the provisions of the TEC. In the *Burgoa* case, the ECJ observed that paragraph 1 of Article 307 'is of general scope and it applies to any international agreement, irrespective of the subject matter'; it also clarified that the provision does not alter the nature of such agreements and, therefore, it does not 'adversely affect the rights which individuals may derive from [them]'.[10] Therefore, when conflicts of obligations arise between those derived from EC law and those derived from pre-existing international human rights treaties, Member States must give priority to those pre-existing human rights treaties. Yet, the primacy of international human rights treaties concluded *after* the entry into force of the TEC or, for acceding states, after the date of their accession cannot be derived from Article 307, and, therefore, EC law would take priority over those treaties.

Furthermore, despite the primacy of pre-existing treaties, paragraph 2 of Article 307 imposes an obligation on Member States to take all appropriate steps to eliminate the incompatibilities between them and EC law. What exactly is required on the part of Member States to eliminate these incompatibilities was addressed for the first time by the ECJ in two judgments delivered in July 2000, where the Court elaborated on the scope of application of Article 307(2). The Court acknowledged that Member States had a choice as to the appropriate steps to be taken to terminate incompatibilities, but it further stated that '[i]f a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded'.[11] However, as Klabbers has pointed out, in practice, this choice may be restricted to amending or denouncing the pre-existing treaties.[12]

At the time, the ECJ did not explicitly state that the obligation to denounce pre-existing international treaties under Article 307(2) was

[9] Although the TEC and the TEU confer powers on the EC/EU to conclude international agreements, international refugee and human rights treaties do not bind the EC/EU *as such*, in the absence of accession by the EC/EU to them. In the current state of EC law, there is no legal basis for the EC/EU to accede to human rights treaties (Opinion 2/94, *Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I–1759). The Constitutional Treaty partly provides for that legal basis in Art 7(2), which contains an obligation for the Union to seek accession to the European Convention on Human Rights.

[10] Case 812/79 *Attorney-General v Burgoa* [1980] ECR 2787, paras 6 and 10 respectively.

[11] Cases C–62/98 *Commission v Portugal* [2000] ECR I–5171, para 49, and C–84/98 *Commission v Portugal* [2000] ECR I–5215, para 58.

[12] J Klabbers, 'Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States' (2001) 26 *EL Rev* 196.

conditional on fulfilling the requirements established by international law, according to which denunciation would be permissible only in accordance with Articles 54 and 56 of the Vienna Convention on the Law of Treaties, when the treaty specifically provides for it or when the possibility could be inferred from the character of the treaty or the intention of the parties.[13] Manzini argued that this must be the case, as otherwise it would not only engage the responsibility of the Member State(s) concerned, but it would also deprive paragraph 1 of its *effect utile*, which is to preserve the rights and obligations arising from pre-existing treaties.[14] The ECJ has implicitly confirmed this interpretation in a recent case in which it found that, by not denouncing the treaty in question, Austria had not violated Article 307, given that it had not had the opportunity of doing so in compliance with Article 7(2) of the treaty itself, according to which, the next opportunity for Austria to denounce it is 30 May 2007 at the earliest.[15]

The question, therefore, arises whether Member States could be under an obligation, derived from Article 307, to amend or denounce international human rights and refugee law instruments incompatible with EC law.

Article 63(1) TEC establishes:

> The Council … shall … adopt … measures on asylum, in accordance with the Refugee Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and *other relevant treaties* [emphasis added].

Therefore, the TEC establishes an obligation for EC secondary legislation on asylum to comply with the Refugee Convention and its Protocol,[16] and, arguably, with other human rights treaties *as treaties* (and not merely as non-binding sources of general principles of Community law), which would include the European Convention on Human Rights (ECHR),[17] the International Covenant on Civil and Political Rights[18] and the Convention

[13] Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 Jan 1980, 1155 UNTS 331.

[14] P Manzini, 'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law' (2001) 12 *European Journal of International Law* 791.

[15] Case C–203/03 *Commission v Austria*, judgment of 1 Feb 2005 (not yet reported), paras 61–64.

[16] Protocol relating to the Status of Refugees, adopted 31 Jan 1967, entered into force 4 Oct 1967, 606 UNTS 267. For an analysis of the relationship between the Dir and the Refugee Convention see H Lambert, 'The EU Asylum Qualification Directive—Its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 *International and Comparative Law Quarterly* 184.

[17] European Convention on Human Rights and Fundamental Freedoms, adopted 1950, entered into force 3 Sept 1953, 213 UNTS 221.

[18] International Covenant on Civil and Political Rights, adopted 16 Dec 1966, entered into force 23 Mar 1976, 999 UNTS 171.

Against Torture.[19] It could, therefore, be argued that Article 63 is *lex specialis* to Article 307 as regards the legal effect of international refugee and human rights treaties,[20] and that, therefore, if EC asylum law required Member States to violate their obligations under international refugee and human rights law, the relevant EC law would be invalid without a further obligation on Member States to denounce the treaties. This interpretation would also guarantee a uniform interpretation of EC law among Member States, which cannot be ensured by the sole applicability of Article 307, as this provision would preserve the effects of international human rights treaties for some Member States, but not for those who acceded to the relevant instruments only after the entry into force of the TEC or after accession.

However, the primacy of international refugee and human rights treaties thus established would apply only to EC secondary legislation the legal basis of which is Article 63(1). EC law adopted under a different legal basis (such as Article 63(2) and (3), referring respectively to subsidiary protection and to residence permits) would be exempted from that obligation of compliance, and priority would be given to the obligations arising from its provisions over those arising under international refugee and human rights treaties.[21]

Human Rights as General Principles of Community Law

Even when not bound by international refugee and human rights *treaties* as such, EC secondary legislation must nevertheless conform to human rights as *general principles* of Community law. Article 6(2) of the Treaty on European Union[22] establishes that:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as *general principles of Community law* [emphasis added].

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec 1984, entered into force 26 June 1987, 1465 UNTS 85.

[20] S Peers, 'Human Rights, Asylum and European Community Law' (2004) 24(2) *Refugee Survey Quarterly* 29.

[21] Member States would nevertheless remain bound under obligations of *jus cogens*. The existence of Community competence to legislate on Subsidiary Protection was questioned by some Member States at the beginning of the negotiations on this instrument in 2002. The Council's Legal Service was asked to give an opinion on this matter, confirming that Art 63 TEC and in particular its para 2(a) must be interpreted in a broad sense, allowing for the adoption of measures covering all persons benefiting from a form of protection in accordance with the Member States' international obligations: Doc 10560/02 ASILE 34 JUR 247, 10 July 2002, paras 55–56 (on file with author).

[22] [2002] OJ C 325/5 (consolidated version).

This provision confirms the ECJ's well established case law, that had already held that fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States are binding as general principles of Community law,[23] and ensures that the legality of EC secondary legislation, regardless of the legal basis for its adoption, be assessed by reference to international human rights law.[24]

While not yet legally binding, the Charter of fundamental rights of the European Union[25] (the Charter) is a most relevant instrument, as it recognises the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States.[26] The Charter was incorporated in the Treaty Establishing a Constitution for Europe[27] and, therefore, its provisions would be legally binding upon the entry into force of this instrument. Human rights norms, including Articles 18 and 19 on the right to asylum and the prohibition of *refoulement* respectively, would, therefore, acquire the status of primary EC law with which secondary EC legislation would necessarily need to comply. However, the rejection of the Constitutional Treaty by referenda in France and the Netherlands has rendered the fate of the legally binding force of the Charter uncertain.

Despite this lack of legally binding force, the Charter constitutes a reference in determining which human rights are general principles of

[23] Case 29/69 *Stauder* [1969] ECR 419, para 7. A detailed commentary on human rights as general principles of EC law is beyond the scope of this chapter. There is extensive literature on this matter; see, for instance, GC Rodríguez Iglesias, 'The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities' [1995] *Columbia Journal of European Law* 169; K Lenaerts, 'Fundamental Rights in the European Union' [2000] *European Law Review* 575. For discussions on recent developments in the protection of human rights by the EU following adoption of the EU Charter of fundamental rights see P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford, Hart, 2005).

[24] See, for instance, Case C–540/03 *Parliament v Council and Commission* ([2004] OJ C 47/21) concerning a challenge to Dir 2003/86/EC on the right to family reunification ([2003] OJ L 251/12) on its compatibility with human rights standards. The ECJ found that the contested provisions do not infringe the right to respect for family life recognised by Art 8 ECHR, noting that they merely afford a margin of discretion to Member States that nevertheless requires them to weigh the competing interests in each factual situation. In particular, Member States are required by Arts 5(5) and 17 of the Dir to consider the best interests of the child, the nature and solidity of the person's family relationships, the duration of his or her residence in the Member State, and the ties with his or her country of origin: Case C–540/03 *Parliament v Council and Commission,* judgment of 27 June 2006 (not yet reported), paras 62–64. In her Opinion, Kokkot AG had dismissed the claim, but nevertheless found that Art 8 of the Dir does not guarantee the effective protection of human rights and that, accordingly, this provision is against Community law: AG's Opinion in Case C–540/03 *Parliament v Council and Commission*, delivered on 8 Sept 2005, para 105.

[25] [2000] OJ C 364/1.

[26] *Ibid,* Preamble.

[27] [2004] OJ C 314/1.

Community law (and therefore binding) and its authority as a standard of legality for EC law has already been stated by the institutions.[28] A few months after its publication, the Commission approved arrangements for the application of the Charter to all legislative proposals. The Commission agreed that '[a]ny proposal for legislation and any draft instrument to be adopted by the Commission will, therefore, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter'.[29] The Directive itself, as adopted by the Council, refers to its compatibility with the Charter and, in particular, it states that it seeks to ensure full respect for the right to asylum.[30]

Whether protected by the Community legal order as international treaties or as general principles of Community law, human rights constitute a standard of legality of EC legislation in the field of asylum. The difference between human rights obligations as arising from international treaties or as general principles of EC law is, however, relevant in so far as it determines the scope of the right in question and of the limitations and derogations that may be imposed on it.[31] As the Directive is implemented and interpreted, the contours of the Community law-based rights of refugees and other persons in need of international protection will be developed.

THE RIGHT TO BE GRANTED ASYLUM FOR REFUGEES AND OTHER PERSONS IN NEED OF PROTECTION

The starting point in any consideration on the right to be granted asylum is the acknowledgement that, while this right is the most fundamental one for refugees, at the time when the Directive was adopted it had not been expressly recognised by any international human rights law instrument (including the Refugee Convention) of either universal or European scope.

[28] For an analysis of the impact of the Charter for the protection of the rights of individuals in the fields of asylum and migration see S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) 3 *European Journal of Migration and Law* 141.

[29] SEC(2001)380/3, 13 Mar 2001, at 3. In 2005, the Commission adopted a Communication on Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals. Methodology for Systematic and Rigorous Monitoring, COM(2005)172 final, 27 Apr 2005. The main objective of this methodology 'is to allow Commission services to scrutinise all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision-making procedures' (para 6), given that 'the conformity of Commission actions with fundamental rights is a primary aspect of their constitutional legality' (para 8). See further H Toner, 'Impact Assessments and Fundamental Rights Protection in EU Law' (2006) 31 *EL Rev* 316. Also see Ch 4 in this volume.

[30] Above n 1, Recital 10.

[31] For detailed commentary see above n 20, at 24–38.

The right to asylum, however, had already been enshrined in international treaties of regional scope in the Americas and Africa.[32] The Directive, therefore, brings Europe in line with other regions, as it constitutes the first legally binding instrument in Europe of supranational scope that imposes an obligation on states to grant asylum to refugees and other persons in need of protection.[33] It is worth noting that, despite the lack of an international recognition of the right to be granted asylum of universal scope, following the entry into force of the Directive, around 100 of the 146 states parties to the Refugee Convention and/or its Protocol are now bound by an obligation under international law of regional scope to grant asylum.

The Directive, however, does not word it in these terms. Article 13 establishes that 'Member States shall grant *refugee status* to a third country national or a stateless person, who qualifies as a refugee' (emphasis added). Likewise, Article 18 establishes that 'Member States shall grant *subsidiary protection status* to a third country national or a stateless person eligible for subsidiary protection' (emphasis added). It is, therefore, necessary to examine what these terms mean for the purposes of the Directive.

Article 2(d) of the Directive establishes that '"refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee'. This wording is unfortunate, as a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition[34]—regardless of whether or not his or her refugee status has been formally determined—something that the Directive itself recognises.[35] As UNHCR has pointed out, 'the Qualification Directive appears to use the term "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum".'[36]

A similar analysis can be made of the protection granted to other persons in need of protection who do not meet the criteria for the

[32] Art 22 of the American Convention on Human Rights, adopted 22 Nov 1969, entered into force 18 July 1978, 114 UNTS 123, and Art 12(3) of the African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 Oct 1986, OAU doc CAB/LEG/67/3 rev 5, (1982) 21 ILM 58. Grahl-Madsen considered that while the right of asylum had traditionally referred to the right of states to grant asylum, it was undeniable that the evolution of international law and state practice in relation to refugee protection allows one to speak of a right of the individual to (be granted) asylum: A Grahl-Madsen, *Territorial Asylum* (Stockholm, Almqvist & Wiksell International, 1980), 2.

[33] This obligation, which was enshrined in Art 5 of the Commission's proposal, was immediately rejected by the Council at the very beginning of the negotiations process (see doc 10596/02 ASILE 36, 9 July 2002) but was later reinstated.

[34] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, UNHCR, 1979) para 28.

[35] 'The recognition of refugee status is a declaratory act': above n 1, Recital 14.

[36] UNHCR, *Annotated Comments*, above n 7, at 10–11.

recognition of refugee status. Article 2(f) establishes that '"subsidiary protection status" means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection'.

Despite the fact that the term asylum is not used in the Directive, one of its legal bases, as indicated above, is Article 63(1)(c) TEC, which specifically refers to measures on asylum. Furthermore, the Directive itself states its compliance with the Charter and in particular with the right to asylum in Article 18.[37]

Indeed, if asylum is defined as the protection accorded by a state to an individual who comes to seek it,[38] the name that this protection status may receive is irrelevant, as long as it includes—at a minimum—the right to enter, the right to stay, the right not to be forcibly removed and the recognition of the fundamental rights of the individual. Furthermore, despite the trend in European Union (EU) instruments to refer to asylum in relation to Convention refugees only, asylum as an institution is not restricted to the category of individuals who qualify for refugee status. Rather, on the contrary, this institution predates the birth of the international regime for the protection of refugees and has been known and practised throughout history, protecting different categories of individuals.[39]

In accordance with the transposition period established by Article 38, Member States are under an obligation to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 10 October 2006. Should they fail to do so, or should they transpose the Directive incorrectly, given the direct effect of EC law, individuals may nevertheless derive rights from the Directive upon the expiration date for transposition by invoking the direct effect of its provisions,[40] provided that they are clear and unconditional, and do not require a discretionary implementing measure.[41] Articles 13 and 18 arguably meet the requirements for direct effect, and, therefore, even when Member States fail to transpose the right to be granted protection into their domestic legal orders, or when they do so incorrectly (for instance, by

[37] Art 18(2) on the right to asylum establishes that '[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution'.

[38] Resolution of the Institute of International Law, Sept 1950. Institut de Droit International, *Annuaire de l'Institut de Droit International. Session de Bath* (1950), Vol 43-II.

[39] On the historical evolution of the institution of asylum see for instance Grahl-Madsen, above n 33.

[40] Case 9/70 *Grad* [1970] ECR 825, para 5.

[41] Case 44/84 *Hurd* [1986] ECR 29, para 47.

imposing limitations incompatible with the right), individuals may nevertheless invoke this right as directly deriving from these provisions, including in legal procedures before domestic courts.[42]

The right to be granted protection as an EC law-based right has, therefore, important implications in relation to the restrictions that Member States may impose on its effective enjoyment, as well as for its protection by national courts and under the ECHR, as we shall see below.

SCOPE OF THE RIGHT TO BE GRANTED ASYLUM

The Directive is applicable to refugees within the meaning of the Refugee Convention, as well as to other persons who, despite not fulfilling the criteria in this instrument, are nevertheless protected under international human rights law against forced removal or the refusal of entry. The Directive also makes it clear that individuals who fall under the exclusion clauses of the Directive are not refugees or persons eligible for subsidiary protection within the meaning of this instrument.

The Refugee in EC Law

Article 2(c) of the Directive defines a 'refugee' as:

> [A] third country national who, owing to a 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 and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

While the Directive broadly reflects the terms in Article 1A of the Refugee Convention, not surprisingly it is limited to third country nationals and stateless persons, thereby excluding EU nationals from its protective scope. This is in line with Protocol 29 to the TEC on asylum for nationals of Member States of the EU.[43] This Protocol was the result of pressure exercised by Spain to prevent the examination of asylum applications by Member States lodged by EU nationals indicted or convicted of terrorist crimes, on the grounds that such applications were unfounded and aimed

[42] On the issue of enforceability of individual rights in the Community legal order see T Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CML Rev* 1199.

[43] European Union, *Selected instruments taken from the Treaties* (Luxembourg: Office for Official Publications of the European Communities, 1999) bk 1, i, 561.

at delaying extradition proceedings and to give publicity to their cause. The Protocol introduced a prohibition on examining asylum applications lodged by nationals of EU Member States. It nevertheless allowed for several exceptions, including the unilateral decision by any given Member State to do so,[44] which in practice deprives the prohibition of much of its impact. Although the Protocol constitutes an unnecessary statement (given that the exclusion clauses in the Refugee Convention suffice to accommodate state concerns in this regard), as a matter of law Member States remain free to fulfil their international legal obligations towards refugees and asylum seekers, including the one enshrined in Article 3 of the Refugee Convention not to discriminate on the grounds of nationality.[45]

The Directive contains provisions developing the terms in the Refugee Convention definition, thus defining the meaning of terms including persecution, actors of persecution, race, religion, nationality, particular social group, and political opinion. A detailed analysis of the issues raised by these provisions is beyond the scope of this chapter.[46]

Subsidiary Protection for Non-nationals Protected by International Human Rights Law

The Directive is also applicable to individuals who, despite not qualifying as refugees within the meaning of the Refugee Convention, can nevertheless claim the protection of international human rights law on certain grounds. I have argued elsewhere that international human rights law has evolved in a manner that has conferred upon individuals falling within its scope of protection claims vis-à-vis the state in which they find themselves. Therefore, in addition to refugees within the meaning of the Refugee Convention, there are other categories of individuals that have a right to protection under international law and, accordingly, they are 'refugees' in a broader sense.[47] The refugee in this broader sense includes not only those who have a well-founded fear of persecution, but also those who have a

[44] *Ibid*, para (d) of the Protocol's sole Art.

[45] In fact, Belgium introduced a Declaration to this Protocol, whereby 'in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State': European Union, above n 43, 737. In its commentary on the Dir, UNHCR recommends that implementing legislation make it clear that protection under the Refugee Convention should be granted to all applicants who fulfil the Convention's refugee definition: UNHCR, *Annotated Comments,* above n 7.

[46] See above n 7.

[47] MT Gil-Bazo, 'La protección internacional del derecho del refugiado a recibir asilo en el Derecho internacional de los derechos humanos' in FM Mariño Menéndez (ed), *Derecho de Extranjería, Asilo y Refugio*, 2nd edn (Madrid, Ministerio de Asuntos Sociales, 2003) at 691–2.

substantial risk of being subjected to torture or to serious harm if they are returned to their country of origin, for reasons that include war, violence, conflict and massive violations of human rights.[48]

Article 2(e) of the Directive recognises these developments and defines a 'person eligible for subsidiary protection' as:

> [A] third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

The Directive further lists in Article 15 the international human rights law grounds that give rise to subsidiary protection status:

(a) the death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) a 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 scope of application of subsidiary protection is, therefore, limited to those who are protected against violations of their right to life and freedom from torture or other inhuman or degrading treatment (in their country of origin), as well as those at risk of individualised threats in situations of armed conflict. This limited scope of application is disappointing, as it does not include all individuals who are not removable on international human rights law grounds.[49] Given that Member States remain under an *obligation* of international law not to remove these broader categories of individuals, and they often do so by granting them some formal status, the Directive goes against its stated objective 'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'[50] by creating a category of persons protected

[48] GS Goodwin-Gill, 'Asylum: The Law and Politics of Change' [1995] *International Journal of Refugee Law* 7.

[49] For an overview of complementary protection mechanisms see R Mandal, *Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')*, UNHCR, Department of International Protection, doc PPLA/2005/02, June 2005, available at http://www.unhcr.org/protect/PROTECTION/435df0aa2.pdf. For an overview of the protection of refugees under the ECHR see N Mole, *Asylum and the European Convention on Human Rights* (Strasbourg, Council of Europe, 2002). For an overview of the obligations of states under international human rights treaties regarding entry and forced removal see MT Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law* (Ann Arbor, Mich, UMI, 1999) at 213–426.

[50] Above n 1, Recital 6.

by EC law, *in addition* to those that shall remain protected by the national legal orders of Member States *in fulfilment of their international obligations*. As Gilbert has pointed out, the Directive as drafted is seriously misleading about the scope of the Member States' international legal obligations, as it seems to suggest that *all* those outside the scope of application of the Directive are allowed to remain by Member States on purely compassionate or humanitarian grounds (Recital 9), rather than on the basis of their international obligations.[51]

Furthermore, while international monitoring bodies have consistently found that international human rights law does not confer a right of entry and residence on non-nationals, an incipient case law has been developed in this regard. The European Court of Human Rights has found that in light of the positive obligations of states to guarantee the rights in the Convention, the continuous refusal to recognise the right of permanent residence to certain categories of individuals with a particular connection to the state constitutes a violation of Article 8 of the Convention. The Court has also established that limitations on this right are justified only on very serious grounds.[52] Likewise, the United Nations Human Rights Committee has established that the right to enter one's own country, enshrined in Article 12(4) of the International Covenant on Civil and Political Rights, applies not only to nationals but has a wider scope of application, covering individuals who, despite not being nationals in the formal sense, are not foreigners within the meaning of Article 13 of the Convention, although they may be so for other purposes. The Committee further clarified that while it is not possible to elaborate an exhaustive list of cases protected by Article 12(4), it would at a minimum cover individuals that, due to their special connection or entitlements vis-à-vis a particular state, cannot be considered mere foreigners.[53] Therefore, it is arguable that a right to be granted *some status* beyond the mere prohibition of removal or denial of entry may be derived from international human rights law under certain circumstances.

Accordingly, the Commission proposal better reflected the existing and evolving obligations of states under international human rights law, as it included a general clause as qualifying grounds for subsidiary protection,

[51] G Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 *European Journal of International Law* 980.

[52] App No 60654/00, *Sisojeva and others v Latvia*, judgment of 16 June 2005, paras 104–105, and 108.

[53] Communication No 538/1993, *Stewart v Canada*, views of 1 Nov 1996, doc CCPR/C/58/D/538/1993 of 16 Dec 1996.

namely, a well-founded fear of being subjected to a 'violation of a human right, sufficiently severe to engage the Member State's international obligations'.[54]

Given the limited qualifying grounds for subsidiary protection and the limited rights attached to this status, a so-called '*rendez-vous*' clause was included in Article 37 of the Directive making it a priority to review this provision, as well as those relating to access to employment and to integration facilities. According to this provision:

> By 10 April 2008, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. These proposals for amendments shall be made by way of priority in relation to Articles 15, 26 and 33.

A Need for Two Separate Protection Regimes?

While the protection of non-nationals who do not qualify for refugee status but who fall under the protective scope of international human rights law is a most welcome development, the question arises whether there is a need for a separate status, or whether a correct interpretation of the Refugee Convention would cover all persons in need of international protection.

Spijkerboer has argued that the necessity to develop a separate status for subsidiary protection is a political, rather than a legal one, arising from the restrictive interpretation of the term 'refugee' in the Refugee Convention, which finds no support in the definitions of refugees prior to this instrument and the *travaux préparatoires* to the Convention. If the Convention definition were to be interpreted correctly, that is as encompassing victims of collective persecution rather than as being individual in nature, the need for subsidiary status would be much more limited than it appears today.[55] Subsidiary protection would be needed to cover only situations when the harm does not amount to persecution or when there is no nexus between persecution and the Convention recognised grounds.

Furthermore, the view has been advanced that Refugee Convention status should attach to *all* those to whom the principle of *non-refoulement* (as developed by international human rights law) applies, therefore questioning the existence of a legal basis under international law for a separate subsidiary protection status. On the basis of the premise that international

[54] Art 15(b) of the Proposal for a Council Dir on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 final, 12 Sept 2001.

[55] T Spijkerboer, 'Subsidiarity in Asylum Law. The Personal Scope of International Protection' in D Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels, Bruylant, 2002) at 28–9.

human rights treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments, which together constitute the international obligations to which states have agreed, McAdam has convincingly argued that since the Refugee Convention is a specialist human rights instrument, the protection it embodies is necessarily extended by developments in human rights law. The Refugee Convention, therefore, acts as a form of *lex specialis,* which applies to persons encompassed by that extended concept of protection, regardless of whether the legal source of the states' obligation to protect derives from the Refugee Convention itself or from other international human rights treaties.[56]

The Directive is a missed opportunity to combine in one status all protected categories of individuals under international law, that is Convention refugees and the broader category of non-removable individuals under international human rights law. Therefore, rather than establishing two separate statuses, the Directive could have reflected the evolution of international law by joining in one instrument the various legal grounds on which individuals are protected under international law and creating one status of the 'refugee' broadly considered under EC law.[57]

The Directive, however, reflects the duality of protection status that is most common in European national legislation: refugee status for those falling under the scope of the Refugee Convention and the so-called subsidiary protection for those protected by international human rights law.[58] This position reflects the common practice among Member States, where different forms of protection cohabit, among which Convention status would be the most complete, highest protection status.

However, it is important to note that, despite the special position that the Refugee Convention enjoys, refugees further benefit from the protection of international human rights law. The rights recognised under international human rights law are applicable not only to individuals with a 'subsidiary protection' claim, but also to Convention refugees, who can benefit from the greater protection that sometimes international human rights law may provide. This has been acknowledged by early commentators and by international human rights monitoring bodies. Grahl-Madsen

[56] J McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection', UNHCR *New Issues in Refugee Research*, Research Paper No 125, July 2006.

[57] This position is not unknown to industrialised states. The US and Canada broadly follow this practice and some EU Member States, for instance Spain, used to do so until 1994. For a detailed analysis of the reasons behind the move towards a restriction on the right to asylum under Spanish legislation see MT Gil-Bazo, 'The Role of Spain as a Gateway to the Schengen Area: Changes in the Asylum Law and their Implications for Human Rights' (1998) 10 *International Journal of Refugee Law* 214.

[58] For a survey of subsidiary protection status in the EU see ECRE, *Complementary/ Subsidiary Forms of Protection in the EU Member States* (2004), available at http://www.ecre.org/files/survcompro.pdf.

noted that developments under international human rights law since 1951, which covered many of the aspects regulated by the Refugee Convention, had resulted in many of the rights enshrined in it also being protected and even expanded under these instruments, which protected legally recognised refugees as well as de facto refugees. He felt that an in-depth analysis of these developments was necessary in order to ascertain the way in which the status of refugees could be improved.[59]

Nevertheless, and despite its limited scope of application in relation to individuals who do not meet the Convention criteria, as well as the limited content of the status granted to them, the Directive constitutes the first supranational legally binding instrument in Europe that recognises the status of individuals protected under international human rights law. Given that the Directive makes it explicit that beneficiaries of subsidiary protection are those who do not qualify as refugees, and that the ECJ may ultimately be called upon to interpret the refugee definition in the Refugee Convention, the Directive leaves room for skilful lawyers to argue an inclusive interpretation of the Refugee Convention definition in accordance with the terms of the Convention itself, the Directive, the EC's legal order, and the rules of treaty interpretation, rather than on the basis of scattered state practice.[60]

SECURITY GROUNDS AS LIMITATIONS ON THE RIGHT TO ASYLUM: EXCLUSION AND *NON-REFOULEMENT*

How best to incorporate security concerns in the Directive was a matter of much debate during negotiations. It is worth noting that the Commission's proposal was adopted on 12 September 2001 and, therefore, was negotiated in the climate that followed the attacks in the US the previous day. The provisions finally agreed reflect the emphasis on ensuring that protection legislation would not become an avenue for the impunity of those suspected of involvement in serious criminal activities, as well as the difficulties faced by Member States in pursuing this goal while respecting their international refugee and human rights obligations.[61]

[59] A Grahl-Madsen, 'Refugees and Refugee Law in a World of Transition', *Transnational Legal Problems of Refugees. 1982 Michigan Yearbook of International Legal Studies* 78–9.

[60] Such inclusive interpretation would be in line with the conclusions adopted by the European Council in Tampere requiring that the Common European Asylum System be 'based on the full and inclusive application of the Geneva Convention': Conclusion 13, European Council, 15–16 Oct 1999.

[61] See Conclusion 29 of the Extraordinary Justice and Home Affairs Council Meeting of 20 Sept 2001, in which '[t]he Council invites the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments': Doc SN 3926/6/01 REV 6, of 20 Sept 2001. The Commission presented its views on the matter in its Working Document of 5 Dec 2001, The

The Directive, therefore, contains provisions on exclusion, revocation and *non-refoulement* that, arguably, fall short of existing and evolving international law and standards. Article 14(4) and (5) includes what constitute de facto provisions on exclusion, going beyond what is permissible under the Refugee Convention:

> 4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:
>
> (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
>
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.
>
> 5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.[62]

Likewise, while Article 21(1) reaffirms the obligation of Member States to 'respect the principle of *non-refoulement* in accordance with their international obligations', paragraph (2) nevertheless contains an exception to the rule, similar to the one enshrined in paragraph (2) of Article 33 of the Refugee Convention:

> Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:
>
> (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
>
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

The Drafting History of the Directive's Provisions on Exclusion, Revocation and Non-refoulement

A careful look at the drafting history of the Directive may explain the unfortunate wording of these provisions. Right at the very first meeting of the Council's Asylum Working Party on the Directive, the Commission's proposal on *non-refoulement* was amended to include an exception to the principle, mirroring Article 33(2) of the Refugee Convention. The general

relationship between safeguarding internal security and complying with international protection obligations and instruments, COM(2001)743 final.

[62] Para 6, however, acknowledges that individuals falling under paras 4–5 are entitled to the rights that all refugees, including those *unlawfully present*, enjoy under the Refugee Convention Arts 3, 4, 16, 22, 31, 32, and 33.

obligation enshrined in paragraph (1) of Article 19 of the Commission's proposal (Article 21 of the adopted Directive) was qualified by a new paragraph (2):

> Without prejudice to paragraph 1 a Member State may refoule a refugee or a person eligible for subsidiary protection when there are reasonable grounds for considering:
>
> (a) him or her as a danger to the security of the country in which he or she is; or
>
> (b) having been convicted by a final judgement of a particular serious crime, he or she constitutes a danger to the community of that country.[63]

However, this move was far from peaceful, and only a few weeks later the added paragraph (2) to Article 19 had been deleted and security concerns had instead become a ground for exclusion, rather than an exception to *non-refoulement*.[64] The exclusion clauses in the draft Directive were thus expanded by adding a new clause excluding individuals from refugee status.[65]

Member States then became divided between these two options to incorporate security concerns in the Directive. Belgium, Finland, the Netherlands and Sweden—supported by the Commission—opposed security concerns as a ground for exclusion, which they understood as being contrary to the Refugee Convention by effectively expanding Article 1F of the Treaty. In their view, security considerations should constitute an exception to the principle of *non-refoulement*, given that a provision in this regard would mirror Article 33(2) of the Refugee Convention.[66]

The same debate took place in relation to the provisions excluding individuals from subsidiary protection, and a paragraph was added to the Commission's proposal replicating Article 1F to ensure that persons who constituted a danger to the community or to the security of the country in which they were would also be excluded from protection.[67] Only Sweden expressed concern at excluding individuals from subsidiary protection altogether, considering that exceptions to exclusion should be provided in cases where the person risks the death penalty or torture in the country of origin. Sweden felt that these exceptions were necessary in order to ensure

[63] Doc 12199/02 ASILE 45, 25 Sept 2002.

[64] On the relationship between these two provisions see UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses. Article 1F of the 1951 Convention relating to the Status of Refugees (with Background)' (2003) 15 *International Journal of Refugee Law* 492, at para 4, and 'Background Note on the Application of the Exclusion Clauses. Article 1F of the 1951 Convention relating to the Status of Refugees. Protection Policy and Legal Advice Section, Department of International Protection', Geneva, 4 Sept 2003, (2003) 15 *International Journal of Refugee Law* 502, at para 10.

[65] Art 14(4), Doc 12620/02 ASILE 54, 23 Oct 2002.

[66] *Ibid*, Art 14(4) n 2.

[67] *Ibid*, Art 17(1)(d).

compliance by Member States with the absolute prohibition on removing individuals under those circumstances, regardless of security or other concerns.[68]

Given the controversial nature of the existing options, the (Danish) Presidency of the EU addressed the Council's Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) in advance of its meeting in early November 2002 with a note explaining the respective rationale and purpose of Articles 1F and 33(2) of the Refugee Convention.[69] The Presidency noted that in its view 'the difference in treatment of a third country national or a stateless person who is excluded and that of a refugee who is not given the benefit of *non-refoulement* is insignificant'.[70] The Presidency, therefore, invited delegations to comment on whether an expansion of the exclusion clauses (which at the time was the preferred option of the majority of Member States to deal with security concerns) was acceptable. Given the opposition to this move by a number of Member States, as explained above, the Presidency also asked SCIFA to comment on whether 'it should be optional for Member States to grant refugee status or subsidiary protection status to a third country national or a stateless person, in spite of the fact that this person has been excluded from international protection'.[71]

Exclusion from Subsidiary Protection

With regards to subsidiary protection, the Presidency stated in its note to SCIFA that although Member States agreed that the Directive's provision on exclusion from subsidiary protection 'should take its outset [*sic*] in Article 1F of the Refugee Convention', they were nevertheless aware 'that they are not bound by any legal obligations with regard to the exclusion from subsidiary protection'.[72] Sweden, however, did not agree with this view, and a day later presented a proposal to SCIFA for an additional paragraph to Article 17:

> In the case where a third country national or a stateless person in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of formal habitual residence, would face a real risk of suffering serious harm as defined in Article 15 (a) and (b) and is unable or, owing to such risk, is unwilling to avail himself or herself of the protection of

[68] *Ibid*, Art 17(1) n 1.
[69] Doc 13623/02 ASILE 59, 30 Oct 2002.
[70] For an in-depth explanation of this position, the Presidency referred delegations to a letter on the matter sent by UNHCR on 26 Sept 2002: *ibid*, 3–4.
[71] *Ibid*, 6.
[72] *Ibid*, 2.

> that country, a Member State *may* grant the person subsidiary protection status, residence permit and other rights, *should it be in compliance with the Member States' international obligations*.[73]

Despite Sweden's reservation, Member States agreed that it should be mandatory to exclude individuals from subsidiary protection on security grounds,[74] a decision reflected in the final wording of Article 17 of the Directive as adopted.

The question arises as to the compatibility of this provision with the concept of 'minimum standards' in Article 63 TEC, and in particular whether those minimum standards may be *below* those established by international refugee and human rights law, leaving it to Member States to develop them further in order to meet their obligations under international law.

Article 3 of the Directive explicitly establishes that 'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection', but it adds a qualification, as this is allowed only 'in so far as those standards are compatible with this Directive'. Accordingly, should Member States decide to grant protection to excludable individuals whom they are not allowed to remove under international human rights law, this may be interpreted as a breach of Article 3 of the Directive by being incompatible with the obligation to exclude imposed by Article 17 of the Directive.

During the negotiations on the Directive, the Council Legal Service was called to give an opinion on the legal meaning of Article 3. The Legal Service recalled that, as in any other area of Community law, Member States remain free to legislate in areas which are outside the scope of the Directive, within the limits of Article 10 TEC, which prohibits Member States from taking any measure which could jeopardise the attainment of the objectives of the Treaty. Accordingly, the Legal Service further noted that Member States were not precluded from legislating in areas which were outside the scope of the Directive, such as those referring to individuals allowed to remain for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, as they did not fall within the scope of the Directive. However, it took a rather wide interpretation of the term 'minimum standards'. The Legal Service stated that in order not to annihilate the objective of harmonisation, the possibility of introducing more favourable standards allowed for in Article 3 could not be unlimited. It explicitly noted that any deviation in national law from the definitions laid down in

[73] Doc 13623/02 ADD 1 ASILE 59, 31 Oct 2002 (emphasis added).
[74] Doc 13648/02, ASILE 61, 8 Nov 2002, Art 17.

Article 2 of the Directive, and the related provisions that develop their content, including those on exclusion, would be incompatible with the objective of harmonising the content of those notions.[75]

As has been shown above, the Directive's scope does not cover *all* individuals whom Member States are under an *international obligation* to protect; the question, therefore, arises whether a decision by Member States to grant protection to those individuals in accordance with their international obligations (rather than for mere compassionate or humanitarian reasons) would be considered a breach of EC law. Therefore, even if the mandatory exclusion from subsidiary protection on security grounds might eventually not be construed as constituting a breach of the minimum standards requirement in Article 63 TEC (should the ECJ uphold the view of the Council's Legal Service), the ECJ may nevertheless be called upon to assess the legality of Article 17 by reference to international human rights, as general principles of Community law.

The ECJ has consistently ruled that rights are not necessarily absolute and, therefore, that they can usually be subject to restrictions in the general interest as long as those restrictions do not constitute a disproportionate and unreasonable interference in relation to the aim pursued, undermining the very substance of that right.[76] It is, therefore, possible that the ECJ may find that security grounds constitute an interference with the right to be granted protection under the Directive that is compatible with *Community standards*. As Peers has pointed out, 'the risk that the Community institutions might attempt to use the Community standard to justify limitations of rights which are non-derogable under the ECHR can be seen in the Commission's Green Paper on "return" [expulsion] of third country-nationals, in which it asserted that refugees and other persons in need of international protection could be removed if there were public order grounds'.[77] The developments in international law regarding *non-refoulement*, the increasing recognition by the ECJ of the norms enshrined

[75] Doc 14348/02 JUR 449 ASILE 67, 15 Nov 2002, paras 5 and 7. Official access to this document has been refused by the Council (with the vote against by Sweden). See Letter from the General Secretariat of the Council of 23 May 2005, refusing full access to docs 10560/02 and 14348/02, doc 9727/05 INF 111 API 85 JUR 240, of 3 June 2005, and Reply adopted by the Council on 24 June 2005 to Confirmatory App No 29/c/01/05 to the Council by email dated 2 June 2005, pursuant to Art 7(2) of Reg (EC) No 1049/2001 for access to docs 10560/02 and 14348/02, doc 9729/05 INF 113 API 87 JUR 242, of 13 June 2005. However, the document is available at: http://www.statewatch.org/news/2002/dec/14348.02.doc. For a discussion on mandatory provisions in the Dir and their relation to minimum standards see H Storey 'EU Refugee Qualification Directive, An Introduction', paper presented at the IARLJ and ILPA Seminar on the EC Qualification Dir, London, 26 June 2006, Section III (on file with author).

[76] See, for instance, Case C–280/93 *Germany v Council* [1993] ECR I–4973 and Case C–122/95 *Germany v Council* [1995] ECR I–973.

[77] S Peers, 'Taking Rights Away? Limitations and Derogations' in S Peers and A Ward (eds), *The EU Charter of Rights: Politics, Law and Policy* (Oxford, Hart, 2004) 154.

in the ECHR *as interpreted by the European Court of Human Rights*,[78] the recognition by the Charter itself that it reaffirms the rights as they result from the case law of the ECJ and of the European Court of Human Rights,[79] and ultimately the monitoring that the latter may exercise on the implementation by Member States of EC law would suggest that, when called upon for an interpretation of rights consistently held as non-derogable, the ECJ may interpret EC law-based rights in the light of existing international case law.

Should this not be the case, a conflict of obligations would arise for Member States, as they remain bound by their international human rights obligations when implementing Community law. In *TI v United Kingdom,* the European Court of Human Rights found:

> Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[80]

However, the judgment of the European Court of Human Rights in *Bosphorus* questions the degree to which the international human rights *accountability* of Member States may be upheld when implementing EC law, in whose application Member States have no margin of discretion. In *Bosphorus*, the Court recalled that states can subject themselves to the rule of an international organisation compatibly with the ECHR as long as that organisation has equivalent (understood as comparable rather than identical) standards to the ECHR, in terms of substantive protection and the procedural system for enforcement. While states are 'considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention', the Court established that if such equivalent protection is considered to be provided by the organisation, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. The presumption can be rebutted only if it is considered that the protection of Convention rights was manifestly deficient.[81]

[78] Case 374/87 *Orkem v Commission* [1989] ECR 3283, para 30.

[79] See the Preamble to the EU Charter, above n 25.

[80] App No 43844/98 *TI v the United Kingdom*, judgment of 7 Mar 2000, 15, Reports 2000-III.

[81] App No 45036/98 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland* [GC], judgment of 30 June 2005, Reports 2005-V, (2006) 42 EHRR 1, paras 155–156. For an analysis of this judgment and the doctrine of 'equivalent protection', including in relation to EC asylum and migration legislation, see C Costello, 'The *Bosphorus*

In the absence of accession by the EC/EU to the ECHR and other international treaties, the risk of different interpretations by the ECJ and the European Court of Human Rights regarding the most fundamental rights, as well as the possible lack of effective international accountability of Member States' implementation of Community law in this field, cannot be excluded.

Revocation of Refugee Status and the Non-refoulement of Refugees

As regards refugees, Member States all agreed that security concerns needed to be reflected in the Directive, but remained divided between doing so by means of an expanded exclusion clause (therefore breaching the Refugee Convention) or by means of an exception to the *non-refoulement* prohibition (raising issues under Article 3 of the Convention Against Torture and other human rights instruments). Given the requirement in Article 63 TEC that measures on asylum be in compliance with the Refugee Convention and other relevant treaties, as examined above, none of these options was satisfactory.

Another alternative then emerged, namely, to add a new paragraph to a provision on revocation of refugee status that had already been introduced earlier, allowing Member States in security cases to 'decide not to officially recognise a third country national or a stateless person as a refugee, where such a decision on recognition has not yet been taken'.[82] However, this provision constituted a de facto exclusion clause (regardless of whether or not it was called so) and, therefore, the majority of Member States (Austria, Belgium, Finland, Luxembourg, the Netherlands, Portugal, Sweden and the UK) declared themselves in favour of an exception to the principle of *non-refoulement*, which they saw as best fitting the Refugee Convention.[83]

Negotiations then proceeded and, after further consultations with UNHCR in late November, the EU's Justice and Home Affairs Ministers were presented with a proposal for their approval, where the idea of expanding the wording of the exclusion clause in the Directive was abandoned, and security concerns were introduced as a de facto exclusion ground in the revocation clause in Article 14B(5), as well as an exception

Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 87.

[82] Art 14B, above n 65.

[83] Art 14B(5) doc 14308/02 ASILE 65, 15 Nov 2002.

to the *non-refoulement* obligation in Article 19(2).[84] And the Council so agreed at its meeting on 28 November 2002.[85]

As stated above, the post September 11 climate explains the desire of Member States to retain discretion in security cases. The controversies surrounding the debate on how best to achieve that objective show some willingness on the part of Member States to find an adequate solution. Yet, the outcome is far from adequate, and it seems to reflect the priority given to other considerations, such as the wish to find agreement at the expense of ensuring legal certainty in respect of the international obligations of Member States. The Council could have, for instance, considered alternative options to deal with non-removable individuals who pose a threat to security, such as those offered by international criminal law, in terms of prosecution or extradition.[86] Therefore, the provisions as adopted have been criticised by commentators as raising issues under international refugee and human rights law.

In relation to *non-refoulement*, the Council (admittedly, after having consulted with UNHCR) seems to have ignored the evolution of international law regarding this norm over the past 50 years[87] by introducing a clause similar to Article 33(2) of the Refugee Convention in a legally binding instrument of EC law. While this provision may not be at odds with the literal wording of the Refugee Convention, it does not reflect the broader international law obligations of Member States. On the one hand, all Member States are parties to the Convention Against Torture, which explicitly forbids them to 'expel, return ("*refouler")* or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture', a provision that has been consistently interpreted as including an absolute prohibition even when security concerns apply, and, therefore, offering wider protection than the Refugee Convention.[88] Likewise, the European Court of Human Rights has consistently interpreted Article 3 ECHR as enshrining an absolute prohibition on removing anyone to prohibited treatment, regardless of the

[84] Doc 14643/1/02 REV 1, ASILE 68, 26 Nov 2002.

[85] Doc 15068/02, ASILE 77, 13 Dec 2002.

[86] For an analysis of the principle *aut dedere aut judicare* in relation to the question of excludable but non-removable asylum seekers see N Larsaeus, 'The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers' (2004) 73 *Nordic Journal of International Law* 69.

[87] See E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-refoulement*: Opinion', in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law* (Cambridge, CUP, 2003) 87.

[88] Communication No 39/1996 (CAT), *Páez v Sweden*, views of 28 Apr 1997, doc CAT/C/18/D/39/1996 of 28 Apr 1997, para 14.5.

nature of the activities of the individual.[89] On the other hand, Member States had already agreed on the wording of this principle in Article 19 of the Charter, which establishes that '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

Yet, the Directive as adopted allows Member States to *refoule* a refugee as long as such *refoulement* is not prohibited by international law.[90] Given that the Directive does not refer to extradition or expulsion, but rather to *refoulement*, a literal reading of the Directive would lead to an interpretation *ad absurdum*, as one must conclude that, as the law stands today, *refoulement* is in *all* cases contrary to international human rights law, given that this legal term refers precisely to the removal of individuals to prohibited treatment. As one commentator has observed in relation to the limitation clauses in the Charter of fundamental rights, 'one can only hope that the[y] will not be placed on the curriculum for training of future civil servants as examples of model drafting technique'.[91]

A closer examination of this seemingly contradictory wording might make more sense if one looks at the possible motivations behind it. A look at the interpretation that some Member States have been advancing in relation to the prohibition of *refoulement* might shed some light on the matter. In *Chahal*, the United Kingdom argued that 'there was an implied limitation to Article 3 (Article 3) [*sic*] entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. In support of this view, the United Kingdom referred to Article 33(2) of the Refugee Convention. In the alternative, the United Kingdom suggested that 'the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3 (Article 3). This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security.'[92] The Court rejected this view and affirmed the absolute nature of the prohibition on removing anyone to treatment contrary to Article 3 of the Convention.

Yet, the United Kingdom continues to object to the absolute nature of the obligation enshrined in Article 3. The suggestion that the Court might

[89] App No 22414/93 *Chahal v United Kingdom,* judgment of 15 Nov 1996, Reports 1996-V (1997) 23 EHRR 413, para 80.

[90] The Council felt that there was no need to include a provision in relation to the *refoulement* of individuals with Subsidiary Protection, given that the exclusion clauses also apply on security grounds.

[91] Peers, above n 77, at 178.

[92] *Chahal,* above n 89, para 76.

need to reconsider its case law was taken up by the European Commission in its response to the Council's invitation to examine the relationship between security and protection:

> Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a 'balancing act' between the protection needs of the individual, set off against the security interests of a state.[93]

Most recently, at the time the United Kingdom held the Presidency of the EU, it sought to bring this debate within the EU's institutional framework by putting the discussion on the revision of the *Chahal* doctrine on the agenda of the Justice and Home Affairs Council meeting in October 2005.[94] The United Kingdom failed to obtain wide support for its views from other Member States, although Lithuania, Portugal and Slovakia joined in its third party intervention before the European Court of Human Rights in *Ramzy v Netherlands*.[95] The United Kingdom made this intervention in the hope that the Court would reconsider its position in *Chahal*, and allow for a balancing test to be made in cases where national security concerns applied.[96]

A closer look at Article 21(2) of the Directive in the light of the above considerations may lead one to conclude that the Community legislator may have wished to ensure that the Directive left the door open for Member States to accommodate any future developments in the interpretation made by international monitoring bodies regarding permissible exceptions to the prohibition of *refoulement*. However, as international law stands today, Article 21(2) of the Directive in its current wording allows Member States to remove individuals in breach of international law. Even if the Directive does not impose an obligation on Member States to do so, but merely leaves it to their discretion, arguably the provision is in itself contrary to Community law. As the ECJ has stated in its judgment on the Directive on Family Reunification, rules of Community law that allow Member States to adopt or maintain norms contrary to fundamental rights

[93] European Commission, above n 61, para 2.3.1.

[94] Council of the European Union, Conclusions of the Justice and Home Affairs Council, doc 12645/05 (Presse 247), 12 Oct 2005, 18.

[95] App No 25424/05.

[96] See *Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom Intervening in Application No 25424/05 Ramzy v The Netherlands*, 22 Nov 2005 (copy on file with author). The Court also allowed third party interventions on 22 Nov 2005 by the AIRE Centre; Liberty and JUSTICE; and Amnesty International, The Association for the Prevention of Torture, Human Rights Watch, Interights, The International Commission of Jurists, Open Society Justice Initiative and Redress (copies on file with author). These organisations presented the Court with evidence of the evolution of international law (beyond the Court's own jurisprudence) on the absolute prohibition of *refoulement*, as found in international case law, treaty law and literature.

could in themselves be contrary to those fundamental rights[97] and, therefore, contrary to Community law.

Should the ECJ be called upon to pronounce on the compatibility of this provision with international human rights law (a prerequisite for the legality of EC law), the question arises whether the ECJ would depart from its established case law and uphold the interpretation developed by international human rights monitoring bodies in relation to non-derogable rights. The analysis made above in relation to conflicting obligations of Member States under international law and EC law in relation to exclusion from subsidiary protection is also applicable to this context.

Security Grounds in EC Law

Beyond the specific interpretation of security grounds as limitations on non-derogable rights, the question also arises as to the precise scope of security grounds under EC law, as limitations on the more general right to be granted protection derived from the Directive. Guild has argued that, while international law places few limitations on a state's obligations to respect the choices of individuals as to the country in which they live, the transfer of competence from Member States to the European Community on matters relating to the entry and stay of non-nationals has resulted in a right of the individual against the Member State in the event of any interference by the sovereign state with the exercise of the choice of the individual. As the Community legislator implements the powers conferred by the Amsterdam Treaty in respect of third country nationals, they will be entering into a framework already fixed by the development of free movement of persons and the position of third country nationals privileged by agreements between their state of nationality and the Community.[98] It is in this context that the right to protection as an EC law-based right enshrined in the Directive and its limitations need to be examined.

The Directive has developed the provisions in Title IV TEC recognising a right to be granted protection for refugees and other persons protected by international law against forced removal or the refusal of entry. EC law, however, allows Member States to restrict rights on certain grounds. Given that the Directive has only recently been adopted, the ECJ has not yet had the opportunity to clarify the scope and interpretation given to the concepts of 'danger to the community' or 'danger to the security of Member States' enshrined in the Directive as grounds for exclusion, revocation, *refoulement* and the concepts of 'national security' and 'public

[97] Above n 24, para 23.

[98] E Guild, 'Discretion, Competence and Migration in the European Union' (1999) 1 *European Journal of Migration and Law* 62.

order' included in the Directive as limitations on the right to access to benefits, residence permits or travel documents. However, by virtue of their incorporation in an instrument of EC law, these concepts are subject to the principles applicable to the interpretation of limitations on the effective exercise of EC law-based rights.

The limitations that Member States are allowed to impose on entry or residence of foreign nationals that currently fall under the scope of application of EC law on 'public policy' and 'public security' have been the object of extensive interpretation.[99] The principles applicable to the interpretation of these concepts may be referred to in the future in relation to the interpretation of the similar concepts enshrined in the Directive. In the case of the right to free movement of EU citizens, Member States may refuse such citizens access to their territory when that access would *in itself* constitute a danger to public policy, public security or public health.[100] The ECJ has held that this exception is to be interpreted narrowly as it constitutes a limitation on the right to free movement and, therefore, it requires that the presence or conduct of the individual constitute a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[101]

In its Communication on Restrictions on Freedom of Movement for EC nationals, the Commission sought to clarify the correct application of Community law on this matter, in light of the existing case law, legislative developments and increasing number of complaints against Member States for the incorrect application of the restrictions. The Commission recalled that measures on entry and expulsion of non-nationals must be taken against a common background of respect for human rights and democratic principles, and that therefore:

> [A]ny application of the notions of public policy and public security by the Member States will not only be subject to strict scrutiny so that their scope

[99] For an analysis of the right of residence of foreigners and the limitations that may be imposed under EC law on public security and public order, see E Guild, 'Security of Residence and Expulsion of Foreigners: European Community Law', in E Guild and P Minderhoud (eds), *Security of Residence and Expulsion. Protection of Aliens in Europe* (The Hague, Kluwer, 2001) 59–80.

[100] Art 39(3) TEC. This provision was developed in Dir 64/221/EEC on the co-ordination of special measures concerning the movement or residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850. The Dir has been replaced by Dir 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Reg (EEC) No 1612/68 and repealing Dirs 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77, that codifies all existing Community law on freedom of movement of EU citizens and maintains the possibility to restrict their right to freedom of movement on public policy and public security (Chap VI).

[101] Case 36/75 *Rutili* [1975] ECR 1291, para 28; Case 30/77 *Bouchereau* [1977] 1999, para 35.

> cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community, but also that such Community law scrutiny will be inspired by the basic human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[102]

Moreover, the measures adopted on these grounds must be applied in accordance with the principle of proportionality, which requires justified grounds, justified balance between measure and objective, and justified balance of interests between individuals and the state.

Given the status of general principles of Community law as part of the Community legal order, the infringement of which constitutes an infringement of the Treaty itself or of any rule of law relating to its application,[103] the ECJ may in the future resort to these principles, other than human rights, to assess the validity and legality of restrictions on the right to be granted protection. The ECJ has held that general principles of Community law include the right to sound administration, legal certainty, an effective remedy, the principle of non-discrimination, the rule of law, fairness, equity, and the obligation of public authorities to make good the damage caused by an unlawful act or omission.[104]

In addition to the principles that apply in the Community legal order and the scrutiny of Member States' action by the Community institutions, Member States may remain subject to scrutiny by the European Court of Human Rights and other international monitoring bodies for their compliance with international human rights law in the safeguarding of *Community law-based rights*. In a recent case, the European Court of Human Rights found a violation of Article 8 of the Convention in a case relating to a delay of more than 14 years on the part of the French authorities to issue a residence permit to a Spanish national, a right that the applicant derives from Community law. The Court recalled its established case law regarding the lack of a right to entry or residence of non-nationals under the Convention, but felt that the case under consideration required a special approach due to the fact that the right to be issued a residence permit was one that the applicant enjoyed directly under EC law. The Court further referred to the ECJ's well established case law that the issue of a residence permit for EU nationals is declaratory in nature. Accordingly, the Court

[102] European Commission, Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (Dir 64/221/EEC), COM(1999)372 final, 19 July 1999, at 8.

[103] Case T–54/99 *max.mobil.Telekommunikation Service v Commission* [2002] ECR II–303, paras 48 and 57.

[104] For an overview of general principles of Community law and their standing in the Community legal order see K Lenaerts, P Van Nuffel, and R Bray (eds), *Constitutional Law of the European Union* (London, Sweet & Maxwell, 2005) 711–719.

considered that Article 8 of the Convention needed to be interpreted in the light of Community law and, in particular, of the obligations imposed on Member States regarding the entry and residence of non-nationals.[105] Given that the right to be granted protection derives from the Directive and that the recognition of refugee status is a declaratory act,[106] the Court may in the future pronounce on breaches of the Convention in light of the obligations of Member States, derived from Community law, towards refugees and other protected persons.

EFFECTIVE EXERCISE OF THE RIGHTS ATTACHED TO PROTECTION STATUS

The content of the status recognised to refugees in the Directive mostly reflects—and sometimes expands—that of the Refugee Convention, for instance, in relation to the right of access to employment, education and health care, notwithstanding concerns in relation to other provisions, as indicated above. Regrettably, Article 34 of the Refugee Convention, which requires states parties to facilitate the naturalisation of refugees, has not been reflected in the Directive.

On the contrary, the status accorded in the Directive to persons under subsidiary protection is either limited or left largely to the discretion of Member States. The measures adopted by Member States to give content to these provisions will, therefore, be scrutinised in relation to their compliance with international law and for their ability to ensure the *effective* enjoyment of the right to be granted protection.

Apart from the level of rights that protected persons may be able to claim, the question arises of the extent to which access to the rights recognised may be restricted by the imposition of administrative requirements. Recital 30 of the Preamble establishes that:

> Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.

This requirement found its way into the Directive at the very end of the negotiation process. Although the Directive had the provisional agreement of Member States (pending reservations by Germany and Austria) at the Justice and Home Affairs Council meeting of June 2003,[107] the preparations for the formal adoption of this instrument within the time limit set by

[105] App No 51431/99, *Aristimuño Mendizabal v France*, judgment of 17 Jan 2006 (not yet reported), paras 65–69.

[106] As the Dir, above n 1, itself recognises at Recital 14 of the Preamble.

[107] Doc 10576/03 ASILE 40, 19 June 2003.

the Treaty of Amsterdam required the lifting of reservations by Germany and Austria. This allowed the United Kingdom to reopen the debate on provisions already agreed and to which it had not previously entered reservations regarding the level of socio-economic rights that would be recognised under the Directive. Although the proposed reduction of the level of rights was not agreed by all other Member States, a decision was reached to include a Recital in the Preamble allowing Member States to require a residence permit as a prerequisite for the enjoyment of certain socio-economic rights.[108]

Given that the Preamble has been at times greatly influential in the interpretation of secondary legislation by the ECJ,[109] the question, therefore, arises what value this Recital may have as a means of preventing the enjoyment of the rights attached to refugee and subsidiary protection status.

On the one hand, Article 24 of the Directive imposes an obligation on Member States to issue residence permits, although this obligation is qualified. First, it requires Member States to do so only 'as soon as possible' after the status has been granted. Secondly, it allows for exceptions when 'compelling reasons of national security or public order otherwise require'. Therefore, in practice, protected persons may be subject to long delays before they see their residence permits issued, or may never see them issued at all, which could prevent effective access to the rights attached to their status.

On the other hand, given that residence permits are issued with a limited validity (three years for refugees and one year for persons with subsidiary protection), the non-renewal of permits may become an easy way for Member States effectively to deny protection without having to engage in a formal procedure to withdraw status. Explicit indication of this possibility can be found in Article 21(3), whereby 'Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee' who falls under the *non-refoulement* exception in Article 21(2) for constituting a danger to the security of the Member State in which he or she finds him- or herself or to the community of that Member State.

Therefore, there are a number of instances where individuals who have seen their refugee status recognised or been granted subsidiary protection may nevertheless find themselves undocumented in the country of asylum and, therefore, prevented from enjoying the rights attached to their status. The question therefore arises of the extent to which holding a residence

[108] Doc 7482/04 ASILE 16, 22 Mar 2004, Art 22. The Preamble was subsequently agreed by Justice and Home Affairs Counsellors on 5 Apr 2004, in preparation for the adoption of the Dir by the Council on 29 Apr 2004, Doc 8042/04 ASILE 22 OC 319, 5 Apr 2004.

[109] See, for instance, Cases C–184/99 *Grzelczyk* [2001] ECR I–6193 para 44, and C–413/99 *Baumbast and R* [2002] ECR I–7091.

permit may constitute a valid requirement for the enjoyment of the subjective rights of individuals under the Directive.

While the ECJ has already ruled that Member States may require individuals to comply with certain administrative formalities in order to have their rights recognised,[110] the lack of compliance by Member States with such administrative formalities cannot result in preventing the effective exercise of the rights recognised.

As examined above, given that Articles 13 and 18 of the Directive recognise a subjective right of refugees and persons eligible for subsidiary protection respectively to be granted protection under EC law, the better view is that preventing the enjoyment of the rights attached to protection status through the imposition of a requirement to hold a residence permit undermines the very substance of the right to be granted protection and is, therefore, contrary to EC law. A different interpretation would render meaningless the right to protection enshrined in the Directive. The considerations expressed above in relation to the limitations of EC law-based rights on security grounds and on the applicability of general principles of Community law are also valid in relation to restrictions on the rights attached to the protection status granted. Likewise, the legality of other provisions of Community law and the measures adopted by Member States to implement them, such as the application of the 'safe third country' concept, restrictions on the right to appeal and other procedural safeguards, will also have to be checked against the effective enjoyment of the right to be granted protection.

Furthermore, in so far as the socio-economic rights in question are mandatory on Member States, they give rise to direct effect, as explained above, and, therefore, individuals may rely on them directly if any Member State prevents access to those rights on the ground that they do not hold residence permits.

CONCLUSIONS

The Directive constitutes a major step forward in the recognition of the rights of refugees and other persons protected by international law. The obligation of Member States under EC law to grant protection (and to recognise socio-economic rights) to refugees and to the broader category of individuals who are not removable under international human rights law confers upon these individuals a subjective right to be granted asylum, protected by the Community legal order and enforceable before national courts and the ECJ.

[110] See, for instance, Case C–281/98 *Roman Angonese v Cassa di Risparmio di Bolzano—Italy* [2000] ECR I–4139, para 49.

The Directive, however, falls short of international standards in a number of ways, notably, in relation to the qualifying grounds and the status of individuals under subsidiary protection and to the provisions on exclusion, revocation and *non-refoulement*, which should never have found their way into the Directive. Restrictions and limitations on the right to be granted protection on security or other grounds are, however, subject to the applicable principles of Community law, including the protection of fundamental rights and, therefore, the legality of the Directive's provisions and those enacted in national legislation to implement the Directive remain subject to scrutiny by national courts and the ECJ of these grounds. This leaves room to argue for an interpretation of this instrument in the light of all existing and evolving obligations of Member States under international law.

These shortcomings, as well as the possible conflicting obligations arising for Member States under EC law and international human rights law, call for the review of the Directive in the near future in a way that fully integrates Member States' obligations under international law.

Beyond the review of provisions that fall short of international standards, a further reflection on the process and outcomes of the first stage in the establishment of a Common European Asylum System is called for in order to ensure that lessons are learned and that the EU lives up to its commitments to refugees and other categories of protected non-nationals. While it may not be easy to reconcile the human rights protection obligations of states with other legitimate interests, including the duty to prevent the serious threats posed by transnational criminality, states nevertheless remain bound by their international human rights obligations, even in the most serious circumstances, whether they act individually or collectively within international organisations and multilateral arrangements. As Goodwin-Gill has observed, the protection of refugees under EC law must be clearly premised both on the specific requirements of the Refugee Convention and its Protocol, and on the foundations of international human rights law, the essentials of which are obligations *erga omnes* and much of which is authority from peremptory rules of international law (*jus cogens*). 'State interests may have their place, but the sovereignty of the state exists within a community of principle.'[111]

Beyond the inherent tensions that complying with conflicting obligations may pose, it is, however, far from clear that states are doing all in their

[111] GS Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam' in E Guild and C Harlow (eds), *Implementing Amsterdam. Immigration and Asylum Rights in EC law* (Oxford, Hart, 2001) 160. See also European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion No 363/2005, doc CDL-AD(2006)009, 17 Mar 2006.

power to ensure that their resources are used in the most efficient manner, thus minimising the actual scope of those tensions.

Some of the outcomes of the first stage in the harmonisation of asylum policies may be explained by the inexperience of the institutional actors in the process and the lack of effective dialogue and transparency. The European Commission's Directorate-General (DG) for Justice, Freedom and Security is the newest and smallest of the Commission's DGs. It was established only in October 1999, following the entry into force of the Treaty of Amsterdam on 1 May 1999.[112] Observers have pointed out the fact that during this initial stage the DG may not have had an adequate level of expertise in EC law (let alone international human rights and refugee law) and institutional memory regarding co-operation and negotiations. Insiders have also pointed out the lack of experience of the Council itself in negotiating asylum matters as *Community law*, after more than two decades of state co-operation at intergovernmental level. Furthermore, the lack of transparency on the part of the Council has antagonised the European Parliament, the consultative role of which has been reduced to a minimum, with most asylum instruments agreed by the Council in disregard of the Parliament's calls for amendments, and sometimes even before the Parliament has adopted its Opinion.[113] The lack of transparency of Council negotiations also prevented other actors, such as international organisations, to contribute to the process in a meaningful manner, as their input was often based on informal accounts and had to take the shape of encrypted messages in order to maintain the appearance of discretion, effectively depriving Declaration 17 to the Treaty of Amsterdam of any meaning.[114]

Be that as it may, the first stage of the asylum legislative process has resulted in the adoption of several pieces of EC legislation, the compliance of which with the international obligations of states and with the EC's own internal legal order has been questioned by the European Parliament, international organisations and academics. The overall emphasis on finding agreement by all means has led not only to the adoption of a 'minimum

[112] [1997] OJ C 340/1. The Commission had previously set up a small task force for Justice and Home Affairs when the Maastricht Treaty was signed in 1992.

[113] See Case C–540/03, above n 24, where the Parliament calls for the annulment of some of the provisions in the Family Reunification Dir on the ground that they breach fundamental rights. See also Case C–133/06 *Parliament v Council* [2006] OJ C108/12, where the Parliament argues, inter alia, that the Council has breached the obligation to co-operate in good faith.

[114] 'Consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy': Declaration (No 17) on Art 63 (ex Art 73k) of the Treaty establishing the European Community. See European Union, above n 43.

common denominator', but also to provisions inadequately drafted or worded in such ambiguous terms that they may be in themselves contrary to EC law. In addition, as one commentator has observed, to rely on national implementation to cure the defects in EC asylum instruments would require a prolonged period of legal uncertainty and much litigation.[115] This will not only be costly for Member States and for individuals, but will also render the system unable to achieve its stated goals of harmonisation of the Member States' asylum systems and the provision of protection to refugees across the Union.

[115] C Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law* 54.

8

From Dublin Convention to Dublin Regulation: A Progressive Move?

ANDREW NICOL QC

THE DUBLIN CONVENTION AND REGULATION: THE RULES ALLOCATING RESPONSIBILITY

THE PURPOSE OF the Dublin II Regulation[1] is 'to establish the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national'. It is the successor to the Dublin Convention[2] and closely follows the earlier instrument in its methodology for allocating responsibility as between the Member States, that is by:

— setting out a formal hierarchy of rules for determining which Member State is responsible;
— establishing a procedural framework by which one Member State can be asked to take over responsibility for an asylum seeker from another Member State; and
— setting up an ad hoc committee to resolve issues that arise over the working out of the rules as between the Member States.

The substance of the hierarchy of rules in the Regulation is also broadly similar to that established by the Convention. To identify the Member State responsible, one works through the hierarchy in strict order until a situation matching the one in issue is identified.

In simplified terms, the Convention's hierarchy is as follows:

— state where a family member has been recognised as a refugee (Article 4);

[1] Council Reg (EC) No 343/2003 of 18 Feb 2003, [2003] OJ L 50/1.

[2] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Dublin, 15 June 1990. Although agreed in 1990, it did not come into force until 1997.

— state which has issued a valid residence permit or visa (Article 5);
— state whose borders the applicant crossed irregularly having come from a non-Member State (Article 6);
— state responsible for controlling entry into the territory of the Member States (except where a visa requirement is waived and a second Member State later also waives a visa requirement) (Article 7);
— state in whose international transit zone the application is made (Article 7(3));
— if no other Member State is responsible, the state where the application for asylum is lodged (Article 8).

The Regulation's hierarchy, again in simplified terms is as follows:

— state where the family of an unaccompanied minor is legally present (Article 6);
— in the absence of a family member, the state where an unaccompanied minor lodges his application (Article 6);
— state where a family member has been allowed to reside as a refugee (Article 7);
— state where a family member has an outstanding substantive application for asylum (Article 8);
— state which has issued a valid residence permit or visa (Article 9);
— state whose borders the applicant crossed irregularly having come from a non-Member State (Article 10);
— state which waives a visa requirement unless a second Member state also waives a visa requirement (Article 11);
— state in whose international transit zone an application is made (Article 12);
— if no other Member State is responsible, the state where the application for asylum is made (Article 13).

Underlying the somewhat complex table of rules of the Regulation is the premise that the asylum applicant should not have a free choice as to which Member State should consider the substance of the application.

APPLICANTS' CHOICE, MEMBER STATES' BENEFITS

While the Regulation was being negotiated, the UK Immigration Law Practitioners' Association (ILPA) and others argued strongly against this premise which, as can be seen, had also lain behind the Dublin Convention's criteria. Giving primacy to the asylum applicant's choice would have made good sense in terms of common humanity because it would have minimised the trauma of delaying substantive consideration of the asylum claim. It would have made sense in terms of integration of successful

applicants (surely more likely if this took place in the applicant's country of choice). It would have saved the administrative effort and cost of trying to establish which country was the right one according to the hierarchy of criteria. The outcome of all this work appears to have been extremely limited. Such data as are available show that only a tiny fraction of asylum applicants, about 1.7 per cent, led to transfers as a result of the Dublin Convention.[3] It is even harder to calculate the *net* effect (ie the number of applicants transferred out of a particular Member State less the number of applicants which that Member State was required to take back under the Dublin Convention), but this will necessarily have reduced the 'benefit' of Dublin for Member States even more. Finally, the Dublin Convention hierarchy puts a disproportionate burden on those Member States which were the most popular points of entry into the European Union from outside.[4] So far as the Convention did produce results, in crude terms Britain stood to gain; Greece and Italy stood to lose.

Although the Commission saw the logic of these arguments, Member States remained firm and clung to the premise that the asylum applicant's choice of state of refuge should be the last, not the first, determining factor. Early data on the effect of the Dublin II Regulation shows a very similar pattern to that which was experienced under the Convention: namely, a small number of transfers; for countries such as the UK an even smaller number of net transfers and a disproportionate burden on countries on the Eastern and Southern borders of the EC.[5]

In some circumstances, the applicant's choice does play a more important part. This was true to a limited extent under the Convention, and the circumstances have been expanded somewhat under the Regulation. Thus, both the Convention and the Regulation allow (but do not require) a Member State to consider the substance of the asylum claim on humanitarian grounds, even though it is not the state responsible under the criteria—but only if the asylum applicant consents (see Convention Article 9 and Regulation Article 15—the 'humanitarian clause'). Whether on these or other grounds, a Member State is free to accept responsibility for

[3] See European Commission Staff Working Paper referred to in E Guild, 'Seeking Asylum: Storm Clouds Between International Commitments and EU Measures' [2004] *EL Rev* 198, 207.

[4] See, for instance, E Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden Sharing' (2004) 6 *European Journal of Migration and Law* 47, which also seeks to analyse reasons for an asylum seeker's choice of country.

[5] See *The Dublin II Regulation: A UNHCR Discussion Paper,* Apr 2006 available at http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf; and ECRE, *Summary Report on the Application of the Dublin II Regulation in Europe*, Mar 2006, available at http://www.ecre.org/positions/ECRE%20Summary%20Report%20on%20Dublin%2007.03.06%20-%20final.pdf. The full report is at http://www.ecre.org/positions/ECRE%20Dublin%20Report%2007.03.06%20-%20final.pdf.

considering an asylum application even if it is not the state responsible under the criteria (see Convention Article 3(4) and Regulation Article 3(2)—the 'sovereignty clause'). The Convention had said expressly that the person concerned must consent in this context. This condition is not repeated in the Regulation, although it may be thought that consent could usually be inferred from the very fact that the asylum application had been lodged.[6] All of these circumstances depend on the state where the application is lodged agreeing to consider it. The experience under the Convention was that states were parsimonious in exercising their discretion in favour of the asylum seeker. A significant innovation in the Regulation concerns the position of unaccompanied minors who do not have a family member. In their case, the state where the application is lodged is responsible—see Article 6. Thus in their case choice of the state of refuge is given pre-eminence. Indeed, the treatment of unaccompanied minor asylum applicants is one of the real improvements in the Regulation over the Convention.

The asylum applicant's consent is also necessary in another situation. If the applicant has a family member resident with refugee status in a Member State, that state will be responsible for determining the application, but only if the applicant so desires. This was the case under the Convention—see Article 4—and remains the case under the Regulation—see Article 7. Regulation Article 7 requires that the family member already has had his or her refugee status acknowledged by the Member State in question. However, a further innovation in the Regulation is the introduction of a new step in the hierarchy. A Member State which has yet to make a first decision on the substance of a person's asylum application will now be responsible for considering the application from another family member. Again the new applicant must consent—see Article 8.[7]

The term 'family member' was defined narrowly under the Convention as 'the spouse of the applicant for asylum or his or her unmarried child who is a minor of under 18 years, or his or her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor under 18 years'—see Article 4. The Regulation tightens this definition in some respects and relaxes it in others. It tightens the definition by adding the condition that the relationships must have existed in the country of origin. Children are also included only if still minors and

[6] This will not always be so. See for instance *R (Ahmed Shah) v Secretary of State for the Home Department*, 12 Mar 2001, [2001] EWHC Admin 197, [2001] ImmAR 419 where the applicant claimed that it was only through force of circumstance that he lodged an asylum claim in another Member State. There is some evidence that certain states use the 'sovereignty clause' in order to dispose of asylum claims expeditiously and negatively through fast track procedures: see the UNHCR and ECRE reports, above n 5.

[7] For the purposes of Arts 7 and 8 of the Reg (and also Arts 15(1) and 21(3)) consent must be given in writing: see Commission Reg (EC) No 1560/2003, below n 22, Art 17(1).

unmarried *and dependent*. However, the Regulation broadens the definition by including an 'unmarried partner in a stable relationship where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens'. Correspondingly, children of the couple or the applicant will count whether 'they were born in or out of wedlock or adopted as defined under national law'—see Article 2(i).

DETERRING MULTIPLE APPLICATIONS

The Convention and the Regulation have had another function—and that is to reduce the number of multiple applications for asylum in different Member States. Thus, under Article 11 of the Convention a Member State had an obligation to *take charge* of an applicant whose application for asylum it was responsible for considering, and to *take back* an applicant whose application it was already considering or whose application it had rejected and who was illegally present in another Member State. Substantially the same obligations are contained in the Regulation—see Article 16. The prospect of multiple applications being detected has increased with the establishment of EURODAC, a European-wide database of the fingerprints of asylum applicants.[8] This has been in operation since January 2003. In May 2004, EURODAC reported that in its first year of operation it had successfully processed in 246,902 fingerprints of asylum seekers, 7,857 fingerprints of people crossing the borders illegally, and 16,814 fingerprints of people apprehended on the territory of a Member State in an illegal situation. It detected multiple applications in 17,287 (7 per cent) of the cases.[9]

The reasons for multiple applications are likely to be complex. No doubt Member States believe that they are largely due to persons making a second or further attempt to achieve the refugee status to which the first refusal showed they were not entitled. In some cases this may be so. In others, an asylum application may be repeated in another country because the claim was not adequately presented on the first occasion. We have all too many instances in the UK of justified claims being denied because of poor representation (or none), inadequate exploration of the reasons for seeking asylum or simply an over-hasty processing of the application contributing to a wrongful rejection. A further reason for multiple applications, at least in the past, has been a difference of interpretation of the UN Convention relating to the Status of Refugees (Refugee Convention) in

[8] Established under Council Reg (EC) No 2725/2000, [2000] OJ L 316/1.

[9] First annual report to the Council and the European Parliament on the activities of the EURODAC Central Unit, SEC(2004)557, 5 May 2004.

various Member States. Notoriously, this manifested itself in the attitude towards persecution by non-state agents. Germany and France did not consider that ill-treatment feared from such a source could qualify a person as a refugee, unless the state was in some way responsible for the persecution. Other states, including the UK, did not interpret the Refugee Convention as requiring state responsibility.[10] Although the Refugee Convention contemplates that the International Court of Justice (ICJ) will be competent to resolve disputes over the Convention—see Refugee Convention Article 38—no state has ever invoked the ICJ's jurisdiction in this regard and (by contrast, for instance to the European Court of Human Rights) only states have standing to do so.

The Council's Directive on refugee status[11] (also known as the Qualification Directive) will go some way to reducing this phenomenon. Its criteria for refugee status include the possibility of persecution by non-state agents (see Article 6), but only if the state of origin is unable or unwilling to provide protection. The expansion in Article 7 of the concept of a lack of state protection has plainly drawn on the UK's jurisprudence.[12] While this Directive will reduce the legitimate case for multiple applications for asylum, it is not likely to eliminate it. After all, the Directive purports to establish only *minimum* standards and Article 3 recognises expressly that Member States are free to apply more favourable standards. Indeed, as a regional organisation, the EU through none of its organs could determine authoritatively the extent of a state's obligations under the UN Refugee Convention.

THE JURISPRUDENTIAL STATUS OF THE CONVENTION AND THE REGULATION

The Regulation does differ from the Convention in its jurisprudential status. The Convention was a treaty which was entered into by the Member States as part of the third pillar. The third pillar arrangements took place intentionally outside the normal institutional structures of the Community. This was important. At a Community level, it meant that the European Court of Justice (ECJ) had no jurisdiction with regard to the Convention. At the level of UK law, it meant that the Convention did not

[10] See *R v Secretary of State for the Home Department ex parte Adan* [2001] 2 AC 477, though the need to show an insufficiency of state protection where persecution was feared from non-state agents (see *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489) narrowed the difference in practice.

[11] Council Dir 2004/83/EC of 29 Apr 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, [2004] OJ L 304/12.

[12] See above n 10.

rank as a European Treaty for the purposes of the European Communities Act 1972. It did not have the special status which that statute conferred. Instead, it was like any other unincorporated treaty. In a series of decisions, the English courts held that in consequence it could not be relied upon to create duties (as a matter of domestic law) on the UK government or rights (again as a matter of domestic law) for asylum applicants.[13]

The legal origin of the Regulation is very different. The Amsterdam Treaty brought the third pillar into the regular institutional framework of the Community. Specifically, Article 63 of Title IV of the EC Treaty provides:

> The Council … shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States.

The Regulation is the result.

The jurisdiction of the ECJ in this respect is governed by Article 68 of the EC Treaty which provides:

> (1) Article 234 [which allows for national courts to make references to the ECJ] shall apply to [Title IV] under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> …
>
> (3) the Council, the Commission, or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

Thus the ability of a national court to refer a question about the Regulation (or the other Community measures adopted under Title IV) is more limited than in relation to other EU matters.[14] In particular it is only

[13] See for instance *Zeqiri v Secretary of State for the Home Department* [2002] Imm AR 42 (CA). Also, A Nicol and S Harrison, 'The Law and Practice in Relation to the Dublin Convention' (1999) 1 *European Journal of Migration and Law* 465.

[14] The problems arising from this limited jurisdiction of the ECJ over Title IV measures are analysed in Ch 3 in this volume.

'a court or tribunal … against whose decisions there is no judicial remedy under national law' that can make a reference. In the English context, this means for most purposes the House of Lords. Does it make a difference that an appeal to the House of Lords is dependent on the grant of permission to appeal (as, for that matter, is access to the Court of Appeal from either the High Court or the Asylum and Immigration Tribunal)? Based on the ECJ's reaction to similar wording in other provisions, the answer would seem to be 'no'.[15] However, if a case did reach the House of Lords and a question of interpretation or validity arose which was not *acte claire* the House would be obliged to make a reference to the ECJ.

While a reference to the ECJ in relation to the Regulation from the English courts will, therefore, be a rare event, there is more scope for the Regulation being considered at the national level. Article 29 of the Regulation provides that '[t]his Regulation shall be binding in its entirety and directly applicable in the Member States in conformity with the Treaty establishing the European Community'. Without further domestic legislation, therefore, this Regulation becomes a part of UK domestic law. The argument that once took place in relation to the Dublin Convention, namely that it was a mere unincorporated treaty conferring neither rights nor duties, will be an anachronism.

The *ancient regime* does still govern the residue of old applications making their way through the system.

The Regulation applies to applications for asylum lodged from 1 September 2003 and, from that date, to any request to take charge or to take back asylum seekers irrespective of the date on which the application was made. The Member State responsible for the examination of an asylum application submitted before that date is to be determined in accordance with the Dublin Convention—see Article 29 of the Regulation. There are still many cases going through the system where the application was lodged and the request to take charge or take back and some other Member State accepted responsibility all before 1 September 2003.

Mohammed Omar v Secretary of State for the Home Department[16] was a hybrid situation. The applicant, a Somali, had claimed asylum in Italy in May 2003. In June 2003 he travelled to England and claimed asylum here. In July, the UK asked Italy to take him back. The Italians failed to respond. After more than three months, the UK said that, if there was no response within a week, Italy would be deemed to have accepted responsibility. Article 11(4) of the Convention said that failure by a requested state to act

[15] See Case C–99/00 *Lyckeskog* [2002] ECR I–4839, discussed by E Guild in 'Making References to the European Court of Justice: Some Considerations Regarding Asylum', paper for the International Association of Refugee Law Judges Conference, Edinburgh, 12–13 Nov 2004.

[16] [2005] EWCA Civ 285, 16 Mar 2005.

within three months was tantamount to accepting the claim. Italy did accept in January 2004. The Convention said that removal should then take place within one month (Article 11(5)), and it was not until more than a month had elapsed that removal directions were set. The applicant argued that after 1 September 2003 he was entitled to rely on the direct effect of the Regulation. The Dublin Convention criteria applied to his case. Under those criteria, the UK had only one month to remove him to Italy after that country's acceptance of responsibility. Having failed to do so, it was now for the UK to consider his asylum application.

This argument was rejected by the Court of Appeal. Sir Swinton Thomas distinguished between the 'criteria' in the Dublin Convention, which the Regulation said should be applied to transitional cases such as this, and the 'mechanisms' in the Dublin Convention, which were not referred to or given direct effect by the Regulation. Chadwick LJ thought that it was not easy to divorce the mechanisms from the criteria, but he (like the other members of the Court) observed that the Convention prescribed no consequences if the one-month time limit was missed. At best the applicant could insist on effect being given to his substantive right to have his asylum application determined in Italy and could have obtained an order for his prompt removal to Italy, but this was the very opposite of what he wanted to achieve.

The case does highlight other differences between the Convention and the Regulation. In the first place the time for the requested state to respond is much shorter. Under the Convention it was three months (and, in default, acceptance of the request was to be presumed—see Convention Article 11(4)). Under the Regulation the time for reply has been abridged to two months, and only one month in a case where the requesting state has asked for an urgent reply. Again, in default of a timely reply, acceptance is to be presumed—see Regulation Article 18(7). On the other hand, the maximum time for the actual transfer after acceptance is increased. It should still take place promptly, but the maximum period is now six months. However, unlike the Convention, which provided for no consequences if the maximum time was exceeded, the Regulation says that after the maximum period responsibility for considering the substantive asylum application passes to the state where the application was lodged. There is some greater leeway if the applicant is imprisoned or absconds, but even in these cases after a maximum of one year where the person has been imprisoned, or 18 months if he has absconded, responsibility for considering the asylum claim will still revert to the state where the application was lodged.

The Convention remained relevant (for a limited period at least) in relation to Denmark. The UK and Ireland chose to opt in to the Regulation. Denmark did not at first, and until 1 April 2006 the Convention continued to regulate the position as between Denmark and the other

Member States.[17] However, at the Council meeting on 7 March 2005 it was announced that Denmark would now accept the Dublin II Regulation and EURODAC. The matter was concluded by an agreement between the EC and Denmark in 2006.[18] Norway and Iceland have agreed to abide by the Regulation, and so they are treated in the same way as Member States.[19]

Even though the Regulation is directly applicable, the familiar distinction between powers and duties remains important. There is an obligation on the Member State which can be identified as responsible to consider the application substantively. Article 15, the humanitarian clause, is couched in altogether different language. It says a Member State which is not responsible *may* bring together family members or other dependent relatives, in particular on humanitarian or cultural grounds (Article 15(1)); where dependency is due to pregnancy, a new-born child, serious illness, severe handicap or old age, Member States 'should normally' bring together the family members (Article 15(2)) and Member States 'shall if possible' unite an unaccompanied minor with his relatives (Article 15(3)). In the one, incompletely reported, case on this provision, the UK Court of Appeal thought that it gave no rights to the individual but provided a framework for agreement between the Member States,[20] and, in the absence of an arguable claim under Article 8 of the European Convention on Human Rights, the Secretary of State was entitled to remove the asylum seeker to the Member State responsible under the ordinary criteria.[21]

Again, even though the Regulation is directly applicable, the mechanisms which it establishes necessarily involve a great deal of inter-state dialogue. The Commission's Regulation[22] supplements the Council's Regulation. It prescribes forms to be used and lists in detail means of proof which are (a) probative and (b) indicative of the various matters which are relevant to establishing which Member State is responsible. The Dublin Convention

[17] See Recitals 18 and 19 of the Preamble to the Reg, above n 1.

[18] [2006] OJ L 66/38.

[19] See Council Dec 2001/258/EC of 15 Mar 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway [2001] OJ L 93/38.

[20] The Commission's Reg (EC) No 1560/2003, below n 22, envisages that the initiative of requesting another Member State to take charge will be taken by the Member State where the application was lodged or the Member State responsible: see Art 13(1).

[21] *R (G) v Secretary of State for the Home Department*, 13 Apr 2005 (CA) (Maurice Kay, Buxton and Neuberger LJJ). I am grateful to Luqmani Thompson, solicitors for the appellant, for a note of the decision.

[22] Commission Reg (EC) No 1560/2003 of 2 Sept 2003 laying down detailed rules for the application of Council Reg (EC) No 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 by a third-country national [2003] OJ L 222/3.

had established a committee for resolving disputes between the Member States. The Council's Regulation also requires a committee—see Article 27—and the Commission's Regulation provides that this Committee may be used to conciliate disputes over the humanitarian clause—see Article 14 of the Commission's Regulation.

The Council's Regulation contemplates that a decision that a person is to be taken back or taken in charge by another Member State may be the subject of appeal or review, but this is not to suspend the decision unless the court so decides on a case-by-case basis—see Regulation Articles 19(2) and 20(1)(e). So far as the UK is concerned, there will be no right of appeal to the Asylum and Immigration Tribunal, and any challenge will have to be brought by way of judicial review.[23]

CONCLUSIONS

The Dublin Convention was the subject of a great deal of criticism from the UK government because of the slowness and inefficiency of its administrative procedures. Very soon the UK and the other Member States will have to prepare their submissions to the Commission to enable it to prepare a report on the Regulation in 2006—see Article 28.[24] It remains to be seen whether the numbers of asylum seekers who are transferred are significantly higher than under the Dublin Convention.[25] For asylum seekers themselves, the major disappointment is in the terms of the Regulation itself which, like the Convention, turned its back on the principle that their choice of refuge should be the first rather than the last criterion for determining the state responsible for examining their claims for asylum. The unfairness between Member States is reduced to only a very small degree by the EU programmes for financial assistance to the Member States with large numbers of asylum applicants. Some grants have been made under the European Refugee Fund (ERF), but they have been on a very modest scale. Although the second phase of the fund has increased the level of funding somewhat, it is still not at a level which is likely to make a very substantial impact.[26] Like the Convention before it, the Regulation has stopped some of the previous obnoxious practices. The phenomenon of asylum applicants being bounced around like shuttlecocks

[23] See Asylum and Immigration (Treatment of Claimants, etc) Act 2004, sch 3, para 5.

[24] The Hague Programme, agreed in Nov 2004, contemplates that the review of the First Phase Instruments (of which the Reg is one) will not take place until 2007.

[25] Early indications are that they will not be. See 'The Dublin II Regulation: A UNHCR Discussion Paper', above n 5, which also contains an interesting review of differing national practices in relation to the Reg.

[26] ERF II is expected to provide €114 million over the period 2005–6 and projected to rise to a total of €604 million over 2005–10—see ECRE, *Information Note on the Council Decision Establishing the ERF for the period 2005–2010*, Dec 2004.

from one European country to another with none taking responsibility has gone. The need to establish explicit and express assumption of responsibility means that it is (largely at least) no longer the case that an asylum seeker can be removed from one country without the other taking up the responsibility of examining the claim. There was much anecdotal evidence of this happening under various bilateral agreements between the UK and other states before the Dublin Convention came into effect.[27] But these advantages should not be exaggerated. There is some evidence that the uneven allocation of responsibilities among the Member States has led some countries to adopt practices which effectively negate the principal purpose of the Regulation, and the Convention before it. The Greek authorities will, for instance, sometimes treat an asylum application as effectively abandoned if the person concerned moves on to another country before it has been determined. In consequence, several other European countries will not regard Greece as a 'safe country' to which an asylum claimant can be sent without risk of onward *refoulement*.[28] Furthermore, both the Convention and the Regulation determine which is the state responsible *as between the Member States*. Both permit the responsible Member State to remove the person concerned (where this is possible) to some third 'safe' non-Member State (Convention Article 3(5) and Regulation Article 3(3)). There is a continuing enthusiasm for pushing the responsibility for asylum seekers away. This is also shown by the entry into readmission agreements both by Member States and third countries on a bilateral basis and by the EU itself.[29]

[27] See Nicol and Harrison, above n 13.

[28] See both the UNHCR and ECRE reports, above n 5. The European Court of Human Rights has emphasised that regional treaties such as the Dublin Convention do not displace Contracting States' obligations under the European Convention on Human Rights: App No 43844/98, *TI v UK* [2000] INLR 211, 228.

[29] On readmission agreements and responsibility-shifting to third countries of origin or transit see Chs 11 and 9 in this volume, respectively.

9

The External Dimension of the EU's Asylum and Immigration Policies: Old Concerns and New Approaches

ANNELIESE BALDACCINI*

INTRODUCTION

THE EXTERNAL DIMENSION of immigration and asylum policies is taking up a significant proportion of the Union's current efforts in the field of freedom, security and justice. The importance of integrating these matters into the EU's external policies is, however, by no means a new concern. Early policy governing the external aspects of migration developed, in a piecemeal fashion, as a response to the actual influx of persons fleeing the conflict in the Balkans and the scare of a potential influx created by the greater mobility which followed the end of the Cold War and the breakdown of the Soviet Union.[1] A Commission Communication dating back to 1994 drew attention to the need for an overall approach in the field of immigration and asylum, which would include in particular the reduction of migratory pressure on Europe by co-operation with third countries of origin.[2] A framework for discussion on external migration policies was defined in 1999 by the Treaty of Amsterdam and the Tampere European Council. However, whereas attention at first was on the need to strengthen policies that focus on the root

* This is a revised and updated version of a paper published previously. See A Baldaccini, 'EU Partnerships under the Hague Programme: Trading Immigration Controls for Refugee Needs' (2005) 1 *JUSTICE Journal* 50. The views expressed in this chapter are those of the author alone.

[1] See S Peers, 'Irregular Immigration and EU External Relations' in B Bogusz, R Cholewinski, A Cygan and E Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden/Boston, Martinus Nijhoff, 2004) at 206.

[2] Communication from the Commission to the Council and the European Parliament on immigration and asylum policies, COM(94)23 final.

causes of migration, more recently the emphasis has shifted to containing refugees in their regions of origin or in transit countries and externalising responsibility for asylum seekers.

This development may be seen as the inevitable culmination of 'internal' policies placing emphasis on border control and management at the expense of refugee protection needs. For over two decades, individual Member States have introduced increasingly restrictive measures in their asylum policies, which variously included increased use of immigration detention, the withdrawal of social benefits, safe third country practices and lack of effective opportunities to challenge detention and deportation, resulting in increased risk of *refoulement*. Similarly, at the EU level, Member States have been developing common standards for the treatment of asylum seekers which, whilst in principle seeking to uphold the right to seek asylum and the obligations of the Refugee Convention, have primarily focused on restriction rather than protection, in the ill-conceived hope that this would keep potential asylum seekers out of and away from Europe.

It is perhaps in this failure at controlling a phenomenon that, by its very nature and because of clear international obligations, is not one that can be easily managed that emphasis shifted to placing responsibility for processing claims and providing protection on third countries outside the EU. We find evidence of this drive towards subcontracting protection duties to third countries in the EU legislative process, particularly in the attempt to secure a broad interpretation of the 'safe third country' concept. There have also been bolder attempts by Member States to achieve a paradigm shift in the international protection regime. These attempts predate the more recent initiatives outlined in the Union's latest multi-annual work programme, but have influenced thinking in the area of external policies.

This chapter will trace the development of the external dimension of the EU's immigration and asylum policy and then concentrate on some key features of the external agenda as set out in the programme adopted in The Hague. It will try to answer two questions. First, why has the integration of asylum and immigration into the EU's relationship with third countries become a major drive of EU policy in this field? Secondly, what does this policy want to achieve and what implications does it have in practice?

DEVELOPING AN EXTERNAL MIGRATION POLICY

The Austrian Strategy

In tracing the development of the external dimension of the EU's immigration and asylum policy in the post-Amsterdam era, it seems apt to use as the starting point the controversial proposals that were made by the

Austrian EU Presidency in 1998.[3] A confidential strategy paper, leaked in July 1998, remarks disappointedly on the failure of past policies to stem the flow of illegal immigrants and asylum seekers and outlines a new strategy to reduce migratory pressure the essential elements of which are:

— To link in a common approach all migration-related decisions within EU institutions, ie justice and home affairs, foreign policy, economic relations with third countries, association agreements, and 'structural dialogue' with countries applying for EU membership;
— To use political leverage in agreements with migrants' countries of origin and transit, eg to make aid dependent on visa questions, greater ease of border crossing on guarantees of readmission, trade on effective measures to reduce push factors;
— To create concentric circles of co-operating states in place of 'fortress Europe' and engage these circles of friends around Europe in policing the EU borders from the outside in return for trade and aid concessions depending on the political muscle that could be used by the EU.

This last element resembles closely the current European Neighbourhood Policy—an aspect of the external dimension that will be addressed in the last section of this chapter.

The second category of proposals relates to the refugee protection regime which the strategy paper bluntly proposes to dismantle. In essence, the Austrian strategy paper proposes the consideration of a 'new approach' to refugee protection based not so much on legal procedures focusing on the individual case as on a political offer on the part of the host country. The paper recognised that this would imply a departure from prevailing international standards of refugee protection which would have to be achieved in time and would require a redefinition of the role of the UNHCR.

The paper also suggests that refugee status should be dispensed with on account of the fact that recognising a refugee under the Geneva Convention encourages permanent settlement in the host country, whereas it should be 'possible and internationally acceptable for such people to return home' at some point in time.

The bluntness of this paper, probably due to the fact that it was not intended for public disclosure, is astonishing and the proposals met obvious concern and condemnation. Elements of them have, however,

[3] Strategy paper on immigration and asylum policy from the Austrian Council Presidency to the K4 Committee, 1 July 1998, 9809/98 CK4 27, ASIM 170. The wording of later versions of the paper was somewhat watered down: see, eg, the second draft of 29 Sept (9809/1/98).

become recurrent themes in the European asylum debate and resurfaced in various guises in subsequent initiatives by Member States and EU institutions.

From Root Causes to Control of Migration

At the time of the Tampere European Council in October 1999, much of the EU's policy on asylum was concerned with 'harmonising' Member States' laws and practices, building on the legal framework created by the 1997 Amsterdam Treaty. The Tampere Conclusions laid little stress on the broader external migration agenda, apart from drawing attention to the contribution which the EU's various external policies (in aid, trade, etc) could make in addressing the underlying causes of migration flows and in encouraging the conclusion of readmission agreements.[4]

Focus on integrating asylum and immigration into the EU's broader external policies was stepped up at the Seville European Council in 2002, which sought to add a complementary approach to that of root causes advocated at Tampere. At Seville, Heads of State and Government urged that 'any future co-operation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration'.[5] Most notably, the Council introduced the concept of negative migration conditionality, ie the threat to reduce the level of EU relations with a third country in cases of 'an unjustified lack of co-operation in joint management of migration flows'.[6] There had been talk of reducing development aid to countries that did not co-operate with EU demands on immigration but this was objected to by a group of Member States.[7] There remained, however, political ambiguity in the Conclusions as regards the measures that might be taken, the legal basis for deciding on whether a state had failed to co-operate and the substantive grounds for concluding that there had been such a failure.

The Thessaloniki European Council in June 2003 reiterated the need to monitor third countries' co-operation in the field of illegal migration and called for the development of an evaluation mechanism. This was to include the participation of third countries in relevant international human rights and refugee protection instruments; their co-operation in the readmission and return of their nationals and of third country nationals;

[4] Presidency Conclusions, Tampere European Council, 15–16 Oct 1999.
[5] Presidency Conclusions, Seville European Council, 21–22 June 2002, para 33.
[6] *Ibid*, para 36.
[7] See 'EU rejects Blair's line on asylum', *The Observer*, 23 June 2002.

efforts in border control and the interception of illegal immigrants; the creation of asylum systems, with specific reference to access to effective protection; and efforts in re-documentation of their nationals.[8] The practical consequences of inadequate co-operation on these issues were still not addressed. Notably absent was also any residual reference to addressing the root causes of migration flows within the Union's relations with third countries. Instead, further scope for developing external policies on cross-border co-operation was provided by the Thessaloniki summit's endorsement of the Conclusions of the June 2003 General Affairs and External Relations Council calling for intensified partnership with the EU's eastern and southern neighbours.[9] A new framework for relations with neighbouring countries was to provide the basis for developing a new range of policies with the aim of bringing those countries closer to the EU.

The UK Proposals

A different strategy for engaging with third countries on issues around immigration and asylum was offered by the UK government early in 2003 when it presented to its EU partners ideas on new international approaches to asylum.[10] Purportedly designed to support the creation of an equitable asylum system globally, the UK proposals advocated Regional Protection Areas and processing centres in transit routes to Europe. The latter—called Transit Processing Centres—were unambiguously to be holding camps for extra-territorial processing of asylum seekers, who either had made it to the territory of the EU or had been intercepted *en route* to the EU. Regional management involved long-term action in the source regions to address root causes of migration through effective use of development assistance, to increase protection capability, and to develop resettlement routes. Regional intervention also included inducing source countries to accept returns via the conclusion of readmission agreements. It was further

[8] Presidency Conclusions, Thessaloniki European Council, 19–20 June 2003, para 19. The first set of countries chosen (Albania, China, Libya, Morocco, Russia, Serbia and Montenegro, Tunisia and Ukraine) has been the subject of a pilot monitoring and evaluation report prepared during 2004 and published in July 2005. See Communication on the monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, COM(2005)352 final. The conclusions of this first report and the direction and methodology of future reports are being discussed in the High Level Working Group on Asylum and Migration—a cross-pillar group attended by the officials from the Member States' home, foreign and development departments.

[9] General Affairs and External Relations Council, Conclusions on a Wider Europe—New Neighbourhood, 16 June 2003, available at http://ec.europa.eu/world/enp/pdf/cc06_03.pdf.

[10] *New international approaches to asylum processing and protection*, paper submitted by the Prime Minister, Tony Blair, to the Greek Presidency of the EU, 10 Mar 2003, available at http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf.

envisaged that returnees to Regional Protection Areas might include asylum seekers from Europe for external processing temporary protection or on a return route.

These proposals raised a variety of legal, practical and ethical concerns and were roundly condemned by human rights and refugee advocacy groups.[11] They also failed to receive unanimous support from EU Member States. However, subsequent debate in the Council highlighted interest in the regional management aspect of the proposals and a mandate was given to the Commission to explore the idea further. The Commission's proposals for a new EU approach to the international protection regime, in the form of EU Regional Protection Programmes, were submitted to the Council in June 2004.[12] They incorporate the essence of the UK ideas and will be examined in the next section. Along with partnership agreements underway with EU neighbouring countries, dealt with in the last section of this chapter, they have come to define the EU's external approach to immigration and asylum.

The External Dimension of Asylum and Immigration in the Hague Programme

In November 2004, the European Council adopted the Hague Programme setting out the Union's aims and priorities in the Area of Freedom, Security and Justice for the next five years. Considerable space is given in the Programme to the external dimension of asylum and migration, signalling that over the next five years there will be an increased focus on international protection challenges beyond the EU borders. Member States are called upon to 'contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage'.[13]

[11] See, amongst others, Human Rights Watch, *An Unjust 'Vision' for Europe's Refugees: Human Rights Watch Commentary on the UK's 'New Vision' Proposals for the Establishment of Refugee Processing Centres Abroad*, 17 June 2003, available at www.hrw.org/backgrounder/refugees/uk/newvision.pdf; Amnesty International, *Unlawful and Unworkable: Amnesty International's Views on Proposals for Extra-territorial Processing of Asylum Claims*, AI Index: IOR 61/004/2003 (London, 18 June 2003); UK Refugee Council, *Unsafe Havens, Unworkable Solutions* (London, June 2003). See also counsel's opinion on the legality of the UK's proposals obtained by JUSTICE and available at www.justice.org.uk/asylum/index.html.

[12] Communication on the managed entry into the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: 'Improving access to durable solutions', COM(2004)410 final, 4 June 2004.

[13] The Hague Programme, annexed to the Presidency Conclusions, Brussels European Council, 4–5 Nov 2004, para 1.6.1.

The Union's priorities in the context of the external dimension of asylum and migration are to develop partnerships with third countries to assist them 'in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return'.[14] Specific actions envisaged come under four headings dealing with: partnership with third countries; partnership with countries and regions of origin; partnership with countries and regions of transit; and return and re-admission policy. Within these, the core elements of the external asylum and immigration agenda are: (i) the development of Regional Protection Programmes; (ii) intensified co-operation with countries on the southern and eastern borders of the EU in the framework of the EU Neighbourhood Policy; (iii) the development of minimum standards for return procedures; and (iv) the timely conclusion of Community readmission agreements, to be aided by the appointment of a Special Representative for a common readmission policy.[15]

The development of minimum standards on return procedures and the EC policy on readmission agreements are addressed elsewhere in this volume.[16] This chapter will examine the evolving partnership concept in the framework of the proposed Regional Protection Programmes (RPPs) and the EU Neighbourhood Policy (ENP).

PROTECTION IN THE REGION

Proposals for EU Regional Protection Programmes (RPPs) were first advanced by the Commission in its June 2004 Communication on improving access to durable solutions.[17] The Communication responded to the Thessaloniki European Council invitation, in June 2003, to submit a detailed report examining the legal implications of and the measures that had to be taken to advance the idea, first stirred by the UK, of new approaches to asylum that may provide better and more equitable protection to refugees.

'New approaches to asylum' has come to epitomise a set of policies which ought to address the serious and structural deficiencies of the current international protection regime. These deficiencies, presented from the perspective of EU policy makers, lie first in the inescapable reality that

[14] *Ibid*.
[15] *Ibid*, paras 1.6.1–1.6.4.
[16] See Ch 11.
[17] Above n 12.

developing states host the largest number—some 70 per cent—of the world's refugees.[18] Secondly, a disproportionate amount is said to be spent in the developed world on processing claims the majority of which do not meet the criteria for international protection, while the majority of refugees remain for protracted periods in poorly resourced countries in their regions of origin.[19] Thirdly, the asylum system in Western countries is such that refugees who travel to Europe to seek protection have no option but to do so illegally, often paying large sums of money to human smugglers and traffickers. The final argument is that those found not to be in need of international protection are often not returned to their countries of origin. EU Member States' interception practices and deterrence policies, and their restrictive interpretation and application of the 1951 Refugee Convention, are not contemplated as part of the problem.

Encouragingly, the Commission's contribution to the discussion on 'new approaches' is firmly premised on the principle that 'any new approach should be complementary rather than substituting the Common European Asylum System, called for at Tampere'.[20] It, however, accepts that there is a crisis in the global protection system and a need to devise policies which can both enhance protection capacity in regions with protracted refugee situations and ensure that refugees arriving in the EU from that region do so in an orderly and managed manner. EU RPPs and EU Resettlement Schemes are the short- to mid-term elements identified by the Commission for achieving both objectives.[21] Discussions among government officers that followed the Commission's proposal indicated widespread support for RPPs but little enthusiasm for an EU Resettlement Scheme.[22] The Council Conclusions on durable solutions, adopted on the eve of the Hague Programme, reflect this lack of commitment towards resettlement by endorsing its 'targeted use' to 'encourage [countries in regions of origin] to take part in Regional Protection Programmes'.[23] Rather than an end in

[18] UNHCR, *2003 Global Refugee Trends*, Population Data Unit/PGDS, Division of Operational Support (Geneva, UNHCR, 15 June 2004).

[19] UNHCR counts 38 protracted refugee situations worldwide—involving more than 6 million people—and not including the Palestinian refugees. Protracted refugee situations are those involving refugee populations of over 25,000 people, who have been in exile in a developing country for more than 5 years and have no prospect of a durable solution, whether voluntary repatriation, integration into their host country, or resettlement. See Executive Committee of the High Commissioner's Programme, doc EC/54/SC/CRP.14, 10 June 2004.

[20] Communication from the Commission to the Council and the European Parliament, Towards more accessible, equitable and managed asylum systems, COM(2003)315 final, 3 June 2003, at 12.

[21] COM(2004)410 final, above n 12.

[22] See HC Debs, vol 428, col 738W, 9 Dec 2004. Discussions take place in the EU's High Level Working Group on Asylum and Immigration.

[23] General Affairs and External Relations Council, *Conclusions on improving access to durable solutions*, doc 13588/1/04 REV 1 (Presse 295), 2 Nov 2004, para 7.

itself, and one that in a concrete and viable way can ease the burden in countries of origin and address protracted refugee situations, a residual commitment to resettlement is retained on account of its importance in securing targeted countries' participation in RPPs. Moreover, Member States are to be allowed to choose whether or not to participate in the scheme. In the absence of a genuine and firm commitment from Member States, there is little prospect that such a scheme would lead to a sizeable case load of refugees being resettled to Europe.[24] In any event, the Commission was invited to present a proposal for a resettlement scheme, along with one for RPPs by July 2005. The latter was eventually presented in September 2005. The former has never seen the light.

The Commission's thinking around RPPs, as presented in the June 2004 Communication, is that they should be situation-specific and elaborated in full partnership with the third country for which they are intended. They would be formulated in conjunction with the Regional and Country Strategy Papers, drawn up by the Commission's Development and External Relations Directorates. This is meant to ensure consistency with the EU's overall strategy towards the country or region in question in areas such as good governance, judiciary reform, institution building, democratisation and human rights. The Commission contemplates RPPs as a 'tool box' of mainly 'protection oriented' measures with some 'migration related' ones, in consideration of 'the need to balance and assess all interests concerned.'[25] The measures suggested range from assistance to enhanced protection capacity, action to establish registration and resettlement schemes, assistance in improving local integration and infrastructure, to co-operation on legal migration, action on migration management and return. The implementation of these measures would rely on the financial assistance and expertise of the EU.

The inclusion of non-protection-oriented measures in the 'tool box', ie action on migration management and return, has been much remarked upon as raising doubts about the true motivations at the heart of these proposals.[26] The EU's preoccupation with enhancing protection in the region is premised on the principle of international solidarity and fair

[24] In Jan 2005, the then High Commissioner for Refugees, Ruud Lubbers, addressing the informal meeting of Justice and Home Affairs devoted to the external dimension of the European asylum policy, called for a broader commitment to resettlement. He highlighted that, in 2004, only around 4,700 places were made available by the half-dozen European countries that offer resettlement. In contrast, Australia, Canada, New Zealand and the United States together offered 100,000 places for refugee resettlement. See UNHCR, *United Nations High Commissioner for Refugees, Mr. Ruud Lubbers, Talking Points for the Informal Justice and Home Affairs Council (Luxembourg, 29 January 2005)*, 29 Jan 2005, available at http://www.unhcr.org/admin/ADMIN/41fb91342.html.

[25] COM(2004)410 final, above n 12, para 51.

[26] See, for instance, Oxfam, *Foreign Territory: The Internationalisation of EU Asylum Policy* (Oxford, Oxfam GB, 2005), at 65.

sharing of responsibility. It is indeed a fundamental principle of the international protection regime set up by the 1951 Refugee Convention that states have an obligation to co-operate in order to find permanent solutions to the problems of refugees.[27] In addition, RPPs are presented as providing a clear dividend for Europe: they would assist in creating the conditions where there is no need for refugees to move beyond their regions of origin and seek asylum in Europe. However, Member States cannot realistically expect any short to medium term impact of RPPs in significantly reducing onward movements of refugees from these countries to the territory of the EU. The European Commission itself accepts that building the institutional and infrastructural capacity to the standards required to ensure effective protection in current refugee hosting countries in the regions of origin is a long process, which in some cases may even take decades.[28] RPPs might be thought of as achieving more immediate results for the EU if the establishment of such programmes were to allow Member States to shift responsibility for asylum seekers by returning them to 'safe' countries in the region of origin.

Making Third Countries 'Safe' for Returns

The return element in the 'tool box' for RPPs is one of the most critical in the entire scheme. The Commission indicates that returns to third countries could be aimed not only at nationals of the country in question but at 'other third country nationals for whom the third country has been or could have been a country of first asylum, if this country offers effective protection'.[29] Thus, RPPs could potentially form the backdrop to large-scale 'safe third country' removals for which the EC Asylum Procedures Directive effectively paves the way.[30]

The Asylum Procedures Directive creates a detailed legislative scheme at EU level governing third country removals by Member States to countries outside the EU.[31] In recent years, the notion of a 'safe third country' has increasingly been relied upon by Member States as a mechanism to determine whether or not they have responsibility for asylum seekers. The concept, developed in state practice, is used to justify removals of refugees

[27] The preamble to the 1951 Convention relating to the Status of Refugees affirms that 'the grant of asylum may place unduly heavy burdens on certain countries, and … a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'.

[28] COM(2004)410 final, above n 12, para 41.

[29] *Ibid*, para 51.

[30] Council Dir on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

[31] Procedures for third country transfers within the EU are covered by the Dublin II Reg but do not address the issue of safety of Member States as they are presumed safe.

who are deemed to have improperly moved from a country where they had found protection or *could have* found protection to a final country of destination. Important safeguards which govern the transfer of responsibility under international law, such as ascertaining a 'meaningful connection' of asylum seekers with the country in question and ensuring that their protection needs are properly assessed, have been progressively diluted.[32]

The Asylum Procedures Directive codifies this restrictive practice in EU law. Under the terms of the Directive, the 'safe third country' concept allows Member States to remove asylum seekers to any country willing to accept them, often without any consideration of the merits of their claims and without sufficient safeguards. Member States are given considerable latitude in setting down rules under which the presumption of safety can be challenged in individual cases, and they are not obliged to obtain assurances that the third country concerned will process the asylum claim.[33] In effect, the wide scope of application of the concept in Community law allows Member States to shift responsibilities for a potentially large group of asylum seekers to third (often poorer) countries without ensuring that these countries, required to accept responsibility for refugees, have the capacity to do so. The 'safe third country' provisions in the Directive were severely criticised by UNHCR and the agency remains concerned that, when implemented by Member States, it could lead to violations of international law.[34]

EU governments are mindful that the concept of a 'safe third country' has a considerable bearing on their relations with third countries and on

[32] The European Human Rights Court in Strasbourg has clarified that the application of safe third country procedures does not absolve the country of asylum of its duties under Art 3 European Convention on Human Rights (ECHR). The *TI* case clearly illustrates that transfers to third countries, where sufficient safeguards are not in place, are not compatible with the ECHR. Thus, international law places the responsibility for the asylum applicant on the country where the application is lodged. Accordingly, that state is entitled to transfer responsibility only where four conditions are fulfilled: (i) the criteria for the determination of countries as safe must be adequate; (ii) the third country must be safe for the individual applicant and the burden of proof on safety of the third country lies with the country of asylum; (iii) the third country agrees to admit the applicant to a fair and efficient determination procedure; (iv) a meaningful link between the applicant and the third country can be established: App No 43844/98, *TI v UK,* 7 Mar 2000.

[33] Art 27(2) of the Dir, above n 30, provides that: '[t]he application of the safe third country concept shall be subject to rules laid down in national legislation, including: (c) rules, in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment'.

[34] UNHCR, *The European Union, Asylum and the International Refugee Protection Regime: UNHCR's Recommendations for the New Multiannual Programme in the Area of Freedom, Security and Justice* (Geneva, UNHCR, Sept 2004), available at www.unhcr.org/home/RSDLEGAL/415c2d964.pdf.

the international protection regime.[35] During negotiations on the Directive, attempts to link the 'safe third country' concept to the provision of 'effective protection', however, led nowhere due to lack of agreement on the content of 'effective protection'. The Directive now envisages that the concept may be applied where Member States' authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
(b) the principle of *non-refoulement* in accordance with the Geneva Convention is respected; and
(c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and
(d) the possibility exists to request refugee status and, if the person seeking asylum is found to be a refugee, to receive protection in accordance with the Geneva Convention.[36]

The application of these rules does not guarantee access to effective protection. While there is no internationally agreed definition of effective protection, according to UNHCR effective protection connotes not only protection against *refoulement*, ie the removal to another country where asylum seekers face persecution or breaches of human rights, but access to determination procedures based on due process of law and to conditions of stay which match up to basic human rights standards and allow a life of self-sufficiency and dignity.[37] The concept is ultimately linked to the availability of well-resourced asylum infrastructures which cover all stages of a refugee situation: from initial reception to status determination and adequate support, to the ultimate resolution of their situation (ie voluntary repatriation, local integration in the host country or resettlement to a third country).

Returning asylum seekers to countries targeted by RPPs which have not yet developed a sustainable protection system would be unsafe for asylum seekers and would undermine the EU's effort to support the creation of such a system in the first place. The implementation of RPPs necessarily requires EU Member States to agree a benchmark against which the

[35] See, for instance, the Irish Presidency discussion paper on the application of the safe third country concept prepared for the informal meeting of Justice and Home Affairs Ministers, 22–23 Jan 2004.

[36] Above n 30, Art 27(1).

[37] See minutes of evidence by Erica Feller, Director of International Protection, UNHCR, House of Lords European Union Committee, *Handling EU Asylum Claims: New Approaches Examined*, 11th Report of Session 2003–04, HL 74 (Q35).

protection capacity of a host country can be assessed. This has yet to be worked out. In an opinion on RPPs delivered by the European Economic and Social Committee, the following are suggested as suitable indicators of protection capacity and as orientations for a benchmark of effective protection:

— accession and adherence to refugee instruments, including regional refugee instruments and other human rights and international humanitarian law treaties;
— national legal frameworks, such as adoption/amendment of refugee and asylum legislation;
— comprehensive and systematic registration and documentation of refugees and asylum seekers;
— admission and reception of asylum seekers;
— support for self-reliance and local integration.[38]

According to the Commission, indicators of effective protection should be drawn from EU standards agreed as part of the development of the common European asylum system. They should focus on respect for *non-refoulement*, access to a legal procedure, and the possibility of adequate subsistence 'taking into consideration the relevant socio-economic conditions prevailing in the host country'.[39] However, as mentioned above, Community law standards enable some of the important safeguards that attach to asylum claims made in the Member States to be dispensed with and have been criticised for falling short of international law. EU instruments and policies as such have a negative export value. If they are to serve as standards for other states seeking to develop their national asylum systems, they will allow for provisions which enable responsibility for assessing protection needs to be shifted on to other countries, regardless of their capacity to do so. This will have far-reaching consequences for the international refugee protection regime.

UNHCR has warned EU Member States that the establishment of such programmes with specific countries in the region should not lead to 'any precipitous initiatives to declare such countries safe in the absence of acceptable protection safeguards'.[40] However, Member States' 'safe third country' practices and their restrictive interpretation of 'effective protection' entail the disturbing possibility that RPPs may become a reason for refusing asylum claims received in EU Member States and for large-scale returns to the countries concerned. This would negate the potential use of

[38] Opinion of the European Economic and Social Committee, SOC/184, *Managed entry of persons/international protection*, 15 Dec 2004, para 1.6.
[39] COM(2004)410 final, above n 12, para 45.
[40] 'Lubbers outlines ways to better manage [*sic*] refugee problems in EU', *UNHCR news*, 29 Jan 2005.

such initiatives to strengthen the international protection regime, and undermine the claim that such initiatives will represent genuine sharing of responsibility by the EU.

The Current RPP Pilots

In October 2005, the Justice and Home Affairs Council hailed the EU's first step in 'improving access to protection needs and durable solutions for those in need of international protection, as quickly and as close to their home as possible'.[41] The object of this praise was the Commission's September Communication on Regional Protection Programmes.[42] In it the Commission presented its proposals for two pilot schemes. The proposed geographical locus for the first one is Eastern Europe, more precisely the Western Newly Independent States (Ukraine, Moldova, Belarus), a region that has emerged as a clear priority for Member States; the second is to take place in the sub-Saharan African/Great Lakes Region. There is little that can be gauged from the Communication about the precise content of these programmes. General activities listed include projects aimed at the registration of refugees, the establishment of refugee status determination procedures, improving reception conditions, and addressing wider environmental concerns. Neither of the two pilots envisages resettlement. The Commission simply notes a move in several Member States towards *considering* setting up their own national resettlement schemes—a change of approach which is expected to 'contribute substantially to the wider success of Regional Protection Programmes'.[43] The opportunity to bring forward a proposal for a more structured approach to resettlement activities will be examined only after evaluation of these two pilot programmes, which is to be carried out by 2007. The prospects for an EU-wide resettlement scheme ever being agreed look, however, rather bleak judging from the Justice and Home Affairs Commissioner's statement that 'it is difficult to envisage an ambitious initiative in this area'.[44] To entice reluctant Member States, the Commission has proposed to amend the European Refugee Fund so that resettlement under RPPs can be financed substantially by the Community.

[41] Justice and Home Affairs Council, Luxembourg, 12 Oct 2005, Council doc 12645/05 (Presse 247).

[42] Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM(2005)388 final, 1 Sept 2005. The Communication was the response to the Council Conclusions on improving access to durable solutions, of 2 Nov 2004, which invited the Commission to present an action plan for one or more Regional Protection Programmes by July 2005. See above n 23.

[43] *Ibid*, para 7.

[44] Franco Frattini in Eurasylum's Monthly Policy Interviews, Oct 2005.

As to the geographical locus, it is not immediately obvious why RPPs should prioritise a region of transit, rather than one with protracted refugee situations, which they were conceived to address. The Communication seems to suggest that political support by Member States for RPPs depended on the selection of a transit region where a pilot programme would 'allow for rapid and measurable results'.[45] The Western Newly Independent States of Ukraine, Belarus and Moldova are transit countries bordering the enlarged EU. Efforts to establish viable asylum systems in these countries are certainly to be welcomed and, according to UNHCR, needs for capacity building and resettlement exist in these countries. However, there is deep suspicion of and much anxiety about such a programme forming the backdrop to return arrangements under the Asylum Procedures Directive which, as explained above, endorses fairly broad safe third country practices, particularly with regard to neighbouring countries. The link was not lost on UNHCR, whose observations on the Commission's Communication emphasise the need to ensure and maintain access to asylum systems in Europe.[46] The Commission proposes that around €2 million be allocated from the AENEAS financial programme for this pilot in Eastern Europe.

As to the second pilot in the Great Lakes Region, the Communication proposes to focus particularly on Tanzania. Tanzania, one of the poorest countries in the world, hosts Africa's largest concentration of refugees, most of whom require food, shelter, security and a means to survive. The scale of the refugee situation is such that the Commission itself recognises that a pilot RPP, with limited funds and the absence of resettlement from this region, is unlikely to have any lasting impact. This sober view sits uncomfortably with the funding allocated for the protection of refugees in sub-Saharan Africa within the exiting AENEAS programme. The Commission proposes that €4 million be earmarked for action towards durable solutions for refugees in sub-Saharan Africa and a further €5 million for actions linked with migration management.[47] As observed by Oxfam, an organisation with long-standing operational experience in the region, 'more AENEAS funding is allocated to control than protection'.[48]

Unless the Council ensures appropriate sustainable funding for current and future initiatives under the RPPs, it seems very unlikely that RPPs will be effective in addressing protracted refugee situations and contribute to

[45] COM(2005)388 final, above n 42, para 11.

[46] UNHCR, Observations on the Communication from the European Commission to the Council and the European Parliament on Regional Protection Programmes (Geneva, UNCHR, 10 Oct 2005), available at www.unhcr.org/home/RSDLEGAL/436090204.pdf.

[47] COM(2005)388 final, above n 42, para 17.

[48] Oxfam GB Comment on the Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes (Oxford, Oxfam GB, 16 Oct 2005), available at www.ecre.org/eu_developments/debates/OxfamRPP.doc.

durable solutions in the regions of origin. It also seems unrealistic to expect that any evaluation of the success of a pilot programme established in this region can be carried out within the timeframe of 2007 set by the Council. Migration management, on the other hand, may in relatively short timescales have a positive impact in reducing migration flows to the EU and in encouraging returns. Member States' overarching interest in this latter aspect is discernable in the allocation of funding to such programmes, in the geographical preference for their implementation, and in the EU's wider policy towards its neighbours.

THE EU NEIGHBOURHOOD POLICY

Along with EU RPPs, the seeds of an opportunity for enhanced co-operation on asylum and immigration with countries closer to Europe have been sown in the framework of the EU's Neighbourhood Strategy. The Hague Programme underlines the need for intensified co-operation with countries in regions of transit, particularly with those on the southern and eastern borders of the EU. Partnership with countries of transit is to enable them 'better to manage migration and provide adequate protection for refugees'.[49] Support will be provided to those countries 'that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees'.[50] The appropriate framework for these partnerships is to be provided by the European Neighbourhood Policy (ENP). Subsequent discussion in Justice and Home Affairs meetings indicates that EU support measures for countries of transit could be similar to those included in protection programmes for regions of origin.[51]

EU policy-makers have been keen to integrate migration and asylum concerns into relations with their neighbours as a way to address the large-scale immigration flow to Europe through North Africa and the countries of Eastern Europe. The volume of illegal human traffic from these regions to the EU is not only perceived as a substantial drawback to their attempts to 'manage' migration. Member States are also aware of the cost in human lives such trafficking incurs. Non-governmental organisations document that, in the past decade, some 5,000 refugees and migrants have died while attempting hazardous journeys to Europe.[52]

[49] Hague Programme, above n 13, para 1.6.3.
[50] *Ibid*.
[51] See Press Release, 'Informal JHA: The external dimension of European Asylum Policy', 29 Jan 2005.
[52] See 'United for Intercultural Action', Information Leaflet No 24, 16 June 2004.

The ENP was first outlined by the Commission in its Communication on Wider Europe of March 2003.[53] It is meant to provide a framework for a new range of policies in the EU's relations with countries at the east and south of Europe. Neighbour countries identified are those on the new land borders of the enlarged EU—Ukraine, Moldova and Belarus—and the southern Mediterranean countries of Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia. The ENP was further extended to the countries in the southern Caucasus (Armenia, Azerbaijan and Georgia).[54] The EU has existing agreements and relations with all but two of these countries, Belarus and Libya, which have in fact been the subject of EU sanctions.[55] Many of them are also major transit countries for migrants to the EU.

The overall goal of the ENP is to work with the partner countries to reduce poverty and create an area of shared prosperity and values based on free trade, deeper economic integration, intensified political and cultural relations, enhanced cross-border co-operation and shared responsibility for conflict prevention and resolution. The strategy worked out by the Commission is to offer various incentives (such as preferential trading relations and a stake in the EU internal market) in return for concrete progress made by partners in the field of political and economic reform, and for enhanced co-operation in defined areas, such as Justice and Home Affairs.[56] A set of priorities within key areas is set out in action plans agreed with each partner country and will guide the financial support provided by the EU to the relevant countries. Action plans are also to contain a number of priorities intended to strengthen commitment to shared values. These include strengthening democracy and the rule of law, and respect for human rights and fundamental freedoms—the key objectives of the EU's external policies.[57] Existing financial assistance to these countries will be complemented from 2007 onwards by the European Neighbourhood and Partnership Instrument (ENPI).[58]

[53] Communication from the Commission to the Council and the European Parliament, Wider Europe Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM(2003)104 final, 11 Mar 2003.

[54] See Presidency Conclusions, Brussels European Council, 17–18 June 2004, para 64.

[55] See KE Smith, 'The Outsiders: the European Neighbourhood Policy' (2005) 81 *International Affairs* 757, at 759.

[56] Commission Communication, European Neighbourhood Policy: Strategy Paper, COM(2004)373 final, 12 May 2004.

[57] *Ibid,* at 13.

[58] Proposal for a Reg of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument, COM(2004)628 final, 29 Sept 2004. ENPI will replace current funding to countries of the south and eastern Mediterranean and southern Caucasus through MEDA and TACIS. This instrument will also support the EU's strategic partnership with Russia. For the next budgetary period (2007–13), approximately €12 billion in EC funding will be available, an

The Commission indicates that, within the area of Justice and Home Affairs, 'border management is likely to be a priority in most Action Plans' and that such plans 'should also reflect the Union's interest in concluding readmission agreements with the partner countries'.[59] Joint measures to strengthen the refugee protection capacity of the countries in question are not identified as a priority issue. This was, however, identified as a clear problem area in earlier reports by the Commission on the state of co-operation and dialogue with specific countries in the neighbourhood and has been a constant source of concern for international human rights organisations.[60] Some of the countries concerned never acceded to the Refugee Convention;[61] other countries, although parties to the Convention, lack a basic protection mechanism, which implies that almost any asylum seeker will move on from those countries to seek protection elsewhere. Co-operation on migration is seen by the EU as an essential area of interaction, for instance, with Libya and the reason for its prospective inclusion in the ENP. Several organisations have reported that asylum seekers and migrants, who live or are in transit in Libya, particularly if they come from sub-Saharan Africa, suffer violence by the police, arbitrary detention and deplorable detention conditions. It is common for people to be turned away or expelled to countries like Somalia or Eritrea, where their lives are at risk.[62] The Italian government's collective removal in October 2004 of several hundred migrants and asylum seekers to Libya, without an individual examination of their case, has appalled organisations in Europe and triggered a request to the Commission to open proceedings against Italy for alleged violation of Community law.[63] Libya, which is not a signatory to the Refugee Convention, in turn deported these migrants to Egypt and Nigeria. In May 2006, Italian lawyers instituted proceedings before the ECtHR on behalf of a group of 83 asylum seekers who were

increase of 32% in real terms. Information on funding is available at http://ec.europa.eu/world/enp/funding_en.htm (accessed on 20 Oct 2006).

[59] COM(2004)373 final, above n 56, at 17.

[60] See, for instance, in relation to Tunisia, the Commission Staff Working Paper on intensified co-operation on the management of migration flows with third countries, SEC(2003)815, 9 July 2003.

[61] As of 1 Mar 2006, Jordan, Lebanon, Libya and Syria had acceded to neither the 1951 Convention nor the 1967 Protocol. See states parties to the Convention and the Protocol at www.unhcr.ch.

[62] 'Libya Blocks Visit by Rights Group—Torture, Political Trials, Treatment of Migrants Remain Major Concerns', Human Rights Watch press release, 7 Dec 2004. For a general critique of current EU externalisation practices, in particular through case studies of conditions in Ukraine and Libya, see Human Rights Watch, *European Union—Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugee*, Oct 2006, available at http://hrw.org/backgrounder/eca/eu1006/.

[63] 'Italian associations file a complaint with the European Commission against Italy's collective expulsion of hundreds of migrants to Libya', *Statewatch news*, available at www.statewatch.org/news/2005/feb/04italy-expulsion-complaint.htm.

victims of forced repatriation to Libya after having been detained in the Lampedusa camp with no possibility of effective access to legal counsel.[64] The Strasbourg Court has declared most of the applications admissible, showing a welcome determination to assess the merits of the conduct of the Italian authorities.

The treatment meted out on sub-Saharan Africans is also of grave concern as regards Morocco,[65] which has been the recipient of a substantial EU grant of €50 million in the framework of the AENEAS programme for financial and technical assistance to third countries for co-operation in controlling immigration flows.[66] As with Libya, the fate of migrants and asylum seekers in transit through Morocco in an attempt to reach Europe is widely documented.[67] One last tragic episode, which gained widespread publicity, occurred in October 2005 when at least 10 people died, allegedly killed by border guards, and hundreds of others, including asylum seekers, were deported and subsequently abandoned in the desert by the Moroccan authorities following their desperate attempts to cross the high fences surrounding the Spanish enclaves of Ceuta and Melilla in northern Morocco. A report by the Commission,[68] which followed a visit to the Spanish enclaves after the tragic events, found that Morocco was making substantial efforts to tackle the problem of illegal migration. This has shown results in the decrease in illegal crossings to the Canary Islands and Spain by sea: 17,252 irregular migrants, mostly from sub-Saharan Africa, were apprehended by the authorities in 2004. The report of the mission, however, also echoes UNHCR's concerns about the way the 1951 Refugee Convention is applied in Morocco:

> There are doubts as to whether Morocco is able to offer in practice effective protection to all those seeking protection inside its territory. Despite the existence of governing legislation, no appellate authority for hearing refugee

[64] See Apps No 10171/05, 10601/05, 11593/05 and 17165/05, *Hussun and Others v Italy,* Decision of 12 May 2006 (Section III).

[65] See the appeal issued on 17 Feb 2005 by two Spanish organisations in relation to the violation of the rights of would-be migrants at the hands of the Moroccan military, translated by Statewatch at www.statewatch.org/news/2005/feb/14sp-morocco.htm.

[66] See F Pastore, 'The Challenge of Trans-Mediterranean Migration', *Media Monitoring Network,* 20 Mar 2004.

[67] See, for instance, L Schuster, 'The Realities of a New Asylum Paradigm', Centre on Migration, Policy and Society Working Paper No 20 (Oxford, University of Oxford, 2005) and the study commissioned by the European Parliament, 'Analysis of the external dimension of the EU's asylum and immigration policies', DT\619330EN.doc, PE 374.366, 8 June 2006. Both examine the implications on the ground of external asylum policies in the two most attractive partners to EU Member States in their drive to control migration, Libya and Morocco. See also H de Haas, *Trans-Saharan Migration to North Africa and the EU: Historical Roots and Current Trends* (Washington, DC, Migration Policy Institute, 1 Nov 2006), available at www.migrationinformation.org/Feature/print.cfm?ID=484.

[68] 'Visit to Ceuta and Melilla—Mission Report. Technical mission to Morocco on illegal immigration', 7–11 Oct 2005, MEMO 05/380, 19 Oct 2005.

> claims appears to have been established and there remains some confusion as to the correct procedure for claiming asylum. UNHCR has been represented in Casablanca since 2002 but the practical implementation of refugee protection remains problematic.[69]

Indeed, according to UNHCR, Morocco has deported many sub-Saharan nationals, some of whom were asylum seekers or were already recognised by UNHCR as in need of international protection. Under such circumstances, one might expect that the refugee and human rights dimension of transit migration should not be ignored in the development and implementation of ENP Action Plans.

In December 2004, the European Commission proposed Action Plans with seven countries that already had agreements in force with the EU: Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia and Ukraine.[70] They have all been formally adopted in the course of 2005. Action Plans with Egypt, Lebanon Armenia, Azerbaijan and Georgia appear to be still under development.[71] The Action Plans contain very long lists of 'priorities for action' across a wide range of areas. They appear in the main to be a list of things to do for the countries concerned, for few concrete rewards in return. Another striking feature is that they reflect a rather ample dose of EU self-interest.[72] Four Action Plans, those with Moldova, Morocco, Tunisia and Ukraine, insist that the neighbours must conclude readmission agreements with the EU. All include measures in the field of immigration control, such as security of travel documents and visas, exchange of information, monitoring of irregular migration flows, training of border officials, etc. None address in any significant way the lack of asylum capacity.

What these Action Plans seek to achieve, in terms of migration policy, is to place the onus on third countries to control movements of their own and other countries' nationals towards the EU. In doing so the Union plays an ambiguous role: on the one hand it considers democratic principles and the respect for human rights as a central component of the dialogue with neighbouring countries and as a condition for developing further relations with them.[73] On the other hand, by requiring these countries to filter

[69] *Ibid,* at 5.

[70] 'European Neighbourhood Policy: the first Action Plans', IP/04/1453, Brussels, 9 Dec 2004.

[71] See http://ec.europa.eu/world/enp/partners/index_en.htm (accessed on 20 Oct 2006). Also Communication to the Commission from Commissioner for External Relations and European Neighbourhood Policy, Benita Ferrero-Waldner: Implementing and Promoting the European Neighbourhood Policy, SEC(2005)1521, 22 Nov 2005.

[72] Smith, above n 55, at 764–5.

[73] See also the recently outlined *Strategy on the external dimension of the area of freedom, security and justice,* COM(2005)491 final, 12 Oct 2005, which was endorsed by the Justice and Home Affairs Council in Dec 2005. The Strategy affirms solemnly that '[t]he development of the area of freedom, security and justice can only be successful if it is underpinned by

migration it runs the risk of favouring the adoption of undemocratic control policies and of prompting violations of human rights law. By urging governments to police the movements of their own populations, they have the effect of delegitimising national authorities in neighbouring countries which, in too many cases, are already weak and lacking in popular support. They potentially expose refugees and migrants in transit countries, where they have no political voice, to serious human rights violations. The result of these policies may well be to fuel corruption and political unrest and destabilise countries on the EU's borders.[74]

The European Union's co-operation and support are vital in developing protection capacities in transit countries. For this reason it is important that the Action Plans issued in the framework of the European Neighbourhood Policy include substantial components on both asylum and migration. The effects of policies that focus exclusively on border control measures and return, without providing safeguards for refugees and asylum seekers and without prior efforts to strengthen third countries' often drastically underdeveloped protection capacity, is potentially capable of frustrating the EU's external policy objectives of fostering stability, rule of law and human rights protection in the regions around the EU.

CONCLUSION

The Hague Programme takes asylum and immigration further into the realm of the EU's relations with third countries by calling for the development of partnerships with countries in transit and source areas of migrants and refugees. Partnerships are meant to address both the management of migration flows and the lack of protection capacity for refugees in the countries concerned. However, the focus so far has been almost exclusively on immigration control measures. In return for trade and aid concessions and through various other incentives, they attempt to establish a series of concentric circles in which states outside the EU play an ever-increasing role in assisting the application of the EU migration management priorities.

The prevailing attitude of encouraging third countries to co-operate in border enforcement measures and to accept returns, particularly of non-nationals, contradicts the premises on which EU partnerships with third countries are supposedly built. Far from contributing to durable solutions

a partnership with third countries on these issues which includes strengthening the rule of law, and promoting the respect for human rights and international obligations': Council doc 14366/3/05 of 30 Nov 2005, at para 1.

[74] See F Pastore, 'Cooperation with Sending and Transit Countries: Beyond Sticks and Carrots?', paper presented at the Dutch Presidency Conference on Asylum, Migration and Frontiers, Sept 2004.

for refugees, they constitute in all but name a measure of containment and a form of burden-shifting which seriously undermines the international refugee protection regime. Moreover, by policing the EU's border from the outside against asylum seekers and their own population, third country governments risk political backlash and breaches of international law which negate the key objectives of the EU's external relations of strengthening democracy, the rule of law and respect for human rights. The consequences and contradictions of EU policy-making in the external dimension of asylum and immigration need to be faced squarely and addressed urgently. Efforts and funding invested by the Community and EU Member States should primarily be directed to help the countries of origin and transit establish an institutional framework that respects human rights and meets the needs of refugees, rather than to ensure co-operation in keeping migrants and asylum seekers out of and away from Europe.

Part III

Borders and the Enforcement of Migration Control

10

The Criminalisation of Migration in EU Law and Policy

RYSZARD CHOLEWINSKI*

INTRODUCTION

THE CLOSE ASSOCIATION between the movement of third country nationals to and within the European Union (EU) and criminality and law enforcement is becoming an unfortunate feature of the developing EU law and policy on migration and asylum. While the free movement of EU citizens and their family members is an important rationale of the EU project and is promoted and celebrated, the movement of third country nationals is often viewed in a considerably more negative light, whether it is in the context of their admission or non-admission to the EU, their presence on the territory of EU Member States, including their capacity to integrate, and their return or expulsion.

This chapter traces the treatment of third country nationals in EU law and policy first in a historical context to demonstrate that co-operation among EU Member States and common action aimed at combating criminality have always been juxtaposed alongside migration issues, in particular asylum and irregular migration. The usage of terminology, particularly the terms 'illegal' migration or even 'illegals', constitutes a contributory factor in the construction of the migrant from outside the EU as someone to be suspected and not to be trusted. The chapter then examines some elements of the criminalisation of migration with a focus on the legally binding measures adopted since the communitarisation of

* This chapter is written in my personal capacity and does not necessarily reflect the views of the International Organisation for Migration (IOM). Any errors or omissions remain my own. The first version of this chapter was a paper I presented at the ILPA, British Institute for International and Comparative Law and JUSTICE Conference on 'How Much Freedom, Security and Justice? Developments in EU Asylum and Immigration Law', 13–14 May 2005, and was written while I was Reader in Law at the Faculty of Law at the University of Leicester. I wish to express my gratitude to the University for granting me study leave during which that paper was completed.

asylum and migration matters. Some of these measures deal directly with criminality by defining criminal offences and setting minimum and maximum penalties on those actors and intermediaries who facilitate unauthorised migration, such as transport carriers, traffickers and smugglers, whereas the criminalisation of migration is a rather more discrete concept in other measures. Given that other chapters in this volume address the questions of asylum and detention, this chapter focuses mainly on irregular migration, although it briefly discusses 'social sanctions' in respect of the reception and treatment of asylum seekers and refugees.

'Criminalisation' in this chapter is understood not only in the narrow dictionary sense of 'making an activity illegal'[1] by the imposition of penal sanctions on the migrant where there were none previously, or to reflect the increased involvement of international criminal groups in irregular migration movements, but more broadly to encompass the culture of suspicion and distrust surrounding the movements of third country nationals, and irregular migrants in particular. To a certain degree, this culture of distrust has been generated and then reinforced by the developing EU migration law and policy, particularly in the adoption of measures that stigmatise migrants, in the absence of a more principled approach based on detailed human rights guarantees.

BACKGROUND

The juxtaposition of migration with criminal matters and policing in the broader EU context has a relatively long history. Indeed, the 'TREVI' group, established in 1976 and considered to be the forerunner for inter-governmental co-operation on asylum and immigration between the interior ministries of EU Member States,[2] began operating in the context of the prevention of trans-border crime. Asylum and immigration, as matters that also transcended borders, were subsequently considered as suitable and logical additions to this portfolio. It is not surprising, therefore, that many of the measures adopted by European immigration ministers during the period of ad hoc inter-governmental co-operation were generally repressive in content and mainly concerned co-operation regarding expulsion, the prevention of illegal employment, etc.[3] Parallel developments taking place among the Schengen states at this time also considered

[1] *Compact Oxford English Dictionary*, 2nd edn (Oxford, Oxford University Press, 2003).

[2] Cf T Bunyon, *Secret and Openness in the European Union: The Ongoing Struggle for Freedom of Information*, available at http://www.freedominfo.org/case/eustudy/index.html, ch 2.

[3] A core measure adopted at this time was the Recommendation of EC Ministers responsible for immigration of 30 Nov 1992 regarding practices followed by Member States on expulsion, doc SN 4678/92, WGI 1266. With regard to illegal employment see EC

migration and criminal matters together. The Schengen Implementing Agreement (SIA), now partly incorporated into the Community pillar,[4] is a clear example of this approach, although it is sub-divided into sections dealing with internal and external border controls, responsibility of states for determining asylum applications (now defunct in the light of the Dublin Convention and the subsequent 'Dublin II' Regulation[5]) and police and criminal co-operation. However, the area where there is the closest relationship between migration and criminal matters is the Schengen Information System (SIS) containing alerts about objects (associated with criminal activity) and aliens (third country nationals), who are considered a threat to the public policy or national security of an EU Member State.

In contrast with Schengen developments, the introduction of formal inter-governmental co-operation between EU Member States' governments in the field of Justice and Home Affairs under the Maastricht Treaty made no distinction between migration issues (asylum; rules governing the crossing of external borders; and immigration policy regarding third country nationals) and co-operation in criminal and judicial matters as well as police co-operation for the purpose of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.[6] While this co-operation took place formally under the auspices of the EU, the same actors (interior ministries) were mainly involved and the content of the essentially 'soft law measures' on non-asylum matters adopted during this period differed little from the repressive measures adopted previously by EU Immigration Ministers and focused on prevention of illegal employment, facilitation of expulsion and readmission.[7]

Ministers responsible for immigration, Recommendation of 25 May 1993 concerning checks on and expulsion of third country nationals residing or working without authorisation, doc SN 3017/93, WGI 1516.

[4] Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990 (hereinafter Schengen Implementing Agreement—SIA). For the text of the Convention and the measures adopted thereunder (ie, the Schengen *acquis*) see [2000] OJ L 239/1. See also Protocol No 2 integrating the Schengen *acquis* into the framework of the European Union [1997] OJ C 340/1.

[5] Council Reg 243/2003/EC of 18 Feb 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national [2003] OJ L 50/1.

[6] Art K.1 of the former Treaty on European Union. The only difference was one of competence. The Commission was not able to advance proposals under Art K.1 in relation to judicial co-operation in criminal matters and police co-operation: *ibid*, Art K.3(2).

[7] See respectively Council Recommendation of 22 Dec 1995 on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control [1996] OJ C 5/1 and Council Recommendation of 27 Sept 1996 on combating the illegal employment of third country nationals [1996] OJ C 304/1; Council Recommendation of 30 Nov 1994 concerning the adoption of a standard travel document for the expulsion of

A clearer split between migration and policing and criminal matters was achieved under the Amsterdam Treaty, whereby asylum and immigration were transferred to the first or Community pillar (Title IV of Part III of the EC Treaty) and policing and criminal matters were left in the revised third pillar (Title VI of the Treaty on European Union). Although this was an important development, it should be recalled that the normal Community method for decision-making and the role of the Court of Justice were altered in order to accommodate this transfer. Moreover, not all the Member States wished to follow this route, with the result that Ireland, the United Kingdom and Denmark secured Protocols opting out of these provisions.[8] Nevertheless, the former two countries retained opt-ins, which have since been widely used, particularly with regard to the measures on asylum and irregular migration, while Denmark, as a state participating in the former Schengen arrangements, remains involved in EU measures building on the Schengen *acquis*. Clearly, the rationale for the division between these two areas by virtue of the Amsterdam amendments was not connected with the subject-matter of this chapter, namely a principled attempt to dissociate migration from criminality and policing, but chiefly for practical reasons, given that Member States were not prepared at this stage to undertake a bolder harmonisation of their criminal laws. However, this division also resulted in some practical legal hurdles as some of the measures subsequently adopted concerned with the identification of a common approach to defining the scope of criminal offences and penalties for human traffickers or those who facilitate irregular migration (migrant smuggling) straddle both the first and third pillars. These measures are discussed in more detail below.

The Constitutional Treaty, the acceptance of which may have been irretrievably affected by the 'no votes' in referenda in France and the Netherlands in 2005, would have brought together migration policies, judicial co-operation in criminal matters and police co-operation under the same general legal framework.[9] While this, arguably, reflects a greater

third country nationals [1996] OJ C 274/18; Council Recommendation of 22 Dec 1995 on concerted action and co-operation in carrying out expulsion measures [1996] OJ C 5/3; Council Recommendation of 30 Nov 1994 concerning a specimen bilateral agreement between a Member State and a third country [1996] OJ C 274/20, Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements [1996] OJ C 274/25 and Council Decision of 2 Dec 1999 on the consequences of the Treaty of Amsterdam on readmission clauses in Community agreements and in agreements between the European Community, its Member States and third countries, doc 13409/99.

[8] See Protocol No 3 on the application of certain aspects of Art 14 to the UK and to Ireland, Protocol No 4 on the position of the UK and Ireland, and Protocol No 5 on the position of Denmark (1997) [1997] OJ C 340/1.

[9] Treaty Establishing a Constitution for Europe [2003] OJ C 169/1, Pt III, Ch IV (area of freedom, security and justice), Section 2 (policies on border checks, asylum and immigration), Section 4 (judicial co-operation in criminal matters) and Section 5 (police co-operation).

readiness among Member States to approximate their laws and to work together in the post-September 11 security-oriented climate, it also signals a return to a more marked association between migration and criminality.

TERMINOLOGY

The use of terminology is crucial in shaping the debate on migration, particularly when sensitive political issues relating to immigration at the national level are concerned. For example, the failure to explain the legal distinction between persons seeking asylum and economic migrants in debates at the national level is often at the heart of negative public and media perceptions of these groups, with the result that the political response to address this discontent is invariably a disproportionate one. The perception of irregular migrants is also shaped by the current terminology in use at the EU level. While most organisations with a mandate on migration have now adopted a more neutral terminology by referring to migrants with no legal status in the country as 'irregular',[10] the EU institutions and the measures that have been adopted under Title IV of the EC Treaty and Title VI of the EU Treaty persist in using the terms 'illegal migrants' or 'illegal immigration'. Moreover, the more pejorative term 'illegals', often slang usage among officials and practitioners, has also made its way into official EU texts.[11] Presumably, this is not necessarily deliberate, but nonetheless reflects the kind of negative climate in which such texts are frequently discussed. Moreover, illegal immigration is to be 'fought' and 'combated'.[12] The EU is at war with irregular migrants and must gather all its forces to repel the attack. However, this is not merely negative language and the war on irregular migration has indeed resulted in military-type operations on the external borders of the EU, particularly in the Mediterranean and the Eastern Atlantic, with tragic consequences.[13]

[10] See International Labour Organisation (ILO), IOM, and the Council of Europe. With regard to the IOM, the International Migration Law *Glossary on Migration* (Geneva, IOM, 2004) uses the term 'irregular migrant' and 'irregular migration': at 34–5.

[11] See Council Conclusions on the development of the Visa Information System (VIS), Council doc 6534/04, 20 Feb 2004, which state that one of the purposes of VIS is to 'assist in the identification and documentation of undocumented *illegals* and simplify the administrative procedures for returning citizens of third countries': Annex to the Annex, point 1(f), emphasis added. For more on the VIS see below.

[12] See eg Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union [2002] OJ C 142/23 and Draft Council Conclusions on the establishment of a monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration, Council doc 15292/03, 25 Nov 2003.

[13] See L Fekete, 'Canary Island Tragedy: Did the RAF Put Border Security before Human Safety?', *Institute of Race Relations (IRR) News*, Oct 2003. Available at http://www.irr.org.uk/index.html.

The use of this military and negative terminology immediately raises imagery of an enemy, of repeat criminal offenders who habitually violate the law, of 'non-persons' with few, lesser or even no rights. Consequently, the association of migrants with criminality, in the case of irregular migrants in particular, is immediate and unrelenting. It gives no recognition to the fact that for many irregular migrants their first entry into the country was lawful, and that their slide into an unauthorised situation may not have been entirely their fault or that irregular migrant workers, when employed (as they often are), perform valuable tasks of benefit to the national economy. More importantly, it downplays or even overlooks the calmer assertion that every human being has recognition before the law and possesses fundamental human rights, which are protected by major international and regional human instruments, including the European Convention on Human Rights (ECHR), which applies to everyone within the jurisdiction of states parties.[14] Many of these principles are also found in the EU Charter of fundamental rights,[15] which will gain legally binding status if the Constitutional Treaty ever enters into force. Indeed, the Charter may yet have a profound impact on EU asylum and migration law and policy, given the references in the main text of the Charter to values such as 'human dignity'.[16] Such values transcend borders and the categorisation of persons into nationals and non-nationals or lawfully resident and irregular migrants.

LEGALLY BINDING MEASURES: EXTERNAL BORDERS, VISAS AND IRREGULAR MIGRATION

The legally binding EU measures on external border controls, visas and the prevention of irregular migration 'criminalise' migration in a number of ways in the broader sense in which the concept of criminalisation is used in this chapter. Third country nationals are not treated as individuals but as risk categories. Fingerprinting as a means of their identification and of tracking their movements, particularly in the case of asylum seekers and third country nationals who require visas to enter EU territory, is becoming the norm, and is being extended to other groups of persons who cross borders, including EU citizens, in the context of the expanded use of biometric identifiers. Moves to harmonise the scope of criminal offences and penalties in respect of those who facilitate irregular migration has broadened the net of criminality in the narrower sense. The greater

[14] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 Nov 1950, ETS No 5, Art 1.

[15] [2000] OJ C 364/1. See also Pt II of the Constitutional Treaty, above n 9.

[16] *Ibid*, Art 1: 'Human dignity is inviolable. It must be respected and protected.'

emphasis on forced return has led to a series of collaborative measures and actions which may seriously undermine some of the legal safeguards that have traditionally operated in the context of expulsion. Finally, third countries, particularly those in the neighbourhood of the EU, are increasingly becoming targets for the adoption and implementation of repressive EU-type measures, which have tightened controls on the entry, presence and treatment of irregular migrants in those states.

Suspicion is Enough: Profiling

The rules applicable to the refusal of entry and expulsion of third country nationals are much 'looser' than those applying to EU nationals. In other words, third country nationals are treated with far more distrust and suspicion, not as individuals who may pose a specific and identifiable threat but as members of groups that are profiled as risk categories. Consequently, the 'burden of proof' falls on the migrant to demonstrate that he or she is somehow different from the profile of the category with which he or she is identified.

The lack of harmonisation of the rules relating to entry risks the application of unjustifiable distinctions between third country nationals.[17] The rules on crossing external borders in the new Regulation on the Community Borders Code (Schengen Borders Code) oblige Member States to refuse admission to third country nationals to EU territory if they are considered to be a threat to 'public policy, internal security, public health or the international relations of *any* of the [participating] Member States'.[18] The only exception to this exclusionary rule is that Member States may grant entry to the persons concerned on humanitarian grounds, for reasons of national interest or because of international obligations, but this admission has to be limited to that country's territory and the Member State concerned has to inform the other participating Member States.[19] Moreover, entry must also be refused to a third country national in respect of whom a 'hit' has been recorded in the Schengen Information System (SIS) under Article 96 SIA. Under this provision, Member States can enter alerts in respect of those third country nationals who are considered to be a threat to their public order or internal security. Moreover, alerts can also be entered in respect of third country nationals who have been convicted of

[17] See generally R Cholewinski, *Borders and Discrimination in the European Union* (London, Brussels: ILPA, MPG, 2002).

[18] Reg 562/2006/EC of the European Parliament and of the Council of 15 Mar 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1, Art 5(1)(e), emphasis added. The Reg will enter into force on 13 Oct 2006.

[19] *Ibid*, Art 5(4)(c).

a criminal offence carrying the penalty of at least one year's imprisonment or who are seriously suspected of having committed such an offence. Persons who have breached immigration laws can also be entered. Clearly, these rules set a far lower threshold for refusal of entry than those operating in respect of EU nationals entering other Member States, who, in accordance with Article 39 EC Treaty, can be refused entry only on public security, public policy and health grounds which, in line with the free movement principle, have been restrictively interpreted by the Court of Justice. For example, with regard to criminal offenders, the Court's long-established jurisprudence lays down that previous convictions alone are insufficient for refusal of entry or expulsion; what matters is the personal conduct of the individual concerned and whether he or she poses a present and sufficiently serious threat affecting one of the fundamental interests of society.[20] This case law has now been codified in the EU Citizens Directive, which Member States were required to transpose into their legal systems by 30 April 2006.[21] Moreover, with regard to Article 96 SIA alerts, the NGO, Statewatch, reports that the Schengen Supervisory Authority, an independent body established under Article 115(1) SIA and charged with supervising the technical support function of the SIS, has highlighted their inconsistent application by some Member States. First, certain Member States are likely to enter considerably more alerts than others. Indeed, the German and Italian authorities have entered 77 per cent of the 778,886 Article 96 SIA alerts relating to persons in the SIS. Secondly, the reasons for the alerts differ markedly and the SIS includes third country nationals, such as rejected asylum seekers, 'unwelcome migrants', seasonal workers and truck drivers who have failed to pay traffic fines.[22] To say the least, this is a very generous and troubling interpretation of Article 96 SIA criteria. Moreover, it is clearly disproportionate, given that the effect of these alerts is to prevent the individual from entering EU territory, possibly for many years to come.

The new Schengen Borders Code recasts the previous Common Borders Manual as part of the broader project of translating the whole Schengen *acquis* into Community instruments. While this was the first Title IV Treaty EC measure subject to the co-decision-making procedure, thus

[20] See eg Case 30/77, *R v Bouchereau* [1977] ECR 1999, para 28 and Case 36/75, *Rutili v Minister of the Interior* [1975] ECR 1219, para 22.

[21] Dir 2004/38/EC of the European Parliament and of the Council of 29 Apr 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Reg (EEC) No 1612/68 and repealing Dirs 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77; [2004] OJ L 229/35 (Corrigendum), Arts 27 and 28.

[22] Statewatch, 'EU-SIS: Three-quarters of a million 'illegal aliens' banned from Schengen area', *Statewatch News online,* available at http://www.statewatch.org/news/2005/apr/08SISart96.htm.

giving the European Parliament a much more influential role in the legislative outcome, the Code, unfortunately, does not constitute a significant overhaul of the external border rules. It makes no changes to Article 96 SIA or the refusal of entry criteria (formerly Article 5 SIA) with the exception of adding public health to the list. Somewhat oddly, the Commission justified this addition in the Explanatory Memorandum to the proposed measure by noting that public health is a valid ground for refusing entry to EU nationals in Community law,[23] without pointing out that the notion of public health is interpreted very restrictively in the EU Citizens' Directive to refer to diseases with epidemic potential recognised by the World Health Organisation.[24] The Rapporteur of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, who was responsible for considering the Commission's proposal, referred to this inconsistency in his report, and his amendment[25] was taken on board in the final text by the insertion of a definition of public health.[26] However, the other refusal of entry criteria in Article 5 SIA or the flexible application of Article 96 SIA alerts remains essentially the same in the Schengen Borders Code.

The expectation in these rules is that Member States mutually recognise each other's decisions, which is a principle operating in other areas of Community law. However, the principle of mutual recognition is highly inappropriate and suspect in those areas of immigration law where Member States' legal rules are not harmonised to a significant degree and where the consequences of poor decision-making may result in serious human rights implications for the individual concerned. This principle is the basis for the Council Directive on the mutual recognition of decisions concerning the expulsion of third country nationals.[27] While this Directive refers to the need for Member States to act in accordance with human rights guarantees and sets down some ground rules in respect of the decisions to which it applies, these rules still allow for considerable discretion on the part of the competent authorities in Member States to decide which decisions are covered.[28] It would appear, however, that

[23] European Commission, Proposal for a Council Reg establishing a Community Code on the rules governing the movement of persons across borders, COM(2004)391, 26 May 2004, at 17 (Explanatory Memorandum).

[24] Dir 2004/38/EC, above n 21, Art 29.

[25] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Rapporteur: Michael Cashman), doc PROVISIONAL 2004/0217(COD), at 12–13.

[26] Schengen Borders Code, above n 18, Art 2(19).

[27] Council Dir 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L 149/34.

[28] See Art 3(1), where the expulsion decision is based on a 'serious and present threat to public order or to national security and safety' ('conviction of a third country national by the

measures to implement this Directive in Member States are slow in materialising even in the context of a companion Directive compensating Member States for the financial imbalances that may be created as a result of the former Directive's implementation.[29] Indeed, the Commission reported in October 2004 that a number of Member States had still not transposed the Directive by the 2 December 2002 deadline and that 'the impact, ie cases of formal recognition, was almost non-existent'.[30] The Commission has begun infringement proceedings against the Member States concerned, which have already resulted in two judgments of the Court of Justice in September 2005 against Italy and Luxembourg for failure to transpose the Directive within the prescribed time limit.[31]

The failure to consider third country nationals seeking to enter as individuals rather than as members of risk categories is also evident in the EU visa rules. Indeed, the negative or 'black' visa list of countries, the nationals of which require a visa to enter EU territory for short-term visits of not more than three months, is based on the profiling of the countries concerned according to whether persons coming from them are more likely to overstay, and thus become irregular migrants, and also according to public security and policy considerations, which are connected with the likelihood of criminal activity. A further criterion concerns the EU's external relations with third countries taking into account the implications of regional coherence and reciprocity.[32] The rules regarding procedures for

issuing Member State for an offence punishable by a penalty involving deprivation of liberty of at least one year' and 'the existence of serious grounds for believing that a third country national has committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State') or where there is a 'failure to comply with national rules on the entry or residence of aliens'.

[29] Council Dec 2004/191/EC of 23 Feb 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Dir 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals [2004] OJ L 60/55.

[30] European Commission, Annual Report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents, SEC(2004)1349, 25 Oct 2004 at 10.

[31] Cases C–462/04 *Commission v Italy* and C–448/04 *Commission v Luxembourg*, [2005] OJ C 271/10.

[32] Council Reg 539/2001 of 15 Mar 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81/1, Recital 5. With regard to the first criterion, the most recent Commission proposal to amend the visa lists recommends the transfer of Bolivia from the positive to the negative list: 'the information received points to persistent and intense migratory pressure from Bolivia. The effect is being felt in the large number of refoulements at the external borders and in expulsions in several Member States. Nor can the public policy dimension be neglected since detention orders and convictions of Bolivians for criminal offences and illegal immigration are also rising. In addition, nationals of Latin American countries subject to the visa requirement are seeking to circumvent the requirement by fraudulently acquiring Bolivian passports. For all these reasons, the Commission believes that there are good grounds … to transfer Bolivia from Annex II to Annex I': European Commission, Proposal for a Council Regulation amending Reg (EC) No 539/2001 listing the

issuing a visa, which are found in the part of the Schengen *acquis* known as the Common Consular Instructions,[33] also have the capacity for introducing further differentiations among third country nationals depending on their countries or regions of origin, their financial position or social status. These rules have been designed with a view to ensuring uniform decision-making in respect of visa-issuing among EU Member States' consular authorities. However, the ambiguity of some of the provisions,[34] the weakness of local consular co-operation and well-publicised incidents of corruption have undermined any claim that the rules result in fair and consistent decision-making. In July 2006, the Commission proposed to recast the Common Consular Instructions into a Community instrument,[35] which is a somewhat overdue development, particularly as the EU is attaching priority to the introduction of a European Visa Information System (VIS) (discussed below) which, arguably, cannot operate properly without clearer and fairer criteria for issuing a visa in the first place. As these rules stand at present, where third country nationals have been profiled as coming from a risk country in terms of irregular migration or crime, which is enhanced by their weaker financial position or social status (ie students or unemployed persons), the burden lies with them to prove that they will not behave in the way that is expected of them given this status. Crucially, profiling of a similar kind was condemned in December 2004 by the highest court in the UK, the House of Lords, as unlawful direct discrimination on the basis of ethnic origin, in respect of the conduct

third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement, COM(2006)64, 13 July 2006, at 2–3. On the other hand, the Commission also proposes the transfer of a number of small Caribbean states and the Seychelles to the positive list on the basis that 'imposing the visa requirement on nationals of [these] countries is no longer justified by the statistics or other information confirming that the country represents a risk in terms of … in particular illegal immigration and public policy. Nor is maintaining the visa requirement justified in terms of regional consistency or the Union's international relations': *ibid*, at 3.

[33] [2000] OJ L 239/318. A more recent version of the Common Consular Instructions, which include a number of amendments, is available at [2002] OJ C 313/1.

[34] Previously, Art 5(1) SIA did not provide an obligation to admit the third country national who had met all the entry criteria, and noted merely that entry 'may' be granted if the entry conditions are satisfied. It therefore appeared to give residual discretion to refuse entry at the border, even if the third country national arrived with a valid visa, presumably to check that the conditions for issuing the visa were still applicable. While Art 13 of the Schengen Border Code, above n 18, obliges Member States to refuse entry to those third country nationals who do not fulfil the entry conditions laid down in Art 5(1) of the Code and who do not fall within the exceptions in Art 5(4), it stipulates explicitly that 'entry may only be refused by a substantiated decision stating the precise reasons for refusal'. The reasons listed in the standard form for refusal of entry at the border (Annex V, Part B of the Code) are effectively the same as those in Art 5(1), and therefore it is difficult to see how in practice refusal of entry on the basis of other criteria can now be applied.

[35] See European Commission, Draft Proposal for a Reg of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006)403, 19 July 2006.

of immigration officers towards Czech nationals of Roma origin (before the accession of the Czech Republic to the EU) operating at Prague Airport.[36] The background to this operation was the disproportionately high number of asylum applications made by Czech nationals of Roma origin in the UK. Roma passengers were subject to longer and more intrusive questioning at the airport and were far more likely to be refused permission to board the aircraft. One judge in the House of Lords, Baroness Hale of Richmond, underlined that the rationale of anti-discrimination law is to ensure individual treatment and to avoid stereotyping or profiling:

> The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.[37] …
>
> It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong.[38]

Importantly, she also underlined that the avoidance of unlawful discrimination in such circumstances, where there was a high risk of such discrimination, required the provision of specific information and careful instructions to those charged with the activities in question:

> The combination of the objective of the whole Prague operation [ie to prevent asylum seeking] and a very recent ministerial authorisation of discrimination against Roma [see below] was, it is suggested, to create such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this. Officers should have been told that the Directorate did not regard the operation as one which was covered by the Authorisation. They should therefore have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone.[39] …
>
> [S]etting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic

[36] *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55 (judgment of 9 Dec 2004).
[37] *Ibid*, para 74.
[38] *Ibid*, para 90.
[39] *Ibid*, para 89.

> group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.[40]

While UK anti-discrimination law (in this case the Race Relations Act 1976 as amended) extends to discrimination in the immigration sphere, it is possible to 'legalise' discrimination on the basis of ethnic origin in accordance with a Ministerial authorisation,[41] although such a measure was not issued in respect of the operation at Prague Airport. However, the EU Race Equality Directive[42] is more limited in scope and, arguably, would not have applied in the above situation. While the Directive also outlaws discrimination against third country nationals on the grounds of race or ethnic origin, it is without prejudice to conditions relating to the admission and residence of this group.[43]

Fingerprinting, Biometrics and Databases

The introduction of the collection and storage of the fingerprints of various groups of migrants and other biometric identifiers is fast narrowing the gap between law enforcement and migration control. The taking of any personal data constitutes an infringement of the right to private life in Article 8 ECHR unless such action is prescribed by law and is necessary in a democratic society in accordance with the specific reasons set out in Article 8(2) ECHR.[44] The established jurisprudence of the European Court of Human Rights states that such measures must pursue a pressing social need identified by a legitimate aim and be proportionate to that aim. Furthermore, data protection rules adopted at the national level, by the EU in its secondary legislation and the Council of Europe, require that personal data must be collected only for specified and legitimate purposes, not used or processed further in a way incompatible with these purposes, and also be adequate, relevant and not excessive in relation to the purpose for which such data are collected, stored, or further processed.[45]

[40] *Ibid*, para 97.

[41] Race Relations Act 1976, s 19D.

[42] Council Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[43] The Dir is 'without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third country nationals and stateless persons concerned': *ibid*, Art 3(2). See also *ibid*, Recital 13.

[44] See App No 15225/89 *Friedl v Austria*, Opinion of the Eur Comm HR, 19 May 1994. For the right to respect for private life and the protection of personal data see also the EU Charter of fundamental rights, n 15 above, Arts 7, 8 and 52.

[45] See Dir 95/46/EC of the European Parliament and of the Council of 24 Oct 1995 on the protection of individuals with regard to the processing of personal data and on the free

Member States are under a legal obligation to fingerprint asylum applicants of at least 14 years of age and to send these data along with other personal information to the central EURODAC database.[46] They are also required to take the fingerprints of irregular migrants apprehended at the border and may also fingerprint those found present without authorisation in their territory.[47] While the purpose of this data collection and storage is limited to assisting in the inquiry into which Member State is responsible for determining the asylum application in accordance with the responsibility rules in the Dublin II Regulation and to facilitate the latter's application,[48] a more extensive database, the European Visa Information System (VIS),[49] is being prepared which will eventually require the collection of alphanumeric data, photographs and fingerprints from all third country nationals applying for a short-term EU visa.[50] The names and addresses of those EU citizens and third country nationals resident in the EU issuing invitations to visa applicants will also be included in the VIS.[51] The Commission's proposal for the Regulation on the VIS observes that the purpose of collecting and storing such data is concerned with the administration of the common visa policy and facilitating the exchange of data among Member States regarding applications for and decisions on visas with a view to the following: preventing threats to internal security; facilitating the fight against fraud; facilitating checks at the external borders and within the territories of Member States; facilitating the application of the Dublin II Regulation; and assisting in the identification and return of irregular migrants.[52] Moreover, the intention to link this database with other databases, such as the second generation Schengen

movement of such data [1995] OJ L 281/31 (as amended by Reg 1882/2003/EC of 29 Sept 2003 ([2003] OJ L 284/1), Art 6; Reg 45/2001/EC of the European Parliament and of the Council of 18 Dec 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, [2001] OJ L 8/1, Art 4; and Art 5 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 Jan 1981; ETS No 108; entry into force 1 Oct 1985; ratified by 38 states parties, including all the EU Member States.

[46] Council Reg 2725/2000 of 11 Dec 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L 316/1, Art 4.

[47] *Ibid*, Arts 8(1) and 11(1).

[48] *Ibid*, Art 1.

[49] European Commission, Proposal for a Reg of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, COM(2004)834, 28 Dec 2004; Council Dec 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L 213/5; Council Conclusions on the development of the Visa Information System (VIS), above n 11.

[50] Proposal for a Reg concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, above n 49, at 14 (draft Art 3(1)).

[51] *Ibid*, 15 (draft Art 6(4)(f)).

[52] *Ibid*, 12 (draft Art 1(2)).

Information System (SIS II) and EURODAC, with a view to tackling irregular migration multiplies the data protection concerns, given that one of the rationales for such linkages is to provide greater access for law enforcement officials.[53] The European Data Protection Supervisor, in examining the VIS proposal, argues that it does not distinguish clearly between the main purpose of the VIS (ie improvement of the administration of the common visa policy) and its potential benefits (eg prevention of threats to internal security, etc) and, therefore, routine access to the data by law enforcement officials would not be in accordance with this purpose.[54] The establishment of such a huge database, bearing in mind that in 2003, in the pre-EU enlargement era, approximately eight million uniform visas for short-term travel were issued to visa nationals in 11 participating EU Member States and Norway,[55] must be questionable from the standpoint of proportionality. It has been argued that the security to which the SIS is supposed to contribute can be better addressed through improved intelligence.[56] Moreover, the European Parliament's Rapporteur, charged with the examination of the proposal, is by no means convinced that the creation of a database (a centralised system) is necessary to store the biometric data envisaged. She argues that it should be possible, subject to overcoming the technical hurdles, to store the data in a chip in the passport or on a separate document (a decentralised system). The benefits of such an approach would be retention of greater control of personal data by the visa applicant and a substantial reduction in costs for the EU and Member States.[57]

[53] In the Hague Programme on Strengthening Freedom, Security and Justice in the EU, adopted on 4–5 Nov 2005, the European Council 'requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between… [SIS II, VIS] and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals': Presidency Conclusions, Brussels European Council, 4–5 Nov 2004, Bull EU 11–2004, Annex I, point I.29. The Commission Communication appeared in Nov 2005: see European Commission, Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM(2005)597, 24 Nov 2005.

[54] Opinion of the European Data Protection Supervisor on the Proposal for a Reg of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, COM(2004)835 final, [2005] OJ C 181/13, at 6.

[55] See Exchange of Statistical Information on the Issue of Uniform Visas, Council doc 7496/04, 10 May 2004. This figure does not include statistics for the Netherlands and Portugal because the tables for these countries do not specify these totals.

[56] S Peers, 'Key Legislative Developments on Migration in the European Union' (2004) 6 *European Journal of Migration and Law* 243 at 256.

[57] European Parliament, Working Document on the proposal for a regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas: Introduction (Committee on

The collection and storage of personal data, including biometric identifiers, will not only be required in the context of the movement of third country nationals. In the very near future, all new EU passports will require two mandatory biometric identifiers, facial scans and fingerprints, in a chip stored on the passport itself.[58] It has been contended that there is no legal basis for adopting such a provision in EU law and that the additional collection and (subsequent) storage of fingerprints is a disproportionate response to what is required, and thus an unjustified interference with the right to private life in Article 8 ECHR.[59]

Sanctions Against Facilitators of Irregular Migration: A Law Enforcement Context

EU rules have attempted to arrive at a consensus on the nature of criminal offences and the minimum and maximum penalties that should be applicable to human traffickers and migrant smugglers. The measures adopted should all have now been transposed in the laws of Member States.[60] While one of the laudable objectives of these measures is to ensure that EU Member States apply at least the minimum penalties to convictions for trafficking and smuggling offences, with a view to ensuring that no Member State is considered the 'weak link' where criminal organisations can focus their efforts, the broad scope of these offences may well extend to humanitarian organisations and other persons who assist irregular migrants and refugees. The Directive defining the facilitation of unauthorised entry, transit and residence criminalises the provision of intentional assistance to migrants in respect of their unauthorised entry into, transit

Civil Liberties, Justice and Home Affairs: Rapporteur Sarah Ludford), doc, 15 Mar 2005, at 3–4.

[58] Council Reg 2252/2004 of 13 Dec 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L 385/1, Art 1(2). Member States are to apply the Reg within 18 months as regards the facial image and 36 months as regards fingerprints: *ibid*, Art 6.

[59] S Peers, 'The Legality of the Regulation on EU Citizens' Passports', *Statewatch Analysis*, updated 26 Nov 2004, available at http://www.statewatch.org/news/2004/feb/27legal-analysis-EU-biometric-passports.htm.

[60] See respectively: Council Framework Dec 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1 (transposition deadline 1 Aug 2004); Council Dir 2002/90/EC of 28 Nov 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17 (transposition deadline 5 Dec 2004) and Council Framework Dec 2002/946/JHA of 28 Nov 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1 (transposition deadline 5 Dec 2004). See also Council Dir 2001/51/EC of 28 June 2001 supplementing the provisions of Art 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45 (transposition deadline 11 Feb 2003), which sets minimum levels for maximum or minimum fines in respect of transport carriers bringing undocumented passengers into EU Member States.

across and residence within the territory.[61] With regard to unauthorised residence, the assistance must also be for 'financial gain'.[62] Member States are given the discretion to exempt assistance in respect of irregular entry or transit from the imposition of sanctions where the aim of the behaviour is to provide humanitarian assistance.[63] While both offences are qualified by the need for intention and, in respect of unauthorised residence, an economic motive, these provisions have the potential to criminalise a wide range of activities. For example, the provision of accommodation for a nominal sum by family members to a relative from a third country who has overstayed his or her visa would constitute a criminal offence to which there is no defence under EU law. Moreover, it has already been reported that the very existence of a possibility that the assistance non-governmental and charity organisations provide to irregular migrants may engage criminality has resulted in these organisations working less openly and sometimes resorting to illicit methods to assist migrants (eg through the provision of illegal employment), thus increasing the spiral of unlawful activity.[64]

The concern with these measures is that they have all been adopted in an overly law enforcement context. Even the Directive concerned explicitly with the protection of trafficking victims, by issuing to them a short-term residence permit, fits into this rubric.[65] Victims of offences relating to trafficking or, if a Member State agrees to extend the scope of the Directive, victims of action to facilitate irregular immigration (human smuggling)[66] can obtain the residence permit only if the following conditions are satisfied: they are able to demonstrate a clear intention to co-operate with the competent authorities; the co-operation is deemed useful to the investigation or judicial proceedings; and they sever relations with the trafficker/s or smuggler/s.[67] However, such persons have no access to specific protection as victims per se, with the exception of making a claim for asylum or some form of subsidiary international protection.[68] This position differs from that under the Counter-Trafficking Protocol to

[61] Dir defining the facilitation of unauthorised entry, transit and residence, above n 60, Art 1(1)(a).

[62] *Ibid*, Art 1(1)(b).

[63] *Ibid*, Art 1(2).

[64] R Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Strasbourg, Council of Europe 2005) at 53–4 with reference to information provided by the NGO PICUM (Platform for International Co-operation on Undocumented Migrants), available at http://www.picum.org/.

[65] Council Dir 2004/81/EC of 29 Apr 2004 on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities [2004] OJ L 261/19 (transposition deadline 6 Aug 2006).

[66] *Ibid*, Art 3(1) and (2).

[67] *Ibid*, Art 8(1).

[68] *Ibid*, Recital 4.

the UN Convention against Transnational Organised Crime.[69] The Protocol does not make the provision of temporary residence dependent on the victim's co-operation in legal proceedings, and also obliges states parties to consider granting trafficking victims a more secure residence status in appropriate cases,[70] which is more concrete than the rather vague encouragement to Member States in the Preamble to the Directive to consider the possibility of providing wider protection to victims.[71] Consequently, the Council of Europe Convention on action against trafficking in human beings[72] is an initiative to be welcomed because of its human rights focus.

Return Measures

The EU views the return of rejected asylum seekers and irregular migrants as vital to the credibility of a common asylum and migration law and policy. Unfortunately, however, the focus on return has been disproportionate to that given to other important areas, also identified as vital to the credibility of this law and policy, such as the creation of a viable EU policy on the legal migration of third country nationals into EU Member States for the purpose of employment, which is still at a nascent stage of

[69] Protocol to Prevent, Suppress and Punish Trafficking in Persons supplementing the UN Convention against Transnational Organised Crime, UNGA Res 55/25 of 15 Nov 2000. The Counter-Trafficking Protocol entered into force on 25 Dec 2003 and, as of 25 Aug 2006, had been ratified by 103 states parties. The following 20 EU Member States and one EEA country have ratified the Counter-Trafficking Protocol: Austria, Belgium, Cyprus, Denmark, Estonia, France, Germany, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and UK. In July 2006, the Council adopted a decision authorising the Commission to conclude the Convention on behalf of the EU. See Council Dec 2004/579/EC of 29 Apr 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime [2004] OJ L 261/69. While at that time no agreement could be reached on the draft decisions regarding the Counter-Trafficking and Counter-Smuggling Protocols, the Council adopted decisions on 24 July 2006 approving the conclusions of both Protocols. See JHA Council, 2746th Meeting, Brussels, 24 July 2006 (doc 11556/06 (Presse 216)) at 16 and Council doc 11384/06 (14 July 2006).

[70] Counter-Trafficking Protocol, above n 69, Art 7(1) and (2): (1) 'each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or *permanently*, in appropriate cases. (2) In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors' (emphasis added).

[71] Dir on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities, above n 65, Recital 15: 'Member States should consider authorising the stay on other grounds, according to their national legislation, for third country nationals who may fall within the scope of this Directive, but who do not, or no longer, fulfil the conditions set by it, for the members of his/her family or for persons treated as members of his/her family'.

[72] Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, ETS No 197. Just over one year on, Moldova and Romania are the only Council of Europe Member States that have ratified the Convention.

development.[73] The present law and policy on return consist of a mix of both legally binding measures and a 'soft law' approach, which is largely based on the implementation of a Return Action Programme, adopted by the Justice and Home Affairs (JHA) Council in November 2002.[74] This approach has crystallised into intense operational activity involving co-operation between immigration and law enforcement officials in Member States. Conversely, operational activity has also led to the adoption of legally binding measures, such as the Council Regulation on the immigration liaison officers' network,[75] which places on a legal footing co-operation among Member States' immigration liaison officers posted to third countries. The legally binding measures focus on returning rejected asylum seekers and irregular migrants, by way of readmission agreements, to countries of origin or the third countries from which they originally travelled.[76] Co-operation between Member States in, and facilitation of, the expulsion process is another major theme, involving mutual recognition of expulsion decisions,[77] assistance in cases of transit for the purposes of removal by air[78] and the organisation of joint flights.[79] The latter two measures originated in proposals advanced by Member States (Germany and Italy respectively).

[73] In Dec 2005, in response to the invitation of the European Council in the Hague Programme, the Commission presented its Policy Plan on Legal Migration, which defines a road-map for policy-making in this field for the period 2006–9. See European Commission, Policy Plan on Legal Migration, COM(2005)669, 21 Dec 2005. While the explicit recognition of the need in the EU for migrant labour from third countries is a positive development, Member States will have to demonstrate considerable political will and unity of purpose to ensure the speedy adoption and effective implementation of the legally binding measures and actions proposed in the Policy Plan. Clearly, however, preventing and reducing irregular migration remain the priority, although the Commission has recently been more prepared to accept openly that there is an intrinsic connection between both policies: '[a] firm policy to prevent and reduce illegal immigration could strengthen the credibility of clear and transparent EU rules on legal migration … Conversely, the existence of such rules may in itself reduce illegal immigration by offering perspectives to those who may otherwise migrate illegally': European Commission, Policy priorities in the fight against illegal immigration of third country nationals, COM(2006)402, 19 July 2006, at 3, para 11.

[74] Council Return Action Programme, 28–29 Nov 2002, Council doc 14673/02, 25 Nov 2002. See also the EU Plan for Return to Afghanistan, Council doc 15215/02, 4 Dec 2002. For further details on the Return Action Programme, see Ch 11 in this volume.

[75] Council Reg 2004/377 of 19 Feb 2004 on the creation of an immigration liaison officers network [2004] OJ L 64/1.

[76] For a detailed discussion of readmission agreements see S Peers, 'Irregular Migration and EU External Relations' in B Bogusz, R Cholewinski, A Cygan and E Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden/Boston, Mass, Martinus Nijhoff, 2004) 193.

[77] Council Dir on the mutual recognition of decisions on the expulsion of third country nationals, above n 27.

[78] Council Dir 2003/110/EC of 25 Nov 2003 on assistance in cases of transit for the purposes of removal by air [2003] OJ L 321/26 (transposition deadline 6 Dec 2005). See also Council Conclusions of 22 Dec 2003 on assistance in cases of short-term transit by land or sea through the territory of another Member State in the course of effecting of a removal

The dominant element in all these measures concerns the effectiveness and efficiency of returns and the reduction of the costs involved. This is spelt out in the first paragraph of the JHA Council's Return Action Programme:

> The establishment of an effective comprehensive common return policy with regard to third country nationals poses one of the greatest challenges to the European Union in the field of Justice and Home Affairs.[80]

The Directive on mutual recognition of expulsion decisions observes that 'the need to ensure greater effectiveness in enforcing expulsion decisions and better co-operation between Member States entails mutual recognition of expulsion decisions'.[81] Similarly, economy and convenience support co-operation between Member States in removing third country nationals by air:

> Removal by air is increasingly gaining in importance for the purpose of terminating the residence of third country nationals. Despite the efforts of the Member States to give priority to using direct flights, *it may be necessary, from an economic viewpoint or insufficient availability of direct flights*, to use flight connections via airports of transit of other Member States.[82]

The economic and efficiency aspects clearly constitute an important rationale for the Council Decision on the organisation of joint flights for removals, which refers to the call for such measures in the Return Action Programme:[83]

> Removing illegal residents using charter flights usually proves expensive for Member States. Member States could therefore enforce returns more efficiently by organising joint operations where relevant in order to share existing capacities on charter flights. Provided that adequate transit arrangements are established, Member States should on a voluntary basis seek to carry out joint charter flights for returns.[84]

This undue concern given to the economic or costs aspect of expulsion is the disconcerting feature of these measures. The protection of procedural

adopted by a Member State against a third country national in the framework of the operational co-operation among Member States, Council doc 15988/1/03 REV 1, 12 Dec 2003.

[79] Council Dec 2004/573/EC of 29 Apr 2004 on the organisation of joint flights for removals, from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders [2004] OJ L 261/28.

[80] Return Action Programme, above n 74, para 1.

[81] Council Dir on the mutual recognition of decisions on the expulsion of third country nationals, above n 27, Recital 3.

[82] Council Dir on assistance in cases of transit for the purposes of removal by air, above n 78, Recital 2 (emphasis added).

[83] Dec on the organisation of joint flights for removals, above n 79, Recital 3.

[84] Return Action Programme, above n 74, para 36.

and substantive human rights in the expulsion process inevitably costs money and cannot be squared with the underlying political purpose of these measures, which is to ensure that the expulsion of those considered no longer worthy of staying within EU territory occurs as quickly and efficiently as possible. These objectives in themselves clearly serve a further objective, which is deterrence: to send a message to potential irregular migrants (and those who facilitate their entry and stay) that they are likely to be removed quickly and efficiently from EU territory, a message that is, arguably, best transmitted by other returnees. Indeed, the Return Action Programme underlines this aspect of joint return operations: '[t]he development of this practice would not only have financial advantages, but the signal sent would be stronger as well'.[85]

The treatment of migrants as criminals is most visible in the return process. Detention, discussed elsewhere in this volume, often precedes the removal of migrants, especially in cases of forced return. Indeed, forced return is very much the context for most of these measures. The Return Action Programme is unequivocal in this respect:

> Notwithstanding the importance to be attached to voluntary return, there is an obvious need to carry out forced returns in order to safeguard the integrity of the EU immigration and asylum policy and the immigration and asylum systems of the Member States. Thus the possibility of forced return is a prerequisite for ensuring, that this policy is not undermined and for the enforcement of the rule of law, which itself is essential to the creation of an area of freedom, security and justice. Moreover the major obstacles experienced by Member States in the field of return occur in relation to forced returns. Therefore the programme to a large extent focuses on measures facilitating forced returns, although some of the measures are also relevant with regard to voluntary return.[86]

[85] *Ibid*, para 36.

[86] *Ibid*, para 12. This position should be contrasted with the 20 guidelines on forced return adopted by the Committee of Ministers of the Council of Europe on 11 May 2005, available at http://www.accompanydetainees.org/docs/CM%20Forced%20Returns.pdf. Guideline 1 stipulates that '[t]he host State should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.' The JHA Council has adopted a more positive position towards voluntary return in recent Conclusions on this subject (doc 11556/06 (Presse 216), above n 69, at 22–5), where it underlines that 'voluntary return is an important component of a balanced, effective and sustainable approach to the return and, where applicable, reintegration of unsuccessful asylum seekers, individuals currently in the asylum or international protection system but wishing to return and other migrants', although it adds that '[s]uch a balanced approach needs to include the prospect, where appropriate, of enforced return': *ibid*, para 1. More specifically, the Council discusses, inter alia, the establishment of programmes tailored to the circumstances and needs of specific categories of persons (eg those deemed more vulnerable or with special needs); the provision of timely and readily available information on the possibility of voluntary return; and the value of Assisted Voluntary Return Programmes: *ibid*, paras 5–7.

This focus on forced return is also abundantly clear from the Directive on assistance in cases of transit for the purposes of removal by air, which contains a very explicit statement to this effect in the Preamble: '[t]he sovereignty of the Member States, particularly with regard to the use of direct force against third country nationals resisting removal should remain unaffected'.[87] This really is quite a stark and forbidding statement to be found in a measure constituting EU law. Moreover, the Directive expressly authorises persons escorting the migrant from the Member State which has requested transit assistance to use, in addition to self-defence, 'reasonable and proportionate action (ie force) … in response to an immediate and serious risk to prevent the third country national from escaping, causing injury to himself/herself or to a third party, or damage to property'. Such action is possible either in the absence of law enforcement officers or for the purpose of supporting them.[88] The Council Decision on the organisation of joint flights contains a non-binding Annex on Common Guidelines on security provision for joint removal by air, which Member States are obliged to take into account by virtue of Article 8 of the Decision. Somewhat oddly, given that these Guidelines are stated to have no legally binding force, their first provision refers to the legal situation and should, therefore, surely have been included in the text of the Directive.

> Joint flights are organised for illegal residents, who are persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territory of a Member State of the European Union. The organising Member State and each participating Member State shall ensure that the legal situation of each of the returnees for which they are responsible allows for removal.

The last part of this statement is particularly important, given that this measure has been criticised as institutionalising a form of collective expulsion in the EU, which is prohibited without qualification in Article 4 of Protocol No 4 to the ECHR.[89] In *Čonka v Belgium*,[90] the European Court of Human Rights defined collective expulsion as:

> [A]ny measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. *That does not mean, however, that where the latter condition is satisfied the background to the*

[87] Council Dir on assistance in cases of transit for the purposes of removal by air, above n 78, Recital 3.

[88] *Ibid*, Art 7(1).

[89] Protocol No 4 to the ECHR, Strasbourg, 16 Sept 1963, ETS No 46. The Protocol has been ratified by 40 states parties and most EU Member States, with the exception of Greece, Spain and the UK.

[90] App No 51564/99 *Čonka v Belgium*, judgment of 5 Feb 2002, (2002) 34 EHRR 1298.

> *execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No 4.*[91]

Consequently, it appears that the provision of evidence that the case of each person to be expelled has been examined individually might in itself be insufficient to escape a violation of Protocol No 4, particularly in circumstances where the collective implementation of expulsion measures casts considerable doubt on the integrity of the process. Given the risk of collective expulsion in the Council Decision on the organisation of joint flights, it is even more surprising that clearer human rights guarantees, particularly on the procedural level, have not been elaborated in this measure. Moreover it is disconcerting that Member States are placing so much trust in each other's expulsion decisions bearing in mind the actual incidences of such practices in the EU, as indeed condemned by the European Court of Human Rights in *Čonka*.

While all of these measures also stipulate that they are to be implemented with due regard to the Geneva Convention relating to the Status of Refugees and the ECHR (particularly Article 3 concerns) and other international human rights conventions,[92] by and large they only defer to these instruments and the elaboration of a careful human rights framework containing minimum safeguards is patently absent. If detailed provisions on co-operation between Member States' officials and practitioner guidelines relating to expulsion can find their way into these measures, then, by the same token, there is nothing to preclude the inclusion of procedural and substantive safeguards for the affected individual. The Commission and JHA Council, on a number of occasions, referred to the need to adopt Community legislation on a set of common standards on return procedures,[93] although until recently Member States were prepared to push ahead regardless in adopting the type of measures discussed above without this important component. In September 2005, however, the Commission advanced a proposal for a Council Directive containing a number of substantive and procedural safeguards to be observed in the return of third

[91] *Ibid*, para 59 (emphasis added).

[92] Return Action Programme, above n 74, para 13; Council Dir on the mutual recognition of decisions on the expulsion of third country nationals, above n 27, Recital 4 and Art 3(2); Council Dir on assistance in cases of transit for the purposes of removal by air, above n 78, Recital 7 and Art 8; Council Dec on the organisation of joint flights for removals, above n 79, Recital 8.

[93] See European Commission Communication to the Council and the European Parliament on the Hague Programme, Ten Priorities for the next five years. A partnership for European renewal, COM(2005)184, 10 May 2005, at 17, which refers to a proposal on return procedures, due in 2005. See also Return Action Programme, above n 74, paras 15 and 40.

country nationals who are resident in EU Member States without authorisation,[94] including the vexed issue of their detention. Importantly, the draft Directive builds a voluntary return component into the procedure, but has been criticised, in particular by civil society organisations, for advocating that the return of irregular residents should be the governing principle of this measure, without sufficient attention being devoted to other options such as regularisation of the irregular stay.[95] In giving effect to this principle, Article 6 of the draft Directive stipulates unequivocally that 'Member States *shall* issue a return decision to any third country national staying illegally on their territory'.[96] The first indications are that it will be difficult to find consensus among EU Member States on this measure, given the divergent views of key governments.[97]

Criminalising Migrants Outside the EU

The infusion of migration concerns into EU external relations policy, with a view to adopting a more comprehensive approach to migration, appears in practice, however, to be aimed primarily at controlling movements from

[94] European Commission, Proposal for a Dir of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals, COM(2005)391, 1 Sept 2005.

[95] Indeed, large-scale regularisation exercises at the national level, such as the procedure undertaken in Spain in 2005 which resulted in over 690,000 applications for regularisation, have been one of the factors why the Commission, prompted by the JHA Council, has proposed the establishment of a formal mutual information system whereby Member States would be obliged to inform the Commission and other Member States on the national measures they intend to take in the fields of migration and asylum, which may have an impact on other Member States or the EU as a whole. See respectively J Arango and M Jachimowicz, 'Regularizing Immigrants in Spain: A New Approach?', *Migration Information Source*, Sept 2005, available at http://www.migrationinformation.org/Feature/display.cfm?id=331, and European Commission, Proposal for a Council Dec on the establishment of a mutual information procedure concerning Member States' measures in the areas of asylum and migration, COM(2005)480, 10 Oct 2005. On the other hand, the Commission is also planning to launch a study in 2007 on 'current practices, effects and impacts of regularisation measures in Member States' with a view to ascertaining 'whether there is a need for a common legal framework on regularisation at EU level': Policy priorities in the fight against illegal immigration of third country nationals, above n 73, at 78, para 35.

[96] Proposal for a Dir of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals, above n 94, at 15 (emphasis added). In this regard, the Explanatory Memorandum to the draft Dir, at 7, observes that '[a] return decision *must* be issued to any third country national staying illegally' (emphasis added).

[97] UK House of Lords, European Union Committee, 32nd Report, Session 2005–06, *Illegal Migrants: Proposals for a Common EU Returns Policy*, HL 166 (9 May 2006), available at http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/166/166.pdf, at 48, para 140.

countries of origin and ensuring return.[98] This approach has resulted in the export of restrictive EU external border, visa and irregular migration policies to third countries, which seem increasingly to be adopting more draconian laws penalising irregular migrants. For example, a 2003 Moroccan law contains a number of provisions imposing criminal penalties (fines and imprisonment) on migrants crossing the border without authorisation,[99] which appears to have been adopted in response to EU concerns about the transit of irregular migrants through that country.

The increasing co-operation of the EU with neighbouring countries on migration matters raises a number of important human rights concerns. A pertinent example involves the developing EU relations in this area with Libya, which have been criticised by NGOs in view of the lack of protection in that country for refugees, the treatment of irregular migrants and a generally poor human rights record.[100] The focus of relations is connected with the growing transit migration in that country, the resulting irregular migration in the Southern Mediterranean, particularly to Italy, and its impact on the EU's southern external border. These concerns have been highlighted in the Commission's report on the *Technical Mission to Libya on Illegal Immigration*, conducted towards the end of 2004:

> The Libyan authorities estimate the number of legal foreign workers at 600,000 while illegal immigrants are estimated to number between 750,000 and 1.2 million. The Libyan authorities recognise that flows in and out of Libya are poorly controlled and not well known. It is estimated that each year, between 75,000 and 100,000 foreigners enter Libya.
>
> It is unquestionable that Libya is a destination country. … But Libya has now also emerged as a major transit country towards Europe for illegal immigrants. According to available data, the recent trend shows a sharp rise in illegal immigration through the Sicily Channel and strengthening of the Libyan transit route.
>
> Illegal immigration, in particular originating from sub-Saharan Africa is clearly perceived by the Libyan authorities as a growing threat with the dimension of a national crisis, with various political serious consequences. Migrant smuggling networks are operational in the region. Authorities are concerned about the management of this situation and its possible negative consequences. From an EU perspective, the situation is also of very serious concern; the emergence of

[98] However, the content of this approach in recent EU documents is much broader. Eg, see most recently European Commission, Migration and Development: Some Concrete Orientations, COM(2005)390, 1 Sept 2005.

[99] Loi 02–03 relative à l'entrée et au séjour des étrangers, à l'immigration irrégulière [Law 02–03 on the admission and residence of foreigners and irregular migration].

[100] See, eg, Amnesty International, EU Office, *Immigration Co-operation with Libya: The Human Rights Perspective: Amnesty International briefing ahead of the Justice and Home Affairs Council* (14 Apr 2005), available at http://www.amnesty-eu.org/static/documents/2005/JHA_Libya_april12.pdf.

> Libya as a transit country is a new factor that contributes to increasing pressure on EU external borders in the Mediterranean sea.[101]

The report also describes the following problems in Libya regarding the treatment of refugees and irregular migrants:

> Libya has not signed the 1951 [Geneva] Convention on asylum, but has ratified the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. While the Libyan Government clearly foresees the protection of refugees, the Libyan authorities seem reluctant to recognise the refugee dimension given their serious concern that the introduction of legal and formal distinction between asylum seekers and economic migrants would result in an unmanageable situation. Consequently, in practice no refugee policy exists. There is an UNHCR office in Tripoli, but it has no official status and cannot exert its role adequately.
>
> Libya is now pursuing a return policy for foreigners residing illegally in the country. The mission visited various reception camps of different nature, and a main focus of the management of illegal immigration seems to be put on organising repatriation operations. The decision to return illegal immigrants seems to be taken without due consideration to detailed examination at an individual level. No information on specific procedures and criteria for detaining individuals was provided by the Libyan authorities. Conditions of detention in different sorts of camps visited vary greatly, from relatively acceptable to extremely poor. In 2004, Libyan authorities repatriated 54,000 illegal immigrants of various nationalities, and there is a significant increase in nationals originating from sub-Saharan African countries and Egypt.[102]

Clearly, any further progress regarding EU–Libyan co-operation to prevent irregular migration without the instigation of measures to address the problem areas identified must raise serious concerns given these conditions as described in the Commission's own report. Indeed, the European Parliament alleged in April 2005 that the activities of Italian authorities in expelling irregular migrants to Libya fall foul of recognised human rights and refugee standards, which was then followed by a complaint by a number of NGOs to the Commission[103] and complaints by 87 individuals

[101] European Commission, Technical Mission to Libya on Illegal Immigration, 27 Nov– 6 Dec 2004: Report (2005) at 1–2 (Executive Summary). This document is attached to Council doc 7753/05 (4 Apr 2005), but is not available from the Council's register of documents. However, it is accessible (unofficially) from http://stranieriinitalia.com/briguglio/immigrazione-e-asilo/2005/maggio/rel-comm-tecnica-libia.html#_ftn1, which is an Italian web portal providing information on and for migrants.

[102] *Ibid*, at 2.

[103] European Parliament Resolution of 14 Apr 2005 on Lampedusa which, inter alia, '[c]alls on the Italian authorities and on all Member States to refrain from collective expulsions of asylum seekers and "irregular migrants" to Libya as well as to other countries and to guarantee that requests for asylum are examined individually and the principle of *non-refoulement* adhered to' (para 1). See also Amnesty International, above n 100, at 3; and 'Ten European associations file a complaint with the European Commission against Italy's

before the European Court of Human Rights, which the Court declared admissible in May 2006.[104] Moreover, the Commission's report observes that '[i]n 2003, Italy also supported the construction of a reception centre for illegal immigrants in Libya, and the construction of additional camps is planned'.[105] This statement corresponds to concerns that the creation of a so-called 'proper immigration infrastructure' in countries neighbouring the EU often goes hand in hand with the establishment of additional detention facilities. The report also refers to the implementation of a programme of charter flights to repatriate irregular migrants from Libya to their countries of origin, and a list of these flights is provided in an Annex.[106]

It should be emphasised, however, that, given the concerns raised over EU co-operation with Libya on migration matters, the Commission's report does not wholly ignore human rights concerns:

> The political will that exists in Libya and within the EU to develop co-operation on illegal immigration should be transformed as soon as possible into concrete actions, implemented within the framework of a global approach. Such co-operation should be aimed at establishing the effective framework for managing migration flows, while fully respecting the human rights of those concerned.[107]

It is also recognised in the Commission's document that the development of a comprehensive policy on migration in Libya with the support of the EU requires respect for the Refugee Convention, the ability of the UNHCR fully to exercise its mandate in Libya and the full implementation of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[108] Elsewhere in the document, in outlining how specific co-operation with Libya should be developed, the report refers to the need for capacity-building training initiatives, which would include 'specific training on human rights', although this is listed alongside training in 'basic investigation techniques, [and] on treatment of the information and risk analysis for staff working … for the new department dealing with illegal immigration and networks of smugglers'.[109] Moreover, training in human rights is not identified as an 'urgent need' in comparison to 'courses

collective expulsion of hundreds of migrants to Libya', *Statewatch News Online*, available at http://www.statewatch.org/news/2005/feb/04italy-expulsion-complaint.htm.

[104] App No 11593/05, *Salem and others* v. *Italy*, App No 10171/05, *Hussun and others* v *Italy*, App No. 10601/05, *Mohamed and others* v. *Italy* and App No 17165/05, *Midawi* v *Italy*, ECtHR (admissibility dec of 11 May 2006).

[105] Technical Mission to Libya on Illegal Immigration, above n 101, at 10–11.

[106] *Ibid*, at 10. Annex 2 lists the Charter flights and notes that 5,688 foreigners were expelled from Libya in this way between Aug 2003 and the end of 2004. Most of the flights left for Ghana and Nigeria.

[107] *Ibid*, at 12.

[108] *Ibid*.

[109] *Ibid*, at 13, 14.

on document forgery as well as on the use of basic informatics equipment'.[110] It should also be noted that the reference to human rights in the report is rather selective. In common with some of the recent EU legal measures discussed above, no detailed human rights safeguards are proposed, although clearly the focus should be on ensuring protection for refugees, not repatriating migrants to their countries of origin or third countries without proper consideration of their individual situations (thus also guarding against collective expulsion) and improving the very poor conditions in a number of detention centres. Moreover, there is no reference in the Commission's report to the UN Convention on Migrant Workers, which contains a whole part devoted to the protection of the rights of *all* migrant workers and their families, including irregular migrants.[111] Given that Libya ratified this Convention on 18 June 2004, a few months before the visit of the Commission's technical mission, some communication between the representatives of the EU mission and the Libyan authorities on this topic might have been expected although, given the general lack of knowledge about the Convention, it is possible, of course, that the subject was not broached at all.

Another concern identified in one of the Annexes to the report concerns a case study on possible co-operation on irregular migration with Libya's neighbours, in particular Niger, which borders Libya and which is an important source and transit country.[112] The report relates the position of the Niger government on this question. The government underlines the poverty of the country and the fact that migration movements are a source of revenue, both legitimate and otherwise, to individuals who benefit from transactions with irregular migrants passing through the territory. Indeed, most African migrants who transit Niger come from countries belonging to the Economic Community of West African States (ECOWAS) and are, therefore, authorised to cross the borders of Niger without a visa. Moreover, the government is keen to maintain good relations with its southern neighbours because of the need to ensure access to port facilities. Despite this position, the case study suggests a possible reason for co-operation with the Niger government by observing:

[110] *Ibid*, at 14.

[111] International Convention on the Rights of All Migrant Workers and Members of Their Families, UNGA Res 45/158 of 18 Dec 1990, Pt III. 35 countries have ratified the Convention: Algeria, Azerbaijan, Belize, Bolivia, Bosnia-Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syria, Tajikistan, Timor-Leste, Turkey, Uganda and Uruguay. However, not one EU Member State has ratified or signed the Convention, which entered into force on 1 July 2003.

[112] Technical Mission to Libya on Illegal Immigration, above n 101, Annex 15.

> [S]ince there is Government concern about rebels in the North of Niger and international concern about possible terrorist links, this could offer a ground for a common understanding of the desirability of control and of addressing the issue of illegal immigration.[113]

The case study also implies that incentives can be created to ensure access to the sea, and thus trading opportunities, through the North:

> Niger would be interested in a stronger dialogue with the countries to the North and would be open to this being a means to address immigration issues. Niger would like to have more formal trading with the North and indeed with Europe through the North. While at present Niger has little to offer, she should be interested in the idea of being connected to Europe via the North rather than through the ports of West Africa to the South.[114]

The tone of the Annex is disquieting because it implies that the EU can use its economic leverage to persuade the Niger authorities to impose greater restrictions on the 'troublesome' migration from West Africa, which would also lead to a reorientation of that country's foreign relations in the ECOWAS zone. The impact such restrictions may have on the migrants themselves, the citizens of the country or the wider development concerns, a supposed key factor in linking migration to development issues in EU policy,[115] is not addressed in this brief case study.

The reduced emphasis on human rights and development concerns in this report is endemic to EU policy on irregular migration despite the rhetoric often associated with it. On 14 April 2005, the Commission's report on the Technical Mission to Libya was presented to the JHA Council, which conducted an initial exchange of views. The EU Presidency welcomed Libya's co-operation[116] and the Council returned to this issue at the beginning of June 2005 when it adopted Conclusions on initiating dialogue and co-operation with Libya on migration issues.[117] In these Conclusions, the Council:

> Underlines that co-operation between the EU and third countries is guided by the principles of full respect for human rights, respect for democratic principles, the

[113] *Ibid*.
[114] *Ibid*.
[115] See Migration and development: some concrete orientations, above n 98.
[116] JHA Council Meeting, Luxembourg, 14 Apr 2005, Council doc 7721/05 (Presse 74) at 13.
[117] Conclusions on initiating dialogue and co-operation with Libya on migration issues, Council doc 9796/05 REV 1, 6 June 2005. The Commission reported in July 2006 that it has been working to establish a 'technical ad hoc dialogue' with Libya on irregular migration; that a high-level meeting took place in June 2005 leading to agreed minutes on the priority areas for co-operation; and that further meetings were held in early 2006: European Commission, Second Annual Report on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Border Controls, and the Return of Illegal Residents, SEC(2006)1010, 19 July 2006, at 6.

> rule of law and the demonstration by those countries of a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees or other relevant international conventions.
>
> Calls on the Libyan authorities to demonstrate a genuine commitment to fulfil their obligations under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which recognises that the Geneva Convention on Refugees constitutes the basic and universal instrument relating to the status of refugees and which requires effective co-operation with the UNHCR and the respect of the principle of 'non-refoulement'. Invites the Commission to explore ways in which the Libyan authorities could be assisted in fulfilling their obligations.
>
> Agrees to launch an ad hoc dialogue on migration issues between the EU and Libya and to gradually develop concrete co-operation on such issues with the Libyan authorities. The extent and development of such a co-operation will depend on Libya's commitments on asylum and fundamental rights as stated above.[118]

These are positive statements that are further buttressed by the recognition that the exploration of 'possibilities of co-operation in the field of return of illegal immigrants to Libya, fully respecting human rights and ensuring the sustainability of such returns' is identified as a medium-term objective in discussions with Libya,[119] although, arguably, this is something that should be pursued at the outset.

Indeed, it remains difficult to see how co-operation on the prevention of irregular migration can take place without first the establishment and implementation of a transparent legislative and administrative framework ensuring the full application of the Refugee Convention, the African Refugees Convention and other human rights instruments, which Libya has already ratified, including the UN Convention on Migrant Workers. Successful EU action in this field would be a far worthier legacy to leave to third countries.

Criminalisation of migration to third countries is also directly evident in the EU accession process with regard to the candidatures of Bulgaria and Romania. Implicit EU support for the draconian free movement restrictions and sanctions imposed on those Bulgarian and Romanian nationals who are readmitted to their countries after being detected in the EU for overstaying or illegal working is noted in the Commission's reports, which resulted in the transfer of these countries from the 'negative' to the 'positive' visa list, as well as in the Commission's Regular Reports on the progress of Bulgaria and Romania towards accession. The restrictions are concerned with exit controls, the confiscation of the passports of such

[118] *Ibid*, points 2–4.
[119] *Ibid*, Annex (Suggestions for exploratory discussions with Libya).

migrants for a period of up to five years, and sanctions, including imprisonment of between three months and three years.[120] A closer examination of the Romanian law reveals that the substantive and personal scope of the criminal offence is broad. The offence is defined as 'the entering or leaving a foreign state by the illegal crossing of its borders' and can be committed by a Romanian citizen or 'by a person without citizenship resident on the Romanian territory'. Attempts to commit this offence are also punishable under the law.[121] Such measures are very unlikely to constitute a proportionate limitation on the right to leave one's own country, found in Article 2(2) of Protocol No 4 to the ECHR and Article 12(2) of the International Covenant on Civil and Political Rights, instruments ratified by both of these countries.[122] This argument is supported by the very large numbers of persons caught by such measures, recorded in the Commission's 2004 Regular Report in respect of Romania, which notes that 'the number of Romanians who were not permitted to exit the country almost tripled from 417,969 in 2002 to 1,216,625 in 2003.'[123] The tone of approval in the report for these figures is another indication of the apparent unwillingness to consider the human rights concerns. It would appear that the political advantages at the national level of visa-free regimes for these countries in their relations with the EU and with a view to ensuring a smooth accession process have connived with EU acquiescence seriously to undermine fundamental human rights and to criminalise a considerable number of migrants, past and potential, while in their home country. In contrast, the 2005 Report of the Commission on Turkey's progress toward accession does not refer to any similar measures, although it mentions that 955 organisers of irregular migration were

[120] See European Commission, Report to the Council regarding Bulgaria in the perspective of the adoption of the Regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt of that requirement, COM(2001)61, 2 Feb 2001, i; European Commission, Intermediate Report on Visa Issues (Romania), COM(2001)61, 2 Feb 2001, ii; European Commission, Report from the Commission to the Council—Exemption of Romanian Citizens from Visa Requirement, COM(2001)361, 29 June 2001; European Commission, 2003 Regular Report on Romania's progress towards accession, SEC(2003)1211/1, 5 Nov 2003, at 105.

[121] Government of Romania Emergency Ordinance 112/2001 referring to the punishment of some actions committed outside the territory by Romanian citizens or by persons without citizenship resident in Romania.

[122] On the proportionality point see the recent judgment of the ECtHR in App No 46343/99, *Riener v Bulgaria*; judgment of 23 May 2006, in which the Court ruled that a travel ban imposed on the applicant possessing dual Austrian and Bulgarian nationality for a tax debt was disproportionate under Art 2(2) of Protocol No 4 to the ECHR because of its automatic nature and indeterminate duration. I am grateful to Steve Peers for bringing this case to my attention.

[123] European Commission, 2004 Regular Report on Romania's progress towards accession, SEC(2004)1200, 6 Oct 2004, at 124. This question, however, is not addressed specifically in the 2005 report: see European Commission, Romania. 2005 Comprehensive Monitoring Report, SEC(2005)1354, 25 Oct 2005.

arrested in 2004 and 175 in the first three months of 2005. The report also notes that 54,810 irregular migrants were apprehended in 2004 (compared to 48,055 in 2003) and 7,470 in the first quarter of 2005.[124] Interestingly, the 2004 Report observed also, but without comment, that Turkey ratified the UN Migrant Workers Convention in (September) 2004.[125] In this regard, the 2005 Report merely notes that 'Turkey has made progress in acceding to the relevant international and European Conventions' and refers to the Migrant Workers Convention, which entered into force (for Turkey) in January 2005.[126]

OTHER MEASURES: RECEPTION OF ASYLUM SEEKERS

As observed in the Introduction, this chapter focuses on irregular migration. But criminalisation, as it is defined in the chapter, of migrants from third countries is not confined to irregular migrants, but is also evident in the development of the first stage of a common EU asylum system, in particular in the Directive on minimum reception standards for asylum seekers,[127] which should have been transposed in participating Member States by 6 February 2005, the Directive on asylum procedures, which was adopted at the end of 2005,[128] and, to a lesser extent, in the refugee qualification Directive.[129] These measures are discussed in other chapters in this volume, but it is worth noting briefly the 'social sanctions' endorsed by the Reception Conditions Directive, which clearly stigmatise asylum seekers as a particular group of third country nationals lawfully present in Member States. First, the Directive makes it possible for the children of asylum seekers to be educated in accommodation centres and, therefore, outside the mainstream education system.[130] Secondly, there is no *right* to take up employment and Member States are under an obligation to permit access to the labour market only if a decision at first instance has not been

[124] European Commission, Turkey. 2005 Progress Report, SEC(2005)1426, 9 Nov 2005, at 111. The Report notes also (*ibid*, at 113) that prosecutions were brought against 227 traffickers in 2004 and against 215 traffickers in the first 6 months of 2005.

[125] European Commission, 2004 Regular Report on Turkey's progress towards accession, SEC(2004)1201, 6 Oct 2004, at 140.

[126] Turkey. 2005 Progress Report, above n 124, at 137.

[127] Council Dir 2003/9/EC of 27 Jan 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

[128] Council Dir 2005/85/EC of 1 Dec 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 (transposition date: 1 Dec 2007).

[129] Council Dir 2004/83/EC of 29 Apr 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 [2004] OJ L 304/12 (transposition date: 10 Oct 2006).

[130] Council Dir laying down minimum standards for the reception of asylum seekers, above n 127, Art 10(1). It has been argued that 'this solution may be regarded as a form of

taken within one year and if the delay cannot be attributed to the asylum applicant. The granting of such a right to work may also be subject to national labour market tests giving priority to EU and EEA nationals and lawfully resident third country nationals.[131] Thirdly, Member States may withdraw or reduce reception conditions in a number of circumstances: if asylum seekers abandon their required place of residence without informing the authorities or without permission; fail to comply within a reasonable time with reporting and information duties connected with the asylum interview; and lodge another asylum application in the same Member State.[132] Member States may also 'refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State'.[133] The latter provision was inserted into the Directive as a result of efforts by the UK Government to ensure compatibility with its national law (section 55 of the Nationality, Immigration and Asylum Act 2002), which enables the authorities to withdraw benefits from asylum seekers unless they can demonstrate that their state of destitution falls below the threshold provided for by Article 3 ECHR guaranteeing the right to be free from torture, inhuman or degrading treatment or punishment.[134] However, since this optional provision was introduced into the Reception Conditions Directive, the House of Lords has ruled that the practice of the UK Home Office to refuse accommodation or food to those asylum seekers who fail to claim asylum promptly on arrival in the country and who are otherwise destitute is inhuman and degrading, and thus a breach of Article 3 ECHR.[135] This is not the first time that provisions inserted by Member States in EU migration and asylum law, with a view to ensuring conformity

'segregation' that could lead to stigmatisation of these minors and impair or at least delay their integration': S Da Lomba, *The Right to Seek Refugee Status in the European Union* (Antwerp, Intersentia, 2004) at 242.

[131] Council Dir laying down minimum standards for the reception of asylum seekers, above n 127, Art 11.

[132] *Ibid*, Art 16(1).

[133] *Ibid*, Art 16(2).

[134] The ECtHR described this threshold in App No 2346/02 *Pretty v United Kingdom*, judgment of 29 Apr 2002, para 52: '[a]s regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. … Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. … The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible' (cases omitted).

[135] *R (Limbuela) v Secretary of State for the Home Department* House of Lords [2005] UKHL 66, judgment of 3 Nov 2005.

with their national law, have floundered in the Member State concerned before the transposition deadline for the measure has passed. Controversial provisions in the Directive on the right to family reunification to conform to Austrian and German immigration reforms have met a similar fate.[136] Similarly, though to a lesser extent than in the Reception Conditions Directive, the Refugee Qualification Directive enables Member States to treat persons granted subsidiary protection differently from Convention refugees in terms of the social rights and benefits accessible to them.[137]

On a more positive note, however, it can be argued that the minimum standards set in these measures, despite the endorsement of 'social sanctions', at least prevent Member States from reducing their standards further. This is particularly important, given the increasing trend to criminalise irregular migrants at the national level, which is not only evident in the existence of provisions denying them most social rights and benefits, with the exception of access to emergency medical treatment, but also in the imposition of obligations on civil servants to denounce such migrants to immigration enforcement authorities for seeking access to these rights or benefits.[138]

CONCLUSION: THE NEED FOR A RIGHTS-BASED APPROACH

The absence of a clear rights-based approach to EU migration law and policy is fuelling the increasing criminalisation of migration, in respect of the treatment not only of irregular migrants but of other groups of migrants as well, such as asylum seekers, persons granted refugee status and other forms of subsidiary protection, and lawfully resident migrants. In the case of the latter, it is arguable that the continued absence of common principles shaping the admission of third country nationals into the EU for the purpose of employment means that they are at the mercy of precarious legal statuses granted to them at the national level, with the result that they face a real risk of falling into irregularity.[139] In sharp contrast, the movement of EU nationals is buttressed by enshrined EC Treaty rights and the developing concept of European citizenship which, thanks to recent rulings of the Court of Justice, has expanded the social protection afforded to EU citizens in other Member States, thus effectively

[136] C Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 *European Journal of Migration and Law* 111, at 120–1.

[137] Eg, in respect of social welfare and health care, Member States may, by way of exception, limit social assistance and health care to 'core benefits': Refugee Qualification Dir, above n 129, Arts 28(2) and 29(2) respectively.

[138] Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights, above n 64 at 19, 35, 44.

[139] Cf L Morris, *Managing Migration: Civil Stratification and Migrants Rights* (London, Routledge, 2002).

regularising their situation.[140] While an ever more restrictive policy can be detected towards asylum seekers and refugees, both by the EU and in the policies of individual Member States, at least the widely accepted Convention relating to the Status of Refugees and the principle of *non-refoulement* remain important rights-based tools providing for their minimum protection in those cases where they are able to reach the EU borders, thus drawing a firm line below which EU governments should not fall. On the other hand, economic migrants, and irregular migrants especially, have resort to two ILO Conventions[141] and the UN Migrant Workers Convention, which afford them a minimum level of protection tailored to their particular circumstances. However, the ILO instruments have been poorly ratified by EU and EEA countries,[142] while the UN Convention for the time being remains ignored by EU Member States. Consequently, these migrants can only rely in practice on the guarantees in the ECHR and other general international human rights instruments.

While the EU Charter on fundamental rights, if it ever becomes legally binding (this would occur if the Constitutional Treaty was accepted by all Member States), will no doubt instil a greater human rights culture into EU law and policy concerning the movement of third country nationals, this development is likely to be an insufficient and inefficient tool in the absence of the articulation of a clear rights-based approach in EU asylum and migration law. Such an approach should include both procedural and substantive safeguards, such as the establishment of procedural guarantees for decisions concerning the refusal of entry of third country nationals to EU territory and the provision of effective remedies;[143] clearer and more detailed rules relating to the protection of individual data, including remedies to correct and delete incorrect data; the elaboration of the rights third country nationals should be entitled to while on the territory of

[140] See E Szyszczak, 'Regularising Migration in the European Union' in Bogusz *et al*, above n 76, at 407, who discusses some of this recent case law.

[141] Conventions No 97 of 1949 concerning Migration for Employment (Revised) and No 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, otherwise referred to simply as the Migrant Workers (Supplementary Provisions) Convention. These instruments are available from the ILO's website at http://www.ilo.org/public/english/standards/index.htm.

[142] Eleven EU/EEA countries have ratified Convention No 97 (Belgium, Cyprus, France, Germany, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, UK), but only 6 have ratified Convention No 143 (Cyprus, Italy, Norway, Portugal, Slovenia, Sweden).

[143] See Draft Dir on minimum guarantees for individual security, freedom and justice in relation to decisions regarding free movement of persons, reproduced in P Boeles *et al*, *Border Control and Movement of Persons: Towards Effective Legal Remedies for Individuals in Europe* (Utrecht, Standing Committee of Experts in International Immigration, Refugee and Criminal Law (Meijers Committee), Dec 2003) at 6–11. See also R Cholewinski, 'The Need for Effective Individual Legal Protection in Immigration Matters' (2005) 7 *European Journal of Migration and Law* 237 and the other articles in that issue.

Member States, regardless of their employment or legal status;[144] a much stronger adherence to the principle of non-discrimination, including the prohibition of unjustified distinctions based on nationality; and procedural and substantive guarantees in the return or expulsion process. The articulation and implementation of such a rights-based agenda, supported by the more general principles in the ECHR and the Charter, would be an important starting point in reversing the trend of the criminalisation of the migration of third country nationals, not only at the borders of the EU or within the territory of Member States but also in neighbouring third countries.

[144] In this regard, the Commission's recent explicit reference to the need to protect the fundamental rights of irregular migrants, as an element of an EU policy to prevent and reduce irregular migration, is to be welcomed; '[f]undamental rights must be protected and promoted. Irregular migrants must be offered a humane and dignified treatment particularly as they are often victims of traffickers' networks and exploited by employers. Any legislative initiative in this field therefore should be subject to an assessment to evaluate its impact on fundamental rights': Policy priorities in the fight against illegal immigration of third country nationals, above n 73, at 3, para 8. However, it is vital to go beyond the rhetoric and ensure that the measures adopted actually reflect such statements.

11

Building a Community Return Policy With Third Countries: An Equal Partnership?

CATHERINE PHUONG*

INTRODUCTION

MOST EU MEMBER States have encountered serious difficulties in removing irregular migrants and failed asylum seekers from their territory. Irregular migrants, who are referred to as 'illegal residents' in EU documents, include those who were refused entry into the EU. The Commission estimates that every year more than 340,000 third country nationals find themselves in this situation.[1] Irregular migrants also include those who entered the EU without valid travel documents or overstayed their visas. About 500,000 of those are apprehended annually.[2] From a legal perspective, irregular migrants have no claim to stay in the EU. If a case is to be made for them to remain legally, then it is the immigration rules on entry and stay which should be modified. As for failed asylum seekers, their removal is also justified. The purpose of asylum procedures is to determine who is a refugee and should be granted leave to remain. If failed asylum seekers were allowed to remain, there would be no point in having asylum procedures in the first place. Of course, the removal of failed asylum seekers is justified only where their application has been given fair consideration.

It is estimated that about 300,000 third country nationals are removed annually.[3] This means that only about a third of decisions to expel irregular migrants from the EU are actually implemented. Notwithstanding the legal constraints on each Member State's ability to remove irregular

* Many thanks go to Ann Sinclair for her research assistance.

[1] See Communication establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007–2013, COM(2005)123, 6 Apr 2005, 4.

[2] *Ibid.*

[3] *Ibid.*

migrants and failed asylum seekers from their territory, the practical obstacles are often the main explanation behind the low numbers of removals. Member States are hoping that increased co-operation between them, and with countries of origin and transit countries, will facilitate removals. As a result, returns now form an integral part of the EU asylum and immigration policies. This chapter argues that although the focus of recent EU initiatives is on operational co-operation, such co-operation should be based on a legal framework which clearly identifies the rights of the migrants to be removed and the respective responsibilities of the states involved in the removal operations. This legal framework must, of course, be compatible with international refugee and human rights laws. Furthermore, the chapter will also suggest that co-operation with third countries should go well beyond the facilitation of removals: it should seek to facilitate the reintegration of the returnees and address the causes of migration.

The chapter will first identify the legal constraints placed upon Member States attempting to remove irregular migrants and failed asylum seekers from their territory. It will then analyse earlier EU initiatives which were taken in the mid-1990s to facilitate returns. In the light of the limited impact of these initiatives, a major change was decided upon at Amsterdam: the return of irregular migrants became an EU competence under Article 63(3)(b) EC Treaty. On the basis of that provision, the Community has attempted to formulate a return policy which has so far led to the adoption of a Return Action Programme. This document will be analysed in detail in the third part of this chapter. A central feature of the Community return policy is the negotiation of Community readmission agreements with target third countries. The chapter will thus examine in more detail these recent agreements and the status of negotiations. Finally, it will be argued that one of the most serious gaps in the emerging Community return policy is the lack of focus on reintegration measures.

LEGAL CONSTRAINTS PLACED ON RETURNS

When returns decisions are made, it is fundamental to establish beforehand that the person to be removed has no protection needs. The most important obligation contained in the 1951 Refugee Convention is the prohibition of *refoulement*.[4] The sending state must thus establish that the person's life or freedom is not threatened by reasons of his or her race, religion, nationality, membership of a particular social group or political

[4] See Art 33 of the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), 189 UNTS 137, amended by Protocol Relating to the Status of Refugees, 1967, 606 UNTS 267.

opinion in the country of destination. There has never been any doubt that Article 33 also prohibits indirect *refoulement*: states cannot transfer a person to a state which, in turn, would return him or her to a place where he or she has a well-founded fear of persecution or begin a chain deportation. In the case of failed asylum seekers, it has already been established that they have no well-founded fear of persecution. In all other cases, the sending state has a responsibility to ensure that the person to be removed has no such fear of persecution in the country of destination.

Member States are all parties to the European Convention on Human Rights and should consider the legal constraints imposed by that instrument on their power to remove persons from their territory.[5] The most important provision to be considered is Article 3, which prohibits torture and inhuman or degrading treatment or punishment. In the landmark case of *Soering*, the European Court of Human Rights (ECtHR) found that no one should be extradited to a state where he would face a real risk of serious ill-treatment by that state.[6] It was subsequently established that Article 3 would also apply to removal cases where the risk of ill-treatment emanates from non-state agents and where state authorities are unable to afford protection.[7] The Court has also established that, in very exceptional circumstances, Article 3 may also be engaged where a person is returned to a situation, rather than specific acts, exposing him to serious ill-treatment.[8]

There has been some uncertainty as to what constitutes inhuman and degrading treatment for the purposes of Article 3. Nonetheless, the Court has recently given some guidance on the type of treatment which may fall within the definition of ill-treatment prohibited by the ECHR: it has stated that 'ill-treatment' must attain 'a minimum level of severity and involve actual bodily injury or intense physical or mental suffering' and that:

> [T]he suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.[9]

Other Articles of the ECHR should be considered when examining the legality of returns to third countries. Article 2 (right to life) has been invoked on several occasions to challenge removal decisions, but the Court has not found it necessary to rule on whether this provision could be engaged in such cases.[10] In contrast, the Court has explicitly considered

[5] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 Nov 1950, 213 UNTS 221.
[6] See *Soering v United Kingdom et al* (1989) 11 EHRR 439.
[7] See *HLR v France* (1998) 27 EHRR 29.
[8] See *D v United Kingdom* (1997) 24 EHRR 423.
[9] See *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52.
[10] See, for instance, *D v United Kingdom*, above n 8, para 59.

that Article 8 could be breached in removal cases. In earlier cases, Article 8 was successfully invoked only where the removal decision would impact on the enjoyment of family life of those already established within the territory of a state party to the ECHR. Indeed, the Court focuses on whether the expulsion or (less often) the refusal to permit entry of the spouse/child/parent of a settled person amounted to an 'interference' with that person's right to respect for family life.[11] For such an interference to exist, the applicant has to demonstrate that he or she cannot reasonably be expected to follow his or her spouse and establish his or her family life elsewhere.[12]

More recently, the Court has shifted its attention to the rights to private life of the person to be removed. In *Bensaid*, it declared that a decision to remove a person to a situation in which he would face treatment which does not reach the severity of Article 3 'may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity'.[13] It is worth noting that Article 8 was broadly interpreted to include elements such as gender identification, name, sexual orientation, sexual life, mental health and so on.[14] This case should be seen as an important development since there is no longer a requirement to establish close family ties with a person who is settled in the territory of a contracting state. So far, the Court has not found that a removal decision constituted a violation of Article 8 on the sole ground that the person will face a severe interference with his or her private life, but states should be aware that it is clearly open to the suggestion that some removal decisions may breach this provision.

Article 6 (right to fair trial) has been invoked mainly in extradition cases. Although the Court had once made clear that an extradition decision could breach Article 6 where there was a risk of a 'flagrant denial of a fair trial' in the requesting country,[15] it has so far refused to examine any issue arising under Article 6 in extradition cases.[16] Removal decisions may be challenged under Article 6 where the person would face trial in the third country and there is evidence that he or she will be denied a fair trial. Article 9 (freedom of thought, conscience and religion) has never been successfully invoked to challenge a removal decision. However, while discussing the applicability of Article 9 to removal decisions, the British

[11] See *Abdulaziz, Cabales and Balkandi v United Kingdom* (1985) 7 EHRR 471.

[12] For more detail see N Rogers, 'Immigration and the European Convention on Human Rights: Are New Principles Emerging?' [2003] *European Human Rights Law Review* 53.

[13] See *Bensaid v United Kingdom* (2001) 33 EHRR 10, para 46.

[14] *Ibid*, para 47.

[15] See *Soering*, above n 6, para 113. See also the admissibility decision in *MAR v United Kingdom* (1997) 23 EHRR CD120 Eur Comm HR. This case was subsequently settled.

[16] See *Mamatkulov and Abdurasulovic v Turkey* (2003) 14 BHRC 149.

House of Lords has recently stated that Articles other than Article 3 could be engaged where there is 'a real risk of a flagrant violation of the very essence of the right'.[17]

One should also refer to the UN Convention against Torture to which all EU Member States are parties.[18] Article 3 of that Convention states that no one should be returned to a state 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. A Committee was established under the Convention and states parties can choose to accept its competence to receive and examine individual communications under Article 22. The Committee has clearly established that with regard to return to torture, for a claim to succeed under Article 3 it is not sufficient, nor required, to submit evidence that there is a consistent pattern of gross violations of human rights in a country: what must be examined is 'whether the individuals concerned would be personally at risk of being subjected to torture in the country to which they would return'.[19]

EARLIER EU INITIATIVES TO FACILITATE RETURNS

Notwithstanding the legal constraints, Member States have also faced many practical difficulties in returning irregular migrants and failed asylum seekers. There has been hope that sharing information, resources and experience may help them overcome these difficulties. Back in the mid-1990s, initiatives in the field of return were limited to the adoption of non-binding recommendations under the Justice and Home Affairs pillar. Any co-operation between Member States was limited to the exchange of information concerning voluntary returns only.[20] Nevertheless, Member States were already focusing on readmission agreements as an essential tool for facilitating returns: they drafted an EU travel document (which, as will be seen later, is now being used in Community readmission agreements)[21] a standard readmission agreement to be used in negotiations between individual Member States and third states.[22]

[17] See *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, para 50.

[18] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec 1984, 23 ILM 1027 and 24 ILM 535.

[19] See General Comment No 1 of 27 Nov 1997, A/53/44, Annex IX.

[20] See Council Dec 97/340/JHA of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of third country nationals [1997] OJ L 147/3. See also Council Recommendation of 22 Dec 1995 on concerted action and cooperation in carrying out expulsion measures [1996] OJ C 5/3.

[21] See Council Recommendation of 30 Nov 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals [1996] OJ C 274/18.

[22] See Council Recommendation of 30 Nov 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country [1996] OJ C 274/20. See

One of the main initiatives which had been taken by EU Member States was the decision to fund projects on reception and voluntary returns.[23] The Joint Action covered the voluntary return of failed asylum seekers and envisaged the funding of projects providing information, counselling, training and education prior to return.[24] Although the Joint Action had a general scope, the budget earmarked for such projects was spent almost exclusively on projects concerning Kosovo Albanians, who were temporarily admitted into the EU during the NATO air operation in the spring of 1999. One could thus argue that EU co-operation in the field of return was mainly prompted by a (sudden) strong common political will to return these people to Kosovo as swiftly as possible. It is only in the aftermath of the successful return operation to Kosovo that further EU funding was granted, through the creation of the European Refugee Fund, to projects relating to reception conditions, integration and repatriation of persons applying for or granted refugee status, subsidiary protection or temporary protection.[25] Failed asylum seekers did not appear to come within the scope of the Fund.[26]

Although the EU did not yet have legal competence to negotiate Community readmission agreements with third countries, the problem of irregular migration was not entirely excluded from negotiations with these countries. Indeed, when negotiating association and co-operation agreements, which mainly deal with trade issues, the EU took the opportunity to raise the issue of readmissions. As a result, association and co-operation agreements often contain provisions dealing with readmission.[27] These provisions create a reciprocal obligation to readmit the nationals of each party to the agreement, who are illegally residing on the territory of the other party. The state of nationality must usually provide the appropriate travel documents to facilitate the readmission. The state parties to the agreement also commit themselves to concluding with any EU Member State a bilateral readmission agreement which will specify their respective obligations in terms of readmission and may cover third country nationals

also Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements [1996] OJ C 274/25.

[23] See Joint Action 99/290/JHA of 26 Apr 1999 establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo [1999] OJ L 114/2. This instrument is no longer in force.

[24] *Ibid* Art 5.

[25] See Council Dec 2000/596 of 28 Sept 2000 establishing a European Refugee Fund [2000] OJ L 252/12.

[26] *Ibid* Art 3. A proposal amending this Decision has been published recently. See amended proposal for a Decision of the European Parliament and the Council establishing the European Refugee Fund for the period 2008–13 as part of the General programme 'Solidarity and the Management of Migration Flows', COM(2005)123 final/3, 24 May 2006.

[27] See the present EU standard readmission clauses, Council doc 13409/99, 25 Nov 1999.

and stateless persons.[28] Such provisions were inserted in the Cotonou Agreement signed with the African, Caribbean and Pacific (ACP) countries.[29]

By the late 1990s, the EU had acknowledged the links between asylum and immigration policy on the one hand, and development policy on the other. As a result, the High Level Working Group on Asylum and Migration (HLWG) was established at the end of 1998. For the most important countries of origin of asylum seekers and migrants, the HLWG was to propose an Action Plan reflecting a 'comprehensive approach' to migration, foreign policy, development aid and so on. The Action Plans were to analyse the root causes of migration, assess the effectiveness of development aid in reducing migration, identify the need for humanitarian aid and rehabilitation assistance, review readmission agreements, explore the possibilities for voluntary return, envisage co-operation with UNHCR and NGOs, and formulate proposals for joint measures.[30] The HLWG has formulated six Action Plans covering Morocco, Sri Lanka, Afghanistan, Somalia, Iraq and Albania.[31]

The implementation of these Action Plans has encountered many difficulties. For one thing, Member States were reluctant to provide financial support for the work of the HLWG.[32] Moreover, some target countries, such as Morocco, were displeased with their Action Plan because they felt that there had been no dialogue prior to the drafting of the Plan.[33] Their reaction could also have been explained by the fact that, while the HLWG provided an opportunity to explore an alternative approach to asylum and immigration issues, its Action Plans still reflected EU Member States' primary concerns about security.

Earlier EU initiatives in the late 1990s to facilitate returns paved the way towards the subsequent Community return policy. The emphasis was very much on encouraging technical co-operation amongst Member States to facilitate removals from their territory. In addition, the EU started to use its

[28] See N Berger, *La politique européenne d'asile et d'immigration: enjeux et perspectives* (Bruylant, Brussels, 2000) 138. For an overview of the readmission clauses inserted in co-operation agreements see S Peers, 'Readmission Agreements and EC External Migration Law' *Statewatch analysis* no 17, available at http://www.statewatch.org/news/2003/may/readmission.pdf.

[29] See Art 13(5)(c) of the Partnership Agreement between the Members of the African, Caribbean and Pacific group of states of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L 317/3.

[30] See J van Selm, 'Immigration and Asylum or Foreign Policy: the EU's Approach to Migrants and their Countries of Origin' in S Lavenex and EM Uçarer (eds), *Migration and the Externalities of European Integration* (Lexington Books, Lanham, Mld, 2002) 1 at 8.

[31] See Report of the High Level Working Group on Asylum and Migration to the European Council in Nice, Council doc 13993/00, 29 Nov 2000.

[32] See A Nadig, 'The High Level Working Group on Asylum and Immigration and its Action Plan for Afghanistan' (2001) 11 *Journal of Refugee Studies* 428, at 431.

[33] See van Selm, above n 30, 11–12.

joint leverage on third countries: in the course of trade negotiations, it has sought to obtain concessions on readmissions and 'encourage' the signing of bilateral readmission agreements with individual EU Member States. As for the HLWG, it was a first (failed) attempt to address the link between migration and development. Many others would follow.

TOWARDS A COMMUNITY RETURN POLICY

The removal of irregular migrants and failed asylum seekers gained prominence on the EU agenda following the decision made at the 1999 Tampere European Council to formulate a common EU asylum and migration policy.[34] The focus of attention has always been irregular immigration and it was repeated on many occasions that a 'return policy is also an integral and crucial part of the fight against illegal immigration'.[35] Such a policy can now be formulated on the basis of Title IV of the EC Treaty which was introduced by the Treaty of Amsterdam. The new Article 63(3)(b) EC Treaty enables the Council to adopt measures on 'illegal immigration and illegal residence, including repatriation of illegal residents'. The emerging Community return policy thus covers persons residing illegally in the EU. As failed asylum seekers no longer have the right to remain in the host country, or even in the EU, they are covered by the new policy.

Efforts to formulate a Community return policy were stepped up in 2002 when the Commission released a Green Paper on the return of illegal residents.[36] EU-wide consultations on the Green Paper led the Commission to propose a Return Action Programme, which was adopted by the Council in November 2002.[37] On the basis of the Return Action Programme, one can identify three main components of the emerging Community return policy, namely: operational co-operation among Member States, common standards for return procedures and readmission agreements. Readmission agreements will be examined in more detail in the following section.

Operational Co-operation Among Member States

Operational co-operation among Member States is to be reinforced through the continuing exchange of information, the networking of

[34] See Presidency Conclusions, Tampere European Council, 15–16 Oct 1999.
[35] See A common policy on illegal immigration, COM(2001)672, 15 Nov 2001, 25.
[36] See Green Paper on a Community return policy, COM (2002) 175, 10 April 2002.
[37] See A Community return policy on illegal residents, COM(2002)564, 14 Oct 2002 and Return Action Programme, Council doc 14673/02, 25 Nov 2002.

officials involved in removals procedures, the identification of best practices (which can be specific to certain countries of origin or transit), joint training and mutual assistance by immigration liaison officers.[38] The immediate objectives are to facilitate mutual assistance in the enforcement of removal decisions, and, ultimately, the organisation of joint return operations.

One of the practical problems encountered when enforcing removals is the lack of direct commercial air links. Some irregular migrants and failed asylum seekers come from countries which do not have good (or any) transport links with the sending country. A Member State may thus require assistance where a person to be removed requires 'supervision' during his or her transit through another Member State's territory.[39] Commercial airlines are often reluctant to transport persons who are subject to expulsion orders. The use of charter flights for forced removals may be preferable, but has proved extremely costly. In order to produce 'economies of scale', the same flight could be used to return people from several Member States to the same country of origin, hence the idea of joint charter flights. Some have apparently already been organised on a bilateral or trilateral basis among Member States.

Not surprisingly, Member States are extremely enthusiastic about this possibility and a whole range of initiatives have already been suggested. Progress on this matter is frighteningly rapid. First, a manual for joint return operations, which would contain operational instructions, is already being prepared.[40] It comes as a surprise that the manual will contain provisions on the audio-visual recording of operations. It is not specified for what purpose these recordings would be made. Possibilities presumably include the event of legal proceedings or simply for media relations. Secondly, at the initiative of Italy, a Council Decision on the organisation of joint return flights was adopted.[41] Thirdly, a European Border Agency

[38] See *ibid,* paras 21–35.

[39] See Council Dir 2003/110 of 25 Nov 2003 on assistance in cases of transit for the purposes of removal by air [2003] OJ L 321/26. See also Initiative of the Italian Republic with a view to adopting a Council Dir on assistance in cases of transit through the territory of one or more Member States in the context of removal orders taken by Member States against third-country nationals [2003] OJ C 223/5. The Italian proposal will not be adopted in its current form and has been replaced by draft Council Conclusions: see Council doc 15998/1/03, 12 Dec 2003.

[40] See Draft manual for the shared organisation of joint flights for group removals of third country nationals illegally present in the territory of two or more Member States, Council doc 10911/03, 3 July 2003.

[41] See Council Dec 2004/573 on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subject to individual removal orders [2004] OJ L 261/28.

(FRONTEX) was established.[42] One of its tasks is to assist Member States in organising joint return operations.[43]

There is clearly a strong political will to organise joint return operations and, as a result, a model for the operational organisation of joint flights is already under preparation, institutional support will soon be provided and funding is available. In evidence provided to the House of Lords European Union Committee, it was mentioned that the FRONTEX agency will be involved in at least four joint return operations in 2006.[44] Member States appear to be rushing into this project, but there are a number of issues that need careful examination before joint flights are envisaged. At the moment, each Member State has a different set of rules about the enforcement of removals and it is important to determine which rules and procedures would apply in the case of joint operations. Where these procedures are breached and/or human rights are infringed during the joint return operations, it may be difficult to identify which Member State can be held responsible. All such issues must be clarified beforehand and are not addressed in the Council Decision on the organisation of joint return flights, or in the common guidelines on security provisions which are annexed to it.

Common Standards for Return Procedures

If operational co-operation is to take place, it requires a more developed legal framework. In its 2002 Communication, the Commission suggested that short-term measures focus on operational co-operation, while medium-term legislative measures would be envisaged later.[45] This is an inappropriate strategy. Any efforts at promoting operational co-operation on returns should be based on clear common legal rules. The adoption of common (minimum) standards is a prerequisite for operational co-operation.[46] At a minimum, Member States should have the same understanding of the terms they are using. For instance, there is some confusion around the terms 'removals', 'expulsions' and 'deportations', which may have various meanings in some legal systems. It is crucial that

[42] See Council Reg 2007/2004 of 26 Oct 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1.

[43] For more details on FRONTEX see Ch 12 in this volume.

[44] See House of Lords European Union Committee, *Illegal Migrants: proposals for a common EU returns policy,* 32nd Report, Session 2005–06, HL 166 (Q583).

[45] A Community return policy on illegal residents, above n 37, 10. See also Return Action Programme, above n 37, para 40.

[46] See D Bouteillet-Paquet, 'Passing the Buck: a Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States' (2003) 5 *European Journal of Migration and Law* 359, at 376.

Member States agree on a common understanding of these terms in order to avoid linguistic confusion. The Commission has already drawn up a list of definitions.[47]

Mutual assistance and joint operations require the mutual recognition of removal decisions. Indeed, a Member State should not provide assistance to another Member State unless all Member States recognise the legality of the removal decision. A Directive had been adopted in 2001 to ensure that an expulsion decision concerning a third country national adopted by one Member State could be carried out by another where the person to be expelled had travelled to the latter country.[48] It will remain in force until the proposed Directive on minimum standards for return procedures mentioned below is adopted.

Beyond that, the Commission suggested that a certain degree of harmonisation was required in the form of adoption of minimum standards on removal decisions and procedures.[49] The Return Action Programme thus envisages the adoption of a whole range of minimum or common standards to facilitate joint operations, eg common standards for escorts, common minimum standards on security and restraints and minimum standards on detention.[50] Some suggestions are very vague: the document mentions the need for common minimum standards 'safeguarding both the rights and health of the person concerned as well as the effectiveness of the removal'.[51]

A Commission proposal for a Directive on minimum standards for return procedures was announced as early as 2001,[52] but it was not until 2005 that it was released.[53] The proposed Directive is not very detailed. It makes a distinction between the return decision, that is the decision or act declaring the stay of a third country national to be illegal and imposing an obligation to return, and the removal order (Article 1). The proposed Directive also contains procedural safeguards (Articles 11–13) and deals with detention pending removal (Articles 14 and 15). The text of the proposal does not actually refer to detention as such, but to 'temporary custody for the purpose of removal'. The safeguards to be applied during

[47] See A Community return policy on illegal residents, above n 37, 26.

[48] See Council Dir 2001/40 of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L 149/34. See also Council Dec 2004/191 of 23 Feb 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Dir 2001/40 on the mutual recognition of decisions on the expulsion of third country nationals [2004] OJ L 60/55.

[49] See A Community return policy on illegal residents, above n 37, 17–20.

[50] See Return Action Programme, above n 37, paras 41 and 44.

[51] *Ibid*, para 42.

[52] See A common policy on illegal immigration, above n 35, 25.

[53] See Proposal for a Dir on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005)391, 1 Sept 2005. See also the Commission's impact assessment annexed to the proposal, SEC(2005)1057, 1 Sept 2005.

the removal are incredibly vague: Article 10 provides only that coercive measures shall be proportional, shall not exceed reasonable force, and shall be implemented in accordance with fundamental rights and with due respect for the dignity of the person to be removed. A mere reference is made to the Guidelines on security provisions mentioned above. It is regrettable that much more detailed provisions have not been included in the proposed Directive and that negotiations are based on such a weak text.[54] At the very least, standards contained in the Directive should reflect the Council of Europe Guidelines on forced return.[55] This was recommended by the House of Lords European Union Committee.[56]

Harmonisation in the field of returns will be difficult to achieve. Member States probably want to retain as much control as possible over who can be removed from their territory and how they will be removed. There are already indications that the proposed Directive on minimum standards for return procedures will not be adopted in the near future because Member States hold very different views on this issue.[57] In the light of past and present negotiations in the field of asylum and immigration, one may fear that the harmonisation of minimum standards on removals will also lead to the adoption of the lowest common denominators. Nonetheless, joint operations should not be envisaged until some harmonisation of removal procedures, at an acceptable minimum standard, has taken place.

Negotiating EC Readmission Agreements

A central feature of the Community return policy is the negotiation of EC readmission agreements. While international law imposes on states a general obligation to readmit their own nationals,[58] this obligation is subject to a number of practical limitations. For instance, where there are no official documents linking the person to the state of nationality, that

[54] For more detailed criticism of the proposed Dir see for instance ILPA, *Response to the Commission's proposed directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, 24 Nov 2005; UNHCR, *Observations on the European Commission's proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, Dec 2005; and *Joint Refugee Council and Amnesty International UK submission to the House of Lords Select Committee on the European Union Inquiry into the draft directive on common procedures for the return of illegally staying third country nationals,* Dec 2005.

[55] See Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, 11 May 2005, available at http://www.accompanydetainees.org/docs/CM%20Forced%20Returns.pdf.

[56] See above n 44, para 71.

[57] *Ibid*, para 12.

[58] See Art 12(4) of the International Covenant on Civil and Political Rights, UNGA Res 2200A(XXI), 16 Dec 1966.

state may be reluctant to accept the return and/or assist with the issuing of travel documents. Some countries, such as India, Pakistan, China and Algeria, issue travel documents only after a lengthy verification that the person to be returned to their territory is clearly one of their nationals.[59] In order to overcome these limitations, readmission agreements can be negotiated in order to create obligations for each contracting party to readmit persons who have breached the immigration rules of the other contracting party and have no right to remain there. The Commission has proposed that EU Member States make further use of their joint political weight to negotiate Community readmission agreements. The Commission has already been given by the Council successive mandates to negotiate such readmission agreements with some target countries, which have been identified according to set criteria. These criteria refer to the migration pressure exerted by flows from or via third countries, together with the number of persons awaiting return and the existence of obstacles to return, such as obtaining travel documents. The Council also decided that countries with which the EU is negotiating accession agreements should not be included in the list of targeted countries.[60] Concerns have been raised, for instance by the European Parliament, over the human rights record of some of the target countries and the safety of returning failed asylum seekers to these countries.[61]

The Council concluded the first EC readmission agreement with Hong Kong in 2003.[62] It has also managed to conclude readmission agreements with Macao, Sri Lanka and Albania.[63] A readmission agreement was recently signed with the Russian Federation.[64] All EC readmission agreements follow the same structure and their texts are almost identical. The

[59] See House of Commons Home Affairs Committee, *Asylum Removals,* Fourth report of session 2002–03, HC 654, 14 Apr 2003, para 57.

[60] See Criteria for the identification of third countries with which new readmission agreements need to be negotiated, Council doc 7990/02, 16 Apr 2002.

[61] See Bouteillet-Paquet, above n 46, 371.

[62] See Council Dec 2004/80 of 17 Dec 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation [2004] OJ L 17/23.

[63] See Council Dec 2004/424 of 21 Apr 2004 concerning the conclusion of the Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation [2004] OJ L 143/97; Council Dec 2005/372 of 3 Mar 2005 concerning the conclusion of the Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation [2005] OJ L 124/41; and Council Dec 2005/809 of 7 Nov 2005 on the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation [2005] OJ L 304/14 (text of the Agreement available at [2005] OJ L 124/22).

[64] See Council Dec concerning the signing of the Agreement between the European Community and the Russian Federation on readmission, Council doc 8859/06, 17 May 2006.

purpose of the agreements is contained in the Preamble: it is to establish rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the parties to the agreement.

The agreements are divided into eight sections containing up to 23 Articles. The readmission obligations are spelt out in sections I and II of each agreement. The obligation to readmit is triggered by a simple application by a Member State (or the other contracting party) and, most importantly, 'without any formalities other than those specified in th[e] Agreement'.[65] The readmission obligations cover the contracting parties' own nationals, as well as third country nationals and stateless persons who have transited through their territory (and who are referred to as 'persons of another jurisdiction'). Although the readmission obligations are set out in equal terms for each contracting party, it is clear that the agreements are in fact one-sided: the numbers of persons readmitted by the EU is likely to be negligible compared to those readmitted by the other contracting party.

Once a readmission request has been made, travel documents must be issued. However, if they have not been issued after two weeks, EU Member States can still return the person using the EU standard travel document.[66] Sri Lanka was unable to accept the use of such a document and a common provisional travel document was drafted for the purposes of the Agreement (Annex 7). The respective sections III of the agreements deal with the readmission procedure, eg readmission application, lists of the means of evidence, time limits and so on. Only the agreement with Albania contains a peculiar provision (Article 12), which envisages the case of readmissions in error: in such a situation, each contracting party agrees to take back the person who has been readmitted by mistake by the other contracting party. One may wonder whether this provision was included because some Albanians may claim to be EU nationals in order to be readmitted by the EU.

The agreements also deal with transit operations (section IV). These concern third country nationals and stateless persons who cannot be returned to the state of destination directly. Section V deals with costs, while section VI contains provisions on data protection and a non-affection clause. The latter clause provides that the agreement shall be without prejudice to the parties' rights, obligations and responsibilities arising from international law. However, only two agreements make references to specific treaties. The agreement with Albania mentions that such rights, obligations and responsibilities arise, in particular, from the

[65] See Art 2 of the readmission agreements.
[66] See above n 21.

European Convention on Human Rights and the 1951 Refugee Convention and its 1967 Protocol. In addition, the agreement with the Russian Federation makes a reference to the Convention against Torture. References to international refugee law and international human rights law should have been inserted into each readmission agreement. At a minimum, the prohibition of *non-refoulement* should be reiterated. From a protection point of view, each readmission agreement should contain guarantees that the third country national who is readmitted by a contracting party in application of the 'safe third country' rule is granted access to fair and efficient asylum procedures.[67] Section VII deals with the implementation and application of the agreements. In each case, a readmission committee is to be established. Section VIII simply contains final provisions relating to entry into force, duration and termination.

The Commission is still hoping to conclude similar readmission agreements with Algeria, China, Morocco, Pakistan, Turkey and Ukraine. They are not progressing well.[68] Part of the problem is that there is little incentive for targeted countries to accept them.[69] For Hong Kong and Macao, the lifting of visa requirements for their residents travelling to the EU was offered in exchange for the conclusion of the EC readmission agreement.[70] With regard to China, the visa question is also taking a prominent place in the negotiations over a possible readmission agreement. The Commission has managed to negotiate a memorandum of understanding with China whereby Chinese tourists coming to the EU will benefit from facilitated procedures to obtain tourist visas.[71] In exchange, China has agreed to the insertion of a readmission clause in the agreement. The clause covers only Chinese tourists who have overstayed their visa. The Commission claims:

> The unprecedented acceptance by Beijing of a readmission clause within the ADS [Approved Destination Status] context could well pave the way for the Commission in its efforts to have China agree to open negotiations on a readmission agreement.[72]

[67] See N Albuquerque Abell, 'The Compatibility of Readmission Agreements with the 1951 Convention Relating to the Status of Refugees' (1999) 11 *International Journal of Refugee Law* 60.

[68] See M Schieffer, 'Community Readmission Agreements with Third Countries—Objectives, Substance and Current State of Negotiations' (2003) 5 *European Journal of Migration and Law* 343.

[69] *Ibid,* 356.

[70] See A Community return policy on illegal residents, above n 37, 24.

[71] See Council Dec 2004/265 of 8 Mar 2004 concerning the conclusion of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS) [2004] OJ L 83/12.

[72] See Proposal for a Council Dec concerning the signing of the Memorandum of Understanding between the European Community and the National Tourism Administration

However, formal negotiations on a readmission agreement have not been opened yet. Visa concessions constitute a strong incentive for entering into negotiations on readmission agreements. Although these were offered to Hong Kong and Macao, the Commission feels that this possibility cannot be made available to most other countries.[73] One should note here the special situation of Sri Lanka, which agreed to conclude a readmission agreement with the EC in exchange for closer law enforcement co-operation with the EU, in particular on the financing of counter-terrorist activities.[74]

Readmission agreements were widely used in the 1990s to facilitate removals to the Central and Eastern European states that were candidate countries. Such agreements were often accompanied by substantial financial aid to be used to reinforce border controls. Assistance was also provided to set up and/or improve asylum systems. Above all, the acceptance of readmission agreements with Member States was often seen as a precondition to EU membership.[75] No incentive such as the prospect of EU membership can be given to the countries with which readmission agreements have been or are currently being negotiated (apart from Turkey and Albania). In some countries, readmission agreements are perceived as being imposed by the EU with little regard for the local conditions which prompted people to leave in the first place.[76]

'Increased' Co-operation with Third Countries

Although the need for co-operation with third countries in the area of return is essential, the Return Action Programme focuses almost exclusively on improved enforcement of removal decisions. Co-operation with countries of origin and transit countries should go well beyond the mere conclusion of Community readmission agreements. In any case, and as mentioned above, these countries are unwilling to enter into readmission agreements unless adequate incentives are provided to them. Instead of creating incentives for countries to accept readmission agreements, Member States have focused on the threat of punitive measures against those countries which refuse to co-operate: in case of persistent and unjustified

of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS), COM(2003)790, 15 Dec 2003, 3.

[73] See A Community return policy on illegal residents, above n 37, 24.

[74] See Schieffer, above n 68, 356.

[75] See C Phuong, 'Enlarging "Fortress Europe": EU Accession, Asylum, and Immigration in Candidate Countries' (2003) 52 *International and Comparative Law Quartlerly* 641.

[76] See for instance EA Mrabet, 'Readmission Agreements—the Case of Morocco' (2003) 5 *European Journal of Migration and Law* 379.

denial of co-operation, the EU may 'adopt measures or positions under the Common Foreign and Security Policy and other European Union policies'.[77]

If EU Member States are serious in their efforts to negotiate readmission agreements, they should offer more incentives so that the agreements are not seen as being in the sole interest of the Community. The Commission has suggested that technical and financial assistance for improving migration management could be proposed.[78] For that purpose, a programme was specifically adopted to provide such assistance to the countries which have concluded readmission agreements or are about to do so.[79] However, in most cases, this would not constitute a sufficiently strong incentive for concluding a readmission agreement. The Commission acknowledges that incentives should not be limited to the field of Justice and Home Affairs and should extend to the granting of better market access or tariff preferences, or additional development aid.[80] It was only recently that the Council decided that, in some cases, 'a direct link should be established between the negotiation of co-operation, association or equivalent agreements and the conclusion of readmission agreements with the same third countries'.[81]

Co-operation with third countries should not be limited to seeking their assistance in facilitating readmissions. If returns, both voluntary and forced, are to be sustainable, support for the economic and social integration of the returnees must be provided. Although integrated return programmes are envisaged by the Commission,[82] they are hardly mentioned in the Return Action Programme. Member States have paid little attention to this aspect of the Community return policy. So far, despite earlier initiatives such the High Level Working Group on Asylum and Immigration, little has actually been proposed to address the root causes of displacement, ie poverty, lack of good governance, human rights violations, etc.[83]

Integrated return programmes involve pre-return advice and counselling, skills training, travel assistance (for those returning voluntarily), reception

[77] See Presidency Conclusions, Seville European Council, 21–22 June 2002, para 36. This aspect is examined further in Ch 9 in this volume.

[78] See Integrating migration issues in the European Union's relations with third countries, COM(2002)703, 3 Dec 2002, 25–6.

[79] See Reg 491/2004 of 10 Mar 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS) [2004] OJ L 80/1.

[80] *Ibid,* 26.

[81] See Draft Council Conclusions on the priorities for the successful development of a common readmission policy, Council doc 13044/04, 4 Oct 2004.

[82] See A Community return policy on illegal residents, above n 37, 21–3.

[83] See Bouteillet-Paquet, above n 46, 373.

upon arrival, follow-up assistance and counselling post-return.[84] They are implemented mainly by the relevant international agencies, such as UNHCR and IOM, and local non-governmental organisations. There is no doubt that some integrated return programmes can prove very expensive.[85] They also require extensive contacts with the authorities and non-governmental organisations in the country of origin. Nevertheless, returns which are not accompanied by reintegration programmes for the returned migrants will not be sustainable in the medium to long term.

The EU has started experimenting with country-specific return programmes and the Council adopted the Afghanistan return plan at the end of 2002.[86] As with the readmission agreements, the drafting process of the return plan was not promising. It is most surprising that no dialogue seems to have been engaged with the relevant Afghan authorities *prior* to drafting the return plan. The plan actually mentions:

> [T]he Commission and the EU Presidency shall establish the relevant information exchange with the [relevant Afghan] authorities, and the Council Special Representative in Afghanistan shall in co-operation with the head of the Commission representation in Afghanistan ensure acceptance of the plan by the Afghan authorities.[87]

It is notable that the purpose of establishing contact with the Afghan authorities is acceptance of the plan, rather than negotiation. Similarly, the plan mentions the importance of liaising with UNHCR. The UN agency is conducting a major return operation in Afghanistan and has a long-standing experience of organising such operations.[88] It would thus have made more sense for the Council to consult UNHCR when drafting its return plan. In contrast, Member States, such as France, the UK and the Netherlands, all concluded tripartite memoranda of understanding with both Afghanistan and UNHCR in 2002–3.[89]

As for the plan itself, its provisions are remarkably vague, especially in comparison with the tripartite agreements just mentioned above. Little attention is given to protection issues: vulnerable groups are mentioned, but not identified in any way.[90] These groups should include, at a minimum, unaccompanied minors. No reference is made to the principle of family unity and how it should be preserved. Furthermore, it does not

[84] See A Community return policy on illegal residents, above n 37, 21.
[85] *Ibid*, 22.
[86] See Afghanistan return plan, Council doc 14654/02, 25 Nov 2002.
[87] *Ibid*, para 14.
[88] See http://www.unhcr.ch/cgi-bin/texis/vtx/afghan?page=home.
[89] The texts of the memoranda of understanding signed by the UK and the Netherlands are available at http://www.unhcr.ch/cgi-bin/texis/vtx/afghan?page=policy.
[90] See Afghanistan return plan, above n 86, para 18.

contain any provision on monitoring of the return process. Considering that the security situation in the country is still very unstable, an appropriate monitoring system is crucial.[91]

The plan covers pre-departure measures, travel-related and post-arrival measures. It appears that Member States are to provide pre-departure information to returnees so that they know what is awaiting them back home, and *not* so that they can make an informed choice as to whether the return to their homes of origin is safe.[92] In terms of post-arrival measures, these are fairly limited. Appropriate reception facilities are to be provided in Kabul for returnees in transit to their intended destinations, but these facilities should be available for only three days.[93] It is not at all clear who should be responsible for providing these reception facilities. Additional support to returnees is limited to the provision of information on the security conditions and the state of reconstruction of the local community in the area of return,[94] and the provision of adequate onward transport to return areas.[95] Once again, it is not specified which party is in charge of providing these services. Finally, reintegration assistance in the form of vocational skills training and employment-generating programmes may be offered 'where feasible'.[96] All in all, the Afghanistan return plan does not appear to demonstrate a strong commitment to the reintegration of returnees.

Despite the limited impact of the Afghanistan return plan, EU Member States are determined to develop further integrated return plans. As mentioned earlier, return and reintegration programmes can prove expensive, and the issue of funding is thus crucial to the viability of such programmes. To this end, the Commission proposed the establishment of a European Return Fund.[97] The result is disappointing. One of the objectives of the Fund is to support the organisation and implementation of integrated return management by Member States, based on integrated returns plans which will focus on effective and sustainable returns. However, the commitment to sustainable returns is weak and the focus is once again on operational co-operation between Member States. It is even repeated on several occasions in the proposed Decision that Member States *may* include in the plans the provisions of reception and reintegration support.

[91] See Amnesty International, *Briefing on the EU Return Plan to Afghanistan,* 6 May 2003.
[92] See Afghanistan return plan, above n 86, para 21.
[93] *Ibid,* para 28.
[94] *Ibid,* para 29.
[95] *Ibid,* para 30.
[96] *Ibid,* para 31.
[97] See Communication establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007–13, COM(2005)123, 6 Apr 2005, which includes the Proposal for a Decision establishing the European Return Fund.

As a result, initial expenses after return, eg temporary accommodation for the first days of arrival, and other short-term measures such as training, employment assistance, start-up support for economic activities and post-return assistance and counselling are eligible for funding only 'where considered appropriate by Member States'.[98] It is proposed that €676 million be allocated over six years to the European Return Fund.[99] An additional €1,820 million would be allocated to FRONTEX.[100] This would give the EU return policy by far the largest budget allocation in the Justice and Home Affairs area.

CONCLUSION

In the last few years, Member States have become increasingly interested in the issue of returns of irregular migrants and failed asylum seekers: they want to be able to show that they can control entry into their territory and, where third country nationals are not entitled to enter or remain there, that they can return them to their country of origin or a transit country. Member States are putting much faith in the idea of operational co-operation, which will suddenly allow them to remove many more individuals from the EU. They are very enthusiastic about the idea of joint return operations. However, it is crucial that adequate legal safeguards are put in place before such operations take place.

There is also a belief that if Member States jointly exercise political pressure on certain third countries, they can bully them into signing readmission agreements with the EC. The experience so far has demonstrated that the reality is very different. Not surprisingly, third countries have proved extremely reluctant to conclude, or even negotiate, such agreements. The method of negotiation used by the Commission is simply astounding. In each case, the draft text of the agreement is drafted by the Commission without any consultation with the authorities of the state concerned. The draft text is then 'transmitted' to them in the hope that it will simply be rubber-stamped.[101] In such circumstances, it comes as no surprise that, in many cases, serious difficulties have been encountered in opening formal negotiations on readmission agreements.

Effective return procedures will ensure that more irregular migrants and failed asylum seekers are removed and actually arrive in their country of origin or transit country. This is only the tip of the iceberg. Operational efficiency does not ensure that the returns will be sustainable in the

[98] See Art 5 of the proposed Decision.
[99] See the amended proposal, above n 26.
[100] *Ibid*, with regard to the Proposal for a Decision establishing the External Borders Fund.
[101] See Schieffer, above n 68, 344–7.

medium to long term. The human and financial resources involved in return operations are simply wasted if the migrants immediately attempt to return to the EU in an irregular manner. Of course, reintegration programmes are costly and difficult to organise, but they form an essential and often neglected part of return operations. The Return Action Programme will suffer from the weak linkages between return and reintegration. If Member States are committed to developing successful country-specific return programmes, the Afghanistan return plan should definitely not be used as a precedent. Constructive engagement with the country of origin and other relevant partners, such as UNHCR, are a prerequisite to any meaningful return programme. Once again, third countries should be considered as full partners, not simply as agents which would be only too happy to assist EU Member States in their initiatives.

12

Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance

VALSAMIS MITSILEGAS

INTRODUCTION

THE PAST DECADE has witnessed renewed efforts to strengthen external border controls in the European Union. Further to the communitarisation of the legal basis for border controls, and the incorporation of the Schengen *acquis* in the Amsterdam Treaty, calls for more border control-related measures increased. This in turn resulted not only in the proliferation of border control measures, but also in a qualitative change in the nature of a number of such measures. This change justifies a shift in terminology from 'border control' to 'border security' in the European Union. This chapter will cast light on the factors behind this change and go on to provide an overview of the many facets of border security in the EU. The analysis will focus primarily on three major elements providing the framework of EU border security: (i) the establishment of the European Border Agency; (ii) the establishment of mechanisms to enable the transmission by air carriers of a wide range of passenger data; and (iii) the 'widening' and 'deepening' of EU and national immigration and identification databases and calls to establish their 'interoperability'. The challenges these initiatives are posing to civil liberties and the relationship between the individual and the state will be examined along with the institutional framework underlying their evolution at EC/EU level.

THE RECONCEPTUALISATION OF BORDERS AND SECURITY IN THE EU

The post-Cold War security landscape has been characterised by new policy attention to the existence of threats lying beyond the conventional

type of military threats to the state. The focus had shifted to newly-perceived security threats, whose framing as such ('securitisation') served to justify calls by governments and international organisations for the adoption, as a matter of urgency, of measures to counter them.[1] Inextricably linked with this reconceptualisation of security had been the uncertainty regarding the stability and security of borders, especially after the fall of Communism—and the belief that this uncertainty would lead to the uncontrolled spread of organised crime and irregular migration across the globe. Indeed, transnational organised crime and migration were flagged up as major new security threats by Governments in the early 1990s, with the securitisation of migration helping to coin the concept of 'societal security', which focused on societies—rather than states—being threatened in identity terms.[2]

In Europe, this reconceptualisation of security was linked with fears of the opening of the Iron Curtain leading to the flooding of the EU by criminals—and migrants—coming from the East. The collapse of the Soviet Bloc coincided with efforts to push forward European integration, after successful steps to establish a borderless internal market and the Schengen experiment, which was undertaken at the time outside the Community, but by leading Member States. Calls for further integration and the total abolition of internal border controls provoked a debate whether the inevitable consequence would be the conferment of powers on the Community to act on new security issues of crime and migration—as these would be encouraged in an area without internal frontiers and compensatory measures would have to be taken.[3] Negotiations eventually led to the Treaty of Maastricht, which created the European Union and the pillars, and where competence to deal with crime and immigration was granted primarily to the Union—and not the Community—in the third pillar. There, asylum, immigration and international crime were listed as matters of 'common interest' and EU action deemed necessary to achieve, in

[1] From the vast literature and perspectives on post-Cold War 'securitisation' see, inter alia, O Weaver, B Buzan, M Kelstrup and P Lemaitre, *Identity, Migration and the New Security Agenda in Europe* (London, Pinter, 1993); RD Lipschutz (ed), *On Security* (New York, Columbia University Press, 1995); and D Bigo, 'When Two Become One: Internal and External Securitisations in Europe' in M Kelstrup and MC Williams (eds), *International Relations Theory and the Politics of European Integration* (London and New York, Routledge, 2000) 171–204.

[2] On the securitisation of migration and societal security see Weaver *et al*, above n 1, and J Huysmans, 'Migrants as a Security Problem: Dangers of "Securitizing" Societal Issues' in R Miles and D Thraenhardt (eds), *Migration and European Integration. The Dynamics of Inclusion and Exclusion* (London, Pinter, 1995) 53–72.

[3] For a background to the debate see V Mitsilegas, J Monar and W Rees, *The European Union and Internal Security* (Houndmills/Basingstoke/New York, Palgrave Macmillan, 2003) ch 1.

particular, the free movement of persons.[4] By linking crime and immigration, it has been argued that the Treaty created a security continuum, under which the issue of immigration was treated as being similar to the issues arising from criminality, organised or other.[5] This approach had the potential not only to treat immigrants as criminals,[6] but also to place the emphasis on the enforcement aspects of EU immigration policy.

The Maastricht Treaty resulted only in timid steps towards EU action on immigration and borders. It was amended in 1997 by the Amsterdam Treaty, which maintained the pillar structure, but transferred the majority of the legal bases for the adoption of asylum, immigration and border control measures to the first (EC) pillar (Title IV). Thus, at least in the structure of the Treaty, immigration and borders were largely disassociated from criminal matters (which remained in the third pillar) and were more closely linked with free movement and the new objective of establishing the EU as an 'area of freedom, security and justice'. However, this communitarisation did not stop the focus on enforcement measures to tackle irregular migration at the expense of more protective measures giving rights to third country nationals.[7] At the same time, the Schengen *acquis* was incorporated in the Amsterdam Treaty, to the appropriate pillar for each of its parts. The 'compensatory' Schengen logic was thus inserted in the EC/EU legal framework, along with an emphasis on controls, in particular border controls. But, at least on paper, the Amsterdam Treaty and the 1999 Tampere Conclusions catered for the possibility of both enforcement and protective measures for third country nationals, with enforcement and border control measures focusing on the need to control immigration to the EU. This outlook would change significantly in the 2000s, due to two major factors.

The first such factor was the enlargement of the European Union, on 1 May 2004, from 15 to 25 Member States, leading to the movement of the EU external border to the East. In the late 1990s, EU membership of the eight then candidate countries from Central and Eastern Europe caused a number of concerns. These concerns centred in particular on the perceived difficulties that these countries would face in guarding the EU external border, especially once their internal borders with 'old' Member States (such as Germany and Austria) were abolished. This lack of trust of the newcomers led to protracted accession negotiations on the Justice and

[4] See Treaty of Maastricht, Art K.1.

[5] See D Bigo, *Polices en Réseaux. L'éxperience européenne* (Paris, Presses de Sciences Po, 1996); also M Anderson *et al*., *Policing the European Union* (Oxford, Clarendon Press, 1995). For a recent overview see J Huysmans, *The Politics of Insecurity. Fear, Migration and Asylum in the EU* (London and New York, Routledge, 2006).

[6] Bigo, above n 5. See also Ch 1 in this volume.

[7] For an early assessment see E Guild and C Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart, 2001).

Home Affairs (JHA) chapter, in particular with regard to border controls.[8] A particular challenge for candidate countries—apart from having to refocus on border controls and keeping people out of their territory (particularly from neighbouring countries with long established links), at a time when the collapse of their own borders was celebrated[9]—has been to comply with the highly 'securitised' EU immigration *acquis*[10] and in particular meet the Schengen standards, as incorporated in the EC/EU legislative framework post-Amsterdam[11] At the time of writing, although the eight Central and Eastern European Countries are full EU members, they are not yet full Schengen members, as they have yet to pass the evaluation by the current full Members.[12] What can be perceived as a lasting lack of trust towards the 'new' EU Members from the East has also been translated into calls for new, centralised forms of co-operation in the field of border controls, perhaps to compensate for the 'non-readiness' of these countries to take up fully the task of guarding the EU external border. The establishment of the European Border Agency can be seen in that context.

The second factor leading to a change in EU immigration law and policy has been the terrorist attacks in New York, and subsequently in Madrid and London. They resulted in the 'war on terror' rocketing to the top of the political agenda both in the US and the EU. A major characteristic of counter-terrorism strategies post-9/11 has been the focus on maximum surveillance, and the gathering of data by intelligence and law enforcement authorities from any source that may be of use, including immigration authorities and the private sector. This move has been linked with calls to 'deepen' surveillance—for instance by the use of biometrics—and to create large databases which are interoperable. These developments pose considerable challenges to privacy rights and the treatment of terrorism and crime as separate from immigration and the movement of people. In the US, where tendencies to maximise surveillance could be discerned before

[8] See V Mitsilegas, 'The Implementation of the EU *Acquis* on Illegal Immigration by the Candidate Countries of Central and Eastern Europe: Challenges and Contradictions' (2002) 28 *Journal of Ethnic and Migration Studies* 665 at 682.

[9] See *ibid;* also H Grabbe, 'The Sharp Edges of Europe: Extending Schengen Eastwards' (2000) 76 *International Affairs* 519 at 536.

[10] See the concerns expressed in G Amato, *Border Regimes and Border Protection in the European Union*, EUI Policy Paper 99/6 (Florence, EUI, 1999), and the subsequent Report under his chairmanship.

[11] J Monar, *Enlargement-related Diversity in EU Justice and Home Affairs: Challenges, Dimensions and Management Instruments,* WRR Working Doc 112 (The Hague, Dutch Scientific Council for Government Policy, Dec 2000) 18.

[12] Membership of the Schengen group is conditional upon the unanimous approval of a country's application by existing Schengen members. This mechanism is a remnant of the era prior to the incorporation of the Schengen *acquis* in the EC/EU framework. Acceptance of new Schengen members comes only after detailed evaluation of law, policy and practice of applicant countries regarding border controls and police and judicial co-operation.

9/11, the post-9/11 era was marked by the establishment of the Department of Homeland Security—dealing both with immigration and terrorism—and the production of domestic standards (such as on biometrics and passenger data) which would inevitably be highly influential world-wide.[13] In the EU, this has led to a growing emphasis on the development of databases and an increasing link of immigration and border control measures with security and counter-terrorism measures. The European Council, in the 2004 Hague Programme, confirmed this trend by declaring:

> The management of migration flows, including the fight against illegal immigration should be strengthened by establishing *a continuum of security measures* that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary.[14]

THE EUROPEAN BORDER AGENCY

Background

With the date of accession of the 10 new Member States approaching, anxieties in some of the 'old' Member States regarding the capacity of newcomers to guard effectively the EU external border did not abate. This resulted in increasing calls within the EU to intensify co-operation on border controls, the underlying idea being that stronger co-operation—and, for certain Member States, centralisation of border controls—would be necessary to 'compensate' for lack of capacity in the East.[15] Thus, in December 2001, the Laeken European Council gave the Council and the Commission a mandate to work out 'arrangements for co-operation between services responsible for border control and to examine the conditions in which a mechanism or common services to control external

[13] See V Mitsilegas, 'Immigration, Security and Transatlantic Co-operation in the 21st Century' in T Givens (ed), *Immigration, Security and Transatlantic Co-operation post-9/11* (Palgrave, forthcoming).

[14] The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C53/1, 3 Mar 2005, para 1.7.2 (emphasis added).

[15] On the continuing lack of trust and the implications of enlargement on border controls see the following reports by national parliamentary committees: House of Lords Select Committee on the European Union, *Proposals for a European Border Guard*, 29th Report, Session 2002–03, HL Paper 133; and Assemblée Nationale, *Rapport d'Information sur la Création d'une Agence Européenne pour la Gestion de la Coopération Opérationnelle aux Frontieres Extérieures de l'Union Européenne*, Report no 1477, 3 Mar 2004.

borders could be created'.[16] Some months later, in May 2002, the Commission published a Communication entitled 'towards an integrated management of external borders'.[17] The reference to the *management* of borders, and not their controls, is interesting. It has been argued that this terminology implies a shift from a purely security-related approach to a more global one, focusing also on the smooth crossing of borders by bona fide travellers.[18] However, the emphasis on management can also be interpreted as attempting to de-politicise the issue while at the same time justifying the creation of a Community body, upon the model of existing Community agencies deemed necessary to 'manage' Community policies.[19] In the Communication, the Commission advocated the creation of an 'External Borders Practitioners Common Unit' and, ambitiously, the eventual establishment of a 'European Corps of Border Guards'.[20] By advocating a two-stage approach, and placing emphasis on practical co-operation, the Commission ensured a broadly positive reception of its proposals (with the exception in some cases of the proposal for a European Corps of Border Guards).[21]

The Commission Communication was followed in June 2002 by a Council Action Plan for external border management.[22] This placed less emphasis on common legislation and financing and more on operational co-operation and co-ordination and the establishment of common units under strict deadlines. It envisaged the possible setting up of a 'European Corps of Border Guards', but added that this would support but not replace national border police forces. Shortly afterwards, the Seville European Council 'applauded' the Action Plan and referred to 'the intention expressed by the Commission of continuing to examine the advisability' of a European border police.[23] The Seville Council also called for the immediate creation, within the Council framework, of the common unit for external border practitioners, composed of Member States' heads

[16] Presidency Conclusions, European Council Meeting in Laeken, 14–15 Dec 2001, para 42.

[17] COM(2002)233 final. In the same month, the results of a feasibility study for the setting up of a 'European Border Police' led by the Italian Government were published. The Report advocated a complex network of national border agencies linked by specialised centres (doc of 30 May 2002 on file with author).

[18] L Corrado, 'Negotiating the EU External Border' in S Carrera and T Balzacq (eds), *Security versus Freedom: A Challenge for Europe's Future* (Aldershot, Ashgate 2006), 183.

[19] On the 'management' role of EC agencies and its implications see, inter alia, M Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' (1997) 4 *Journal of European Public Policy* 276.

[20] COM(2002)233.

[21] See, for instance, criticism voiced in the House of Lords EU Select Committee Report, above n 15, para 25.

[22] Council doc 10019/02, 14 June 2002.

[23] Presidency Conclusions, Seville European Council, 21–22 June 2002, para 31.

of border control. This would develop from the Strategic Committee for Immigration, Frontiers and Asylum (SCIFA).[24]

The Unit was eventually created under SCIFA+ (SCIFA plus the heads of national border agencies) and began in 2002 to co-ordinate a series of joint operations and pilot projects for border controls. SCIFA has been criticised for the secrecy surrounding its work and its lack of transparency and democratic control.[25] A number of such projects have taken place since, and ad hoc centres were created[26] and an implementation report was prepared by the Greek Presidency in June 2003.[27] But almost a year later, in June 2003, the Commission questioned the effectiveness of the SCIFA+ structure and called for the establishment of a 'much more *operational* body' performing the daily operational activities of border management *on a permanent and systematic basis*. It also called for the eventual creation of the '*European Border Guard*'.[28] The emphasis on more operational co-operation was taken up by the JHA Council, which in the same month adopted a series of conclusions on border management. It called for operational co-operation to be taken forward by the Practitioners Common Unit (PCU) operating separately from SCIFA+. Shortly afterwards—in October 2003—the European Council welcomed the Commission's intention to present a proposal for a European Border Agency, taking into account the experience of the PCU from which the Agency would take over the co-ordination of the operational co-operation.

In November 2003, the Commission tabled a draft Regulation on the establishment of a European Border Agency[29] and negotiations began soon thereafter. Notwithstanding the sensitivity and the complexity of the subject matter, and the fact that the adoption of the Regulation necessitated unanimity, the JHA Council swiftly reached 'political agreement' on the text on 29 April 2004—two days before enlargement. The Regulation establishing a European Agency for the Management of Operational

[24] For a detailed analysis of these developments see House of Lords EU Select Committee Report, above n 15.

[25] See, for instance, the House of Lords EU Select Committee Report, above n 15, in particular the evidence given by Elspeth Guild (Q135) and Jonathan Faull from the Commission JHA Unit (Q202).

[26] In particular a Centre for Land Borders with Germany as the leading country. See also the programme to establish a common risk analysis model (CIRAM), led by Finland, below n 27.

[27] Council doc 10058/03, 3 June 2003. For an update on the establishment and work of the ad hoc centres see Council doc 5661/04, 27 Jan 2004.

[28] COM(2003)323 final (emphasis added).

[29] COM(2003)687 final, 11 Nov 2003.

Cooperation at the External Borders of the Member States (also called FRONTEX) was adopted in October 2004[30] and the Agency started work in Warsaw on 1 May 2005.[31]

Border Guard, Border Police or Border Agency?

Declarations by the various EU institutions and negotiations on the Regulation establishing the Agency demonstrated a strong political will by the 'old' EU-15 on closer co-operation regarding border controls. However, and notwithstanding such political will in principle, the detail on the exact form of such co-operation remained—at least until the adoption of the Regulation—hazy. This is evidenced clearly in the terminology used in the various Council Conclusions, feasibility studies and Commission documents—with the terminology ranging from a European Corps of Border Guards to Border Police and, eventually, Border Management Agency. This lack of clarity reflected different views by different actors on the nature and role of any EU body dealing with borders.[32] One view, strongly expressed throughout the debate, advocated a centralised model—a European Border Guard under the command of an EU institution. This has been the view of the Commission,[33] and of Germany and France.[34] However, others feared that this would lead to too much centralisation and too many powers in the EU and away from Member States[35] (with images of EU Border Guards at Member States' borders wearing uniforms with the EU stars). There was also opposition from the new EU Members, in particular Poland (which interestingly holds the seat of the Agency), which were reluctant to give away sovereignty when managing their external borders.[36] This rather centralised model faced competition from a model based on operational co-operation and loose structures (unsurprisingly advocated by the UK) and a model emphasising

[30] Council Reg (EC) No 2007/2004 of 26 Oct 2004 [2004] OJ L 349/1.

[31] The decision to give the seat of the Agency to Poland—after some competition—was confirmed in the JHA Council of 14 Apr 2005.

[32] For an excellent analysis of the different views see the House of Lords EU Select Committee Report, above n 15.

[33] See, in particular, the 2002 Communication, above n 17, paras 47 and 50.

[34] See the joint paper submitted by Dominique de Villepin and Joschka Fisher to the Convention on the Future of Europe JHA Working Group, calling for a European Border Police legal basis in the Constitutional Treaty (Working Doc 32). On the German position see also the House of Lords EU Select Committee Report, above n 15, in particular the oral evidence by representatives of the German Border Police Unit.

[35] See 'Heathrow may have European border guards', *The Times*, 8 May 2002.

[36] See House of Lords EU Select Committee, above n 15. Also, 'L'Agence pour les frontieres exterieures', *Le Monde*, 17 May 2005, where the Polish Interior Minister expressed opposition to a European intervention force by saying that Poland has its own, perfectly specialised border police.

co-operation with neighbours (Finland noting its good relations with Russia). All these ideas and models came into play when agreement as to the role and powers of the European Border Agency was sought.

The European Border Agency: Establishment, Aims, Tasks and Powers

The legal bases for the establishment of the Agency are Articles 66 and 62(2)(a) EC Treaty. The latter was added in negotiations. The Commission's original proposal included only Article 66, which enables the reinforcement of administrative co-operation in Title IV,[37] but Member States considered the addition of an explicit reference to the border controls provision of Title IV a necessary complement. In its original proposal, the Commission also justified the choice of an Agency as the way forward in this area: it argued that the Agency would be in a better position than the Commission to accumulate the necessary technical know-how on control and surveillance of the external borders in order to give added value to operational co-operation in the field. The Agency would also raise visibility of border management and achieve cost savings.[38]

The Regulation states explicitly that the Agency is a body of the Community and has legal personality.[39] It may also 'decide upon the setting up of specialised branches in the Member States, subject to their consent, taking into account that due priority should be given to the operational and training centres already established'.[40] It is not clear whether such specialised branches will have separate legal personality (the absence of any such wording in the Regulation does not point towards that conclusion) or would be covered by the legal personality of the parent Agency. Another question that is open is what will happen to the existing, ad hoc, centres pre-dating the Agency and whether they will automatically become specialised agencies under the Regulation. It has been argued that specialised units under the Regulation will be established on the basis of activities already developed by existing centres,[41] but also that existing ad hoc branches will become the specialised branches of the Agency.[42]

[37] COM(2003)687 final, at 8.
[38] *Ibid*, at.7.
[39] Art 15(1).
[40] *Ibid,* Art 16(1). See also Preamble, Recital 13.
[41] P Coda, 'L'Agence Européenne pour la Gestion de la Coopération Opérationnelle aux Frontieres Extérieures des états Membres de l'Union Européenne' [2005] *Revue du Marché Commun et de l'Union Européenne* 386.
[42] Letter by Caroline Flint (then Home Office Minister) to Lord Grenfell, chairman of the House of Lords EU Committee, 19 Apr 2004. House of Lords EU Select Committee, *Correspondence with Ministers: January to May 2004,* 25th Report, Session 2003–04, HL

The Preamble to the Regulation provides interesting insights into the context in which the Agency must be viewed. The first Recital states:

> Community policy in the field of the EU external borders aims at an integrated management ensuring *a uniform and high level of control and surveillance which is a necessary corollary to the free movement of persons within the European Union and a fundamental component of an area of freedom, security and justice*.[43]

To this end, the establishment of common rules on external borders is foreseen, the effective implementation of which calls for increased co-ordination of the operational co-operation between Member States.[44] In this context, the first Article of the Regulation states that the aim of the Agency is to improve the integrated management of the external borders of the Member States of the EU.[45] The Article goes on to state that, while the responsibility for the control and surveillance of external borders lies with Member States, the Agency will facilitate and render more effective the application of EC measures by co-ordinating Member States' actions in the implementation of these measures, thereby contributing to 'an efficient, high and uniform level of control'.[46] To achieve this, the main tasks of the Agency are:

(i) To co-ordinate operational co-operation between Member States. This includes the evaluation, approval and co-ordination of proposals for joint operations and pilot projects. The Agency may itself, in agreement with Member States concerned, launch initiatives for such operations and projects;[47]
(ii) To assist Member States with training of border guards;[48]
(iii) To carry out risk analysis by developing a common risk analysis model;[49]
(iv) To follow up research development on border control;[50]

Paper 140, at 122. The reference to the existing specialised branches was not in the Commission's original draft and was added during negotiations.

[43] Emphasis added.

[44] Preamble, Recitals 1 and 2.

[45] Art 1(1).

[46] Art 1(2). The wording is almost identical to the Preamble, but the efficiency element has been added.

[47] Arts 2(1)(a)and 3(1).

[48] Arts 2(1)(b) and 5. In this context, developments such as the Community Borders Code are particularly relevant: Reg (EC) No 562/2006 of the European Parliament and of the Council of 15 Mar 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1.

[49] Arts 2(1)(c) and 4.

[50] Arts 2(1)(d) and 6.

(v) To assist Member States in circumstances requiring increased technical and operational assistance at external borders;[51]
(vi) To provide Member States with the necessary support in organising joint return operations.[52]

The main debate on the precise role of the Agency concerns the task of co-ordinating operational co-operation between Member States.[53] The importance of the role of the Agency in operations is evidenced not only by the practice and policy direction prior to the adoption of the Regulation, but also from the very title the Agency was given. Two main questions arise in this context. The first is whether Agency staff will have enforcement powers in the territory of Member States (and consequently which rules will apply to them); the second whether the Agency has coercive powers over Member States when organising joint operations.

As to the first question, the final text of the Regulation includes a provision not present in the Commission's proposal: Article 10 states that the 'exercise of executive powers by the Agency's staff and the Member States' experts acting on the territory of another Member State shall be subject to the national law of that Member State'.[54] What constitutes an 'executive power' is an open question and a prime candidate for interpretation by the European Court of Justice (ECJ) in Luxembourg.[55] It seems, however, that the Regulation avoids explicitly excluding operational powers of Agency staff from its scope, a view that is reinforced by the similar treatment of Agency staff with experts from Member States.[56]

[51] Arts 2(1)(e) and 8–8(2)(b) which calls for the deployment of the Agency's experts to support national authorities.

[52] Arts 2(1)(f) and 9.

[53] The Preamble further confirms that the development of policy and legislation on external border control and surveillance remains a responsibility of the EU institutions, in particular the Council: Recital 20.

[54] Although interestingly, in his evidence before the House of Lords EU Committee on the role of the Agency on returns of irregular immigrants, the Director, Mr Laitinen, stated that they 'do not have executive powers': see House of Lords EU Select Committee, *Illegal Migrants: Proposals for a Common EU Returns Policy*, 32nd Report, Session 2005–06, HL Paper 166 (Q581).

[55] A closely related question is the extent of ECJ jurisdiction to rule on cases of alleged violations of fundamental rights on such occasions.

[56] This view is now reinforced by the recent Commission proposal for a Reg establishing a mechanism for the creation of Rapid Border Intervention Teams and amending the Border Agency Reg as regards that mechanism, COM(2006)401 final, Brussels, 19 July 2006. Members of such teams—who according to the Commission will be wearing a blue armband with the insignia of the EU (Art 6(3))—will operate in the territory of an EU Member State which requests assistance, after approval by the Agency Executive Director. The new Reg thus amends the Border Agency Reg by adding to its tasks the deployment of rapid intervention teams (Art 12). Members of these teams, ie border guards from other EU Member States, are entrusted with a series of wide-ranging tasks of border checks, but also border surveillance, including prevention of illegal immigration (Arts 7 and 8). It remains to be seen how the Commission's proposals will be received in negotiations in the Council and the European Parliament (now co-legislating in this field).

There is less ambiguity with regard to the second question, ie whether the Agency can compel Member States to participate in joint operations without their agreement. Here the Regulation is stronger than the original Commission proposal in preserving state sovereignty. Article 3(1) second indent states that the Agency may itself, and *in agreement with the Member State(s) concerned*, launch initiatives for joint operations and pilot projects.[57] Thus, Member States cannot be made to participate in joint projects without their agreement.[58] Article 20(3) provides an additional safeguard by stating that proposals for decisions on specific activities to be carried out at, or in the immediate vicinity of, the external border of any particular Member State require a vote in favour of their adoption by the Member of the Management Board representing that Member State.

In negotiations, another clause was inserted aiming to clarify the division of competence between the Agency and Member States—and to avoid the Agency having exclusive competence over external border controls. Article 2(2) spells out the conditions for the exercise of shared competence between Member States and the Agency. It states that 'without prejudice to the competences of the Agency', Member States may continue co-operation at the operational level with other Member States and/or third countries at external borders, 'where such cooperation complements the action of the Agency'. It adds that Member States must refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives and report to the Agency on these operational matters outside its framework. It remains to be seen how this provision will be interpreted in practice, a question which is inextricably linked with the precise competences of the Agency.

On the Agency's powers, a thorny issue has been the involvement of the Agency in return operations. The final text is substantially watered down in comparison with the original Commission's proposal and states that the Agency will provide 'the necessary assistance' for organising joint return operations,[59] whereas the Commission envisaged that the Agency would co-ordinate or organise return operations in Member States. The watering down of the provision can be attributed to concerns by Member States regarding the involvement of the Agency in returns—an area which many believe should not fall within its mandate. However, even in its current wording, the text raises many questions, including the position of the Agency in the returns process.[60] The April 2006 JHA Conclusions seem to confer a greater role on the Agency in the returns process: the Agency

[57] Emphasis added.
[58] This clause was absent in the Commission's proposal. See COM(2003)687 final.
[59] Art 9.
[60] In the Explanatory Memorandum submitted to the House of Lords EU Committee, the Home Office stated that the Agency's two main objectives for next year would be the

should 'play a co-ordinating role' in the organisation of joint charter flights (rather than merely assisting Member States).[61] When probed by the House of Lords EU Committee, the Director of the Agency avoided giving direct answers to questions on whether the Agency has an obligation to comply with human rights or whether it can refuse a Member State's request to carry out an operation, by stating that 'it is up to Member States' to check compliance with the European Convention on Human Rights (ECHR) and that whether to refuse is a complicated question as 'we consider ourselves a purely technical actor'.[62]

Another open question regarding the tasks and powers of the Agency, which is mandated to co-operate with Member States but also with third countries and organisations, is the issue of access and use of personal data. The Regulation does not provide much detail on the topic, aside from the rather elliptical provision that the Agency may take all necessary measures to facilitate the exchange of information relevant for its tasks with the Commission and Member States.[63] The data protection implications of such exchange of information may, however, be considerable and the data protection framework for the Agency is unclear.

Relationship with Non-participating Member States and Third Countries or Organisations

A contested issue in the negotiation of the Regulation was the participation in the Agency of the UK and Ireland.[64] The UK formally notified its intention to participate in the Agency,[65] but it—along with Ireland—was denied full participation as the Regulation was deemed to be a Schengen-building measure.[66] Following its exclusion from the Agency[67]—which may be attributed to a political backlash of Schengen members to the

establishment of a system to manage the assistance on joint return operations and assistance to Member States in at least 4 joint return operations: House of Lords EU Select Committee Report, above n 54, at 31.

[61] The Council also invited Member States planning to organise joint charter flights to involve FRONTEX. Doc 8402/06 (Presse 106).

[62] House of Lords EU Select Committee Report, above n 54, QQ 591 and 592, respectively.

[63] Art 11.

[64] For a detailed analysis see V Mitsilegas, 'A "Common" EU Immigration and Asylum Policy: National and Institutional Constraints' in P Shah (ed), *The Challenge of Asylum to Legal Systems*, (London, Cavendish, 2005) 125

[65] Letter of 11 Feb 2004 by John Grant, UK Permanent Representative to the EU, in Council doc 10658/04, Brussels, 17 June 2004.

[66] However, the UK and Ireland may ask, on a case-by-case basis, to take part in the Agency's activities. The decision to approve such request will be taken by the Agency's Management Board. See Art 20(5) of Reg 2007/2004.

[67] The Reg contains provisions on forms of partial participation of the UK and Ireland in the Agency (see, in particular, Arts 12 and 23(4)).

continuation of the UK's 'pick-and-choose' approach to EU immigration and asylum law—the UK has challenged the validity of the Regulation before the Court in Luxembourg on this point.[68] The answer of the Court is eagerly awaited, as there are strong arguments in favour of both sides: the Agency may be necessary to 'compensate' for the abolition of border controls in Schengen but, firstly, it is already operative in a period where the new EU Member States are not yet full Schengen members; and, secondly, there may be a case for arguing that the Title IV – and not the Schengen – Protocol should apply here as the mandate of the Agency is broad enough to fall within the general Title IV provisions (especially bearing in mind its role on returns).[69]

The Regulation states that the Agency may co-operate with Europol and other international organisations 'in the framework of working arrangements concluded with those bodies in accordance with the relevant provisions of the Treaty.'[70] This provision is broader than the Commission's original draft, which limited co-operation with Europol to strategic non-personal information. The amendment of this provision raises data protection concerns, especially in the light of the absence of a data protection framework for the Agency. At this stage, the level of co-operation between the two bodies is unclear.[71] Any exchange of personal data between the two bodies should take place only after the signature of a formal agreement, where data protection rules must be established. Similar concerns arise with regard to the provisions on co-operation of the Agency with third countries.[72] These concerns also extend to potential operational co-operation in guarding the external

[68] See letter of 27 Oct 2004 by Caroline Flint, then Home Office Minister, to Lord Grenfell, chairman of the House of Lords EU Committee. The UK government states that it believes it was wrongfully excluded by the Reg and makes the challenge to establish the correct legal position, also for future legal measures: House of Lords EU Select Committee, *Correspondence with Ministers,* above n 42. The UK has also challenged its exclusion in similar terms from the Council Reg (EC) No 2252/2004 on standards for security features and biometrics in passports and travel docs, below n 137. See Cases C–77 and C–137/05 *UK v Council* [2005] OJ C 82/25 and [2005] OJ C 132/16, respectively.

[69] It is interesting to note that the Commission, in a Staff Working Paper accompanying the proposal on rapid reaction teams, categorically excludes the UK and Ireland from participation in such teams. It is stated that, while the UK and Ireland may participate in joint operations organised by the Agency, they cannot participate or request assistance within the framework of rapid intervention teams, 'since this is considered a measure of solidarity applicable only to the Member States participating in the Schengen acquis on external borders and the third countries associated with the implementation, application and development of the Schengen acquis': SEC(2006)953, 9 July 2006, at 3.

[70] Art 13.

[71] The first FRONTEX Annual Report states that so far the Agency has prepared a contribution to Europol's first Organised Crime Threat Assessment: *Frontex General Report for the year 2005,* Council doc 10438/06, Brussels, 13 June 2006.

[72] Art 14 of Reg 2007/2004.

border between the Agency and third countries neighbouring the EU,[73] where respect for human rights and the non-discrimination principle must be closely monitored.

Finally, countries associated with the implementation, application and development of the Schengen *acquis* will participate in the Agency, on the basis of arrangements specifying the precise details of their participation.[74]

Accountability and Parliamentary Scrutiny

The Agency's work will be co-ordinated primarily by a Management Board, consisting of one representative per participating Member State plus two representatives from the Commission.[75] Associated Schengen states will each have a member on the Management Board[76] and the UK and Ireland—which have been excluded from the Agency—will be invited to attend meetings.[77] The Management Board will inter alia approve (by a three-quarters majority) the Agency's Annual Work Programme, appoint the Agency's Executive Director and decide (by an absolute majority of its members) to allow the UK and Ireland to participate in the Agency's activities on a case-by-case basis.[78] As to scrutiny and accountability of the work of the Agency and the Management Board, the provisions are quite limited. According to Article 20(2)(b), the Management Board will adopt an annual report (which will be made public) and forward it by 15 June of the following year to the European Parliament, the Council, the Commission, the Economic and Social Committee and the Court of Auditors. The Management Board will also forward by 30 September each year to the Council and the Commission the Agency's annual work programme.[79] And within three years from the start of work of FRONTEX, the Management Board will commission an independent external evaluation on the Agency.[80]

[73] See for instance the Conclusions of the 15th EU–Russia Summit in May 2005, where a specific section was devoted to co-operation on border issues and the need to explore possibilities of operational co-operation between the Agency and Russia was highlighted See http://ec.europa.eu/comm/external_relations/russia/intro/summit.htm.

[74] Art 21(3). See Proposal for a Council Decision on the signature of an Agreement between the Community and Norway and Iceland on the modalities of their participation in FRONTEX, COM(2006)178 final, 26 Apr 2006.

[75] Art 21(1).

[76] Art 21(3).

[77] Art 23(4).

[78] Arts 20(2)(c), 20(2)(a) and 20(5), respectively.

[79] Art 20(2)(c).

[80] Art 33.

The European Border Agency—Some Open Questions

In a relatively short period of time, with the EU's eastward enlargement looming, the EU-15 adopted unanimously a very detailed Regulation establishing an Agency to 'manage' the EU's external borders. The Agency—which focuses on operational co-operation and has taken over from ad hoc centres and projects on border controls which have been taking place in the last few years— has slowly started work and has already been involved in joint land operations and in risk analysis projects.[81] There are currently talks about greater involvement of the Agency in joint operations, including the establishment of a Mediterranean Coastal Patrols Network under the auspices of FRONTEX.[82] However, the extent and legal basis of the powers and tasks of the Agency are still unclear.

Along with a certain vagueness in the text of the Regulation regarding the powers of the Agency (reflecting the need to accommodate different national perspectives on its role), the reason for this lack of clarity can be traced in the very nature of the choice of Community intervention in this area, ie the establishment of an agency. So far, Community agencies have been established (mostly with a similar justification to the one given by the Commission regarding FRONTEX, ie the need for greater technical know-how and visibility) as information or executive agencies[83]—and the reference to the 'management' of the external border is a conscious attempt by the EU institutions to include FRONTEX in the category of executive agencies. However, the text of the Regulation itself and the very nature of the subject matter (border controls) cast doubts on whether the role of the Agency will be merely 'managerial' and point to a strongly operational Agency. The title of the Regulation talks about the 'management of operational co-operation'. However in practice there may be a very thin line between management and the undertaking of operations by Agency staff.

Such a role in operational activities—in particular by reference to co-ordination of operations, executive powers and information exchange—

[81] FRONTEX Annual Report, above n 71.

[82] Commission Communication on *First Follow-up to Hampton Court,* COM(2005)621 final, 30 Nov 2005. Also see 'EU Green Light for Rapid Reaction Borders Teams', available at www.eupolitix.com, 13 Jan 2006.

[83] On an attempt to categorise see A Kreher, 'Agencies in the EC—A Step Towards Administrative Integration in Europe' (1997) 4 *Journal of European Public Policy* 225, at 245. See also E Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37 *CML Rev* 309. It has been argued that agencies have a 'persuasive' role to play and enhance policy credibility by being independent of government. See G Majone, 'The New European Agencies: Regulation by Information' (1997) 4 *Journal of European Public Policy* 262. However, this may lead to a 'de-politicisation' of the policy at stake. This argument is made further below.

distinguishes FRONTEX from other first pillar agencies, and brings it much closer to third pillar agencies such as Europol and Eurojust. Work by the Agency—whether it involves 'management' or goes beyond that—has substantial implications for civil liberties and fundamental rights. However, the framing of the Agency as a 'management agency' has resulted in this aspect of its work being sidelined in the Regulation, with very little being included on the legal framework of the Agency's work in the context of respecting human rights and in the context of liability, applicable law and jurisdiction (especially by the ECJ) in cases where the Agency's work breaches fundamental rights and/or Community law. These concerns are exacerbated by the fact that the choice of an agency results in very little transparency and scrutiny over its operations and limited accountability. This may be seen as an attempt to de-politicise the area of work of the Agency—ie border controls—and to avoid debate by treating it as a merely technical issue.[84]

The exact role and powers of the Agency in practice remain to be seen. The same can be said about the relationship between the Agency and Member States and the delimitation of competence and powers between them. The EU policy documents envisage the maintenance of the momentum for further evolution of the Agency, with the Hague Programme calling on the Commission to table a proposal for teams of national experts that can provide rapid assistance to Member States (a proposal which may clarify some of the issues discussed above) and leaves open the possibility for the eventual establishment of a 'European System of Border Guards'.[85] The Constitutional Treaty creates a specific legal basis for the 'integrated management of the external borders',[86] but Member States' concerns over sovereignty have been reflected in a Protocol on the external relations of the Member States with regard to the crossing of the external borders, where it is made clear that the Treaty provisions will be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements.[87] The debate on the exact nature and powers of the Agency and its relationship with Member States will certainly go on.

[84] On the legitimacy issues that this attitude raises with regard to existing EC agencies see Shapiro, above n 19; R Dehousse, 'Regulation by Networks in the European Community: the Role of European Agencies' (1997) 4 *Journal of European Public Policy* 246.

[85] It is interesting to note again the change in wording from the Commission's preparatory Communication to the Hague Programme, which contained a reference to the European Corps of Border Guards. See COM(2004)401 final, 2 June 2004.

[86] It has been argued that this renders integrated border management one of the Union's objectives: Corrado, above n 18.

[87] Protocol 21, sole article, Treaty establishing a Constitution for Europe [2004] OJ C 310/1, 16 Dec 2004.

THE COLLECTION AND EXCHANGE OF PASSENGER DATA[88]

Background

The 9/11 attacks have led to a raft of measures aiming to ensure aviation security and tight controls on all airline passengers travelling to the US. Extensive domestic legislation was enacted placing an obligation on airlines to make available to the Homeland Security Department detailed passenger data. In Europe, such an approach was not initially prevalent, with the exception of some countries such as the UK, which placed emphasis on the electronic surveillance of borders.[89] However, similar proposals at EU level surfaced, not by an initiative of the Commission[90] but by an initiative of Spain, which used Member States' right to put forward EC legislative proposals in Title IV matters. These new proposals added on existing measures 'privatising' border controls via the introduction of carriers' liability for transporting illegal immigrants and established a new level of co-operation between the private sector and the state.[91] EC legislation, along with the EU response to US requirements, will be discussed in this section.

The 'Advance Passenger Information' Directive

The proposal for this Directive was tabled by the Spanish Government in March 2003.[92] Its original draft called on air and sea carriers to transmit, in advance of departure, a wide range of passenger data to border control authorities at their request. These data would include, inter alia, the

[88] For a detailed analysis see V Mitsilegas, 'Controle des Etrangers, des Passagers, des Citoyens: Surveillance et Anti-terrorisme' (2005) 58 *Cultures et Conflits* 155, at 182. A great part of this and the next section is based on this article.

[89] See Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Cm 5387 (London, TSO, Feb 2002).

[90] In June 2003, three months after the tabling of the proposal by the Spanish Government, the Commission published a Communication which would be taken into account by European leaders discussing the development of a common EU policy on illegal immigration in Thessaloniki later that month: COM(2003)323 final 3 June 2003. It was stated in the Communication that there was no immediate need for new harmonising measures regarding carriers' liability and no such references were included in the Thessaloniki Conclusions.

[91] See the Carriers' Liability Dir, building upon Art 26 of the Schengen Convention [2001] OJ L 187/45, 10 July 2001. On the privatisation of immigration control see, inter alia, G Lahav, 'Immigration and the State: the Devolution and Privatisation of Immigration Control' (1998) 24 *Journal of Ethnic and Migration Studies* 675; and V Guiraudon, 'De-nationalizing Control: Analysing State Responses to Constraints on Migration Control' in V Guiraudon and C Joppke (eds), *Controlling a New Migration World* (London/New York, Routledge, 2001) 31.

[92] Initiative of the Kingdom of Spain with a view to adopting a Council Dir on the obligation of carriers to communicate passenger data [2003] OJ C 82/23, 5 Apr 2003.

number and type of travel document used, nationality, the passenger's full name and date of birth and the border crossing point of entry into the territory of the Member States. The draft also gave discretion to Member States to require carriers to transmit to immigration authorities similar information on passengers who had not used their return tickets. Non-complying carriers would face monetary sanctions.[93]

The carriers' proposal was justified, and ultimately adopted, under Articles 62(2)(a) and 63(3)(b) of the EC Treaty. These serve as the legal basis for the adoption of measures relative to external border controls and illegal immigration respectively. Similarly, Article 1 of the finally adopted text states that the Directive 'aims at improving border controls and combating illegal immigration by the transmission of advance passenger data by carriers to the competent national authorities'.[94] However, although the text of the Directive has the stated aim of combating illegal immigration, there have been attempts to frame it also as a national security and counter-terrorism matter. This was undoubtedly the view of the UK Government. In her evidence to the House of Lords EU Committee, Caroline Flint, then Home Office Minister, argued that the proposal 'is all about border control, whether it is illegal immigration or criminals coming in, or people who are a threat to national security'.[95] In her response to the Committee's Report, the Minister reiterated that the Government considered the proposal necessary and justifiable 'for the purpose of identifying known immigration and security threats'.[96]

The framing of the proposal as a counter-terrorism and national security measure would seem to cast doubt on the *legality* of its adoption solely under the first pillar. It could be argued that, similarly to certain Schengen-building proposals, the transmission of Advance Passenger Information (API), if justified as a border control *and* a counter-terrorism measure, would necessitate a dual legal basis in both the first and the third pillars. This would also necessitate two distinct legal instruments, a 'Title IV' (first pillar) directive and a 'Title VI' (third pillar) framework decision. This view seems to be reinforced by the recent ECJ ruling on the EC/US Passenger Name Data Agreement.[97]

The framing of the proposal as a national security and counter-terrorism measure would also have substantial implications for the assessment of its *proportionality* to the intended aim. The proposal has been criticised for

[93] *Ibid*. For a detailed analysis see House of Lords EU Select Committee, *Fighting illegal immigration: should carriers carry the burden?* 5th Report, Session 2003–04, HL Paper 29.

[94] Council Dir 2004/82/EC of 29 Apr 2004 on the obligation of carriers to communicate passenger data [2004] OJ L 261/24, 6 Aug 2004.

[95] House of Lords EU Select Committee Report, above n 93, para 9.

[96] Letter of 1 Apr 2004, in House of Lords EU Select Committee, *Government Responses*, 26th Report, Session 2003–04, HL Paper 164, at 13.

[97] See the next section below.

being disproportionate to the achievement of its stated aims of enhancing border controls and combating illegal immigration.[98] However, these objections might seem less well founded if the measure were justified as necessary to combat terrorism, an aim that could be argued to necessitate intensive counter-measures and, in this case, justify the routine transmission of personal data to immigration and border authorities. It was indeed a proportionality objection that Caroline Flint was addressing by framing the proposal as a security measure in her response to the House of Lords EU Select Committee Report. In the same letter, she noted that 'proportionality is inextricably linked to the purpose for which the data is collected'.[99]

These considerations had a direct impact in the negotiations over the *content* of the proposal, most notably in the area of data protection. Article 6 of the Directive (on 'data processing') has been subject to long and controversial negotiations reflecting different national approaches to how far data exchanged under the Directive should be protected. Shortly before the adoption of the Directive, an agreement appeared to have been reached on strict data protection standards, including purpose limitation (transmission of data for the purpose of facilitating the performance of border checks with the objective of combating illegal immigration more effectively), limits to authorities having access to data (border authorities) and to the retention of data (which should be deleted by border authorities within 24 hours from transmission and by carriers within 24 hours from arrival). However, after pressure from the UK, two significant inroads were made to these standards:

— data would be deleted by border authorities within 24 hours from their transmission unless the data were needed later for the purposes of exercising the statutory functions of the authorities responsible for carrying out checks on persons at external borders in accordance with national law and subject to data protection provisions under Directive 95/46/EC;
— Member States may also use personal passenger data for law enforcement purposes.[100]

It is clear that these additions render the pre-existing limits to access to, and retention of, data, as well as purpose limitation, virtually meaningless. Unsurprisingly, the insertion of these additional clauses into the text was hailed as a success by the UK government, as it would align the Directive to the UK 'multi-agency' approach, which links border checks with the

[98] See House of Lords EU Select Committee Report, above n 93, n 2, at 8.
[99] Above n 96.
[100] See Council doc 7595/04, 23 Mar 2004, where these changes were introduced.

fight against illegal immigration, crime and terrorism.[101] This link between immigration controls and law enforcement operations is explicitly made in Article 6 of the Directive, something that seems at odds with the justification of the proposal as a Title IV immigration and border controls measure. The link between immigration and national security is also made in the Preamble to the Directive, in a provision ironically designed to assuage data protection concerns.[102]

Another field on which the link between the proposal and security considerations has had an impact has been the *democratic scrutiny* of the Directive, the handling of which by the Council and EU Member States has left much to be desired. Two factors form the background to this handling of scrutiny. The first is the fact that the proposal was tabled by a Member State and not by the Commission. According to the Amsterdam Treaty, such proposals in this field would be valid only up to five years after the entry into force of the Treaty (on 1 May 1999). This meant that, if agreement on the Directive was not reached by 30 April 2004, the proposal would fall. The second factor was the Madrid bombings of 11 March 2004. These led, two weeks later, to the European Council Declaration on terrorism, in which the adoption of the API Directive was prioritised. These factors led to the acceleration of procedures to adopt the Directive, notwithstanding opposition by the European Parliament. The European Parliament had to be consulted on the Directive, but finally the Council adopted the Directive, without such consultation taking place.[103]

The Directive was thus adopted on 29 April 2004, one day before the Amsterdam deadline expired. The text no longer requires the transmission of data on return tickets and the Directive applies only to air carriers. But the obligation for them to transmit personal passenger data (such as names and dates of birth and also the departure and arrival times of flights) to border control authorities remains and the transmission of such data is not

[101] See letter by Caroline Flint of 1 Apr, above n 96, n 12. See also the UK border control strategy in the Home Office's recently published Five Year Strategy for Asylum and Immigration, Cm 6472 (London, TSO, 2005). The UK Government states therein that it will introduce legislation to enable data exchange between the Immigration Service, HM Customs and the police (para 58). Extensive reference is made to the UK Government's e-borders programme, which will create 'a joined-up modernised intelligence-led border control and security framework' enabling inter-agency co-operation 'to maintain the integrity of our border control, target activity against those who have no right to be in the UK and assist in the fight against terrorists and criminals' (Annex 1).

[102] Recital 12 notes that it would be legitimate to process transmitted data for the purposes of allowing their use as evidence in proceedings aiming at the enforcement of immigration laws, 'including their provisions on the protection of public policy (ordre public) and national security.'

[103] The background is also discernible in the Preamble to the Directive. It is stated therein that 'the Council has exhausted all possibilities to obtain in time the opinion of the European Parliament' and that 'under these exceptional circumstances the Directive should be adopted without the opinion of the European Parliament' (Recitals 5 and 6, respectively).

subject to the very strict data protection safeguards mentioned above. By linking border controls and the fight against illegal immigration with the fight against crime and terrorism, the Directive paves the way for the routine transmission of everyday personal data to a number of authorities in EU Member States, which can then start building the profile of all those travelling into the EU.

The EC/US Passenger Name Records (PNR) Agreement

Responding to the 9/11 attacks, the United States passed legislation, in November 2001, requiring air carriers operating flights to, from or through the US to provide US Customs with electronic access to data contained in their automatic reservation and departure control systems.[104] These data, known as Passenger Name Records (PNR), constitute a record of each passenger's travel requirements and contain all the information necessary to enable reservations to be processed and controlled by the booking and participating airlines. PNR data can include a wide range of details, from passengers' names and addresses to their email addresses, credit card details and on-flight dietary requirements. PNR is thus broader than the API data, which airlines flying to the EU were obliged to transmit under the Directive analysed above. Furthermore, US law empowered US Customs authorities to access airlines' databases (a 'pull' system), unlike the Directive, which required airlines to transmit API data by the end of check-in (a 'push' system).

The US legislation is applicable to all flights to the US, including flights from the EU. EU airlines would thus have to comply with the legislation if they did not want to be subject to heavy fines, including the cancellation of landing rights at US airports. However, concerns were voiced in the EU that US legislation was too invasive of privacy and could be in conflict with Community and Member States' data protection standards. The Commission informed the US authorities of these concerns and this led to the entry into force of the US legislation being postponed until 5 March 2003. At the same time, the Commission began negotiations with US authorities in order to formulate standards governing the transfer of PNR data to the US, which would comply with EC data protection standards. In the course of negotiations, the European Parliament adopted a series of Resolutions urging the Commission to ensure that these standards are fully

[104] Title 49, US Code, sect 44909(c)(3) and title 19, Code of Federal Regulations, sect 122.49b. On the US response regarding border security see A Ceyhan, 'Sécurité, frontières et surveillance aux Etats Unis après le 11 Septembre 2001' (2004) 53 *Cultures et Conflits*, available at www.conflits.org.

respected.[105] The US requirements were also scrutinised by the 'Article 29 Working Party' on data protection,[106] which was highly critical of US demands.[107]

Negotiations were protracted and lasted well beyond 5 March 2003, when US law formally entered into force vis-à-vis EU airlines. They resulted in an agreement between the Commission and the US authorities on 16 December 2003. Following a series of undertakings by the US authorities, the Commission accepted that US data protection standards in the context of PNR transfers were adequate. The Commission said so in a Communication issued that day, justifying its decision by stating:

> The option of insisting on the enforcement of the law on the EU side would have been politically justified, but … would have undermined the influence of more moderate and co-operative counsels in Washington and substituted a trial of strength for the genuine leverage we have as co-operative partners.[108]

The Commission called for a global EU approach to the sharing of PNR data. On the issue of EU/US transfers, the Commission noted that the way forward was to establish a legal framework for existing PNR transfers to the US. This would consist of an 'adequacy' Decision by the Commission, certifying that the US data protection standards were adequate, followed by a 'light' bilateral international agreement between the Community and the US. Although the US legislation was prompted by the 9/11 events and is viewed in the US as a counter-terrorism measure, in the EU it was dealt with as a first pillar ('internal market') measure and not as a third pillar ('counter-terrorism') measure. Making the most of its mandate, the Commission is, arguably, trying to consolidate its position as the EU and Member States' chief representative in negotiating standards in the field—it does not seem accidental that the Communication on PNR also calls for a 'global' EU approach in negotiating standards in international fora such as the International Civil Aviation Organisation (ICAO)—where, presumably, it will be the Commission and not the Council or Member States which will take the lead.

The 'first pillar' choice is also significant legally, as it led to the assessment of the 'adequacy' of US data protection standards—and thus the legality of PNR transfers by EU airlines—being made under Directive

[105] See Resolutions P5_TA(2003)0097 and P5_TA(2003)0429.

[106] The Working Party was established under Dir 95/46/EC on data protection (Art 29), below n 109, and is comprised of Member States' Information Commissioners. Its role is advisory.

[107] Opinion 4/2003 on the Level of Protection ensured in the US for the Transfer of Passengers' Data, 11070/03/EN, WP 78.

[108] Communication from the Commission to the Council and the Parliament, *Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach*, COM(2003)826 final, 16 Dec 2003, at 5.

95/46/EC on data protection.[109] Article 25 of the latter provides for adequacy Decisions to be taken, not by the Council and the European Parliament under the ordinary EU legislative procedure, but under 'comitology', ie by a Committee consisting of representatives of Member States and chaired by the Commission. This is not the most transparent method of decision-making and leaves little, if any, space for parliamentary scrutiny. In the UK, drafts of the adequacy Decision were not submitted for scrutiny by the government to the EU Committees of the Houses of Parliament, notwithstanding the existence of specific requests to that effect.[110]

The draft adequacy Decision was examined by the Article 29 Working Party on Data Protection.[111] In an Opinion published in January 2004, the Working Party expressly stated that 'the progress made does not allow a favourable adequacy finding to be achieved'.[112] Following similar considerations, and notwithstanding its limited role under the comitology process, the European Parliament adopted, on 30 March 2004, a Resolution calling on the Commission to withdraw the draft adequacy Decision.[113] The European Parliament drew attention to many of the data protection points made above and, on the issue of legality, noted that there was no legal basis in the EU permitting the use of PNR commercial data for public security purposes. There was a need, according to the Parliament, for a specific legal basis covering these cases. It considered that the draft adequacy Decision would lead to a lowering of the data protection standards in Directive 95/46/EC on data protection.

The European Parliament also took the step of requesting an Opinion from the European Court of Justice on the compatibility with the EC Treaty of the draft PNR international agreement, which would be concluded after the adoption of the adequacy Decision. This led to a delay in the submission of the Parliament's own opinion under the consultation process of Article 300 EC Treaty. With the Court case pending, and the

[109] Dir 95/46/EC of the European Parliament and of the Council of 24 Oct 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

[110] See correspondence between Lord Grenfell, chairman of the House of Lords EU Committee and Lord Filkin, Minister at the Department for Constitutional Affairs, on scrutiny arrangements. Lord Filkin noted that the UK Government had not identified this proposed decision 'as being of such importance as to trigger the exceptional arrangements for the deposit for scrutiny of Commission comitology legislation': Letter to Lord Grenfell of 26 Feb 2004, in House of Lords EU Select Committee, *Correspondence with Ministers*, above n 42.

[111] The Working Party has a mandate to do so under Art 30(1)(b) of Dir 95/46/EC on data protection, above n 109.

[112] Opinion 2/2004 on the Adequate Protection of Personal Data contained in the PNR of Air Passengers to be transferred to the United States' Bureau of Customs and Border Protection (US CBP), adopted on 29 Jan 2004, doc 10019/04/EN, WP 87.

[113] P5_TA-PROV (2004) 0245.

Parliament not having submitted its opinion, the Council decided to go ahead with the agreement. In the Decision authorising the Conclusion of the Agreement,[114] the Council evoked the urgency caused by the uncertainty for carriers and passengers (Preamble, Recital 2).

The Commission's adequacy Decision was finally adopted on 14 May 2004.[115] This was followed three days later by a Council Decision authorising the President of the Council to sign, on behalf of the Community, the Agreement with the US on PNR transfers.[116] The terms of the Agreement and the US Undertakings have not changed from the draft that was so heavily criticised by the Article 29 Working Party and the European Parliament. According to these documents:

— 34 categories of PNR data are required by the US Bureau of Customs and Border Protection (CBP). These include name, address and billing address, email address, all forms of payment information, travel itinerary, frequent flyer information, travel status of passenger, no-show information, one-way tickets, all historical changes to the PNR and 'general remarks';
— CBP will 'pull' passenger information from air carrier reservation systems until such time as air carriers are able to implement a system to 'push' the data to CBP;[117]
— PNR data are used by CBP strictly for the purposes of preventing and combating terrorism and related crimes and other serious crimes that are transnational in nature;[118]
— Storage of PNR data will take place for 3.5 years. Data which have not been manually accessed during this period will be destroyed. Data which have been accessed will be kept for a further eight years. These provisions will not apply to PNR data which are linked to a specific enforcement record;[119]
— CBP may provide data to other government authorities, including

[114] Council Dec 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2004] OJ L 183/83.

[115] Commission Dec of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the US' Bureau of Customs and Border Protection, [2004] OJ L 235/11. The Undertakings of the US Homeland Security Department are annexed at 15–21. The list of PNR data is annexed at 22.

[116] *Ibid*. The text of the Agreement is annexed at 84–5. The Agreement was signed on 28 May 2004.

[117] Undertakings, above n 115, point 13. It is not clear how the legality of pulling data from carriers' systems will be monitored or how it will be ensured that extracting data from airlines' databases is limited to data on passengers on flights to or via the US.

[118] *Ibid,* point 3.

[119] *Ibid,* point 15.

foreign government authorities, with counter-terrorism or law-enforcement functions, on a case-by-case basis, for the purposes of preventing and combating the above mentioned offences;[120]
— In the event that a PNR requirement is imposed by the EU, CBP will, strictly on the basis of reciprocity, encourage US-based airlines to co-operate;[121]
— The Undertakings will apply for a term of 3.5 years and may be extended or reviewed;[122]
— The Undertakings do not create or confer any right or benefit on any person or party. Their provisions do not constitute a precedent for any future discussions with the Commission, the EU or third states.[123]

The European Parliament brought an action before the ECJ asking for the annulment of the Decision authorising the Conclusion of the EC–US Agreement, on the ground that the latter infringed the right to privacy and data protection and breached the principle of proportionality, as well as on legality grounds.[124] In November 2005, the Advocate-General expressed the view that, while the Agreement and Decision did not cause fundamental rights concerns, the adequacy Decision of the Commission and the Decision authorising the signature of the Agreement had to be annulled since the Agreement dealt primarily with fighting terrorism (ie a third—and not a first—pillar matter).[125] The Court issued its ruling in May 2006.[126]

Unlike the Advocate-General, the Court avoided expressing any views on the compatibility of the Agreement with fundamental rights. However, the Court agreed with the Advocate-General that the adequacy Decision and the Decision authorising the signature of the Agreement must be annulled on the ground that Article 95 EC Treaty, read in conjunction with Article 25 of Directive 95/46/EC on data protection, cannot justify Community competence to conclude the Agreement.[127] The Court

[120] *Ibid*, point 29.
[121] *Ibid*, point 45.
[122] *Ibid*, point 46.
[123] *Ibid*, points 47 and 48.
[124] The European Parliament argues that Art 95 EC Treaty (on the internal market) is not the right legal basis for the contested Dec. It also argues that its assent should be required for the adoption of the Dec authorising the conclusion of the international agreement and not its mere consultation, as has happened. This is because, according to the Parliament, the agreement constitutes an amendment of the 1995 Data Protection Dir. See Council doc 11876/04, 6 Aug 2004.
[125] Opinion of Léger AG, 22 Nov 2005 in Cases C–317/04 *European Parliament v Council* and C–318/04 *European Parliament v Commission* (below).
[126] Joined Cases C–317 and 318/04 *European Parliament v Council*, judgment of 30 May 2006 (not yet reported). The Parliament was supported by the European Data Protection Supervisor, while the Council was supported by the Commission and the UK.
[127] *Ibid*, para 67.

accepted that the transfer of PNR data to the Homeland Security Department 'constitutes processing operations concerning public security and the activities of the State in areas of criminal law'.[128] It would thus seem that the Agreement should have been concluded under the third, and not the first, pillar. The Court, however, preserved the effects of the Agreement until 30 September 2006, for reasons of legal certainty, until a follow-up solution could be found.[129] The Commission has already tabled a recommendation to the Council concerning the conclusion of the Agreement under Articles 24 and 38 EU Treaty—this would be a third pillar agreement with the same content as that of the one annulled by the ECJ.[130] Ironically, this would mean that the European Parliament would have no decisive role in the negotiation and conclusion of the Agreement.[131] It seems that for the Parliament, in the present case and for the purposes of defending its institutional prerogatives, the ECJ challenge has backfired.

The Commission's negotiations with the US highlight, as on other occasions, the dilemma whether the EU should choose to co-operate with third countries, speaking with one voice, if this would mean that its own standards would be compromised.[132] The Agreement has been heavily criticised but swiftly agreed (by being framed as an urgent response to terrorism), facing opposition from both data protection watchdogs and the European Parliament. The first joint review of the operation of the Agreement is not encouraging on the grounds of access to data and passengers' rights.[133] At the same time, the negotiations of the PNR Agreement provided yet another example of fierce inter-institutional fighting. The Commission took the opportunity to represent Member States (by framing the issue as an internal market/first pillar matter) in negotiating with the US. However, in the PNR case, like in other cases, the legitimacy of what the EU negotiators have proposed and/or accepted as a compromise has been almost fatally undermined by the lack of transparency and the absence of any meaningful scrutiny by the European and national parliaments. The re-conclusion of the Agreements on a third pillar legal basis, while legally sounder, gives even less opportunity for scrutiny.

[128] *Ibid,* para 56.
[129] *Ibid,* paras 71–74.
[130] COM(2006)335 final, 16 June 2006. See also the subsequent notice concerning the denunciation of the Agreement: Council doc 11664/06, 28 July 2006.
[131] See V Mitsilegas, 'The New EU/US Co-operation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 *European Foreign Affairs Review* 515.
[132] *Ibid.*
[133] See Commission Staff Working Paper on the Joint Review, COM(2005)final, 12 Dec 2005. See also the Report on the same subject by the US Homeland Security Department (Privacy Office, Department of Homeland Security, 19 Sept 2005).

THE 'DEEPENING' AND 'WIDENING' OF DATABASES AND THEIR INTEROPERABILITY

Background

The US response to 9/11, which had 'border security' as one of its centrepieces, was largely replicated by EU leaders after the Madrid bombings. In the Declaration, of 25 March 2004, on combating terrorism, the European Council linked the monitoring of the movement of people with the 'war on terror' by stressing that 'improved border controls and document security play an important role in combating terrorism'.[134] There were two elements in this approach: the inclusion of biometrics in EU visas and passports, which should be prioritised with relevant measures to be adopted by the end of 2004; and the enhancement of the interoperability between EU databases and the creation of 'synergies' between existing and future information systems (such as SIS II, VIS and EURODAC) 'in order to exploit their added value within their respective legal and technical frameworks in the prevention and fight against terrorism'.[135]

Biometrics

Political pressure towards the insertion of biometrics into identity documents led to the adoption, in December 2004, of a Regulation introducing biometric identifiers (in the form of facial images and fingerprints) in EU passports.[136] As with the Carriers' Directive, the legal basis of the Regulation is Article 62(2)(a) EC Treaty on border controls, and like the Directive, the Regulation was deemed to be a security measure.[137] The Regulation was finally adopted notwithstanding serious objections regarding the appropriateness of the legal basis and the existence of EC competence to adopt binding legislation on the content of identity documents. These concerned the fact that: existing EU measures take the form of non-legally binding Resolutions; Article 62(2)(a) refers to controls of the external border of the EU and not to the content of EU travel documents; and Article 18(3) EC Treaty explicitly states that Community action to facilitate the exercise of citizenship rights does not apply to provisions on

[134] Pt 6, at 7, available at www.consilium.europa.eu under 'European Council Conclusions'.
[135] *Ibid*, pt 5, at 7.
[136] Council Reg (EC) No 2252/2004 of 13 Dec 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L 385/1.
[137] See letter of 15 July 2004 by the then Home Office Minister, Caroline Flint, to Lord Grenfell, Chairman of the House of Lords EU Select Committee, stating that 'our view is that the current proposal is first and foremost a security measure'.

passports, identity cards, residence permits or any such documents. In spite of these concerns about the legality and the proportionality of the measure,[138] and the reactions by the Article 29 Working Party,[139] negotiations on the measure went ahead and a second biometric identifier—fingerprints—was added. The Regulation was adopted swiftly thereafter in December 2004—perhaps to pre-empt a greater say of the initially critical European Parliament, which would become a co-legislator with a right to veto on the biometrics proposal from 1 January 2005.[140] Work on biometrics in visas and residence permits is also continuing, notwithstanding a series of technical problems that have occurred.

Biometric data will be of value to enforcement agencies if they form part of databases which are easily accessible.[141] It is thus no coincidence that in the EU, as in the US, calls for the introduction of biometrics went hand in hand with calls for facilitating their inclusion in databases and enhancing the 'interoperability' of these databases so that data could be easily exchanged. The Commission has been developing for some years now the so-called second generation Schengen Information System (SIS II), with the aim of including more and more detailed data (including biometrics) and enabling the interlinking of alerts and possible synergies with other systems like the Visa Information System (VIS). An example of how central this project is for the Commission is that a new unit on 'large-scale information systems' was created within the JHA Directorate-General on 16 December 2002.[142]

The Second Generation Schengen Information System (SIS II)

One of the main EU priorities in recent years has been the development of the 'second generation' Schengen Information System (SIS II). Further to

[138] On both concerns see the detailed analysis by Statewatch, prepared by Steve Peers, *The Legality of the Regulation on EU Citizens' Passports*, 26 Nov 2004, available at www.statewatch.org.

[139] Letter of 30 Nov 2004 by Peter Schaar, chairman of the Working Party, to Josep Borrell Fontelles, chairman of the European Parliament.

[140] The need for the swift adoption of the proposal has also been justified on the ground that the US would abandon its visa-waiver programme with those EU Member States which had not introduced biometrics in their passports by a certain date. As in the PNR case, the EU has managed to obtain an extension to the US deadline for the insertion of biometrics, but this new US deadline will not be met and it is unlikely to be extended by the US (see letter of 31 Mar 2005 from the Chairman of the US House Judiciary Committee to the Commission and the Council, available at www.statewatch.org).

[141] For analyses on biometric policy see A Liberatore, *Balancing Security and Democracy: The Politics of Biometric Identification in the EU,* EUI WP RSCAS 2005/30; and R Thomas, 'Biometrics, International Migrants and Human Rights' (2005) 7 *European Journal of Migration and Law* 377.

[142] See the Commission Communication on the development of SIS II, COM(2003)771 final.

the Amsterdam Treaty, the Schengen Convention and the Schengen *acquis* form part of Community and Union law and measures developing this *acquis* (Schengen-building measures) are adopted by the Community or Union (according to the appropriate pillar). This rather complex legal situation (which would be simplified had the EU Constitutional Treaty—which would abolish pillars—not been frozen) is replicated in the development of SIS II. The Commission has been presenting a series of documents with this aim, the latest being three documents (two first pillar Regulations and one third pillar Decision) tabled in May 2005.[143]

The main reasons for developing the 'second generation' SIS, apart from technical improvements and allowing the new Member States to connect to it, are to broaden the categories of data included in the database and the categories of national authorities having access to Schengen data. Counter-terrorism considerations have played a significant part in this extension. Indeed, in 2004, the Council adopted a first pillar Regulation and a third pillar Decision concerning the introduction 'of some new functions for the Schengen Information System, including in the fight against terrorism'.[144] The Regulation extends access to SIS data to national judicial authorities and access to immigration data to authorities responsible for issuing visas and residence permits and examining visa applications. The Decision extends access to 'criminal law' SIS data to Europol and Eurojust.

The widening of access to the Schengen databases has led to concerns that the nature of the Schengen Information System is being changed, with the system being transformed from an alerts mechanism, accessed for specific immigration control or law enforcement purposes on a hit/no hit basis, to a general law enforcement database. These concerns are exacerbated by the broad wording of the draft Regulation and Decision regarding the purpose of SIS II—Article 1 of both documents states that SIS II is 'to enable competent authorities of the Member States to exchange information for the purpose of controls on persons and objects' and contribute to 'maintaining a high level of security within an area without internal border controls between Member States'.[145] This wording has been criticised by both the European Data Protection Supervisor and the Schengen Joint Supervisory Authority in their Opinions on the proposals developing SIS II for being too broad and too imprecise. The European Data Protection Supervisor notes that this goes beyond Article 102 of the Schengen

[143] Proposal for a Council Decision on the establishment, operation and use of the second generation Schengen Information System, COM(2005)230 final; Proposal for a Reg on the establishment, operation and use of the second generation Schengen Information System, COM(2005)236 final; and Proposal for a Reg regarding the access to SIS II by the services of Member States responsible for issuing vehicle registration certificates, COM(2005)237 final.

[144] Reg 871/2004 [2004] OJ L 162/29; Dec 2005/211/JHA, [2005] OJ L 68/44.

[145] COM(2005)236 and COM(2005)230, above n 143.

Convention, which ensures strict purpose limitation for the use of information in the system.[146] The latest draft of the Regulation, which has been agreed by the JHA Council meeting in 'mixed Committee' and will now go for scrutiny to the European Parliament, contains a somewhat more precise definition[147]—but the Council insists on biometrics being included in SIS II.[148]

The Prüm Treaty[149]

Other Schengen-type initiatives on border security have developed outside the EU framework. In May 2005, seven EU Member States[150] signed a Convention on the 'stepping up of cross-border co-operation, particularly in combating terrorism, cross-border crime and illegal immigration'—the so-called Prüm Convention.[151] Like Schengen, the Prüm Convention was named after the town where it was signed. Like Schengen, it is a pioneering document, where a number of EU Member States decide to push ahead on an inter-governmental basis and forge closer co-operation in home affairs matters. Innovations in the Prüm Convention include the establishment of national DNA analysis files and the automated search and comparison of DNA profiles (and fingerprinting data), the supply of personal data if circumstances 'give reason to believe that the data subjects will commit criminal offences' (Article 14), the deployment of armed air marshals and joint police operations, including, in emergency cases, action in the territory of other contracting states without their prior consent. When operating in the territory of another contracting party, officers 'may wear their own national uniforms' (Article 28(1)). These are far-reaching proposals and may have significant consequences for the protection of civil liberties and fundamental rights.[152] And they lie outside the Community and Union legal order. However, parties in the Prüm Convention take care

[146] [2006] OJ C 91/38, also available at www.edps.eu.int. Another concern of the Supervisor has been the interlinking of alerts.

[147] See Art 1(2), according to which the purpose of the SIS II is 'to maintain public policy and a high level of public security, including national security, in the territories of the Member States and to apply the provisions of Title IV of the EC Treaty relating to the movement of persons in their territories, using information communicated via the system': Doc 5709/6/06 Rev 6, 6 June 2006.

[148] See the analysis by Steve Peers on the Statewatch website, www.statewatch.org.

[149] See V Mitsilegas, 'Operational Co-operation and Counter-terrorism in the EU' in F Pastore (ed), *Supranational Counter-terrorism* (Rome, CeSPI Working Paper 22/2005, Nov 2005), available at www.cespi.it.

[150] Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. Italy has recently signed a Declaration that it will sign the Convention. See www.statewatch.org.

[151] Council doc 10900/05.

[152] See T Balzacq, D Bigo, S Carrera and E Guild, *Security and the Two-Level Game: The Treaty of Prum, the EU and the Management of Threats,* CEPS Working Doc 234/2006, available at www.ceps.be. For a critique of the process of decision-making on JHA matters

to avoid conflict and ensure compliance with their Community and Union obligations.[153] The German EU Presidency has recently embarked on an effort to incorporate the Prüm Treaty in the EU legal framework.

The Visa Information System (VIS)

While work on the development of SIS II is ongoing, so is work on the development of VIS, one of its main potential 'interlocutors'. The JHA Council adopted detailed conclusions on the development of VIS in February 2004, stating clearly that one of the purposes of the system would be to 'contribute towards improving the administration of the common visa policy and towards internal security and combating terrorism'.[154] The Council called for the inclusion in VIS of biometric data on visa applicants for verification and identification purposes, 'including background checks'.[155] It also called for access to VIS to be granted to border guards and 'other national authorities to be authorised by each Member State such as police departments, immigration departments and services responsible for internal security'.[156]

In June 2004, the Council adopted a Decision forming the legal basis for the establishment of VIS[157] and negotiations began to define its purpose and functions and formulate rules on access and exchange of data. The Commission subsequently tabled a draft Regulation aiming to take VIS further by defining its aims and rules on data access and exchange.[158] The proposal has been the outcome of extensive consultation and the Commission has tried hard to counterbalance the choice of a very invasive form of intervention (biometric data in VIS) with clearly delimiting access to VIS and including in the text detailed provisions on data protection and a 'proportionality' provision so that, while biometric visas can be scanned, they will not be routinely stored in the system. However, the logic of the

outside the Community or Union framework see also House of Lords EU Select Committee, *Behind closed doors: the meeting of G6 Interior Ministers at Heiligendamm*, 40th Report, Session 2005–06, HL 221.

[153] See above n 151, Art 47(1) which states that '[t]he provisions of this Convention shall apply only in so far as they are compatible with European Union law. Should the European Union in future introduce arrangements affecting the scope of this Convention, European Union law shall take precedence in applying the relevant provisions of this Convention. The Contracting Parties may amend or replace the provisions of this Convention in view of those new arrangements resulting from European Union law.'

[154] Doc 5831/04 (Presse 37).

[155] *Ibid*.

[156] *Ibid*.

[157] Council Decision of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L 213/5.

[158] Proposal for a Reg of the European Parliament and of the Council concerning the VIS and the exchange of data between Member States on short-stay visas, COM(2004)835 final, 28 Dec 2004.

'security continuum' can still be discerned, with Article 1(2)(a) of the proposal stating that one of the purposes of VIS is 'to prevent threats to internal security of any of the Member States'.

The conclusions of the recent JHA Council of 24 February 2005 raise concerns that the standards set out by the Commission will be dismantled by Member States in negotiations. The Council calls for access to VIS to be given to national authorities responsible for 'internal security', when exercising their powers in investigating, preventing and detecting criminal offences, including terrorist acts or threats. The Council invited the Commission to present a separate, third pillar proposal to this end. The Commission tabled such a proposal in November 2005.[159] This proposal would authorise access to VIS by national authorities responsible for internal security and by Europol. This step would seem to reinforce the 'security continuum' approach, while at the same time the choice of a third pillar instrument would effectively sideline the European Parliament, which will co-decide with the Council on the first pillar VIS Regulation but will only be consulted in the third pillar instrument.

Interoperability of Information Systems

Under the banner of 'interoperability', we are moving towards a system where EU databases containing significant numbers of sensitive personal data can be interconnected and accessed by a number of different agencies.[160] This is notwithstanding the fact that the various EU databases were constructed to serve very diverse purposes, ranging from the facilitation of the assessment of visa and asylum applications (VIS and EURODAC respectively) to police co-operation and counter-terrorism (aspects of SIS, Europol database)—and notwithstanding the fact that they contain quite diverse categories of data. Interoperability—especially if it is justified under the blanket need for fighting a 'war on terror'—renders any safeguard based on purpose limitation regarding access and use of these databases meaningless.

[159] COM(2005)600 final, 24 Nov 2005.

[160] See the Commission Communication on interoperability, COM(2005)597 final, 24 Nov 2005. According to the Commission, the purpose of the Communication is to highlight how, beyond their present purposes, databases 'can more effectively support the policies linked to the free movement of persons and serve the objective of combating terrorism and serious crime' (at 2). The Communication also provides a definition of 'interoperability', which is the 'ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge'. According to the Commission, this is a technical rather than a legal/political concept (at 3). This emphasis on the technical has been criticised by the European Data Protection Supervisor in his Opinion on the Communication (10 Mar 2006).

This complexity is further compounded by the fact that EU databases, because of their diversity, are created under different legal bases (first and third pillar) and are governed by different data protection regimes. These are very fragmented in the third pillar, where specific rules and specific supervision arrangements apply to specific bodies holding databases (such as Europol and Eurojust), with no general, across the board, standards or supervision. These piecemeal arrangements appear rather limited and ineffective in a climate where the extension of current databases and the creation of new ones are advocated,[161] maximum access to personal data is to be facilitated, and where operational co-operation between the various agencies at the EU and national levels is the centrepiece of EU action in the field of JHA for the next five years.[162]

CONCLUSION

The EU legal framework to achieve 'border security' has been constantly evolving in recent years and, as evidenced in the Hague Programme and related documents, is one of the central priorities of EU JHA action for the future. So far attempts have resulted in a multi-level, comprehensive framework, making use of a variety of legal and policy strategies: the adoption of 'internal' legally binding rules, the conclusion of international agreements, the establishment of agencies and the broadening of the scope of databases. The reach of these laws and databases and the powers of the agencies and operational bodies are likely to develop, especially if the recent Commission Communication 'on policy priorities in the fight against illegal immigration' accurately reflects the current political climate.[163] A great part of the Communication is devoted to border controls and the activities of FRONTEX, which—reminiscent of similar US discourses—are linked with the concept of 'secure borders'. This is translated into the increased use of biometrics, the focus on an 'integrated technological approach' (e-borders) and the use of technology in the context of border crossing with calls for the automatic registration of the entry and exit of third country nationals in EU territory.[164]

In the light of these developments, a critical eye must be kept on the evolution of EU action, bearing in mind the real and potential challenges to fundamental rights. As I have noted elsewhere, developments to enhance controls and surveillance in this manner:

[161] The Commission Communication on interoperability, above n 160, makes reference to European registers for travel documents and identity cards (p 9) and perceived shortcomings arising from the absence of registration of EU citizens at European level (p 6).

[162] See in particular the Hague Programme, above n 14, paras 2.1–2.5.

[163] COM(2006)402 final, 19 July 2006.

[164] *Ibid*, at 5–6.

> [P]aint a bleak picture of the re-negotiation of the relationship between the individual and the State, in Europe and globally, as regards the control that the State can exert in the individual's private sphere. The net of State surveillance is widening and thickening in a variety of ways. Personal data is now gathered on all the population, and not merely on specific categories of suspect individuals—so surveillance shifts from specific to generalised. More data is collected from various sources, aiming to create a profile of individuals and to track their movements across the globe—their entry and exit in national (and Schengen) territories is monitored and recorded. Information is gathered before, during and after entry in these territories. The quality of information gathered has changed as well, with the State invading further the private sphere by collecting information on the very essence of one's humanity and identity, ie biometrics. Data transmission has shifted from reactive (with private companies responding to law enforcement requests on specific suspects) to proactive—for instance, data on all passengers must be transmitted by airlines to the authorities.[165]

All this leads to what Ericson and Haggerty have named 'the disappearance of disappearance', a process whereby 'it is increasingly difficult for individuals to maintain their anonymity or to escape the monitoring of social institutions'[166]—in this case the state abetted by the private sector.[167] The intensification of surveillance in this manner seems to be strikingly at odds with the concept of the European Union as a borderless area and leads to the paradoxical situation of an area without frontiers but with more controls.

These developments, which have been largely justified by linking immigration and the movement of people with terrorism, become more worrying in the light of the increased *depoliticisation of border security*. This is evident by both the establishment of an Agency—with officially a merely 'managerial' role—in the field of border controls and statements by the Commission that proposed initiatives, which may result in allowing maximum access to databases and seriously challenge privacy (such as the interoperability of databases), are merely of a technical nature. Central decisions (and, potentially, operations) on border controls and surveillance in the EU are delegated to an Agency, which is deemed better placed to act because expert advice is needed. Similarly, on the PNR front, crucial

[165] Mitsilegas, above n 88 (my translation).

[166] KD Haggerty and RV Ericson, 'The Surveillant Assemblage' (2000) 51 *British Journal of Sociology* 619. See also, especially on the shift of monitoring from reactive to proactive, M Levi and DS Wall, 'Technologies, Security and Privacy in the post-9/11 European Information Society' (2004) 31 *Journal of Law and Society* 194.

[167] David Lyon has pointed out that, despite the focus on developments in the private sector when analysing surveillance, the State remains relevant and can use the information gathered by 'private' surveillance: D Lyon, 'Surveillance after September 11, 2001' in K Ball and F Webster (eds), *The Intensification of Surveillance* (London/Sterling, Vir, Pluto Press, 2003) 21–2.

decisions involving the adequacy of privacy protection in a third state—and consequently the protection of fundamental rights and the upholding of EU standards—have been dealt with as a technical issue and delegated to a committee of experts, with the European Parliament being pointedly sidelined in EC–US negotiations. Security considerations are thus mainstreamed and any debate on policy choices and the legitimate purpose of actions by the EC institutions and agencies is avoided. It remains to be seen whether the recently enhanced decision-making role of the European Parliament in matters relating to border controls will result in a better scrutiny of EU policies in the field of border security.

13

Immigration Detention and the Common European Asylum Policy

DAN WILSHER

INTRODUCTION

IN ITS ATTEMPTS to create a common refugee policy, the detention of asylum seekers raises particular problems for the European Union. This is largely because it brings the EU into the arena of enforcement through police-type powers in a particularly blunt manner. Asylum policy, with its associated panoply of arrest, detention and expulsion, was purely a matter of national competence until the Amsterdam Treaty amendments. Now the EU has entered the fray and authorised the Member States' use of wide legal powers to detain asylum seekers pursuant to the Common Asylum Policy and EU border control initiatives. Such enforcement is politically messy. It has the potential to conflict with the EU's arguably evolving role as joint guardian (with the Council of Europe) of human rights in Europe.[1] The debates between the institutions of the Union reveal that the EU is not comfortable with its new role as jailor.

This chapter will consist of three parts. First, it sets out the international legal standards that should represent a minimum level of protection for asylum seekers under any EU detention regime. Secondly, it considers the jurisprudential status of asylum seekers from non-EU states under EU law. This discussion considers the possibility that asylum seekers may be entitled to protection against arbitrary detention under the general principles of EU law which include human rights standards. Thirdly, it examines the current legislative rules regarding detention adopted as part of the Common Asylum Policy in the 2003 Reception Conditions Directive and

[1] We now have express recognition from the European Court of Human Rights (ECtHR) of the importance of this role in App No 45036/98, *Bosphorus Airways v Ireland*, judgment of 30 June 2005. This decision reviews the many EU measures relating to human rights and holds that there is a presumption that the EU system, including the ECJ, provides adequate protection against violations of ECHR rights.

the 2005 Asylum Procedures Directive by the Council of the EU.[2] These are considered last because, as regards detention, the legislation is incomplete. It does not provide a comprehensive set of rules regulating detention and thus offers, at least on its face, little control of Member State discretion. The debates between the (more liberal) Parliament and the (rather less liberal) Council reveal the wide gulf in opinions over detention policy. As the Parliament's opinions were only advisory, the Council prevailed and adopted legislation which provides few explicit safeguards for asylum seekers' liberty. This heightens further the future importance of the European Court of Justice (ECJ) in developing the human rights dimension of general principles of EU law to afford adequate protection for asylum seekers against arbitrariness in detention. The general principles jurisdiction could also be used to interpret the Directives' detention provisions in a manner compliant with human rights norms.[3]

INTERNATIONAL LAW AND THE DETENTION OF ASYLUM SEEKERS

Customary international law permits states a wide discretion to detain immigrants who seek to enter their territory.[4] This is a crucial aspect of traditional notions of territorial sovereignty. Detention of asylum seekers is therefore permissible without procedural or substantive limitations being placed upon states. Treaty obligations have however imposed some restrictions both as to the decision making procedure to be adopted and the substantive justification for the detention of immigrants. Two key texts of particular relevance to EU law are the European Convention on Human Rights (ECHR) and the Charter of fundamental rights of the Union, which is part of the putative Constitution for Europe. A third source is also of importance to the specific issue of detention of asylum seekers, namely, the International Covenant on Civil and Political Rights. The jurisprudence of the Human Rights Committee under this Covenant is more liberal than

[2] Council Dir 2003/9/EC of 27 Jan 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 and Council Dir 2005/85/EC of 1 Dec 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

[3] For discussion of the use of general principles as an aid to interpretation see T Tridimas, *The General Principles of EC Law* (Oxford, OUP, 1998), at 17–19.

[4] See R Jennings and A Watts, *Oppenheim's International Law,* 9th edn (London, Longman, 1992), 897–8 and 941; *Attorney-General for the Dominion of Canada v Cain* [1906] AC 542 at 546 where Lord Atkinson stated: '[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests: Vattel, *Law of Nationals*, book 1, S.231; book 2, s.125.' See also App No 22414/93, *Chahal v UK (*1996) 1 BHRC 405 at 422.

that of the Strasbourg Court in relation to immigration detention. Thus, although it has not been as frequently cited in the context of EU law, the Covenant will be examined in some detail.

A brief mention is made here of soft law sources in the form of material from the Office of the United Nations High Commissioner for Refugees. These have some significance, influencing good practice, but are not binding on national courts when administering refugee or human rights law. The most important of these soft sources is Executive Committee Conclusion No 44[5] which specifically concerns the exclusive grounds on which asylum seekers can be detained and was clearly an influence upon the Commission when it drafted the detention provisions in the draft Directive on asylum procedures. Although it says detention 'should normally be avoided' it goes on to approve of detention for very many reasons when 'necessary', including: to determine the elements on which the asylum claim is based; to verify identity; and when false documents have been presented or documents destroyed to mislead the authorities.[6] It is difficult to understand why detention is justified in such cases rather than looking at the more important issue of suitability for bail or supervised release. The Executive Committee Conclusions have not been employed by courts when reviewing immigration detention. For this reason, they will not be considered here in any detail.[7]

The European Convention on Human Rights

The European Court of Human Rights (the ECtHR or Strasbourg Court) has the most extensive body of case law of any international human rights tribunal on immigration detention. Its case law is widely referred to by the European Court of Justice because it forms part of the general principles of EU law.[8] EU secondary legislation must generally conform to the ECHR's standards.[9] Furthermore, Member States must conform to the Convention's standards when implementing EU measures.[10] Finally, Member States must respect Convention standards when derogating from rights

[5] UNHCR Executive Committee Conclusions—Detention of Refugees and Asylum Seekers (No. 44 (XXXVII)—1986).

[6] Indeed see the later attempts in Guideline 3 to give some sensible and restricted meaning to the very wide words used in ExCom 44: UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Geneva, UNHCR, Feb 1999).

[7] For more details of the tortuous negotiations on ExCom 44 see G Goodwin-Gill, *The Refugee in International Law* (Oxford, OUP, 1996) at 249–51.

[8] See, eg, the first major case, Case 3/74 *Nold v Commission* [1974] ECR 491.

[9] See Tridimas, above n 3.

[10] *Ibid*, at 23–9.

conferred by EU law.[11] The approach of the ECtHR to immigration detention is likely to be of crucial importance in defining the limits to detention under the Common European Asylum Policy.

The key provision is Article 5 which explicitly authorises immigration detention. Article 5(1) states:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

This provision provides only limited protection for asylum seekers against detention. In the famous *Chahal* decision, the Strasbourg Court held that the Article 'does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing'.[12] The Court made clear that this is in contrast to the position of detainees on remand pending prosecution, which requires specific reasons, such as a risk of absconding, for continuing detention by virtue of judicial interpretation of Article 5(3).[13]

The Court has now followed the same approach in relation to asylum seekers who are seeking to enter into a state (rather than avoid deportation) in the case of *Saadi v United Kingdom*.[14] This decision is important because of the fact that the government admitted that the complainant had been detained purely for administrative convenience to process the asylum claim more quickly. There had been no risk of absconding or danger to public order and he had been given temporary admission before later being detained. It was contended by the applicant that he was seeking to enter the UK lawfully at all times and therefore his detention had not been undertaken 'in order to prevent his effecting an unauthorised entry' and so

[11] See, eg, Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

[12] At para 112. This is in contrast to those detained on bail pending criminal charges under Art 5(1)(c) who must present such a risk of absconding or further offending. ECHR Art 5(1)(c) permits 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'

[13] See App No 21335/93, *Scott v Spain* (1997) 24 EHRR 391; App No 32819/96, *Caballero v United Kingdom,* Judgment of 8 Feb 2000*;* App No 35848/97, *Barfuss v Czech Republic* (2002) 34 EHRR 948. ECHR Art 5(3) provides that '[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

[14] App No 13229/03, judgment of 11 July 2006.

fell outwith the purpose of Article 5(1)(f). The Court rejected this, saying that 'until a potential immigrant has been granted leave to remain in the country, he has not effected a lawful entry, and detention can reasonably be considered to be aimed at preventing unlawful entry'. The Court effectively decided that deportation and entry cases should be treated the same so that Article 5(1)(f) imposes no test of necessity upon states.

The adherence to textual fidelity shown in *Chahal* and now *Saadi* is surprising. In reviewing non-immigration detention, the Strasbourg Court has adopted a proportionality test. The Court ruled that mental patients detained under Article 5(1)(e)[15] must present a threat to themselves or others if at large.[16] Detention for being under the influence of alcohol met with the same approach.[17] In neither of these cases was there any proportionality test imposed by the text of Article 5. Rather the Court took the view that it was clearly wrong to adopt a literal view of the text. Proportionality is now a general test that is explicitly articulated in Articles 8–11 but implicit elsewhere. The Court in *Saadi* has now addressed this explicitly where it said:

> The position regarding potential immigrants, whether they are applying for asylum of not, is different to the extent that, until their application for immigration clearance and/or asylum has been dealt with, they are not 'authorised' to be on the territory. Subject, as always, to the rule against arbitrariness, the Court accepts that the State has a broader discretion to decide whether to detain potential immigrants than is the case for other interferences with the right to liberty.[18]

The right of states to control entry by non-nationals to their territory as a matter of customary international law is well established. Detention of immigrants is one means of securing this right. The Strasbourg case law is largely permissive towards such detention.

The only substantive limit upon detention of immigrants imposed by the *Chahal* decision was a form of duty of good administration. The Court held that:

> [A]ny deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f).[19]

[15] ECHR Art 5(1)(e) permits 'the lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants'.

[16] See *Winterwerp v Netherlands,* Judgment of 24 Oct 1979, Series A No33 (1979–80) 2 EHRR 387.

[17] See App No 26629/95, *Wittold Litwa v Poland* (2001) 33 EHRR 1267.

[18] *Saadi v United Kingdom,* above n 14, para 44.

[19] *Chahal,* above n 4, at para 113.

In *Saadi* the Court used different language and appeared to impose an addition duration test, saying:

> All that is required is that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length.[20]

The *Chahal* test could have provided a powerful restraint over immigration detention but the Court's actual decisions on what is due diligence have been disappointing.[21] Chahal saw periods of detention of six years in total, including periods of six and seven months waiting for initial and fresh decisions from the immigration authorities. By contrast, in another, extradition, case the Court ruled that delays of three and 10 months violated Article 5(1).[22] In the most recent decision in *Singh v Czech Republic,*[23] immigration detention of two and half years was criticised because it contained long periods of inactivity by the authorities when faced with practical obstacles to removal of deportable immigrants. It is difficult to say that any period is too long per se; rather the focus (before *Saadi*) in the case law has been upon the immigration authorities' action or inaction in attempting to secure removal of the detainee.

In *Saadi* however we see a suggestion that due diligence by the authorities alone may not be enough, but that excessive duration of detention itself may be a sign of arbitrariness. The concurring opinion of Sir Nicholas Bratza put the matter more clearly when he said that the prohibition on arbitrariness requires both that detention be for no longer than the application takes to process 'and that it be short'. He found that on the facts of that case (seven days' detention to process the application) 'any period of detention significantly in excess of this period would in my view not be compatible with the first limb of Article 5(1)(f).'[24] This leaves open the question of what duration of detention would be acceptable in future cases. The three judges giving the main judgment refused to specify a limit, but clearly felt that the due diligence test alone was insufficient. There is likely therefore to be a kind of proportionality test applied to the period of detention in future, which is welcome and long overdue.

In terms of procedural rather than substantive protection, there has been a relatively recent decision of some importance. *Shamsa v Poland*[25] concerned immigration detention without a basis in domestic law and

[20] *Saadi,* above n 14, at para 44.
[21] See C Ovey and RCA White, *European Convention on Human Rights,* 3rd edn (Oxford, OUP, 2002) at 130.
[22] App No 18580/91, *Quinn v France* (1995) 21 EHRR 529.
[23] App No 60538/00, judgment of 25 Jan 2005.
[24] *Saadi,* above n 14, Concurring Opinion final para.
[25] App Nos 45355/99 and 45357/99, judgment of 27 Nov 2003

therefore was an easy decision for the Court. The Court also said, strictly obiter, that 'detention that goes beyond several days which has not been ordered by a court or judge or other person authorised to exercise judicial power cannot be considered "lawful" within the meaning of Article 5(1)'. The Court argued that this was implicit from a review of Article 5 and in particular Article 5(4),[26] (3) and (1)(c). This is a radical decision in the context of immigration with its long periods of incarceration without judicial approval. The *Shamsa* decision is hugely important but apparently little recognised at present. It would require mandatory judicial review of almost all immigration detention going beyond 'several days', at least as regards its legality. The decision is, however, not free from doubt. The phrase 'other person authorised to exercise judicial power' is not clear and could include immigration officers or the police. 'Judicial power' is not self-defining. The facts of *Shamsa* are unhelpful in clarifying this because the police had no power in that case to detain, so the question did not arise. The more recent *Singh* decision cites *Shamsa* but, because on the facts there was judicial authorisation for the detention there, does not endorse or refute the requirement as to the status of the detaining authority. In *Saadi* the Court suggested that administrative detention without judicial authorisation would be less acceptable the longer it went on but did not go further.[27]

International Covenant on Civil and Political Rights (ICCPR)

In the tradition of the ECJ's pick and mix approach to human rights, the ICCPR has been cited on several occasions as being a possible inspiration for the general principles of EU law.[28] This is important because the ICCPR would then achieve 'direct effects' by the back door of EU law.[29] Whilst hitherto not as influential as the ECHR jurisprudence, there is no doubt that the ECJ can and will apply ICCPR principles in the EU law context. Perhaps the divergence between protection conferred by the ICCPR and ECHR is not so pronounced in most contexts, so that a choice is rarely significant. However in immigration detention, the choice is of some importance in the instant context, given that the decisions of the

[26] ECHR Art 5(4) states that '[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

[27] *Saadi*, above n 14, at para 45.

[28] Cases 374/87 *Orken v Commisson* [1989] ECR 3283 and C–249/96 *Grant v South-West Trains* [1998] ECR I–621.

[29] States parties to the Covenant have the option to confer a right of individual petition to the Human Rights Committee allowing individuals to acquire direct rights to lodge a complaint. The Committee's decisions are not binding on national courts. Amongst EU Member States most have ratified this Optional Protocol but the UK has not.

Human Rights Committee, the UN treaty body monitoring states' compliance with the ICCPR, are far more restrictive of states' discretion to detain immigrants than those of the Strasbourg Court. One interesting question is what the ECJ might do when faced with a serious conflict of this kind. How would it choose which body of jurisprudence was the right one to adopt as part of the general principles of EC law? In *Grant* there was a conflict and the Court adopted the ECHR position. The Court both criticised the absence of reasons given by the Human Rights Committee for its position and said it was 'not a judicial institution' and 'its findings have no binding force in law'.[30] In this light, particularly given the 'special significance'[31] attributed to the ECHR, it is arguable that the Court would follow the Strasbourg jurisprudence.

The basic provision of the ICCPR relevant for present purposes is Article 9(1), which states:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9(4) provides that a detainee must be able to bring proceedings in order that a court may decide on the legality of her detention.[32] It should be noted at the outset that, unlike Article 5 ECHR, Article 9 does not specify the circumstances in which detention is justified.[33] This has allowed the Human Rights Committee a remarkable degree of flexibility in determining when detention is justified. The locus classicus is *A v Australia*[34] in which a Cambodian asylum seeker was detained as part of a policy of mandatory detention of all undocumented persons arriving by boat. Quite exceptional delays occurred in his case and his asylum application was refused only after one and half years, being finally rejected on appeal after three years. After over four years in immigration detention he was released. The Committee started gently by noting that it was not

[30] Above n 28, para 46.

[31] Case C–36/02 *Omega Spielhallen und Automatenaufstellungs v Oberburgermeisterin der Bundesstadt Bonn,* judgment of 14 Oct 2004, para 33.

[32] Art 9(4) states: '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

[33] See MJ Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights* (The Hague, Martinus Nijhoff, 1987) at 172. Interestingly, an earlier draft of Art 9 was modelled upon Art 5 of the European Convention and included a specified set of grounds for detention. This was abandoned when other drafting parties began to add further grounds of their own, such that the text became unworkable with a list comprising some 40 grounds! No consensus could be reached on a concise list, and this led to the adoption of the term 'arbitrary' in lieu of the list. See Bossuyt at 164.

[34] Communication no 560/1993.

arbitrary per se to detain asylum seekers. But it then introduced the crucial general proportionality test[35] by saying:

> [R]emand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.[36]

The Committee gave further detailed guidance in relation to immigration detention which went far beyond the Strasbourg case law in restricting states' discretion to detain saying:

> [D]etention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years …[37]

In *C v Australia*[38] the Committee gave another robust decision on prolonged immigration detention. C's asylum claim had been refused more quickly (after two months) with the appeal decided adversely six weeks later. After further appeals, he was given refugee status after his release some two years later. He had used false documentation when he arrived. The Committee ruled that there had been breaches of Article 9(1) and (4). The breach of Article 9(4) was on the basis that the domestic courts had no power to review the proportionality of detention in terms of Article 9(1). The Committee introduced further guidance on when detention is necessary saying:

> In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. Whilst the State party advances particular reasons to justify the individual detention … the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration

[35] This is derived from the earlier Communication no 305/1988, *Van Alphen v Netherlands*.

[36] Communication no 560/1993, *A v Australia*, at para 9.2.

[37] *Ibid,* at para 9.4.

[38] Communication no 900/1999, meeting on 28 Oct 2002.

> detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.[39]

A more recent case demonstrates the vigour of the Committee's approach. In *Baban v Australia,*[40] the Iraqi complainant had actually escaped from two years in detention and was in hiding at the time of the decision. Despite this, the Committee found that, even where absconding had actually occurred, the period of detention was excessive, given the alternatives of supervised release. A further reason for the ruling was the fact that removal of Iraqis had been impossible during the time. There are limits, however, and in *Jalloh v Netherlands*[41] detention for a period of three and half months whilst making a first decision on an asylum claim was not unreasonable. Even this shorter, but not insubstantial, period of detention was however justified only on the basis that the complainant had previously absconded from supervised release. Here again the Committee noted the importance of release when removal is clearly unfeasible. These are important decisions which provide robust procedural and substantive safeguards against arbitrary detention of asylum seekers.

The EU Charter of Fundamental Rights

Turning to the EU Charter of fundamental rights, we can say that, given its relative youth and the lack of certainty regarding its status, the extent to which it may offer protection against arbitrary detention is speculative.[42] I will proceed on the basis that it may have legal effects in the future. This should be particularly so in situations where the ECJ is called upon to interpret the secondary legislation of the EU. The Charter has no explicit provisions dealing with detention of immigrants, and there is no relevant case law that provides any great assistance in this area. There are, however, a number of articles which may benefit migrants in detention. It is arguable that the Charter could be developed along lines that provide a higher degree of respect for immigrants' liberty than the minimal Strasbourg level. The analysis will proceed from general principles of EU and human rights law.

It is clear that the Charter, if it has legal effects, must bind Member States (as well as the Union institutions) when acting within the scope of Union law. The Preamble is not specific, but it would be impossible to

[39] *Ibid* at para 8.2.
[40] Communication no 1014/2001 of 18 Sept 2003 (CCPR/C/78/D/1014/2001).
[41] Communication no 794/1998 of 15 Apr 2002 (CCPR/C/74/D/794/1998).
[42] K Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *EL Rev* 575; K Lenaerts and E De Smiter, 'A Bill of Rights for the EU' (2001) 38 *CML Rev* 273.

achieve the goals the Charter seeks to attain without this. Importantly it states that the Union 'places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'.

For our purposes Article 6 states simply '[e]veryone has the right to liberty and security of the person'. There are no derogations particular to immigrants. The Charter does however contain a general clause permitting interference with any of the rights protected. The derogating provision is Article 52, which states:

> 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The Charter's right to liberty is important because it does not permit immigration detention on its face, unlike Article 5 (1)(f) of the ECHR. Therefore such detention would be in breach of the right to liberty unless justified under Article 52. This later applies the test of necessity and proportionality familiar from ECHR and EU jurisprudence. Thus immigration detention would have to be shown to be necessary and proportionate to the goals of immigration control and/or public order. This goes beyond the Strasbourg Court's position in *Chahal* which clearly stated that necessity and proportionality were not required to justify immigration detention because of the clear exception made in Article 5(1)(f) to the general right of liberty.

The Charter also makes clear in Articles 20 and 21 that discrimination on a wide range of grounds is prohibited. Immigration status is not mentioned as such a ground, but that should not mean that such discrimination is lawful. The list is arguably illustrative, not exhaustive. Therefore, detention on the basis of immigration status may be in breach of this provision. The crucial issue here is whether a third country national without lawful immigration status is 'similarly situated' to an EU citizen. The approach of the Strasbourg Court in cases like *Saadi* has been to conclude that they are not. There is no discrimination because migrants do not have a right to be at liberty until given immigration status. The ECJ will have to decide if it accepts that reasoning or prefers that of the Human Rights Committee.

A further right of importance in relation to immigration detention is that of good administration in Article 41 of the Charter which is in the Citizens' Rights Chapter. This states:

> 1. Every person has the right to have his or her affairs handed impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

> 2. This right includes:
>
> (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; …
>
> (c) the obligation of the administration to give reasons for its decisions.

The right is clearly given without regard to status of citizenship of the Union. The more difficult question is whether Member States are 'bodies' of the Union when making detention decisions. Arguably they are, because they are implementing EU policy on border control and asylum. If this is right, then they must decide asylum claims within a reasonable time in general. In the context of a detained person, what is reasonable would no doubt be more exacting. The cause of much asylum detention is administrative delay in making decisions on substantive claims or appeals against refusal. A right to good administration in this respect could facilitate reductions in detention pending a decision. It is not clear, however, what remedy a detainee who was suffering bad administration in the form of delay would obtain against detention per se. They might, however, be entitled to injunctive relief ordering that a decision be taken on their claim. The right to good administration would also help to facilitate better detention decision-making because, as set out in Article 41(2), it confers further rights to be heard before any adverse decision is taken and a right to reasons for decisions.[43]

Conclusions on International Law Standards and Detention

The range of different international standards relating to immigration detention is troubling. The Strasbourg Court's position is very permissive towards lengthy detention because a proportionality test is not imposed. The Human Rights Committee does impose such a test. This requires that detention of any length must be shown to be necessary to prevent absconding or criminal offending. However, a short initial period may be permissible to investigate someone who has illegally entered. Arguably this would also apply to a port arrival who had no documentation to support his or her entry into the state. The Human Rights Committee has recognised the importance of protecting the liberty of immigrants, even those who have not yet gained formal immigration status. The EU Charter may prove to be a source of protection for immigrants within EU law that the European Court of Justice could develop along lines similar to the

[43] On good administration see J Schwarze, 'Judicial Review of European Administrative Procedure' (2004) 85 *Journal of Law and Contemporary Problems* 65.

jurisprudence of the Human Rights Committee. It is certainly open to a more liberal interpretation than would be entailed by following the Strasbourg case law.

It is submitted, however, that a crucial safeguard absent from all the well established international case law is a requirement that there be mandatory independent reviews of detention. Such reviews should be more than bail hearings which are largely dependent upon the adequacy of sureties. Rather the hearing should be able to review the factual and legal basis for detention. This is the position of the Office of the United Nations High Commissioner for Refugees.[44] The decision of the Strasbourg Court in *Shamsa* will need to be confirmed and clarified in further cases before we can say that the ECHR position is now the same. A further safeguard would be to impose a duty of good administration in decision making on the asylum claim. The judicial review would also be empowered to consider whether the authorities were acting diligently and, if not, to order the detainee's release. This system applies in Canadian immigration law.[45] This would provide powerful independent scrutiny of detention decisions and give detainees rights similar to those of criminal suspects on remand. Indeed the European Parliament's amended version of the detention elements of the draft Directive on asylum procedures, which is discussed below, did attempt to create such a system. Interestingly, the present Commission's proposal for a Directive on procedures for returning third country nationals illegally residing within the Union contains some very powerful controls over detention. These include judicial authorisation, regular and mandatory judicial review, a requirement that detention be a last resort and that it be limited to six months.[46]

GENERAL PRINICIPLES OF EU LAW AND ASYLUM DETENTION

It can be seen from the above discussion that international human rights law is not of one voice on the appropriate limits upon immigration detention. The Charter of fundamental rights offers the ECJ a wide discretion to develop protection for immigrants against arbitrary detention. This is particularly true under the (unratified) Constitution for Europe which would remove the jurisdictional barriers to the Court created by Article 68 of the EC Treaty.[47] In applying the Charter, it is to be hoped that

[44] See Guideline 5, UNHCR Revised Guidelines on Detention, above n 6.

[45] See D Wilsher, 'The Administrative Detention of Non-nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) 53 *International and Comparative Law Quarterly* 897.

[46] See Art 14 of the draft Dir, COM(2005)391 final.

[47] For an analysis of the current limitations to the Court's jurisdiction see the contribution by Steve Peers in this volume.

the ECJ follows the proportionality approach taken by the Human Rights Committee over the more restrictive case law of the Strasbourg Court. The Charter may however not be a practical solution because of both its uncertain status and the problems faced by the Constitution of which it forms part. Despite this, the well established general principles of EC law may prove to be as useful in protecting immigrants. Thus, the principle of proportionality could prove as effective as the Charter rights if employed rigorously. The rigorous limits placed on the administrative detention of EU national migrants by the ECJ in *Oulane*[48] could be extended to asylum seekers. This section does not address the specific EU legislation on detention that does exist.[49] The analysis seeks to establish the status of asylum seekers in EU constitutional terms and to demonstrate that they are within the personal scope (*rationae personae)* of EU law. Their detention then may arguably be considered within the material scope (*rationae materiae)* of the general principles of EU law.[50]

The theoretical problem is to show how asylum seekers' detention falls within the ambit of EU law at all in order for the protection of general principles to bite. There are three potential routes for this to occur. These view detention as: (1) a limitation on fundamental rights; (2) the implementation of EU border control; (3) within the scope of EU more generally due to EU powers and policies in the field of asylum, including EU legislation that explicitly authorises detention. These are not mutually exclusive and it may be that the ECJ would find overlapping reasons to subject national detention measures to general principles of EU law.

The discussion that follows illustrates the uncertainty surrounding the legal protection offered to third country nationals by EU law. This uncertainty led the Meijers Committee recently to propose a comprehensive Directive on effective legal remedies against decisions based on EU immigration and asylum law.[51] Within this it argues that detention decisions should be justified by reference to 'overriding reasons based on the general interest' and must be necessary and proportionate to that objective.[52] It also proposes that courts should have the power to annul

[48] Case C–215/03 *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie*, Judgment of 17 Feb 2005.

[49] See below for a full discussion of the legislation.

[50] For the distinction between personal and material scope see Case 293/83 *Gravier v City of Liège* [1985] ECR 593.

[51] P Boeles, E Brouwer, A Woltjer and P Alfenaar, *Border Control and Movement of Persons—Towards Effective Legal Remedies for Individuals in Europe* (Utrecht, Standing Committee of Experts in International Immigration, Refugee and Criminal Law, 2004)

[52] *Ibid*, Art 3(4) of their suggested draft code.

detention decisions which are disproportionate.[53] In the absence of such measures, this discussion looks to general principles as a basis for review of detention decisions.

Does Detention Limit Fundamental Rights Recognised by EU Law?

This section seeks to establish three linked propositions: first, that there is a fundamental right to asylum as a matter of EU law. Secondly, detention may be viewed as an interference with the exercise of this right in the *national* or *Community interest*. Thirdly, it is settled law that such interferences must comply with the general principles of EU law, including protection of fundamental rights and proportionality.

Before the creation of a Common European Asylum Policy, asylum law and enforcement was a matter for Member State discretion. Substantive EU law had a role only for third country nationals who were family members in relation to an EU citizen exercising Treaty rights.[54] In this circumstance, the ECJ has been ready to subject the expulsion of a third country national to review on human rights and proportionality grounds.[55] This follows the same approach of the ECJ in relation to Member States' interference with free movement of persons who are EU citizens.[56] Even where EU legislation is in place laying down qualifying conditions for the exercise of a fundamental freedom, the ECJ has been prepared to make Member States' reliance upon such conditions subject to a test of proportionality. Thus, in *Baumbast* the ECJ held that the UK decision to refuse a residence permit to an EU citizen because he did not fulfil all the criteria laid out in secondary legislation was a disproportionate inference with his right of citizenship derived from the EU Treaty. Similarly, in *MRAX*[57] the Court ruled that restrictions on family life caused by refusal of entry for third country national spouses of EU migrant workers were disproportionate and contrary to the right to family life. This was despite the existence of secondary legislation appearing to authorise such refusal where no visa was held by the spouse.

[53] *Ibid*, Art 6(5).
[54] See Cases C–60/03 *Carpenter* [2002] ECR I–6279 and C–370/90 *Surinder Singh* [1992] ECR I–4265.
[55] See *Carpenter*, above n 54.
[56] See Cases 365/74 *Rutili* [1975] ECR 1219 and C–413/99 *Baumbast* [2002] ECR I–7091.
[57] Case C–459/99 *MRAX v Belgian State* [2002] ECR I-6591 paras 53 and 61.

Closer to the issue of detention, one can cite the numerous cases on free movement of persons where criminal measures which excessively deter migration have been held to be in breach of EC law.[58] In the decision in *Casati* the ECJ said:

> The administrative measures or penalties must not go beyond what is strictly necessary, the control measures must not be conceived in such a way to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.[59]

The recent important decision in *Oulane*[60] specifically addressed the case of an EU citizen detained because he had not produced identity documents to prove his nationality. Whilst the Court did say that a penalty could be imposed for such failure it held:

> [D]etention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence conferred directly by Community law and are manifestly disproportionate to the seriousness of the infringement.[61]

The Court emphasised that detention could be justified only where it was necessary on grounds of public policy, security or health and confirmed that 'failure to comply with legal formalities pertaining to aliens' access, movement and residence does not by itself constitute a threat to public policy or security'.[62] This rules illegal purely administrative detention which is so prevalent in relation to third country nationals. The Court also implicitly rejected the argument that a risk of absconding could justify detention.[63] Thus, on this basis, immigration detention is legal only if it is necessary and proportionate to meet public policy requirements. Immigration control over EU citizens does not appear from the judgment to be a ground of public policy.

This is a powerful decision, but one which may not apply in the same manner to the situation of third country nationals. For example, in the older case of *Sagulo*[64] the Court said that it was not possible to equate an EU national with an alien when considering the penalties for failure to be

[58] See Case 118/75 *Watson and Belman* [1978] ECR 1185.
[59] Case 203/80 *Casati* [1981] ECR 2595, para 27.
[60] *Oulane,* above n 48.
[61] *Ibid,* para 40.
[62] *Ibid,* para 41.
[63] *Ibid,* paras 9 and 11 state the facts in terms which indicate that a fear of absconding was the ground for detention but the referring court did not put its questions on that basis. The Court says, 'the questions referred are, however, based on the assumption that there was no genuine and serious threat to public policy' (para 42). The Court does not explain why the national court thought this.
[64] Case 8/77 *Sagulo, Brenca and Bakhouche* [1977] ECR 1495.

in possession of identity documents required by Community law. This comment may invite the view that the decisions of the Court imply a different approach in cases where third country nationals are claiming a right of entry for themselves rather than through an EU spouse. This is true even for Treaty-based rights. For example in *Panayotova*[65] the rights of third country nationals to reside in a Member State pursuant to the Europe Agreements[66] for self-employment purposes were subject to possession of a visa under national law. The ECJ upheld this despite the fact that the applicants were able to show that they fulfilled the substantive criteria for residence. The Court here failed to follow the same rigorous effectiveness and proportionality approach that it has in relation to the rights of EU citizens and their spouses. The Court appeared very willing to accept that formal restrictions on the exercise of substantive rights were lawful in such cases. In *Akrich*[67] the ECJ appeared to decide that entry into the EU was principally a matter for national law rather being regulated by EU family reunion rules as it had in *MRAX*.[68] Whilst there is clearly no general jurisprudential rule to the effect that entry into EU territory for third country nationals is entirely a matter for Member States' discretion, cases like *Panayotova* and *Akrich* indicate that the Court may be moving towards a more deferent attitude towards substantive restrictions being imposed by national law on the exercise of rights of entry claimed by third country nationals. In the recent decision in *Jia* which concerned family reunion with EU citizens, Advocate-General Geelhoed delivered an opinion arguing that admission in that capacity into the EU should be regulated entirely by national law. He argued that competences should be more clearly demarcated between the Member States and the EU. Geelhoed also argued that human rights evaluations relating to entry into the Union were for the national courts and not within the competence of the ECJ. The implication of this might be that restrictions on entry into a Member State, such as detention of asylum seekers, would be viewed as outside the competence of the ECJ to review.[69] In the Court's eventual judgment in *Jia* however the Advocate-General's views were not adopted. Instead, the

[65] Case C–327/02, Judgment of 16 Nov 2004.

[66] These agreements were concluded between the EC and former Communist nations of Eastern Europe: Poland, Hungary, the Baltic States, Czech Republic, Slovak Republic, Bulgaria and Romania. See, eg, [1993] OJ L 348/1 for the agreement with Poland.

[67] Case C–109/01 *Akrich* [2003] ECR I–9607.

[68] The Court did however hold that denial of entry into the EU must be compliant with ECHR rights and that the ECJ itself was competent to review this on the basis that such a denial was within the personal and material scope of EU law.

[69] Case C–1/05 *Jia v Migrationsverket*, Opinion of 27 Apr 2006. See also the judgment of 9th January 2007.

Court gave a ruling which appeared to confirm that EU law was relevant to entry into the EU by third country nationals and confirmed that the ECJ had jurisdiction in such cases.

With this case law in mind, the question for us is to what extent can it be said that there is a right to asylum as a matter of EU law? If there is no such right, then talk of interference with the right is misplaced. If there is such a right, then immigration detention should be subject to the general principle of proportionality and human rights standards. This is because detention arguably interferes with the right of asylum. Lengthy detention could serve as a deterrent to genuine refugees exercising their rights of asylum. Detention impairs the effective exercise of the right. Also, the right of asylum is arguably more that just a right not to be removed to persecution. It entails a right to freedom of movement protected by the 1951 Refugee Convention and Council Directive 2004/83 on refugee status.[70] Whilst the Convention confines the right of movement to 'refugees lawfully in its territory', it is arguable that imposing prolonged detention without making an asylum decision would flout this provision because it would deny such a right to persons who might well turn out to be genuine refugees. This is particularly so given that refugee status is declaratory of rights always held by those meeting the refugee definition.[71]

The right of asylum is recognised by the EU Charter of fundamental rights in Article 18:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution.

It is important to say that the asylum rights of third country nationals are not, on their face, Treaty rights. They derive from secondary legislation such as Council Directive 2004/83 on the qualification and status of third country nationals as refugees and Directive 2003/9 on reception standards for asylum seekers.[72] These were passed under Article 63 EC Treaty which merely required the Union to adopt 'measures on asylum' of various kinds. Thus, unlike the free movement of persons case law which relies upon fundamental Treaty rights, refugee rights derive from secondary law.[73] Their status as rights worthy of protection may therefore be less readily recognised by the ECJ.

[70] See Art 26 of the Convention relating to the Status of Refugees and Art 32 of Council Dir 2004/83/EC of 29 Apr 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 [2004] OJ L 304/12.

[71] See Goodwin-Gill, above n 7, at 141.

[72] Above n 2.

[73] For a detailed review of the right of asylum as a right rooted in EC law, reference should be made to Ch 7 in this volume.

Nevertheless, the ECJ has utilised the principle of effectiveness of rights in relation to, for example, student rights which are not recognised in the Treaty. Thus, Directive 93/96 conferring the right to move to study was considered by the Court in *Commission v Italy*.[74] The Italian government had implemented the Directive so as to require a student to show certain documents and certain levels of assets to secure a residence permit. The Directive was silent on the modes of proof but the Court held:

> [W]hen exercising their powers in this area Member States must ensure both the basic freedoms guaranteed by the Treaty and the effectiveness of directives containing measures to abolish obstacles to the free movement of persons …[75]

However, another potential problem is that the structure of the secondary legislation is such that it is more difficult to demonstrate the existence of the fundamental right in question. Refugees need to satisfy the tests set out in Directive 2004/83 to obtain recognition of their refugee status. Pending this, their rights to asylum are not yet formally accepted by the Member States or the EU. In the ECJ case law, many cases have turned on the proportionality of the restrictions in cases where the migrant's status as worker was not in question. So *Rutilli*[76] was clearly an EU migrant worker and restrictions on his freedom to move within France were subject to proportionality principles. *Baumbast*[77] was clearly an EU citizen and thus entitled to be in the EU even if this was subject to conditions. The proportionality of Member States' restrictions on the right of residence may take on a difference character with regards to citizens of the EU. By contrast, asylum seekers claim rights of asylum but have not yet been given them in the EU. More particularly, they have no right to reside anywhere in EU territory until they acquire immigration status. We can see reference to this in the Preamble to the Directive on refugee status to 'establishing an area of freedom, security and justice open to those who, forced by circumstances, *legitimately* seek protection in the Community'.[78]

Following this line of argument, one can point to case law to the effect that interference by Member States with purely 'hypothetical' EU rights does not bring the case within the jurisdiction of the ECJ. Thus, in *Kremzow*[79] the proportionality of a criminal sentence could not be reviewed by the ECJ simply because the offender might have been able to exercise Treaty rights if at large. Does this mean that the proportionality of measures, such as detention, which restrict the exercise of a claimed right of asylum are beyond the purview of EU law? The better answer would be

[74] Case C–424/98 [2000] ECR I–4001.
[75] *Ibid*, para 35.
[76] Above n 11.
[77] Above n 56.
[78] Dir 2004/83, above n 70, at Recital 1.
[79] Case C–299/95 *Kremzow v Republic of Austria* [1997] ECR I–2629

that, unlike Kremzow, an asylum seeker has actually applied for entry or residence. Their detention is imposed pending a decision on that application. Whilst their right of asylum may ultimately prove unfounded, the fact of their application is real. A practice of prolonged detention will both deter asylum applications and deny refugee rights to those genuine applicants who are imprisoned. The effects are not therefore hypothetical to the extent that they affect the enjoyment of rights that have been claimed.[80]

In conclusion, it is arguable that there is now a right of asylum under EC law when considering the EU Charter on fundamental rights and Directive 2004/83 on refugee status. Detention is an interference with that right in favour of Member States' interests in immigration control and must be compliant with general principles of EC law, including proportionality and human rights standards. The degree of limitation that this places on Member States' discretion was discussed above in reviewing the international standards on detention. This argument however depends upon it being accepted both that there is a right to asylum and that there is an interference with that right through detention. The Court of Justice in cases like *Commission v Italy*[81] has treated similar free movement Directives of EU citizens as fundamental rights, but third country nationals do not enjoy the same status in EU law. There is a possibility that the Court might decide on an approach which is more deferent to Member States in this context. The Court could take the view that until a person has been recognised as a refugee his or her right is hypothetical and therefore outside the scope of EU law. Alternatively it may conclude that lengthy detention is a proportionate restriction on the right to asylum so long as it complies with the ECHR minimum standards.

Are Member States Implementing European Union Policy on Border Control?

An alternative route to bringing detention within the purview of general principles is rather wider. Whenever Member States are implementing EU law they must act in conformity with the principle of proportionality.[82] Can detention of third country nationals be considered implementation of EU law? Certainly, following the adoption of the Directives on reception

[80] For a reference to the impact upon hypothetical future rights being considered important to present rights, see Case C–117/01 *KB v National Health Service Pension Authority*, judgment of 7 Jan 2004.

[81] Above n 74.

[82] Case 5/88 *Wachauf* [1989] ECR 2609.

conditions and asylum procedures,[83] some aspects of detention are no longer exercised purely under national law, but rather will be implementing EU asylum policy. The Member States will be implementing EU law and detention may be reviewed by the ECJ on that basis. This may not cover all forms of detention. For example, where detention was to protect national security, rather than to process asylum claims, it might be suggested that this would not be an implementing type of detention.

Even before the adoption of the Directive on asylum procedure, decisions to detain prior to asylum determination could arguably be viewed as pursuant to the EU interest in securing the external frontier.[84] There have been many measures taken to improve border security in the interests of promoting the creation of a borderless internal space within the EU. Given the goal of the creation of an area of freedom, security and justice, it can be plausibly argued that access to that common EU space should be controlled by EU institutions according to EU principles of law.

However, the idea that Member States' detention decisions are to be evaluated on the basis that they are implementing Union-wide policy is a radical viewpoint. Member States are particularly sensitive to threats to their sovereignty of this nature. The power to detain non-nationals would be seen as a fundamental aspect of sovereignty. Whilst there may be a coincidence of interest between EU frontier control and Member States' protection of territorial sovereignty, it would be a bold Court of Justice which concluded that this alone brought all detention decisions within ambit of the general principles.

Is Member State Action on Detention within the Scope of EU Law?

In *ERT* the ECJ said that, even when not implementing EU law, it has jurisdiction to review all measures taken by Member States which 'fall within the scope of Community law'.[85] An example is the *Gravier* decision,[86] where the ECJ used the existence of a Treaty power to make policy as the basis for its review of a Member State's breach of the principle of non-discrimination. Thus, a matter may be within the scope of EU law in a wide variety of situations going beyond merely implementing EC legislation. This is controversial territory because the connection allegedly

[83] Above n 2.

[84] See the Presidency Conclusions of the Tampere European Council, 15–16 Oct 1999, at para 3: '[t]his in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise and commit related international crimes.'

[85] See Case C–260/89 *ERT* [1991] ECR I–2925 at para 42.

[86] Case 293/83 *Gravier v City of Liège* [1985] ECR 593

bringing EC law to bear upon national action is rather loose.[87] In the context of detention, it could be argued that the fact that the EU institutions have powers to regulate the whole field of asylum and immigration under Title IV could bring the detention of immigrants by Member States within the scope of EC law. This would however be an extremely radical doctrine and one which the ECJ would be very unlikely to adopt.

However a much firmer foundation for arguing that detention of asylum seekers is now within the scope of EU law is the fact that legislation has been passed on the subject by the Community. Although the legislation itself does not make up a complete code regulating detention, the ECJ should be able to build upon this foothold to prevent arbitrary detention of asylum seekers by employment of its general principles.

Applying General Principles in the Context of Detention

Assuming that detention derogates from a right conferred by EU law, implements or falls within the scope of EU law, what follows? As regards *national measures*, the principle of supremacy applies and detention would be contrary to EU law if it conflicted with these principles. Regarding the legality of the *EU measures* on detention, the place of general principles of EU law in the hierarchy of Community norms is clear. They are in theory superior to secondary legislation which may be annulled if incompatible with them.[88] Thus, it is possible to contend that if the detention provisions in EU Directives on Reception Conditions and Asylum Procedures conflict with the right to liberty recognised by the Court as part of general principles, they should be annulled or be of no effect.[89] This might not be necessary if the Court were to interpret the legislation as being non-exhaustive of the protection against arbitrary detention given by EU law. Thus, the Court might be able to impose additional safeguards beyond the minima set in the Directives themselves. Alternatively, the Court might read the Directives in a manner which was consistent with human rights norms through using general principles as an aid to interpretation.[90]

Finally, it is important to note that the Directives give a power to Member States to detain but do not impose a duty to do so. To the extent

[87] See the disquiet of Laws J in *R v Minister for Agriculture, Fisheries and Food exp First City Trading* [1997] 1 CMLR 250 in which he states that general principles bite only where a Member State is either implementing EC law or derogating from an EC law right.

[88] See Tridimas, above n 9, ch 1.

[89] The more recent draft Dir on procedures for returning illegally residing third country nationals illustrates a much more enlightened approach and one which this author believes does comply with human rights minima: COM(2005)391 final.

[90] See Tridimas, above n 9, and cases such as Case C–392/93 *The Queen v HM Treasury ex parte British Telecommunications plc* [1996] ECR I–1631 para 28.

that Member States are left to exercise a discretion, the Directives themselves do not appear to violate human rights norms. Only if Member States use the discretion oppressively will conflicts with human rights arise. The recent challenge by the European Parliament to the Directive on family reunion[91] was dismissed by the Grand Chamber of the ECJ on this basis.[92] The Court said that the Directive gave a limited discretion to Member States to derogate from the Directive's basic right of family reunion, but this did not itself mandate or authorise breaches of Article 8 ECHR. The Court noted both the reasonableness of the Directive's derogations[93] and the requirement that the Member States utilise them in accordance with Article 8.

Furthermore, the fact that the EU institutions have chosen to permit detention in rather wide circumstances would have to be considered by the Court. This is an internal constitutional question of EU law. How far should the judiciary be deferent to a balance struck by the Community institutions in a complex area of policy? In the case law on proportionality the Court has, not surprisingly, shown deference to the legislature in areas of discretionary policy-making involving economic questions.[94] But in areas severely affecting private rights, particularly when taken by administrative bodies, the Court has been more intensive in its review.[95] Of course, it could be argued that state sovereignty is at issue in relation to migration and that therefore deference should be shown. This argument has greater force in respect of detention on grounds of national security than where detention is purely administrative. It is submitted that the pieces of legislation enacted by the Council authorising detention of asylum seekers should not be shown great deference because they touch upon individual liberty and, not being subject to the co-decision procedure, lack a democratic mandate. Courts are well placed to review the necessity and proportionality of such measures.[96]

However, one of the problems in analysing this area of EU law is the lack of clear normative guidance in the relevant Treaty Articles or indeed the Directives themselves. When we consider Title IV of the EC Treaty, the aim of the powers in relation to asylum and immigration is given as '[i]n

[91] Dir 2003/86 on the right to family reunification [2003] OJ L 251/12.

[92] Case C–540/03 *European Parliament v Council*, judgment of 27 June 2006.

[93] These went to issues such as making it more difficult for children over 12 to join their families separately in order, it was said, to encourage bringing children at younger ages where integration into the host country is more easy to facilitate.

[94] Case 331/88 *Fedesa* [1990] ECR I–4023.

[95] Case 240/78 *Atalanta* [1979] ECR 2137.

[96] The ECJ decision in *Oulane*, above n 48, is illustrative of this robust approach to judicial review of the claimed necessity for detention. In the context of the UK and detention of terrorist suspects see *A (FC) and others (FC)* v *Secretary of State for the Home Department* [2004] UKHL 56, where their Lordships made it quite clear that they did not believe that excessive deference was due to the executive in such questions.

order to establish progressively an area of freedom, security and justice, the Council shall adopt …'. This is extremely vague by comparison with the clear goal of the creation of a single market set out in Article 3(c) and the fundamental freedoms conferred by the Treaty to achieve this. Consideration of the policies adopted under Title IV, first at Tampere in 1999 and now in the Hague programme in 2004, reveal the further lack of normative direction. The policies give weight to strong measures to secure the EU external border against illegal migration. They also seek to put in place a common system of protection for refugees. These policies are in conflict. The difficulty for judges in reviewing either Member States' implementation or EU measures is to know what the normative direction is. Is EU policy to secure the border (implying greater use of detention) or is it to admit refugees and offer humanitarian protection (less detention)? Whereas the normative direction in relation to internal market freedoms is clear and favours protection of fundamental market rights, there is a vacuum in EU policy on asylum. If the ECJ is becoming a guarantor of fundamental rights within the EU perhaps it should view the liberty of individuals as of great weight. But that would require the ECJ to begin to see non-EU nationals as also worthy of its protection even prior to gaining an immigration foothold in the EU.[97]

EU LEGISLATION ON DETENTION: AN UNSATISFACTORY PICTURE

There are now two Directives which touch upon asylum detention—the Reception Conditions Directive and the Asylum Procedures Directive.[98] Both are deeply unsatisfactory from the perspective of providing protection against arbitrary detention for asylum seekers. However, it is very difficult to read the provisions as being a serious attempt completely to regulate detention at EU level. Member States' discretion over detention would appear to be largely intact from consideration of these texts. They represent a very bad compromise, passed as part of the larger goal of securing an overdue common EU policy. This long-term aim had been unfulfilled since the Tampere European Council in 1999 which called for a common asylum policy. In their haste to pass legislation to meet the goal, the quality of the drafting of the Council's provisions on detention was one of many casualties. This section considers the provisions and the debates surrounding them, which illustrate the divergence of views over the proper limits on detention of asylum seekers.

[97] The ECJ in *Akrich*, above n 66, showed that is capable of great ambivalence on this question. There it held that a deported third country national could not claim the benefit of Reg 1612/68 (OJ Sp Ed 1968, No L257/2, p 475) protection as he had no legal foothold in the EU.

[98] Above n 2.

Detention Legislation and Pre-emption of Member States' Powers

A preliminary issue of constitutional importance is that of pre-emption of Member States' discretion. Whilst EU legislation might have completely harmonised rules on detention of asylum seekers, the Member States wished to maintain a large degree of competence over such a sensitive question. Pre-emption of detention powers would be unacceptable to them. This raises an interesting constitutional question relating to the balance of powers between the Member States and the Union. To what extent can the Member States maintain largely exclusive competence over detention despite the existence of EU legislation that regulates certain aspects of it? The option of failing to regulate detention at all at EU level, so as to exclude ECJ jurisdiction, would have been incoherent in an otherwise comprehensive asylum policy. However, including detention provisions in EU legislation, even if in a perfunctory manner, appears to give the ECJ a better foundation to argue that this issue should now be entirely within the scope of EU law.[99] The ECJ has used its *Kompetenz-Kompentenz* jurisdiction to controversial effect in the past.

The EU legislature might have attempted to make clear that certain powers over detention were reserved to the Member States and beyond ECJ review. This would have been difficult to achieve because the ECJ determines the boundaries between EU and Member States' competence.[100] A carefully worded preamble may have some effect on the Court but there is no guarantee. Ousting ECJ jurisdiction is one solution, but this has generally required Treaty modifications such as Article 68(2) EC Treaty. This prevents Article 234 references relating to Article 62 measures on law and order or security. No such ouster exists either within the Constitution or in relation to Article 63 asylum measures.

In the absence of an ouster, the residue of power left to Member States is a matter of interpretation for the ECJ as to the 'scope' of any measure. We can say that it is fairly clear that the two Directives which touch upon detention of asylum seekers do not entirely regulate the field. There is still Member State discretion under national law over detention of asylum seekers that is related to national security, public order and after refusal of asylum.[101] The original drafts on detention proposed by the institutions exhibited varying degrees of exhaustion. The European Parliament suggested a seamless and comprehensive code of rules on detention; the

[99] See *ERT*, above n 85.

[100] See, eg, Case 416/85 *Commission v United Kingdom* [1988] ECR 3921 where a harmonising Dir was held to have ousted Member States' discretion completely even though it did not say so in the actual text of the Dir. The Court based its conclusion on the market integration purpose of the Dir.

[101] See Case 382/87 *Buet* [1989] ECR 1235 where the Dir did not comprehensively regulate the matter.

Council virtually none. The nature of the Common Asylum Policy points away from classical harmonisation, such as that on the internal market under Article 95 EC Treaty. The harmonisation sought is really minimum rather than absolute. Recital 7 to the Directive on refugee status states:

> The approximation of rules on recognition … should help to limit the secondary movements of applicants for asylum between Member States, where such movement is caused by differences in the legal frameworks.

A common set of rules would only completely prevent forum shopping if it were exhaustive of Member States' powers to set higher or lower standards; it must be a floor and a ceiling. In reality, it is clear that the Directives seek to set only a lower benchmark for standards for the protection of refugees and asylum seekers. These are clearly intended to be minimum standards, such that EU law sets a floor, not a ceiling, to refugee protection.[102] On detention the Directives do not really provide much of a floor because the standards are very weak. Nevertheless, Member States are free to allow more liberty to migrants in relation to detention.[103]

The Reception Conditions Directive: Detention by Another Name

The main purpose of this Directive was to seek minimum harmonisation of standards across the Member States regarding housing, educational, medical and material support to asylum seekers.[104] Detention is not explicitly covered in the final version although it was mentioned in the original draft. It is fairly clear from the drafting history of both the Reception Conditions and Asylum Procedures Directives that the latter was supposed to contain the detailed rules on detention. The Reception Conditions Directive originally just cross-referenced rules set out in the Procedures Directive. In the re-drafting process however the main rules on detention were removed from the Procedures Directive. This left the Reception Conditions Directive by default with the main EU law provisions on detention. The text reflects this contorted parentage and birth.

Article 7 is headed 'Residence and freedom of movement' and does not use the word 'detention', perhaps reflecting the political unease that the issue generated. It guarantees that 'asylum seekers may move freely with

[102] See the titles and texts of the Dirs adopted so far: Dir 2004/83 (OJ 2004 L304/12) at Preamble Recital 8 states: '[i]t is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions…'. See also Dir 2003/9 (OJ 2003 L31/18), at Recital 15.

[103] See also Case C-128/94 *Hans Honig* [1995] ECR I–3389 where a Dir adopted under Art 37 setting cage sizes for battery hens was held to be a measure aimed at reconciling both harmonisation of the market in agriculture and animal welfare. It therefore set only minimum standards for Member States and did not preclude more generous welfare rules.

[104] A detailed analysis of the Dir is provided in Ch 6 in this volume.

the territory of the host Member State or within an area assigned to them'. It goes on to say that as well as determining their place of residence, Member States may 'when it proves necessary, for example for legal reasons or reasons of public order … confine an applicant to a particular place in accordance with their national law'. This appears to encompass detention, particularly given that in the definitions section 'detention' is referred to as including confinement to a particular place.[105] The substantive grounds to detain are very opaque but the reference to detention being 'necessary' may be viewed as requiring it that it be proportionate. 'Legal reasons' are entirely unclear. 'Public order' is more exact, and there is a body of ECJ case law on the scope of this type of derogation. The positive feature of Article 7 is that it appears to create a basic right of free movement which is subject to derogation upon certain grounds. It is submitted that a right of free movement must include a right not to be detained. This invites application of the ECJ jurisprudence on general principles under the discussion set out above. A detained person under the Directive would therefore be within the scope of EC law. The negative features are the lack of mandatory judicial review and the opaque nature of the 'legal reasons' that might justify detention. Furthermore, the reference to detention being in accordance with 'national law' is ambiguous. Does this merely reflect the requirement that there actually be national law authorising detention, the principle of legality, or does it attempt to make detention a matter of purely national law?

The Impact of the Asylum Procedures Directive: A Perfunctory Exercise

As noted, the key detention provisions were originally drafted by the Commission within the Asylum Procedures Directive. These provisions were the subject of vigorous debate and amendment by the Parliament and Council during the five-year passage of the draft Directive. The debates are interesting for what they reveal about political perspectives on detention. They also show Member States' great reluctance to lose control over a key aspect of sovereignty. The net result was a final text passed by the Council in November 2005 which effectively emasculated any restrictions on Member States' discretion to detain.

[105] Art 2(k) of Dir 2003/9, above n 102.

Original Commission Proposal of October 2000: A UNHCR Template

The Commission's first draft Directive covered detention in Article 11.[106] This was closely modelled upon UNHCR Executive Committee Conclusion No 44.[107] That was a non-binding source of soft law which it was appropriate for the Commission to consider. However, Conclusion No 44 is highly dubious in its coherence and logic. It appears to permit detention in a wide range of unacceptable situations such as upon the presentation of false documents by migrants. Furthermore, it fails to regulate or authorise detention in appropriate situations such as threats to national security or public order. The Commission fell into a similar error probably because it was attempting to leave public order issues within the discretion of Member States under national law, thus avoiding any attempt to bring such a sensitive issue within the field of EU law.

This illustrates the problem discussed above—how to regulate asylum at EU level whilst permitting Member States to retain exclusive power over some aspects of the very same subject matter. The model suggests that any initial detention made at the time of an asylum application and for reasons suggested by the Directive is authorised under *EU law* and therefore falls under the jurisdiction of the ECJ. However detention on other grounds (outwith the Directive) or made after a claim has been rejected would be a matter of national law (subject to ECHR and other obligations of each Member State). This was made clear after the amendments by the Parliament attempted to bring national security into the Directive as a ground for detention. The Commission in its response to these amendments (no doubt under pressure from Member States) removed this provision, saying:

> It is underlined that the scope of this Article is limited to the stage of the examination of an application for asylum by the determining authority. It

[106] COM(2000)578 final. Draft Art 11 read as follows:

'1. Member States shall not hold an applicant for asylum in detention for the sole reason that his application for asylum needs to be examined. However, Member States may hold an applicant for asylum in detention for the purpose of taking a decision in the following cases, in accordance with a procedure prescribed by national law and only for as long as is necessary:

(a) to ascertain or verify his identity or nationality;

(b) to determine his identity or nationality when he has destroyed or disposed of his travel and/or identity documents or used fraudulent documents upon arrival in the Member State in order to mislead the authorities;

(c) to determine the elements on which his application for asylum is based which in other circumstances could be lost;

(d) in the context of a procedure, to decide on his right to enter the territory.

2. Member States shall provide by law for the possibility of an initial review and subsequent regular reviews of the order for detention of applicants for asylum detained pursuant to paragraph 1.'

[107] Above n 5.

> follows … that national policies on detention for other reasons (national security, penal proceedings etc) remain untouched.[108]

This is very confusing because it suggests a shared power over detention but leaves it unclear in the text.

Parliament's Amended Proposal of September 2002: Strengthening Migrants' Rights

The Parliamentary Committee on Citizens' Freedoms and Rights, Justice and Home Affairs made substantial changes to the Commission's draft Article 11 in order to provide greater safeguards against detention. The grounds for detention were made more transparent by including both situations where there is evidence of a threat to public order or national security and also to ensure removal following a failed asylum claim. The difficulty with this was that it explicitly brought most immigration detention within the scope of EU law. The amendment would have removed most Member State discretion over detention policy because it was comprehensive and included issues like national security. The Committee provided a complete code of detention for asylum seekers from arrival to deportation. Thus the Committee also said detention of minors for immigration reasons should be prohibited and asylum seekers should not be held with criminals. The Committee also said that detention should be 'only for as long as is necessary', a crucial safeguard. Finally, and importantly, it proposed mandatory reviews of detention at regular intervals. The Committee's draft required that such review enable detainees to challenge the grounds and legality of detention. The detainees should also be given legal assistance. This was allegedly to comply with Articles 5 and 6 ECHR but this, although welcome, is clearly not the position of the Strasbourg Court.

Amended Commission Proposal: A Compromise

The Commission rejected most of the Parliament's suggestions after unpublished discussions. However, there were some interesting limitations on detention in the amended proposal which moved detention into Article 17. First, detention was justified only when 'objectively necessary' to enable the authorities to make an efficient examination of the claim or when there was a 'strong likelihood' of absconding. As an alternative, detention for a maximum of two weeks was to be acceptable where there were reasonable grounds for believing this was necessary for a quick decision to be made. This reflects the position of the UK on the use of

[108] COM(2002)326 final, Explanatory Memorandum at Art 17.

fast-track detention regimes.[109] There was a new provision giving a more generous power to detain in Dublin removal cases from the moment a person was accepted back. Such detention should not exceed one month. The Commission made clear in its notes on the draft that detention for all other reasons, including national security, remained at the discretion of Member States. The Directive aimed to regulate the administrative detention of asylum seekers only pending examination of their applications.

Final Text: The Council Strikes Back

The final text was approved in the Council in May 2004 and adopted in November 2005 after further fruitless consultation with the Parliament. The Council rejected all serious limits on Member States' discretion over detention. The final text stands testament to the failure to secure Member States' consent to loss of sovereignty over detention. The only substantive limitation imposed by Article 18(1) is that '[t]he Member States may not put someone in detention for the sole reason that he has claimed asylum'. This does of course prevent a Member State's policy being adopted which involved mandatory detention for all asylum seekers such as has been followed in Australia and the United States. This is not however a particularly powerful restriction because authorities can find many other ways of explaining detention that will in practice bear harshly upon asylum seekers as a group. Two common examples are detention for illegal entry and use of false documents. The only procedural guarantee in Article 18(2) says that Member States 'must provide the possibility of rapid judicial review' for persons in detention. So whilst an ouster clause preventing judicial oversight would be illegal, there is no mandatory court oversight of detention required.

This skeletal text cannot be considered as pre-emptive of Member States' powers of detention on any view. It leaves regulation of detention in a dangerous limbo of uncertainty. The Directive apparently permits detention in practically unlimited circumstances. National law might specify limits but this would be a matter for Member States' discretion. The only possible restraints on detention as a matter of EU law stem from the opaque provisions in Article 7 of the Reception Conditions Directive and the general principles of EU law. The danger of a slide downwards in standards is certainly possible. Member States might take the Directive as approving of, or even requiring, stricter detention regimes than operate at present. This is particularly true given the stated EU policy of effective border control. Overlapping legal regimes also create serious problems for legal certainty from the perspective of Article 5 ECHR. The final Council

[109] See *Saadi v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131, [2002] 4 All ER 785.

text in Article 18 does not meet the requirements of being a 'procedure prescribed by law', given that it contains no proper rules to regulate detention. Whilst national laws might provide such detail, the fact of two regimes of detention serves to create a lack of certainty, for both those subject to detention and those employing it, as to the correct rules.

The final text adopted by the Council provides none of the safeguards alluded to above that would be desirable in human rights terms. The ICCPR jurisprudence would require proportionality in detention decisions. Even the more restrictive Strasbourg case law requires due diligence in processing asylum claims pending detention. Of course, Member States would be required to adhere to ECHR case law as a matter of national law, but that would not provide the same level of legal protection for third country nationals because of the more limited remedies available outside the field of EU law. The constitutional status of EU law within Member States means that detention can be controlled more readily if it is brought within the remit of the Court of Justice. The supremacy doctrine and the preliminary reference procedure give EU law its unique character. Where EU law *authorises* detention, it would appear to be desirable, from the perspective of both clarity and effective supervision, for the rules *controlling* it also to derive from EU law. A bifurcation of these roles is neither sensible nor tenable.

CONCLUSIONS

The detention of third country nationals as a result of EU law is certainly a difficult issue for the Union. It raises profound challenges due to the clash between the claimed human rights goals of the Union and its pursuit of border controls. The final text of the relevant Directives provide little security against arbitrary detention and reflects the Member States' fears over loss of sovereignty to the exclusion of adequate protection of migrants' liberty. This is not an acceptable solution from the perspective of human rights or a sensible harmonisation of EU rules on asylum. This very permissive situation may lead to both a proliferation and a lowering of standards on the regulation of detention by Member States. Whilst the ECHR minima must be respected, even in the absence of serious EU regulation of detention, these are standards which should attract little enthusiasm. Apart from the recent *Saadi* decision which tentatively suggests limits on the duration of detention, the case law gives wide discretion to states. The developing jurisprudence from the Human Rights Committee, with its emphasis on proportionality of detention, should form part of the EU detention regime. Other safeguards should be mandatory reviews of detention by judicial bodies, as alluded to in the ECHR decision in *Shamsa* and indeed suggested by the Commission in the draft Directive on

returning illegal residents. This could be best achieved by express provision in a Directive. This is, however, now unlikely, given the difficulty hitherto experienced in securing agreement on the asylum Directives. In the absence of this, it is to be hoped that the ECJ manages to craft such protection through employment of its general principles case law either on a free-standing basis or by reading down the Directives.[110] The decision in the *Oulane* case provides a good template that should be extended to asylum seekers when the Court receives a reference. Even with such protection, there remains a difficult jurisdictional question concerning the extent to which all detention of asylum seekers can or should fall within the scope of EU law. Where detention is for reasons of national security, it is difficult to see Member States accepting the ECJ's jurisdiction simply because the detainee happened to have made an asylum claim. Furthermore where an asylum claim has failed and detention is pending deportation, is this also subject to ECJ review? Until the passing of a specific EU measure regulating removals, it seems unlikely. This issue remains difficult, but the acceptance by Member States of the jurisdiction of the Strasbourg Court over such matters indicates that international tribunals do have a role to play in regulating all aspects of immigration detention.

[110] In this regard, see the judgment in *European Parliament v Council*, above n 92, where the Court made it clear that the broad derogations within the Family Reunification Dir must be read and applied by Member States in a manner compatible with Art 8 ECHR.

Part IV

Managing Legal Migration

14

The Long-Term Residents Directive, Denizenship and Integration

KEES GROENENDIJK*

INTRODUCTION

IN 2003 THE COUNCIL of Ministers adopted Directive 2003/109/EC concerning the status of third country nationals who are long-term residents.[1] This Directive codifies the denizen status in Community law and creates the legal basis for the integration of immigrants from outside the EU into the societies of the Member States.

The Swedish political scientist, Thomas Hammar, introduced the term *denizen* to describe the status of immigrants who came to Western and Northern Europe in the 1960s and 1970s for temporary employment or in order to find protection, but were still resident in their countries of immigration 10 or 20 years later.[2] In several EU Member States these immigrants were granted free access to the labour market, equal treatment under the social security system with the nationals of the country and were protected from sudden expulsion. In some countries they were granted the right to participate in local elections. From a legal perspective these immigrants were still aliens, non-citizens. From a social or political perspective, they had acquired a status approaching, in several aspects, that of a citizen of their country of residence. The term denizen elegantly described their status halfway between the alien and the citizen.

During the negotiations on the Directive opponents raised the question why do we need a new special EC residence status? Is naturalisation, granting full citizenship, not the natural and better solution? That question can be answered by looking at the figures. It appears that both in Northern and in Southern EU Member States there are very large numbers of

* The author is grateful to Jürgen Bast (Heidelberg) and Coen de Heer (Nijmegen) for their suggestions and critical comments on the draft of this chapter.

[1] [2004] OJ L 16/44.

[2] T Hammar, *Democracy and the Nation State* (Aldershot, Avebury, Research in Ethnic Relations Series, 1990).

non-citizens who, even after decades of residence, are either unable or unwilling to acquire the nationality of their country of residence. More than 60 per cent of the 6.7 million non-citizens living in Germany in 2005 have been in that country for more than 10 years and one third even more than 20 years.[3] It was estimated that over 60 per cent of the 2.8 million non-citizens registered in Italy had lived in the country for more than five years.[4] The recent trend of tightening naturalisation requirements in several Member States will result in increasing numbers of long-term resident non-citizens. For example, in the Netherlands the number of naturalised persons between 2002 and 2004 decreased by 50 per cent after stricter integration conditions and a four-hour language test were introduced in 2003.

In January 2006, at a time at which 22 EU Member States should have implemented the Directive in their national laws,[5] the Commission estimated that the Directive could be relevant for the legal status of 10 million third country nationals living in the EU.[6] The Directive may also be relevant in the three Member States, Denmark, Ireland and the UK, that have no legal obligation to comply with it.[7] Those three states may decide to opt in or comply with the Directive one day. Their governments may for internal political reasons copy certain provisions of the Directive in their national law. The case law of the European Court of Justice (ECJ) concerning this Directive may be relevant for the interpretation of other new EC Directives on migration and asylum. In the near future third country nationals, having acquired the new long-term resident status in another Member State, will arrive in the other three Member States and raise questions about the meaning of their status. A British immigration officer may want to know whether a third country national presenting an EC long-term resident's permit is entitled to enter the UK without a visa or can be expelled to the Member State that issued that document.

After a short overview of the history of the Directive, its main elements will be described. In order to evaluate the new status it will be compared with the status of Union citizens under Article 18 EC Treaty and Directive 2004/38/EC on free movement and with the status of Turkish citizens under the EEC–Turkey Association Agreement. The two main Achilles' heels of the Directive will be discussed. In the conclusion the question

[3] Integrationsbeauftragte, *6. Bericht über die Lage der Ausländerinnen und Ausländer in der Bundesrepublik Deutschland* (Sixth report on the situation of aliens in the Federal Republic of Germany) (Berlin, 2005) 557.

[4] *Immigrazione, Dossier Statistico 2005* (Rome, Caritas and Migrantes, 2006)

[5] Art 26 of the Dir. All other Arts referred to hereunder are to this Dir.

[6] Press Communique IP/06/56 of 20 Jan 2006.

[7] See Preamble, Recitals 25 and 26, to the Dir.

whether the Directive is a good illustration of the contradictory ideas about integration of immigrants, both in the Member States and in recent EU migration law, will be addressed.

FROM NGO INITIATIVES, COUNCIL OF EUROPE AND EU THIRD PILLAR SOFT LAW TO HARD COMMUNITY LAW

In 1984 the Churches' Committee on Migrant Workers in Europe started to campaign for a 'European Right of Settlement for Migrant Workers'.[8] Four years later, that campaign resulted in the adoption by the Parliamentary Assembly of the Council of Europe of a Recommendation on the right of permanent residence for migrant workers and members of their families.[9] About the same time, the European Court of Human Rights (ECtHR) began to develop its jurisprudence on Article 8 ECHR providing some protection from expulsion for immigrants with long residence and strong family ties in a country.[10] From the early 1990s, the ECJ in the same vein began its long line of judgments turning the provisions of Decision 1/80 of the EEC–Turkey Association Council and other clauses in the Association Agreement with Turkey from soft law, neglected by lawyers, national authorities and courts, into a set of rules granting a privileged status. Between the ECJ's 1990 judgment in *Sevince* and the recent judgments in *Nazli, Cetinkaya, Dörr and Ünal*, and *Torun*, the status of Turkish citizens, by far the largest group of third country nationals in the EU, moved from somewhere half-way between the status of third country nationals and that of EU citizens to a status similar to that of Union citizens in many respects. The Court consistently reminded Member States that Decision 1/80 does not limit their competence to decide on first admission of Turkish citizens, but that the privileged status granted by the Decision to admitted Turkish immigrants is granted in order to stimulate their gradual integration into the country of residence.[11]

In the second half of the 1990s, NGOs took the initiative, on three occasions, of drafting possible models for EC legislation on the legal status

[8] *A European Right of Settlement for Migrant Workers* (Brussels, CCMWE, 1984), and K Groenendijk, Strategien zur Verbesserung des Rechtsstatus von Drittstaatangehörigen' in K Barwig *et al* (eds), *Vom Ausländer zum Bürger, Problemanzeigen im Ausländer-, Asyl- und Staatsangehörigheitsrecht*, Festschrift für Fritz Franz und Gert Müller (Baden-Baden, Nomos Verlag, 1994) 413–20.

[9] Recommendation 1082/1988, adopted on 30 June 1988; see Doc 5904 for the report of the Legal Affairs Committee on the draft recommendation.

[10] See, for instance, *Abdulaziz, Cabales and Balkandli v UK* (1985) 7 EHRR 471.

[11] Cases C–340/97 *Nazli* [2000] ECR I–957, C–467/02 *Cetinkaya* [2004] ECR I–10895, C–136/03 *Dörr and Unal* [2005] ECR I–4759. See also the two more recent judgments of the Court in Cases C–373/03 *Aydinli* [2005] ECR I–6181 and C–383/03 *Dogan* [2005] ECR I–6237.

of long-term residents. In 1997, the Dutch Centre for Immigrants (*Netherlands Centrum Buitenlanders*) published a draft Regulation on the free movement of third country nationals in the EU. The Brussels-based Starting Line Group, with support from the Commission for Racial Equality and the European Council on Refugees and Exiles (ECRE), published a draft Directive in 1998. After the entry into force of the Amsterdam Treaty in 1999, the British Immigration Law Practitioners' Association (ILPA) and the Migration Policy Group initiated the drafting of a Directive safeguarding the rights of long-term residents in the EU.[12]

In 1996, the Council of Ministers on a French initiative adopted a non-binding third pillar Resolution on the status of third country nationals residing on a long-term basis in the territory of the Member States.[13] One year later, just before the Amsterdam Treaty was signed, the European Commission published a draft Convention on rules for the admission and the status of third country nationals in the EU. In this draft Convention the personal scope was defined and the rights attached to the status were enumerated.[14]

The Amsterdam Treaty, by inserting Article 63(3) and (4) in the EC Treaty, provided the legal basis for the adoption of binding Community law instruments on this issue. This new competence for the Community was disputed by Germany until the last moments of the negotiations in Amsterdam. In 1999, the European Council in Tampere agreed on the general outline of how this new competence should be used. One year later, the 15 EU Member States participated in the adoption of a Recommendation of the Committee of Ministers of the Council of Europe concerning the security of residence of long-term migrants.[15]

[12] D Curtin *et al*, 'Draft Regulation on Freedom of Movement for Workers within the European Community for Third-Country Nationals with Long Term Residence in One Member State' in *Free Movement for non-EC-Workers within the European Community* (Utrecht, Nederlands Centrum Buitenlanders, 1997) 29; 'Draft Directive on Third Country Nationals' in I Chopin and J Niessen (eds), *Proposals for Legislative Measures to Combat Racism and to Promote Equal Treatment in the European Union* (London, Refugee Council and Starting Line Group, 1998) 37; S Peers *et al*, *The Amsterdam Proposals: The ILPA/MPG Proposed Directives on Immigration and Asylum* (London/Brussels, ILPA/MPG, 2000) 141. On those and other initiatives and the wider history of lawmaking in Europe on this issue see K Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third-country Nationals under Community Law' in E Guild and C Harlow (eds), *Implementing Amsterdam: Immigration and Asylum rights in EC Law* (Oxford, Hart, 2001) 225.

[13] Council Res of 4 Mar 1996 [1996] OJ C 80/2.

[14] Arts 32–35 of the proposed Convention [1997] OJ C 337/9. After the Amsterdam Treaty entered into force the Commission withdrew this proposal.

[15] Recommendation 2000(15) adopted on 13 Sept 2000. On 14 Mar 2001, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1504(2001) on non-expulsion of long-term immigrants.

In March 2001, the European Commission published its proposal for the Directive.[16] The 1996 Council Resolution, the 2000 Recommendation and NGO proposals published over the previous five years apparently influenced the Commission whilst drafting its proposal. The Commission also used a comparative study of the national laws of Member States on this subject.[17] The European Parliament adopted its resolution on the proposal in 2002.[18] After two years of negotiations, political agreement was reached under the active Greek Presidency. The Council formally adopted the Directive in November 2003. Probably the prospect of accession of 10 new Member States, the desire of the French Minister of Interior, Sarkozy, to show his support for the protection of settled immigrants at home, the German dilemma that it had postponed the negotiations on several Directives considerably because of the national debate on the new German immigration law (*Zuwanderungsgesetz*)—Germany was also opposed to the Asylum Procedures Directive and did not want to block two major Directives in this field—and, finally, the British opt-out in the end resulted in the Directive being adopted. Two years elapsed between the Commission's proposal and the political agreement, a relatively short period considering the initial disagreement between the Member States and the absence of a strong external lobby for the proposal.

THE MAIN ELEMENTS OF THE DIRECTIVE

The drafters of the Directive had three aims in mind: (i) to create a new status for long-term resident third country nationals; (ii) to determine the rights attached to that status in the first Member State (ie secure residence and equal treatment with nationals of the country of residence); and (iii) to

[16] COM(2001)127 [2001] OJ C 240E/79. For a critical discussion of the proposal see S Peers, 'Implementing Equality? The Directive on Long-term Resident Third-country Nationals' (2004) 29 *EL Rev* 437, and House of Lords Select Committee on the European Union, *The Legal Status of Long-term Resident Third-country Nationals*, Fifth Report, Session 2001–02, HL 33.

[17] K Groenendijk, E Guild and R Barzilay, *The Legal Status of Third Country Nationals who are Long Term Residents in a Member State of the European Union* (Nijmegen/Brussels, Office for Official Publications of the European Commission, 2000/2001) 113. For an analysis of the developments in the national legislation of the 15 'old' Member States in 1999–2004 see K Groenendijk, 'The Legal Integration of Potential Citizens: Denizens in the EU in the Final Years before the Implementation of the 2003 Directive on Long-term Resident Third-country nationals' in R Bauböck, E Ersboll, K Groenendijk and H Waldrauch (eds), *Acquisition and Loss of Nationality. Policies and Trends in 15 European States* IMISCOE Series (Amsterdam, Amsterdam Univerity Press, 2006) ch 9.

[18] [2002] OJ C 284/1. See also the report by S Ludford, EP document A5–0436/2001, at 12, 24 and 94.

grant freedom of movement within the EU under certain conditions.[19] Third country nationals holding the new status are no longer restricted to residence in one Member State only.

The Commission in its proposal conscientiously followed the guidance of the European Council in Tampere:

> The EU must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting these individuals rights and obligations comparable to those of EU citizens.[20]

The Council asked the Commission to draft 'a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union'. This request is explicitly referred to in the second Preamble Recital to the Directive. The Tampere Conclusions and the Directive proposed by the Commission in fact extend the old principle of EC free movement law (secure legal status and equal treatment to stimulate the integration of immigrants) to settled third country nationals. In the first rules on free movement of workers of 1961, equal treatment and integration in the host Member State were perceived as means to an economic end.[21] This time, the rationale for the free movement is not primarily economic: equal treatment and integration are the primary purposes, although the free movement may also bring economic advantages both for the worker and the Member States, ie less unemployment payment in one Member State, fewer vacancies in the other Member State and less immigration from outside the EU. The fourth Preamble Recital confirms the position of this Directive as a central element in the integration policy of the EU. However, during the negotiations the ideas on the relationship between legal status and integration changed in some Member States.[22] Traces of this change are visible in the final text of the Directive.

A full description and analysis of the Directive have been given by other authors.[23] I will limit myself here to a short survey of the main elements:

[19] See Art 1 of the Dir.

[20] Presidency Conclusions, Tampere European Council, 15–16 Oct 1999, para 18.

[21] Arts 11–15 of Reg No 15 of 12 June 1961, OJ 26 Aug 1961, and Arts 7–12 of Reg 1612/68, [1968] OJ L 257/1.

[22] K Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 *European Journal of Migration and Law* 111.

[23] S Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-country Nationals who are Long-term Residents: Five Paces Forward and Possibly Three Paces Back' (2005) 42 *CML Rev* 1011; S Carrera, '"Integration"as a Process of Inclusion for Migrants? The Case of Long-term Residents in the EU', CEPS Working Document no 219, Mar 2005, available at www.ceps.be; K Hailbronner, 'Langfristig aufenthaltsberechtigte Drittstaatsangehörige' (2004) 24 *Zeitschrift für Ausländerrecht und Ausländerpolitik* nos 5–6, 163–8; L Halleskov, 'The Long-term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?' (2005) 7 *European Journal of Migration and Law* 181; J Handoll, 'The Long-term Residents Directive' in JY Carlier and P

the rules on acquisition and loss of the status, the rights attached to the status in the first Member State of residence and the right to move to other Member States.

Acquisition of the Status

Articles 4 to 6 mention three mandatory conditions for acquisition of the status: five years of lawful residence in the Member State where the application is filed, stable and regular income for the family without recourse to public assistance and health insurance. There are two further possible grounds for refusal: 'public policy and public security' (Article 6), and compliance with integration conditions in accordance with national law (Article 5(2)). The three mandatory conditions are essential. The other Member States are obliged to recognise the status granted by a Member State, unless the authorities of that Member State were manifestly and seriously wrong in issuing the residence permit. Member States may be more liberal in granting a permanent residence permit under their national law, but other Member States are not obliged to accept the free movement of holders of such status.[24]

Third country nationals admitted for study and for temporary purposes, such as seasonal workers and posted workers, refugees, persons with temporary or subsidiary protection and asylum seekers, are excluded from the scope of the Directive (Article 3). In the Justice and Home Affairs (JHA) Council of October 2002, a large majority of Member States was of the view that refugees should be covered by the Directive, but in a separate article or chapter.[25] Later it was decided that there should be a separate instrument covering refugees. The Commission repeatedly affirmed its intention to make a separate proposal to extend the scope of the Directive to refugees.[26]

From the aims, the text and the preamble it is clear that a long-term resident third country national is entitled to be granted the new status once he or she meets the conditions mentioned in the Directive and has filed an

De Bruycker (eds), *Immigration and Asylum Law of the EU: Current Debates/Actualité du droit Européen de l'immigration et de l'asile* (Brussels, Bruylant, 2005) 144; M Illamola Dausa, 'Egalité et intégration' in F Julien-Laferrière *et al* (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty* (Brussels, Bruylant, 2005) 175; S Peers, 'Implementing Equality? The Directive on Long-term Resident Third-country Nationals' (2004) 29 *European Law Review* 437; and Y Schibel, *Monitoring and influencing the Transposition of EU Immigration Law, the Family Reunion and Long-term Residents Directive* (Brussels, Migration Policy Group, 2004).

[24] Art 11.

[25] Council doc 12894/02 of 14–15 Oct 2002, at 24.

[26] Council doc 14679/03 of 14 Nov 2003, at 3 and Bull EU 2004–11, Annex I under I.19. According to the Institutional Scoreboard, the proposal should have been adopted by the Commission in the second quarter of 2006, SEC(2006)814 of 28 June 2006, at 12.

application for the status in the manner prescribed by Article 7. Article 7(3) stipulates that the Member State 'shall grant' the new status, once the conditions mentioned in Articles 4 to 6 are met. Article 8(2) stipulates that Member States 'shall issue' an EC residence permit valid for at least five years to long-term residents. The concept 'long-term resident', according to Article 2(b), means 'any third-country national who has long-term resident status as provided for under the Articles 4 to 7'. Those provisions are capable of having direct effect. A third country national may directly rely on the provisions, if a Member States does not implement those provisions fully or on time. The conditions mentioned in these Articles are similar to those in instruments on the free movement of Union citizens that the Court already long ago deemed to have direct effect.[27] The fact that the Directive at certain points refers to national legislation is in itself not sufficient to deny direct effect to those provisions.[28]

In my view, the main difference with the rights of Union citizens under Directive 2004/38/EC and Turkish citizens under Council Decision 1/80 will be that those migrants acquire residence and other rights automatically (*ex lege*) once they fulfil the criteria stipulated in the relevant EC instrument, irrespective of whether the Member State issues the relevant residence document or not. Long-term residents, on the other hand, are entitled to the status, but they will have to apply for it. Within the six-month time limit set in Article 7(2), Member States will have to issue the document defined in Article 8, if the applicant meets the conditions of the Directive. Member States are not free to add additional conditions not mentioned in the Directive. Applicants will have to await the decision of the authorities of the first Member State, before they can actually use their rights in a second Member State. The second Member State will have to accept the decision of the first Member State to issue the long-term EC residence permit.[29] But the second Member State cannot reasonably be asked to check whether the third country national has fulfilled the conditions in the first Member State, in case that Member State does not live up to its obligation timely to decide on the application for the status. However, I do not see why a long-term resident who fulfils the criteria of the Directive and has applied for the status could not directly claim his or

[27] With regard, for instance, to the provisions on income, health insurance and public order in Dir 90/364/EEC [1990] OJ L 180 and the clauses on the public order exception in Dir 64/221 [1964] OJ L 56/4.

[28] Case C–192/89 *Sevince* [1990] ECR I–3461 at 22.

[29] Only under exceptional circumstances may the second Member State refuse to recognise the status granted by the first Member State. With regard to proceedings for determining the entitlements to social security benefits, the Court has held that the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question: see Case C–336/94 *Defaki* [1997] ECR I–6761.

her rights under Chapter II of the Directive in the first Member State, if the authorities of that state fail to decide on the application and issue the new residence permit within the six months allowed for that decision. In this situation, the horizontal effects of the rights granted by the Directive may be absent. One may wonder, however, why the social security bodies or labour agencies of that Member State should not be obliged to either press the immigration authorities to apply the Directive or apply the Directive themselves.

The status is permanent. Expiry or loss of the document does not entail loss of the status.[30] The status can be lost only on three grounds: fraudulent acquisition of the status, an expulsion decision on serious public order grounds and absence from the territory of the EU (ie all 25 Member States) for more than 12 consecutive months (Article 9(1)). However, Member States may decide that longer absences shall not entail withdrawal of the status.

Rights Attached to the Status

The Directive grants two sets of rights in the country of residence: a secure residence right and equal treatment. Expulsion is possible only if the person 'constitutes an actual and sufficiently serious threat to public policy or public security' (Article 12(1)). That Article also stipulates substantial and procedural guarantees (judicial remedies and legal aid) in the event of an expulsion decision. The protection here, apparently, is not fully equal but 'comparable' to that of EU migrants. The national courts and, eventually, the Court of Justice will have to decide to what extent the differences in the wording of the relevant texts will result in a lower level of protection for long-term residents than for Union citizens.

In Article 11 the Directive grants long-term residents equal treatment with nationals in a whole range of fields: employment, education, vocational training, recognition of diplomas and qualifications, tax benefits, housing, access to goods and services, social security, social assistance. During the negotiations in the Council Working Groups, some Member States (mainly Germany)[31] pressed for the introduction of restrictions to the equal treatment principle: access to social assistance may be limited to 'core benefits', equal treatment may be restricted to persons living in the Member State, and long-term residents may be excluded from employment

[30] Arts 8(1) and 9(6).

[31] See, for instance, Council docs 9636/02 of 18 July 2002, at 7, 11360/02 of 30 July 2003, at 5 and 6424/03 of 18 Feb 2003, at 15.

that entails 'even occasional involvement in the exercise of public authority'[32] or that 'in accordance with existing national or Community legislation' is reserved for nationals or Union citizens. Most of those exceptions have a rather limited scope due to opposition to German proposals by other Member States. If one forgets that most long-term residents will have contributed for many years, these provisions may be seen as understandable efforts to protect the public purse. If the contribution of migrants is taken into account, however, they appear more like deplorable derogations from an important principle. Hopefully, they may turn out to be of not very great importance in practice in most Member States. Member States may be more liberal, granting access to additional benefits or extending equal treatment with regard to areas not mentioned in the Article.[33]

Movement to Other Member States

Chapter III of the Directive (Articles 14–23) introduces an important innovation in Community law: the right of a long-term resident to move to, and reside in, another Member State for the purpose of employment, study or any other purposes. Previously, this right had been granted only to third country family members accompanying a Union citizen, who had exercised his or her freedom of movement right. The Directive extends this right to all third country nationals holding the long-term residence status. The right to reside in a second Member State is dependent on conditions similar to those for the acquisition of the new status in the first Member State: an application, sufficient income, health insurance and absence of public order grounds. There is a special provision for refusal where the person constitutes a threat to public health.[34] The second Member state *may* (not must) introduce two barriers: a labour market test in case of migration for employment and, in certain cases, a further condition related to integration.[35] I will come back to those two barriers below. If the applicant meets the conditions 'the second Member State shall issue the long-term resident with a renewable residence permit'.[36] Hence, the second state may not require the long-term resident to apply for a long-term visa

[32] This restriction is apparently a reaction to the judgment of the ECJ in Case C–405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I–10391.

[33] Art 11(5).

[34] Art 18. A similar provision is absent in ch II. Diseases contracted during the 5 years of lawful residence in the first Member State are no ground for refusal of the long-term residence status.

[35] Arts 14(3) and 15(3).

[36] Art 19(2) for the long-term resident and Art 19(3) for his or her family members.

before considering an application for a residence permit.[37] The Directive requires only an application for the residence permit and obliges the Member States to issue that permit if the conditions are met.

Once admitted into the second Member State, the third country national is immediately entitled to equal treatment there, as guaranteed by the Directive in the first Member State.[38] During the first six years in the second Member State, the long-term residence status in the first Member State remains valid.[39] After five years, the long-term resident may apply for the long-term resident's status in the second Member State. Once that status is acquired in the second state, the status in the first Member State is lost.[40]

The spouse and minor children admitted in the first Member State have the right to accompany the migrant to the second Member State. With regard to reunification with family members not yet admitted, the rules of Directive 2003/86/EC on the right to family reunification apply.[41] A third country national having acquired the new status in one Member State may use the right to move within the EU to live with his or her spouse or other family members resident in another of the 22 Member States bound by the Directive. Family reunification qualifies as 'other purpose' under Article 14(2)(c). A third country national family member of a Union citizen, having lived with that Union citizen for five years in one Member State, may apply for the long-term EC residence permit and move to another Member State independently of his or her EU spouse or parent. This will be particularly helpful for persons living near the internal borders of the EU who have found a job across the border in another Member State.

WHAT ARE THE POSITIVE EFFECTS OF THE DIRECTIVE?

Several authors have evaluated Directive 2003/109/EC by comparing its provisions with the rules on the free movement of Union citizens, recently consolidated in Directive 2004/38/EC.[42] Since the European Council in Tampere instructed the institutions to establish a new status 'comparable' or 'as near as possible' to that of Union citizens this approach is understandable. However, it tends to result in underestimating the significance of the changes produced by Directive 2003/109/EC in comparison

[37] See also Art 15(1). The press communiqué on the JHA Council of 8 May 2003 states: '[t]he new status … would allow the person concerned to move from one Member State to another without being required to undergo all the procedures to which new immigrants are subject'. See Council doc 8278/03 of 8 May 2003, at 7.

[38] Art 21 making reference to Art 11.

[39] Art 9(4)(2).

[40] Arts 23 and 9(4).

[41] Art 16.

[42] See Peers, Boelaert-Suominen, Halleskov and Carrera, above n 23.

with the situation before 23 January 2006 (the Directive's implementation deadline), when the rights of long-term resident third country nationals were fully determined by the national law of Member States.

Most of the provisions of the Directive are capable having *direct effect*. They provide a clear definition of the limited number of conditions that Member States will have to check when dealing with applications for the status or for a residence permit in the second Member State. Member States cannot introduce or maintain other conditions for the acquisition or loss of the new status. Thus, long-term residents and their family members cannot be required to pay fees, such as the €530 fee for the national permanent residence permit introduced in the Netherlands in 2002 or the €830 fee for family reunification, levied by the Dutch immigration authorities in 2005.

Further, the Directive functions as a general *standstill* clause in all the areas covered by the equal treatment clause of Article 11 and Article 21, prohibiting national policies which aim to withhold or reduce rights of long-term resident non-citizens. Those two equal treatment provisions supplement the 2000 Directive against racial discrimination.[43] That Directive protects all third country nationals (and Union citizens) from discrimination on the ground of race in a range of areas. Directive 2003/109/EC on the status of long-term residents prohibits unequal treatment on the ground of nationality for long-term resident third country nationals holding the new status in much the same fields.

There are clear differences between the rights granted to long-term residents in this Directive and the rights of Union citizens and their family members under Directive 2004/38/EC, such as with regard to family reunification, first access to employment and integration conditions. Integration conditions, for instance, are completely absent in the law relating to free movement for Union citizens.[44] Also, one should not disregard the differences in the wording of some of the provisions on similar issues in both Directives. With regard to the public order provisions it is not yet clear whether the Court will disregard (minor) differences in wording or, on the contrary, attach great weight to such differences. The recent judgment in *Gattoussi* does indicate that the Court is continuing its line of bringing unity and coherence to Community law.[45] What Member States actually had in mind during the negotiations in the Council, when they decided to use slightly different wording, is often far less clear. Those

[43] Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[44] Language tests are explicitly forbidden by Art 3(1) of Reg 1612/68 unless required for the job to be performed. Dir 2004/38 [2004] OJ L 229/35 has preserved this provision (see Art 38(1)).

[45] Case C–97/05 *Gattoussi*, judgment of 14 Dec 2006 (not yet reported).

provisions will have to be interpreted by the national courts and the Court of Justice in the light of the aims and the instructions of the Tampere Council, referred to in the second Preamble Recital to the Directive. That Recital reiterates that the aim was to adopt 'a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union'. Thus, to give a different meaning to similar provisions in the two Directives has to be justified. It cannot be taken for granted.

Additional Rights for Third Country National Family Members

The relevance of Directive 2003/109/EC can be illustrated by the fact that on one point it grants even more rights to third country nationals than Directive 2004/38/EC. Article 16 of the latter grants a permanent residence right to the third country national family members of Union citizens who have migrated to another Member State after five years of residence in the first Member State. However, that permanent residence right is restricted to the Member State of residence only. Directive 2003/109/EC also grants a permanent residence right and equal treatment rights in the first Member State to third country national family members of Union citizens who have *not* used their freedom of movement right. Moreover, it also grants the third country national family member holding the new long-term resident's status the right to live and work in other Member States. On both counts, the Long-term Residents Directive grants more rights to family members than the Directive on freedom of movement of Union citizens.

Additional Rights for Turkish Citizens Having Rights under Decision 1/80

The added value and the supplementary nature of the Long-term Residents Directive may also be illustrated by looking at its significance for Turkish workers and their family members, who have a residence right on the basis of Article 6 or Article 7 of the Association Council Decision 1/80. Taking into account five major areas (protection from expulsion, access to employment, equal treatment, worker representation and access to social assistance), it appears that Turkish nationals under Decision 1/80 have more rights with regard to three of those five areas: protection from expulsion, access to employment and worker representation. On those counts, the rights of Turkish citizens with free access to employment in their Member State of residence are identical to those of Union citizens. On

the other two issues (access to social assistance and equal treatment) Directive 2003/109/EC clearly offers more rights than Decision 1/80.[46]

The status of Turkish workers and their family members under Decision 1/80 approaches that of EU citizens who have exercised their freedom of movement right. Four important differences from the rights of Union citizens still remain. Under Decision 1/80 Turkish citizens do not have: (i) the right of first admission into a Member State or the right to look for work in a Member State; (ii) the right to family reunification; (iii) the right to live and work in a Member State other than the one where they have been admitted; and (iv) the rights directly derived from Union citizenship in Articles 18–20 EC Treaty. The Long-term Residents Directive grants Turkish citizens and other third country nationals the right to look for work, to live and to work in other Member States, just as the Directive on family reunification grants them a right to family reunion. In both cases an additional right, not present in Decision 1/80, has been granted by Directive 2003/109/EC, admittedly on conditions less liberal than the conditions for Union citizens under Directive 2004/38/EC.

TWO ACHILLES' HEELS OF THE DIRECTIVE: INTEGRATION CONDITIONS AND ACCESS TO EMPLOYMENT

In her excellent analysis of the Directive, Boelaert rightly calls the clause on integration in Article 5 the Achilles' heel of the Directive.[47] In my opinion, there is another Achilles' heel: the rules on access to employment. The first Achilles' heel (integration requirements) relates to the access of third country nationals to the status both in the first and in the second Member State. The second Achilles' heel (access to employment) is crucial for the success of the second part of the Directive, mobility within the EU. Without the status or without access to employment the two main aims of the Directive (integration into the Member State of residence and mobility within in the EU) will not be realised.

Integration Conditions

It may sound odd that an integration requirement may turn out to be the main obstacle to the full effectiveness of a Directive aiming at the integration of long-term immigrants. The European Commission in its

[46] For a more detailed comparison and discussion see K Groenendijk, 'Citizens and Third-country Nationals: Differential Treatment or Discrimination?' in JY Carlier and E Guild (eds), *The Future of Free Movement of Persons in the EU* (Brussel, Bruylant, 2006) 79.

[47] Boelaert-Suominen, above n 23, at 1023.

proposal for the Directive mentioned integration as the central aim of the Directive in Preamble Recitals 4 and 12. In the Commission's proposal, integration was not a condition for acquisition of the status. There it was stated that:

> The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community declared [in] the Treaty.[48]

It also stated that the Directive was meant 'to constitute a genuine instrument for the integration of long-term residents into the society in which they live …'.[49]

The *integration* requirements were introduced in the Directive, primarily at the insistence of three Member States (Germany, Austria and the Netherlands). The insertion of the clauses on integration in the Directive reflects a new trend in some Member States to introduce new integration requirements having the effect of selection and exclusion of immigrants. As part of a policy aimed at admission of highly qualified or rich migrants, that aim is understandable. But problems arise if these new selection instruments are used to hinder family reunification or to keep settled immigrants from acquiring a more secure position in the society in which they live. The politicians who propose such instruments may or may not be aware that the large majority of the third country nationals living in our societies happen to be neither highly educated nor rich.[50] Among the immigrant population the share of those with low incomes is relatively high. Barring access to a secure status will not stimulate but rather hinder their integration into the country of residence.

The proposal to allow Member States to require that applicants for the long-term resident status comply with integration measures was added at the initiative of Germany, supported by Austria.[51] In 2002, Germany was the only one of the 15 EU Member States that had in its national legislation an integration condition for the acquisition of permanent residence status. The effect of that condition was that, for many decades, only a limited number of mainly better educated or rich immigrants were able to acquire the settlement permit provided for in the German Aliens Act. In practice, a permanent residence permit was created as an alternative

[48] COM(2001)127 final.

[49] *Ibid.*

[50] In Germany, the Member State with by far the largest immigration from outside the EU over the last decades, in 2002–3 almost 40% of the foreign workers and less than 10% of the German workers had no full professional training, the unemployment rate among foreign workers was almost twice as high as among German workers, and the monthly income of employed non-citizens was lower: the family income of 56% of those workers was below €2,000 per month; 43% of the families of German workers had an income below that level. See Integrationsbeauftragte 2005, above n 3, at 58, 95 and 103.

[51] Council doc 10698/01 of 2 Aug 2001, at 5.

to the unachievable settlement permit. Millions of immigrants with long residence in Germany were able to obtain only that alternative status that gave fewer rights and less protection.[52] Nevertheless, Germany wanted to insert its national rule into the Directive as well. The Commission, France and other Member States opposed this idea. Their main arguments were that long-term residence in itself is an indication of integration, integration is a long-term process and, moreover, it is hard to measure integration.[53]

The issue of including an integration requirement in the Directive was for the first time discussed at the JHA Council in October 2002.[54] After the Council meeting the Presidency suggested introducing in Article 5 the term integration *measures*.[55] Under pressure from Austria, Germany and the Netherlands the term was later changed to integration *conditions*.[56] Having succeeded in introducing an integration requirement as a possible (not an obligatory) condition for acquisition of long-term resident status in Article 5, those three Member States then proposed making the acquisition of the residence status in a second Member State (present Article 15) subject to a similar requirement. This move met with fierce opposition. It was clear that allowing for new integration conditions in each Member State would seriously reduce the mobility of third country nationals within the EU. Imagine what would have been left of the free movement of Italian workers in the 1960s if they had had to take an integration test in Germany, Belgium or the Netherlands before they could work in those countries. After this issue had been debated twice in the JHA Council (a good indication of the strong disagreement among the Member States), a compromise was finally reached.[57] A long-term resident may be required to comply with integration *conditions* in one Member State only. If he or she has not complied with such conditions in the first Member State, the second Member State may require him or her to comply with integration *measures*.[58] However, if the long-term resident has complied with an integration condition in order to obtain the status in the first Member State, the second Member State may not require the migrant to pass an integration test again.[59] The second Member State may only require the

[52] COM(2001)127, n 14.
[53] Council doc 12983/01 of 26 Oct 2001, at 13.
[54] Council doc 12894/02 of 15 Oct 2003, at 24.
[55] Council doc 15483/02 of 20 Dec 2002, at 11.
[56] The proposal was made in Council doc 12217/02 of 23 Sept 2002.
[57] Groenendijk, above n 22, at 123.
[58] Art 15(3) provides that 'Member States may require third-country nationals to comply with integration measures, in accordance with national law'.
[59] According to Art 15(3) second sentence: '[t]his condition shall not apply where the third-country nationals concerned have been required to comply with integration conditions in order to be granted long-term resident status, in accordance with the provisions of Article 5(2)'.

migrant to attend language courses.[60] After the Council meeting, the German Minister of the Interior, Schily, is reported to have said on this compromise: '*[d]a versteht keiner mehr, was wir gemacht haben*.' (nobody will understand what we have agreed).

The three Member States tried to modify this complicated compromise, but failed. A note of the Presidency to SCIFA of 14 March 2003 with regard to the present Article 15 of the Directive records the failure:

> In this context, while welcoming the compromise reached at Council level, Germany, Netherlands and Austria considered that in the relevant clause the word *measures* should be replaced by *conditions*. Such a suggestion has not been supported by most delegations.[61]

Thus, from the text of the Directive and the negotiation documents it is clear that Member States wanted to distinguish between integration *measures* and integration *conditions*. Measures allow a Member State to require a long-term resident to attend a course. The term integration *conditions* covers more far-reaching obligations, such as passing a language test. Recently, the Dutch government in a legislative document for the Parliament explained the difference as follows: integration measures imply an obligation of the immigrant to make a certain effort (*inspanningsverplichting*); integration conditions require the immigrant to perform at a certain level, by passing an examination or a test (*resultaatsverplichting*).[62]

In the same document the Dutch government contends that requiring an integration test, once the third country national after five years of residence in the second Member State applies for EC status in that state, is allowed by Article 23 of the Directive, since that Article refers to the provisions of Article 5. In my opinion, that reading is contrary both to the compromise reached in the JHA Council (integration conditions in one Member State only) and to the logic and structure of the Directive. In the view of the Dutch government, a Member State may not require the passing of an integration test when a long-term resident, after having passed such test in one Member State, moves to the second Member State. However, that second state would be allowed to require that person to pass such a test five years later, in order to obtain the same EC status acquired five years previously in the first Member State. This interpretation by the Dutch government would also create an unreasonable burden for the first Member State, since that state in many cases could remain indefinitely responsible for the third country national under Article 22 of the Directive.

[60] Art 15(3) third sentence.
[61] Council doc 7393/1/03/REV 1 (emphasis in the original).
[62] In the government's answers to the questions of the Second Chamber on the bill for a new Integration Act: TK 30308, no 7, at 128.

The distinction between *measures* and *conditions* is also relevant for the scope of the Directive on family reunification. Article 7(2) of that Directive implicitly allows for integration *measures* for certain family members before entry. This means that Member States may offer integration courses in the country of origin and require family members to attend such a course, but it does not grant admission for family reunion to those family members who have passed an integration test abroad.[63] In 2002 and 2003, both Directives were under negotiation in the same Council Working Groups, often by the same national civil servants. It was understood that compromises on definitions and other solutions arrived at with regard to one Directive would apply to the other Directive as well. Time for reopening the debate was not available, due to the deadlines set by the European Council.

The fact that, in Articles 5 and 15, integration conditions have to be complied with 'in accordance with national law' does not give the Member States a free hand. When implementing and applying those provisions, Member States will have to respect the general principles of Community law, such as the proportionality principle.[64] They also have to respect the central aim of the Directive, ie the promotion of the integration of long-term residents.[65]

The provisions on integration measures or integration conditions are optional ones. They do not oblige Member States to introduce such measures or tests. Of course, in some Member States politicians will use the presence of these clauses in the Directive as a justification for introducing new integration tests or for making existing tests stricter. In other Member States, such as Belgium or Spain, it is less likely that this will be perceived as an attractive opportunity, because the introduction of a language test requirement could interfere with political compromises on the use of different national or regional languages.

[63] For a commentary by C Hauschild, who participated for the German Ministry of the Interior in the negotiations see [2003] *Zeitschrift für Ausländerrecht und Ausländerpolitik* 352. After the introduction by the Netherlands, in Mar 2006, of integration examinations abroad as a conditions for a visa for family reunification, the German Minster of the Interior, Wolfgang Schaubel, said in an interview that he had asked the Dutch, '*Wie wollt ihr den Sprachkurse in Anatolien machen*?' (How do you organise language courses in Anatolia?). See *Frankfurter Allgemeine Zeitung*, 12 Mar 2006.

[64] In its first judgment on a dir adopted under Art 62 EC Treaty, the Family Reunification Dir, [2003] OJ L 251/12, the Court reminded Member States that in situations where Dirs leave Member States a margin of appreciation 'in accordance with settled case-law, the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements': Case C–540/03 *Parliament v Council*, judgment of 27 June 2006 (not yet reported).

[65] Boelaert-Suominen, above n 23, at 1023.

Access to Employment in the First Member State

In the *first* Member State, a long-term resident with the new status will enjoy equal treatment with nationals as regards access to employment and self-employment. Article 11 allows for two exceptions only: activities that entail even occasional involvement in the exercise of public authority or activities that under national or Community legislation in force on 25 November 2003 are reserved to nationals, and EU and EEA citizens.[66] This is an implicit standstill clause. Member States cannot introduce new restrictions. Halleskov rightly pointed out that those restrictions do not apply to a Turkish citizen, who under Decision 1/80 has 'free access … to any employment of his choice'. Hence, only restrictions applicable to EU nationals can be applied to those Turkish workers.[67]

The provisions on access to employment in the *second* Member State are less liberal, but not so restrictive as they may appear at first reading. Again, this was a highly controversial issue. The ministers in the JHA Council were able to reach a compromise only after repeated discussions.[68]

Article 14(3) allows for a labour market test and the application of national procedures (such as requiring a work permit) for access to employment or self-employment in the second Member State. The second sentence gives preference to Community workers or certain third country nationals. However, after the first admission, the possibilities for the second Member State to regulate the position of the long-term resident are severely limited. Article 21(2) reads: '[l]ong-term residents shall have access to the labour market in accordance with the provisions of paragraph 1'. That paragraph stipulates that long-term residents, once they have received the residence permit provided for in Article 19, 'shall in that Member State enjoy equal treatment in the areas and under the conditions referred to in Article 11'. We have already seen that Article 11 allows for two exceptions only, relating to public service and jobs with statutory restrictions to nationals or EEA citizens. Article 14(4) allows Member States that provided for labour market quotas in their national legislation in November 2003 to apply such quotas. This explicit standstill clause results in this exception being applicable in a few Member States only.[69]

[66] Art 11(1)(a) and (3)(a).

[67] Halleskov, above n 23. Her conclusion applies both to Turkish workers with free access to any employment under Art 6(1) and to their family members with the same right under Art 7 of Dec 1/80.

[68] K Groenendijk, 'Access of Third-country Nationals to Employment under the New EC Migration Law' in F Julien-Laferrière, H Labayle and O Edström (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty* (Brussels, Bruylant, 2005) 141.

[69] Austria and Italy have statutory rules on quota for admission of workers from third countries.

Finally, the second sentence of Article 21(2) allows for a restriction of the general rule in the first sentence. It allows Member States to restrict the employment of a long-term resident to the kind of activities for which he or she was first admitted. But this restriction may apply only during the first 12 months.

Thus, the relevant rules in Articles 14, 21 and 11 of the Directive create a system that is in several aspects similar to Article 6 of Decision 1/80. The first admission to employment in the second Member State may be refused on the basis of a labour market test. The long-term resident has the right to continue to work with his or her first employer, and after one year he or she is free to work with another employer. Once admitted to the labour market, he or she can be excluded only from public service and other explicitly reserved jobs. Here, as in most other Directives under the new Title IV, the German effort to keep full control of access to its labour market was largely unsuccessful.

CONCLUSIONS

Directive 2003/108/EC may give fewer rights to long-term residents than many observers, interested in encouraging the integration of immigrants settled in the EU, had hoped for after Tampere. The Directive may even have a counter-productive effect in some Member States, as seen by the introduction of integration tests as a new barrier to the secure status in Austria, France and the Netherlands.[70] For Turkish workers and their family members, the effect of those measures is limited by the standstill clause in Decision 1/80. In some Member States the Directive may offer a new way of solving an 'old' political problem relating, for instance, to the status of the large minority of Russian-speaking non-citizens in Estonia and Latvia,[71] or the position of persons of Hungarian descent having the nationality of a neighbouring third country and residing in Hungary.[72] Nevertheless, in my view, the positive effects in 22 Member States will

[70] Such requirements were introduced in Austria in 2003, in France by the *Loi Sarkozy* of 2003 in Arts L 314–2 and 314–10 of the new Immigration Code, and in the 2006 Dutch Integration Act, Staatsblad 2006 no 645. See Groenendijk, above n17, at 389–92.

[71] On 1 July 2005, of the total of Latvia's 2,3 million inhabitants almost one fifth (more than 430,000 persons) were non-citizens. Most of those non-citizens are either born on the territory of Lativa or have resided there from the independence of the country in 1990. The European Court of Human Rights, in recent cases against Latvia, has pointed to long residence and social integration as relevant factors in decision-making regarding the residence status of non-citizens. See *Slivenko v Latvia*, judgment of 9 Oct 2003, para 124, and *Sisojeva v Latvia*, judgment of 16 June 2005, para 107.

[72] The large majority of long-term residents in Hungary are persons of Hungarian descent with the nationality of Romania, the former Yugoslavia or other neighbouring countries. The status of these persons and the status of persons of Hungarian descent living in those countries has been the subject of intense political debate for many years.

outnumber the negative effects in some Member States. For the actual realisation of those positive effects, action by national legislators and civil servants, the European Commission, NGOs and immigrants themselves will be indispensable.

So far, political attention has been focused mainly on recognition of administrative decisions of other Member States refusing rights to third country nationals, such as refusal of an asylum request under the Dublin system or the mutual recognition of expulsion decisions. After the recognition of visa and residence permits for the purpose of visa-free circulation within the Schengen area,[73] the Directive is the first example of recognition by Member States of residence status granted by the administration of another Member State.

There are different, competing and contradictory perspectives on the relationship between law and integration visible in the political debate in Member States and in the new EU migration law. The two perspectives can be summarised as follows. The first perspective maintains that secure legal status will enhance the immigrant's integration into the host society. A strong residence status and equal treatment are instruments for integration. According to the second perspective, a permanent residence status (or naturalisation) should be the remuneration for completed integration. Naturalisation is considered to be the crown on a successfully completed integration. In the first perspective, the concept of integration is used in an *inclusive or instrumental* way, whilst the second perspective exemplifies the *exclusive or selective* use of the concept of integration.

The first perspective has a long tradition in EC law. Regulation No 15 of 1961, Regulation 1612/68, Association Council Decision 1/80, the Conclusions of the Tampere European Council, the new Directive on the free movement of Union citizens (Directive 2004/38/EC) and the Common Basic Principles of integration policy adopted by the JHA Council in November 2004 are all clear expressions of the first perspective. As regards the latter, the sixth principle reads:

> Access for immigrants to institutions, as well as to public goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.[74]

The permanent and secure residence status and the right to equal treatment under Decision 1/80 allowed Turkish citizens to plan their future life and to integrate into the country of residence during a period in which they had not yet acquired the nationality of that country. Directive 2003/109/EC now extends comparable rights to all third country nationals with long residence in a Member State, irrespective of their nationality. The Directive

[73] Arts 19 and 21 of the 1990 Schengen Implementing Agreement [200] OJ L 239/19.
[74] Council doc 14615/04 of 19 Nov 2004, at 21.

sends an important symbolic message to immigrants and to the majority of the population: you will be entitled to stay and to equal treatment with co-citizens. This makes the Directive a central element of any EU policy on integration of immigrants.

The way in which the Long-term Residents Directive, the Family Reunification Directive and Association Council Decision 1/80 are implemented by the Member States in their national law will offer a good indication of how serious Member States are in pursuing the integration of immigrants into their societies. It will make clear whether integration is a serious policy aim or whether it is primarily a code word for selection and exclusion of immigrants from their societies.

15

The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Unity?

HELEN OOSTEROM-STAPLES

INTRODUCTION

ON 3 OCTOBER 2003 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification entered into force.[1] The purpose of the Family Reunification Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals lawfully resident in the territory of a Member State.[2] Family reunification is defined as 'the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry'.[3] To this end the Directive defines who can apply for family reunification (Article 3), which family members benefit from the right to family reunification (Article 4), the conditions which must be satisfied (Article 7) and the grounds for refusing an application, including the right to mount a legal challenge (Articles 16–18), the procedure for applying for family reunification (Article 5) and rights enjoyed by family members admitted under the Directive (Articles 14–15). The provisions in the Directive set out minimum standards. This follows from paragraphs (4) and (5) of Article 3 establishing that the Directive is without prejudice to more favourable provisions of international law and does not affect more favourable

[1] The Dir (which will be referred to as the Family Reunification Dir) is published at [2003] OJ L 251/12.
[2] *Ibid*, Art 1.
[3] *Ibid*, Art 2(d).

provisions in national law. Member States are thus free to provide a higher level of protection in their national legislation, if they so desire.[4]

Both the United Kingdom and Ireland abstained from participating in the adoption of the Family Reunification Directive and are not bound by it.[5] The same holds true for Denmark.[6] The other Member States were obliged to implement Directive 2003/86/EC in their national legislation by 3 October 2005.[7] The first Commission report on the application of the Family Reunification Directive is due no later than 3 October 2007. The report will include such amendments as prove necessary.[8] As a measure adopted within the framework of Title IV of the EC Treaty, the right to refer a question concerning the interpretation or validity of the Directive to the European Court of Justice is restricted to national courts against whose decisions there is no judicial remedy under national law.[9] The Council, Commission and Member States are, however, allowed to request the Court of Justice to give a ruling on a question of interpretation of the Directive. The Court's judgment will not apply to cases that have become *res judicata*.[10] The only case concerning the Family Reunification Directive is an annulment procedure that the European Parliament initiated against the Council in the autumn of 2003.[11] The Court handed down its ruling on 27 June 2006, following Advocate-General Kokott's Opinion on 8 September 2005.[12] The Court's decision will be discussed, where appropriate, in this contribution.

Although the recent transfer of power to regulate family reunification to the Community suggests a blank canvas, this was not the case.[13] The reality was that numerous international obligations of the Member States concerning the respect for family life had to be accommodated. There can be no doubt about the Commission's awareness of the existence of these documents as it took great pains to paint the international framework in its

[4] See in this respect Case C–540/03 *European Parliament v Council*, judgment of 27 June 2006 (not yet reported) para 107, where the Court emphasises that Art 3(4) does not interfere with a Member State's obligations under the Treaties mentioned in that section.

[5] Above n 1, Recital 17.

[6] *Ibid,* Recital 18.

[7] *Ibid,* Art 20. An inventory of national legislation implementing the Dir can be found at http://www.coordeurop.org.

[8] *Ibid*, Art 19. Priority is to be given to Arts 3, 4, 7, 8 and 13 of the Dir.

[9] Art 68(1) EC Treaty.

[10] Art 68(3) EC Treaty.

[11] [2004] OJ C 47/21, above n 4.

[12] All references to the AG's Opinion concern the German text that was downloaded from http://curia.eu.int on 14 Sept 2005.

[13] Under the terms of the third pillar the EU Ministers of Home Affairs adopted the Resolution on the Harmonisation of National Policies on Family Reunification in 1993 (Copenhagen, June 1993, WGI 149, reproduced in J Handoll, *Free Movement of Persons in the EU* (Chichester, Wiley, 1995) 646–8). See also the Commission's proposal for a Convention on Migration that also included rules on family reunification but never passed the stage of a draft text, COM(97)387.

initial proposal.[14] The most obvious international obligation follows from Article 8 of the European Convention on Human Rights (ECHR) on the right to respect for family and private life and Article 12 on the right to marry. Both provisions apply in all Member States and have to be respected within the Community legal order by virtue of Article 6(2) EU Treaty, which reflects the case law of the European Court of Justice. In the second Recital to the Directive, a special tribute is found to Article 8 ECHR as a fundamental right respected and observed by the Family Reunification Directive.[15] In the annulment proceedings initiated by the European Parliament, the Court established that the general obligation to respect human rights as general principles of Community law when implementing Community law also applies to the Family Reunification Directive.[16] It confirmed that Member States are under the obligation to respect the European Convention on Human Rights and the International Covenant on Civil and Political Rights when applying Community law, in this case the Family Reunification Directive.[17] It added to this list of international obligations that have to be respected when dealing with issues of Community law the Convention on the Rights of the Child.[18] It found that it is up to the national courts to ensure compliance with these international obligations. Where they have any doubt regarding the interpretation and validity of the Directive, it is incumbent on them to refer questions to the Court of Justice under the terms of Article 68 EC Treaty.[19] This obligation includes observance of international obligations.

In this contribution, I will consider the contents of the Directive, that is: who benefits from the Directive, which conditions have to be satisfied in order to qualify for family reunification under the Directive, and the grounds for refusing an application for family reunification available to

[14] Commission's proposal for a Council Dir on the right to family reunification, COM(1999)638 (to be referred to as: the initial proposal) [2000] OJ C 116 E/66. Relevant international obligations are considered in para 3 of the Commission's Explanatory Memorandum included in the initial proposal.

[15] Other obligations relevant to the protection of family unity listed by the Commission in *ibid,* (at 3–5) are: the 1949 Universal Declaration of Human Rights, the 1966 International Covenants on Civil and Political Rights and Economic and Social Rights, ILO Convention (No 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Final Act of the Conference adopting the 1951 Convention relating to the Status of Refugees and various Conclusions of the Executive Committee of the UNHCR, the 1989 Convention on the Rights of the Child, the European Social Charter and the European Convention of 1977 on the Legal Status of Migrant Workers.

[16] Above n 4, para 105.

[17] This followed from: Case 374/87 *Orkem v Commission* [1989] ECR 3283, para 31; Joined Cases 297/88 *Dzodzi v Belgium* [1990] ECR 3763, para 68; and C–249/96 *Grant v South West Trains* [1998] ECR I–621, para 44.

[18] Above n 4, para 37.

[19] *Ibid,* para 106.

Member States. My contribution will start with a brief analysis of the drafting history. In the conclusion I will try to answer the question set out in the title of this chapter.

Drafting History

The initial proposal for the Directive on Family Reunification was presented by the Commission on 1 December 1999,[20] seven months after the entry into force of the Treaty of Amsterdam that transferred competence to the European Community to draw up measures on immigration, including conditions of entry and residence and standards for procedures for the issue of long-term visas and residence permits for, amongst others, the purpose of family reunification.[21] Whilst preparing the proposal, the Commission consulted the UN High Commissioner for Refugees and non-governmental organisations with a view to gaining a full overview of the problem of family reunification.[22] The section in the Explanatory Memorandum concerning the objective of the proposal starts by recalling the obligation assumed at the Tampere Council to ensure legally resident third country nationals fair treatment and the recognition that a more dynamic integration policy should offer rights and obligations comparable to those enjoyed by Union citizens.[23] Providing third country nationals with a conditional right to family reunification irrespective of the reasons for their stay in a Member State, the Commission considered a means to attain this objective. Equal treatment with EU citizens is secured by basing the proposal on provisions of existing Community law regarding family reunification for family members of EU citizens. Harmonisation is presented as a means to ensure that the right to family reunification is not dependent on the Member State of residence, and thus serves the purpose of preventing forum shopping by third country nationals seeking the Member State with the most lenient rules on family reunification.[24]

Following the European Parliament's Opinion, the Commission redrafted the initial proposal taking into consideration the amendments

[20] See on this text: P Boeles, 'Directive on Family Reunion: Are the Dilemmas Resolved?' (2001) 3 *European Journal on Migration and Law* 61; G Brinkmann, 'Family Reunion, Third Country Nationals and the Community's New Powers', in E Guild and C Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart, 2001) 241, at 252–63; H Staples, 'Wie is familielid volgens het Europees recht?' (2000–4) 22 *Tijdschrift voor Familie- en Jeugdrecht* 82, at 86–9 and 'Gezinshereniging naar komend Unie-recht' (2000–4) 6 *Nederlands Tijdschrift voor Europees Recht* 77–83.

[21] Art 63(3)(a) EC Treaty.

[22] Initial proposal, above n 14, at 8, para 6.9.

[23] *Ibid*, at 9, para 7.1.

[24] *Ibid*, at 9.

proposed by the European Parliament.[25] This proposal, with minor amendments, was presented on 10 October 2000. Nine of the 16 amendments proposed by the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs[26] concerned the terminology used in the Recitals[27] and the general framework in which the Directive would have to operate.[28] Of the remaining amendments which were put forward by the Committee, Amendment 9 deserves to be mentioned here as it concerned the insertion of a new provision stressing that the Directive would be designed to lay down minimum standards and that in implementing the Directive Member States would not be permitted to lower the level of protection already guaranteed with regard to family reunification in the areas covered by the Directive. Further amendments are found in the European Parliament's Opinion adopted on 6 September 2000, most of which the Commission accepted and which are found in the amended 2000 proposal. An important amendment is the exclusion of persons enjoying subsidiary protection from the personal scope of the Directive, a decision that has left this group without a Community law-based right to family reunification.[29] The Commission, however, was not persuaded to include a standstill clause or allow for more favourable arrangements as these amendments opposed the aim of the Directive to align national legislation on family reunification.[30] Likewise the amendments concerning an obligation to give reasons for a decision rejecting an application, a broadening of the concept of dependence in relation to ascending relatives, and the suggestion to delete the obligation to issue renewable residence permits were not endorsed by the Commission in its amended 2000 proposal.[31] Following a request of the Laeken Council,[32] the Commission presented yet another amended proposal in May 2002 to end the stalemate in the Council.[33] This time the amendments were considerable, allowing for

[25] European Commission, Amended Proposal for a Council Dir on the Right to Family Reunification (amended 2000 proposal), COM(2000)624 final [2001] OJ C 62 E/99/2. For comments on this text see R Cholewinski, 'Family Reunion and Conditions Placed on Family Members: Dismantling a Fundamental Human Right' (2002) 4 *European Journal on Migration and Law* 271.

[26] European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur GR Watson, Report on the Proposal for a Council Dir on the Right to Family Reunification, 17 July 2000, A5–201/2000.

[27] Amendments 3, 4, 5, 6, 7 and 8, EP Report A5–201/2000.

[28] *Ibid,* amendments 1 and 2.

[29] H Battjes and T Spijkerboer, 'The Systematic Nature of the Common European Asylum System' in F Julien-Laferrière *et al* (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years after the Amsterdam Treaty* (Brussels, Bruylant, 2005) 276. See also their diagram at 264.

[30] Amended 2000 proposal, above n 25, at 4.

[31] *Ibid*, at 4–5.

[32] Conclusions of the Presidency, Laeken European Council, 14–15 Dec 2001, para 41.

[33] Amended proposal for a Council Dir on the right to family reunification (amended 2002 proposal), 2 May 2002, COM(2002)225 [2002] OJ C 203 E/136.

derogations, introducing a standstill clause and a deadline for revision of the Directive's provisions. Harmonisation, it was now acknowledged, would have to be realised in stages.[34] The adoption of the Directive in October 2003 marks the beginning of the first phase of harmonisation.

WHO BENEFITS FROM THE DIRECTIVE?

To establish the personal scope of the Family Reunification Directive, it is necessary to know who can lodge an application for family reunification (in the terms of the Directive: the sponsor), and on behalf of which family members an application can be lodged.

The Sponsor

Although the Commission's initial proposal used the terminology 'applicant for family reunification', in the Directive the term 'the sponsor' has been chosen to refer to the person seeking permission to be reunited with or be accompanied by his or her family members. A sponsor is defined in Article 2(c) of the Directive as 'a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her'. To be eligible for family reunification, a sponsor will have to be in possession of a residence permit issued for a period of validity of one year or more *and* have reasonable prospects of obtaining a permanent right of residence.[35]

Despite the fact that the concepts 'reasonable prospect' and 'permanent residence' are the key to the right to family reunification, the Directive itself remains silent as to their meaning. Neither is found in the initial proposal, nor in the revised 2000 proposal. From the Commentary in the amended 2002 proposal it follows that these requirements reflect 'the idea that the right to family reunification would not be open to persons staying only temporarily without the possibility of renewal. The exclusion applies in particular to au pairs, exchange and placement students etc.'[36] As there was no discussion on these conditions in either the Council[37] or the European Parliament[38] there are no further clues as to how 'permanent'

[34] *Ibid*, at 2–3. In addition amendments were made to individual provisions. These will be discussed, where relevant, when addressing the contents of the Dir.

[35] Above n 1, Art 3(1).

[36] Amended 2002 proposal, above n 33, at 5.

[37] Council doc 6912/03, 28 Feb 2003, at 3.

[38] European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur Carmen Cerdeira Morteroro, Report on the Amended Proposal for a Council Dir on Family Reunification, 24 March 2003, A5–0086/2003, at 13.

and 'reasonable' are to be interpreted. I share the view put forward by Peers that the concept 'permanent residence' is not to be defined unilaterally by Member States.[39] A Community definition will not only serve the goal of uniform application but should also prevent Member States from amending their national law on the right to permanent residence and thus restricting the personal scope of the Family Reunification Directive. The Community interpretation will have to come from the Court of Justice in either an Article 68(1) EC Treaty procedure or upon request of the Council, the Commission or a Member State as provided for in Article 68(3) EC Treaty.

Persons Not Covered by the Directive

The Position of EU Citizens

By explicitly referring to third country nationals, the Directive is limited to applications made by 'any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty'.[40] A citizen of the Union, according to Article 17(1) EC Treaty, is every national of a Member State. Section 3 of Article 3 of the Directive reiterates this restriction where it explicitly provides, '[t]his Directive shall not apply to members of the family of a Union citizen'.

The exclusion from the Family Reunification Directive of Union citizens does not mean that Union citizens can never benefit from Community law when they apply for family reunification. Provision is made for the entry and residence of family members of Union citizens, irrespective of their nationality, in Directive 2004/38/EC (on free movement of Union citizens) where the Union citizen is exercising his or her right of free movement under Community law.[41] The rights of EU citizens in Directive 2004/38/EC can, however, be relied on only by those Member State nationals who have exercised their right to free movement of persons as provided for by EC law. An attempt to rectify this differentiation is found in the Commission's initial proposal, but did not live to see the second draft. Article 3(1) of the initial proposal ran:

[39] S Peers, 'Family Reunion and Community Law', in N Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004) 180. In my opinion the same holds true for the concept of 'reasonable prospect'.

[40] Above n 1, Art 2(a). This is the standard definition of third country national (amended 2002 proposal, above n 33, at 5).

[41] Dir 2004/38/EC of 29 Apr 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 299/35 (revised text). Unfortunately the number assigned to the Residence Dir in the English bulletin, namely 2004/58/EC, is incorrect. Here I am using the correct number, 2004/38/EC when referring to the Directive as it was published in the OJ.

> This Directive applies where the applicant for reunification is: . . . c) a citizen of the Union not exercising his right to free movement, if the applicant's family members are third-country nationals, irrespective of their legal status.

The EU citizen's right to family reunification was then, by virtue of Article 4 of the initial proposal, equated to the right to family reunification in Articles 10–12 of Council Regulation (EEC) No 1612/68, not to the equivalent right provided for in the Family Reunification Directive. Article 3(1) was deleted from the draft text accordingly, because of the impending revision of Community secondary free movement law.[42] However, to date, Directive 2004/38/EC has not applied to family reunification of Member States' nationals who have not exercised their right to free movement.[43] The result is, therefore, that the right to family reunification for Member States' nationals who have not exercised a right to free movement is not provided for in EC law. These nationals of the Member States will find their application for family reunification processed under national immigration law, as the only alternative open to them, unless provision is made in national law for the standards in the Family Reunification Directive to apply also to their situation.[44] Until their position is reconsidered at the EU level they will find that in regard to family reunification issues they are no more than second-class citizens.[45] This is an unfortunate situation, as it is an open invitation to EU citizens to exercise free movement rights for the sole purpose of qualifying for family reunification under the more generous terms of Community law when they return to their home state after a short stay in another Member State.[46] Member States have argued that such abuse of free movement rights should not lead to entitlements under Community law. The Court has, to a certain extent, recognised the concerns voiced by Member States.[47] The final word on this issue, however, is still to come from the Court in the *Jia* case.[48] Advocate-General Geelhoed's Opinion brilliantly reveals the existing tension.[49] His solution—first admission to the EU territory of an EU citizen's family members is governed by national law, albeit with respect for Article 8 ECHR—is, however, not a satisfying one.

By not providing a right to family reunification for EU citizens who have not exercised a right to free movement, the Community legislator not only put the issue of reverse discrimination on the agenda, but has also fuelled a

[42] Amended 2002 proposal, above n 33, at 3.
[43] This follows from the wording of Art 3(1) of Dir 2004/38/EC, above n 41, that limits beneficiaries under the Dir to EU citizens exercising free movement rights.
[44] This is the case in the Netherlands as follows from VC 2000 B2/1.
[45] Amended 2002 proposal, above n 33, at 3.
[46] Case C–109/01 *Akrich* [2003] ECR I–9607.
[47] *Ibid*, paras 49–58.
[48] Case C–1/05 *Jia* [2005].
[49] *Ibid*, AG's Opinion of 27 Apr 2006.

discussion as to the legal regime that has to be applied in cases of dual nationality.[50] Is the applicant with French/Moroccan nationality applying for family reunification in France, for instance, to be classed as a third country national, because he or she is a Moroccan national or, by virtue of the French nationality, as an EU citizen who has not exercised a free movement right? As a Moroccan national he or she would qualify for family reunification under Directive 2003/86/EC, whereas, if he or she were classed as a French citizen who had not exercised the right to free movement, the application for family reunification would be considered under national law. A Dutch court, in a similar case, ruled in favour of the individual.[51] The court argued that when implementing the Directive no provision was made to exclude Dutch citizens with dual nationality from the scope of the Directive. It added that a Dutch/Moroccan citizen who has not exercised the right to free movement cannot be considered to be a citizen of the Union within the meaning of Article 17 EC Treaty. In the appeal proceedings, the question whether Dutch citizens can rely on the Directive was considered.[52] It was argued that the rules in the Directive are to be applied to Dutch citizens who have not exercised their right to free movement by virtue of the *Vreemdelingencirculaire*.[53] As the question was not referred to the Court of Justice, it remains unclear how this issue should be addressed according to EC law. As Groenendijk correctly points out, in the past the Court has not allowed Member States to apply national law without further consideration of the fact that their citizen has another nationality where EC law is at stake.[54] Whether it will be willing to extend this liberal approach to the Family Reunification Directive will not be known until the Court has the opportunity to rule on this issue.

Excluded Third Country Nationals

Although the wording of Article 3(1) is drafted in general terms, thus suggesting that all third country nationals applying for family reunification benefit from the Directive if they satisfy the conditions of 'one year's

[50] See, for instance, Rechtbank 's-Gravenhage, sitting at Amsterdam, 16 Nov 2005, AWB 04/53482 VRWET, JV 2006/28, and the appeal proceedings before the Afdeling Bestuursrechtspraak van de Raad van State, 29 Mar 2006, 200510214/1, JV 2006/172, and Rechtbank 's-Gravenhage, sitting at Zutphen, 15 May 2006, AWB 05/36788.

[51] Rechtbank 's-Gravenhage, sitting at Amsterdam, above n 50, para 10.

[52] Afdeling Bestuursrechtspraak Raad van State, above n 50, with commentary by CA Groenendijk who discusses the Council of State's ruling on this issue in para 3.

[53] See also Rechtbank 's-Gravenhage, sitting at Zutphen, above n 50, para 2.15.

[54] In [2006] *JV* 172, CA Groenendijk refers to: ECJ Cases 292/86 *Gullung v Conseil de l'Ordre des Avocats* [1988] ECR 111, C–369/90 *Micheletti v Delagación del Gobierbo Cantabria* [1992] ECR I–4239, C–419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I–505 and C–148/02 *Garcia Avello v Belgium* [2003] ECR I–11613. See also: CA Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 8 *European Journal of Migration and Law* 215, at 227–30.

residence' and 'a reasonable view of obtaining a permanent residence status', this, however, is not the case. Paragraph 2 of Article 3 includes a restriction on the right to remain of the person applying for family reunification. Accordingly, the Directive does not apply to a person:

— applying for recognition of refugee status whose application has not yet given rise to a final decision;
— authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status;[55] or
— authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

The first two groups listed were excluded from the personal scope of the Directive from the outset. Third country nationals residing in a Member State on the basis of subsidiary protection, however, were initially not included in the list of persons not benefiting from the Family Reunification Directive.[56] Like the provision concerning the position of EU citizens who have not exercised a free movement right, the amendment concerning those enjoying subsidiary protection is found in the Commission's second draft. From the Explanatory Memorandum it follows that the reason for this amendment is 'the absence of a harmonised concept of subsidiary protection at Community level.'[57] The Commission explicitly mentions that not including persons enjoying a subsidiary form of protection in the Family Reunification Directive does not mean that their right to family reunification should not be regulated at the Community level.[58] Although the Qualification Directive,[59] establishing the status of a person eligible for subsidiary protection, was adopted in 2004, provision is yet to be made for their right to family reunification.[60]

[55] Council Dir 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 and bearing the consequences thereof [2001] OJ L 212/12.

[56] See the text of Art 3(2) in the initial proposal, above n 14.

[57] Amended 2000 proposal, above n 25, at 2.

[58] *Ibid*.

[59] Council Dir 2004/83/EC of 29 Apr 2004 on minimum standards for the qualification and status of third country nationals or stateless persons or refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

[60] See Battjes and Spijkerboer, above n 29, at 276.

It may be questioned whether it was really necessary explicitly to exclude applicants for refugee status, temporary protection and subsidiary protection from the personal scope of the Directive. I would argue that they are already excluded by virtue of the fact that they cannot provide evidence that they have 'reasonable prospects of a permanent residence status' as Article 3(1) requires qualification as a sponsor to have. The explicit exclusion, admittedly, leaves no room for doubt.

A Privileged Status for Refugees and Unaccompanied Minors

Whereas applicants for refugee status are one of the groups excluded from the personal scope of Directive 2003/86/EC, recognised refugees do benefit from this Directive.[61] In Chapter V special provisions set out the conditions for applications lodged by recognised refugees in general and unaccompanied minors in particular.

A refugee for the purpose of the Family Reunification Directive is defined as:

> [A]ny third country national or stateless person enjoying the status of refugee within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967.[62]

With the adoption of Directive 2004/83/EC on 29 April 2004 (Qualification Directive), the European Community has its own rules on the recognition of refugees. I would like to stress the importance of Article 23(1) of the Qualification Directive for applications for family reunification made by refugees. It obliges Member States to 'ensure that family unity can be maintained'. This, I feel, also applies to the application of the Family Reunification Directive, thus obliging Member States to adopt a generous approach when processing applications made by refugees.

A definition of an unaccompanied minor is found in Article 2(f) of the Family Reunification Directive. Unaccompanied minors according to this Article are:

> [T]hird country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States.

This definition corresponds with the definition of unaccompanied minors found in Article 2(i) of the Qualification Directive.

[61] Above n 1, Art 9(2).
[62] Above n 1, Art 2(b).

Now that we have identified who can apply for family reunification, it is time to establish which family members can join the sponsor in the host Member State.

Family Members

Family members who can apply for family reunification under the terms of the Family Reunification Directive are those listed in Article 4. This provision distinguishes between family members who *have to* be admitted by Member States if the conditions in the Directive are satisfied (ie the nuclear family),[63] and family members a Member State *may* include in the personal scope of the Directive when implementing the Directive in national law.[64] This differentiation between family members, which is not found in the Commission's initial draft, will mean that who qualifies for family reunification under the non-mandatory provisions of Article 4—ie paragraphs 2 and 3—will differ from Member State to Member State. This is apparently the price that had to be paid in order to extend the scope of application of the Directive beyond the nuclear family.

To fall within the scope of the Directive, family members have to be third country nationals.[65] Family members who are stateless, ie have no nationality at all, also benefit from the Directive.

From the definition of family reunification it follows that the Directive applies to applications for family reunification 'whether the family relationship arose before or after the resident's entry'.[66] Thus Member States are prevented from distinguishing between family reunification (family ties predate the entry of the sponsor) and family formation (family ties did not exist at the moment the sponsor entered the Member State). The only exception is the possibility for Member States to confine applications for family reunification made by recognised refugees to family relationships which predate the sponsor's entry to the territory of the Member State.[67] The fact that the Directive envisages both family reunification and family formation does not, however, mean that an application for admission made for the purpose of contracting a marriage has to be processed under the terms of the Directive. On the contrary, the Commission has explicitly argued that such an application remains subject to national law.[68]

[63] *Ibid*, Art 4(1) and Recital 9. See also amended 2002 proposal, above n 33, at 6.
[64] Above n 1, Art 4(2) and (3) and Recital 10.
[65] This follows from *ibid*, Art 3(3): 'if the members of his or her family are *third country nationals* of whatever status' (emphasis added).
[66] *Ibid*, Art 2(d). See also Recital 7.
[67] *Ibid*, Art 9(2).
[68] Initial proposal, above n 14, at 12.

By ruling out the possibility of distinguishing between applications at the moment the family ties were realised (prior to entry or post-entry), the Directive has ensured that children of third country nationals who were born and raised in a Member State without acquiring citizenship of that country can rely on Community law for their right to family reunification once they are legally married or are unmarried partners in a duly attested stable long-term relationship or bound by a registered partnership where they satisfy the substantive conditions. These will be discussed further below.

The Nuclear Family

Article 4(1) and (4)–(6) of the Directive sets out the relevant provisions for the admission of the nuclear family. In Article 4(1) we find the family members who must be admitted by all Member States. These family members are the sponsor's spouse and the minor, unmarried children of both the sponsor and the spouse. Article 4(4)–(6) provides a number of restrictions that can be imposed on the nuclear family members requesting family reunification. These restrictions will be discussed where appropriate.

The Spouse

Admission of the spouse in the event of a polygamous marriage is restricted to one spouse.[69] The justification for this restriction is found in Recital 11 which reads:

> The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children.

Although polygamous marriages are considered incompatible with the fundamental principles of the Member States, provision had to be made for the consequences of such a marriage if lawfully contracted, as an absolute ban on family reunification for all spouses would contravene the right to family life of the sponsor. Therefore, the right to family reunification, in the case of a polygamous marriage, is restricted to one spouse at a time.

A further restriction concerning the admission of the spouse is found in Article 4(5) of the Directive which allows Member States to set a minimum age for the spouse to join the sponsor. The choice of age is discretionary, albeit it may never exceed the age of 21 years. The purpose of such an age limit is twofold: to ensure better integration and to prevent forced

[69] Above n 1, Art 4(4).

marriages. I share Boeles and Lodder's concerns regarding this requirement. They have questioned how one determines whether the interests mentioned—better integration and the prevention of forced marriages—are served by national rules and which European institution is competent to assess whether Member States abide by this rule. They also raise the question of how a minimum age requirement that serves the purpose of integration imposed on the spouse relates to the special rules for the admission of children of 15 years and older found in Article 4(1), third paragraph, and (6) of the same Directive.[70]

Unmarried, Minor Children

The obligation to admit children born from, or adopted by, the spouse and/or the sponsor is limited to minor, unmarried children.[71] It is national law that determines whether or not a child is to be classed as a minor.[72] As a rule the age of majority will be 18 years, not 21 years as found in Article 2(2)(c) of Directive 2004/38/EC for the admission of children of a EU citizen and his or her spouse or registered partner. Restricting family reunification to minor and unmarried children reflects the principle underlying the Directive that the right to family reunification is linked to de jure and de facto dependence on the sponsor.[73] Although the restriction is straightforward, there is a point that must not be overlooked. It concerns the exclusion of married children. The words 'must not be married' ('*ne pas être mariés*', '*dürfen nicht verheiratet sein*', '*ongehuwd*') raise doubts whether minor children who have been married but are divorced or widowed when an application for family reunification is lodged are also excluded from the scope of the Directive. A literal reading implies that the marital situation at the time of admission or, in the alternative, the moment of application should be decisive. Considering the fact that in some cultures marriage can be entered into at a very young age, in my opinion a literal reading should be preferred, in particular where the child is still a minor according to Western standards when the marriage is dissolved, and subsequently becomes dependent on the sponsor or spouse. Such a reading is in the interests of the child as required by Article 5(5) of the Directive.

The right to apply for family reunification for children includes adopted children where the adoption is 'in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member

[70] P Boeles and G Lodder, *Commentaar Europees Migratierecht. Richtlijn 2003/86/EG artikel 4* (The Hague, SDU, 2006).
[71] Above n 1, Art 4(1).
[72] *Ibid*.
[73] Initial proposal, above n 14, at 15.

State or must be recognised in accordance with international obligations'.[74] Admission of children 'entrusted' according to local customs is possible where the relevant authority of a Member State has recognised that such customs have the same effect as adoption.[75] Where the child is born from a previous relationship of either the sponsor or the spouse admission is, in principle, restricted to cases where the sponsor or spouse has custody over the child and the child is dependent on him or her. When custody is shared, permission to enter may be granted if the other party who shares custody gives his or her consent.[76] Thus, the other parent's right to custody is adequately protected.

By way of derogation, Member States may restrict admission of minor children born from a polygamous marital relationship between the spouses who have not themselves been granted permission to enter and reside in the Member State.[77] The wording concerning the admission of children born in polygamous marriages in the Commission's initial proposal was more generous than the *carte blanche* given to Member States in the final text. It provided that 'the entry and residence of children of another spouse shall be authorised if the *best interests of the child* so require'.[78] From the Explanatory Memorandums it follows that the child's interests should 'prevail over other considerations, for instance where the biological mother dies'.[79] It is to be hoped that Member States, notwithstanding the rephrasing of this section, will admit children from polygamous marital relations where the child's caring parent dies. This would be in line with the obligation found in Article 5(5) of the Directive to 'have due regard to the best interests of minor children' when examining such an application. This approach is in line with the Court of Justice's reading of Article 5(5) in Case C–540/03.

A further restriction, phrased as derogation, to the right of admission of minor, unmarried children is found in the final subparagraph of Article 4(1). Member States may, accordingly, satisfy themselves that children who are over the age of 12 years arriving independently of the rest of the family meet a condition for integration prior to authorising entry and residence, if this was provided for by national legislation on the date of implementation of Directive 2003/86/EC. From Recital 12 it follows that the intention of this restriction is 'to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school'. Imposing an integration condition on children

[74] Above n 1, Art 4(1)(b).
[75] Initial proposal, above n 14, at 15.
[76] Above n 1, Art 4(1)(c) and (d).
[77] *Ibid,* Art 4(4) second para.
[78] Initial proposal, above n 14, at 26 (emphasis added).
[79] *Ibid*, at 15.

over the age of 12 travelling independently was considered by the European Parliament to breach international obligations. It therefore started annulment proceedings before the Court. The Court, however, found no reason to annul the Directive. It argued that there is no obligation under international law for Member States to admit non-nationals even where their family members reside in the Member State in question. The Court, respecting the fact that Member States enjoy discretionary powers when admitting family members, argued that it is precisely these powers that are affected by Article 4(1) final subparagraph, not the individual's right to enter and reside in a Member State. The integration requirement can, therefore, not be classed as violating international law, as it affects a Member State's discretionary powers, as provided for under Article 8(2) ECHR, not the actual right to family reunification itself. The Court's reading of Article 4(1) final subparagraph implies that a Member State's discretionary powers under Article 8(2) ECHR are restricted by the Directive, in the sense that it restricts the scope of those powers which a Member State has under international law when admitting family members.[80] Article 4(1) final subparagraph is one example of the discretionary powers Member States have kept. The Court does, however, find that in exercising these limited discretionary powers Articles 5(5) and 17 of the Directive have to be observed by the Member State.[81] The former obliges Member States to 'have due regard to the best interests of minor children', whereas the latter lists a number of factors which have to be observed by Member States in their decision-making. The factors listed in Article 17 are:

— nature and solidity of the person's family relationships;
— duration of residence in the Member State;
— existence of family, cultural and social ties with his/her country of origin.

The Court also considers whether the age limit and the integration condition as such are compatible with the right to family life. As far as age is concerned, the Court reiterates that this is one of the points found in the European Court of Human Rights' case law when balancing the interests at stake according to Article 8(2) ECHR.[82] Likewise, it finds that an integration condition as such can be classed as a legitimate aim within the meaning of Article 8(2) ECHR. The integration condition in Article 4(1) final subparagraph, it argues, 'is intended to reflect the children's capacity for integration at early ages and is to ensure that they acquire the necessary

[80] Above n 4, paras 60–62.
[81] *Ibid*, paras 63–64.
[82] *Ibid*, para 65.

education and language skills in school'.[83] This provision thus reflects the Community legislature's conviction 'that, beyond 12 years of age, the objective of integration cannot be achieved as easily'.[84] As to the nature of integration conditions the Court's ruling is crystal clear: Member States are not authorised 'to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights', thus barring them from adopting 'implementing provisions that would be contrary to the right to respect for family life'.[85] Unfortunately, it does not provide clues as to when this might be the case. As far as the standstill clause is concerned (legislation in force at the moment implementing measures enter into force), the Court finds no breach of Community law, and the choice of 12 years is not considered to breach the principle of non-discrimination as it 'corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties'.[86]

Member States may also restrict entry and residence to children for whom an application has been submitted before they reach the age of 15, if provided for under national law on the date of implementation of this Directive.[87] Entry and residence of children over 15 will then be granted on the basis of national law. The alleged violation of international obligations following from Article 4(6) is not rubber-stamped by the Court. It finds that this paragraph allows Member States to derogate from the general principles set out in the Directive where the child is 15 or older. As the provision does not prohibit Member States from processing applications lodged by or on behalf of a child aged 15 or older, there is no prima facie breach of the right to family life.[88] It does, however, find that Member States have to respect Articles 5(5) and 17 of the Directive when processing applications concerning children over the age of 15. Member States are thus under an obligation to respect the best interests of the child and facilitate family reunification.[89] Like the age limit in Article 4(1) last paragraph, the Court finds that section 6 does not breach the principle of non-discrimination.[90] It explains that the difference in treatment of spouses and children over 15 does not amount to discrimination because the

[83] *Ibid*, para 67.
[84] *Ibid*, paras 68 and 71.
[85] *Ibid*, para 70.
[86] *Ibid*, paras 72 and 74.
[87] Above n 1, Art 4(6).
[88] Above n 4, paras 85–86.
[89] *Ibid*, paras 87–88.
[90] *Ibid*, para 89.

purpose of marriage is to establish a long-term relationship, whereas a child over 15 will not necessarily live with its parents for a long time.[91]

Member States' Discretion for Other Family Members

Paragraphs 2 and 3 of Article 4 contain non-mandatory rules for the admission of family members. The Commission explains the need for optional and mandatory rules in the Explanatory Memorandum to the amended 2002 proposal as follows:

> Given the diversity in national legislation concerning those enjoying the right to family reunification, it does not seem possible for the moment to extend the obligation to allow entry and residence beyond the spouse and minor children.[92]

In order to save the Directive, the Commission, in 2002, introduced the idea of family members who *have* to be admitted and the family members a Member State *may choose* to admit. It is the latter which I will now consider.

The first family members listed are the first-degree relatives in the direct ascending line of both the sponsor and the spouse where the parent is dependent on them and does not enjoy proper family support in the country of origin.[93] Besides the dependent parents, provision is also made for the adult, unmarried children of the sponsor and/or the spouse where the child is objectively unable to provide for its own needs on account of its state of health.[94] Member States may also decide to admit:

— the unmarried third country national partner with whom the sponsor is in a duly attested stable long-term relationship;
— a third country national bound to the sponsor by a registered partnership;
— the unmarried minor children, including adopted children, of the unmarried partner and the registered partner; and
— the adult unmarried children of the unmarried partner and the registered partner who are objectively unable to provide for their own needs on account of their state of health.[95]

One of the controversial points in the negotiations was the position of unmarried partners. Initially, the Commission had equated unmarried partners, including same sex partners, to spouses, albeit subject to the

[91] *Ibid,* para 75.
[92] Amended proposal, above n 32, at 6.
[93] Above n 1, Art 4(2)(a).
[94] *Ibid,* Art 4(2)(b).
[95] *Ibid,* Art 4(3).

restriction that this had to be recognised by national law.[96] The right accorded to unmarried couples, be it of different or the same sex, reflects the principle of equal treatment. According to the Commission, it would in no way generate actual harmonisation of national rules leading to forced legal recognition of relations between unmarried partners.[97] Nevertheless, the provision proved a bridge too far for a number of Member States and had to be turned into an optional right to enter and residence for unmarried partners and registered partners. The position of the children of unmarried/registered partners necessarily followed suit. I find no valid reasons why the exceptions in Article 4, paragraphs 4–6, although formulated in such a way that they, strictly speaking, apply only to the nuclear family, should not be applied to those family members who qualify for family reunification under the non-mandatory provisions. Thus, by virtue of Article 4(4), admission of partners can be restricted to one partner and the children born from this relationship (or born to one of the partners), age limits for partners as provided for by Article 4(5) should be possible and national law may be applied where the child seeking admission is over 15 and arrives independently.

The privileged position of the traditional family or, in the alternative, the exclusion of unmarried partners from the group of family members who have to be admitted by a Member State, has been severely criticised as being 'socially inadequate' and not reflecting the international and national legal systems that treat married and unmarried couples alike.[98] As Urbano de Sousa points out, Article 44(2) of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[99] provides for the assimilation of married and unmarried partners and Article 8 ECHR provides protection for the enjoyment of family life irrespective of whether the bonds are of a legal or factual nature.[100] The Family Reunification Directive not only deviates from (inter)national standards, it is also not in line with the Temporary Residence Directive[101] that applies to married and unmarried couples alike, albeit with the important restriction also found in the Commission's initial proposal for the Family Reunification Directive that a Member State has to have recognised unmarried partners by law. Along the same lines, the definitions

[96] The Commission refers to the Court's decision in Case 59/85 *Netherlands v Ann Florence Reed* [1986] ECR 1283 concerning the unmarried partner of a Member State national exercising free movement rights.

[97] Initial proposal, above n 14, at 14.

[98] C Urbano de Sousa, 'Le regroupement familial au regard des standards internationaux' in Julien-Laferrière *et al,* above n 29, at 133. See on partnership rights the extensive study by H Toner, *Partnership Rights, Free Movement and EU Law* (Oxford, Hart, 2004).

[99] UNGA A/RES/45/158, 1991 ILM 1519, at 1521.

[100] App no 50963/99, *Al-Nashif v Bulgaria*, 20 June 2002 (2002) 35 EHRR CD 76.

[101] Art 15(1) of Dir 2001/55, above n 55.

of family members in the Dublin Regulation[102] and the Qualification Directive[103] include both the spouse and the unmarried partner in Member States where legislation and practice treat married and unmarried couples alike. The final text must, therefore, not only be criticised for not promoting equal treatment of married and unmarried couples, but also for spoiling the coherence in the European legal system and its disrespect for international commitments.

Lex Specialis: Family Members of Recognised Refugees

Which family members may apply to be reunited with a refugee under the Directive is the subject of Article 10. The basic rule is found in paragraph 1 which reads:

> Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees.

The exception provided for means that Member States may not choose to subject children of refugees who are over 12 years and arrive independently of the rest of the family to integration measures.[104] From the Explanatory Memorandum to the amended 2002 proposal, it follows that a Member State may not reduce the age that entitles children to family reunification 'below the age of majority'.[105] Article 10(1)(b) establishes a discretionary power for Member States to extend the personal scope of the Directive to 'other family members not referred to in Article 4, if they are dependent on the refugee'. A restriction is found in Article 9(2) which allows Member States to confine applications for family reunification made by a refugee to those family members whose relationship with the refugee predates the date of entry to the Member State.

Special provision is made for the unaccompanied minor refugee in Article 10(3). In the case of unaccompanied minors, Member States are under an obligation to authorise entry and residence of first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a).[106] This means that Member States may not require that parents are dependent on the unaccompanied minor and do not enjoy proper family support in the country of origin. Member States may

[102] Art 2(i) of Reg (EC) No 343/2003 of 18 Feb 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

[103] Art 2(h) of Dir 2004/83/EC, above n 59. For EU citizens see Art 2(2)(a) and (b) of Dir 2004/38/EC, above n 41.

[104] See in this respect also: Art 7(2) second subpara of Dir 2003/86/EC, above n 1.

[105] Explanatory Memorandum to the amended 2002 proposal, above n 33, at 9.

[106] Above n 1, Art 10(3)(a).

authorise entry and residence of the legal guardian or any other family member where there are no relatives in the direct ascending line, or where such relatives cannot be traced.[107]

APPLYING FOR FAMILY REUNIFICATION

Substantive Requirements

An application for family reunification can be subject to the condition that the person seeking access to the territory as a family member does not pose a danger to the public policy, public security and public health of the Member State.[108] A Member State may also require evidence that the sponsor has:

— accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State;[109]
— sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for both the sponsor and the members of the family;[110]
— stable and regular resources which are sufficient to maintain both him/herself and the members of his/her family without recourse to the social assistance system of the Member State concerned.[111]

As the Directive remains silent as to the evidence that must be deemed sufficient proof that the listed conditions are satisfied, it will be up to the Member States to determine which documents are required. The only restriction appears to be that the right to family reunification itself may not be nullified by documentary requirements.

Besides the conditions listed above, Member States may also require from family members compliance with integration measures set out in national law. Article 8 adds to this list the possibility for a Member State to require up to two years of lawful residence before family members can join the sponsor.

The public policy exception that serves as both an admission and termination clause will be considered further below. Here I will consider only the general conditions for family reunification and the possibility of

[107] *Ibid*, Art 10(3)(b).
[108] *Ibid*, Art 6. I will refer to 'the public policy exception' for these three separate grounds for withholding entry permission and/or withdrawing residence rights at a later stage.
[109] *Ibid*, Art 7(1)(a).
[110] *Ibid*, Art 7(1)(b).
[111] *Ibid*, Art 7(1)(c).

imposing a qualification period. The special position of refugees will also be considered. Integration conditions will not be dealt with, as all that can be said on this point has already been said in the section on unmarried minor children. The reader is, therefore, referred to that section.

General Conditions for Family Reunification

The first requirement listed in Article 7 concerns the housing available to the sponsor and the family members who will join him or her. This requirement met with little opposition during the negotiations. Although Directive 2004/38/EC does not impose a housing condition on EU citizens applying for family reunification, the Member States are familiar with this requirement as it was included in Article 10(3) of Regulation 1612/68, which was repealed when Directive 2004/38/EC entered into force. Whereas Article 10(3) of Regulation 1612/68 explicitly stated that when determining whether accommodation is to be classed as 'normal' this should not amount to discrimination, the provision in the Family Reunification Directive lacks such a reference. This, however, does not mean that Member States have a free hand in determining whether housing is 'normal' as they are required to consider the issue in the light of 'general health and safety standards in force'. In assessing the available accommodation they must also consider the social status and the number of family members who will be living in the accommodation.[112] The reference to health and safety standards, the social status of the family and the number of family members should serve as a guarantee against discriminatory application of this condition.[113]

The second condition listed in Article 7(1) concerns insurance against sickness. The sickness insurance must cover 'all risks normally covered for the own nationals' for both the sponsor and the family members. This requirement mirrors the obligation imposed on the economically inactive EU citizens.[114] From the *Baumbast* ruling we know that this condition must be applied in accordance with the principle of proportionality.[115] Although it is hard to imagine how a third country national could put him- or herself in the same position as Mr Baumbast, the case may arise where a third country national and his or her family have health care insurance outside the host Member State and, like the Baumbast family, do not use health care in the host Member State other than in emergencies. Under these circumstances, as in the case of *Baumbast*, I would argue that the

[112] Initial proposal, above n 14, at 18.
[113] See on this omission Peers, above n 39, 184.
[114] Cf Art 7(1)(b) of Dir 2004/38/EC, above n 41.
[115] Case C–413/99 *Baumbast* [2002] ECR I–7091.

principle of proportionality must determine whether this condition has been satisfied. There should not be an automatic negative decision on the application. This reading falls in line with the Explanatory Memorandum to the initial proposal, where the Commission states that the purpose of this condition 'is also to ensure that the reunited family does not become a burden on the host Member State's social security system'.[116] If no health care is used in the host Member State, the family cannot be considered to burden the social security system of that Member State. The health insurance requirement, I feel, should be applied in the light of the personal situation of the family.

The final requirement in Article 7(1) concerns the availability of financial resources. Resources must be 'stable and regular' and sufficient to maintain the sponsor and the family members without having recourse to the social assistance system of the host Member State. The wording of the requirement, strictly speaking, does not mean that resources have to be generated by means of an economic activity. Nevertheless, when assessing the 'regularity' of the resources, Member States might find it easier to accept that an income generated through (self-)employment satisfies the latter requirement than an income generated through private means. Besides resources from an economic activity, the sponsor should also be deemed to satisfy this condition where he/she, for instance, receives an invalidity or retirement pension, be it from the state or through private means. A combination of funds (part income from employment, part invalidity pension or, as an alternative, income from employment and ample private means) is also an option to satisfy this requirement. In order to determine whether resources are 'sufficient' a Member State *may* take the level of the national minimum wages and pensions into account. There is, however, no obligation to do this. As with the health insurance requirement, Member States should be guided by the principle of proportionality when determining whether the resources available are sufficient to admit family members under the Directive.

The three conditions in Article 7(1) resemble requirements already found in secondary EC law regulating free movement of EU citizens. In applying them, a Member State should observe the proportionality principle, as is the case under the free movement rules. Besides these conditions, Member

[116] Initial proposal, above n 14, at 18.

States may also include a qualifying period for admission in their national legislation. This is a condition not found in Directive 2004/38/EC.

Qualifying Period

This brings us to the last condition that can be imposed on applicants for family reunification: the possibility of including a qualifying period in national law. The idea of setting a qualifying period was to ensure stability in the sponsor's residence.[117] The qualification period that finally found its way into the Directive is a period not exceeding two years, with an exception for those Member States, in practice Austria, where on the date of adoption of the Directive the legislation takes its reception capacity into account. Austria may, on the basis of the second paragraph of Article 8, provide for a qualification period of at the most three years, to be calculated from the moment of submission of the application for family reunification until the issue of the residence permit. The other Member States may require at the most two years' lawful residence on their territory by the sponsor before he or she is joined by family members. In its submissions regarding the right to set a qualification period of up to three years, the European Parliament put forward that the Austrian Constitutional Court has found the system of an annual quota contrary to the Austrian Constitution.[118] It is, therefore, assumed that there will be no Member State that has a qualifying period that exceeds a period of two years.

The annulment proceedings initiated by the European Parliament included the validity of Article 8 in the light of the right to family life. According to the Parliament, a qualifying period of two or three years restricts the right to family reunification significantly and, as such, prevents consideration of a case on its own merits and thus 'authorises the Member States to retain measures which are disproportionate in relation to the balance that should exist between the competing interests'.[119] Like the integration condition, the Court found that the qualifying periods in Article 8 of the Directive which authorise Member States to derogate from the general rules found in the Family Reunification Directive relate to a Member State's discretionary powers under international law. It argued that:

> [A qualifying period] does not have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place

[117] Initial proposal, above n 14, at 26.
[118] Constitutional Court of Austria, case G 119, 120/03–13, 8 Oct 2003 (referred to in Case C–540/03, above n 4, para 92).
[119] Above n 4, para 91.

> in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.[120]

In exercising their discretionary powers, Member States do, once again, have to observe the factors listed in Article 17 of the Directive.[121] They are also obliged to take the interests of minor children into consideration.[122] By linking the exercise of discretionary powers to Articles 17 and 5(5) of the Directive, the Court has ensured that Member States will have to consider each case on its own merits. Ultimately, this may mean that in an individual case, a Member State may not impose a qualifying period as a condition to qualify for family reunification. This approach shifts the balancing of interests in favour of the individual.

The Special Position of Refugees

The general conditions for family reunification discussed above cannot be imposed *mutatis mutandis* on applications made by recognised refugees. The conditions that apply to them can be found in Article 12 of the Directive. Besides this provision, we find special rules concerning the admission of family members of refugees in Articles 7(2) and 8 of the Directive.

As a general rule, Member States may not require evidence from either the refugee or the family members that the requirements set out in Article 7(1) of the Directive (accommodation, health insurance and stable and regular resources) are satisfied.[123] From the Explanatory Memorandum to the amended 2002 proposal it follows that this exception applies only to applications made for the spouse and the minor children.[124] So far the rule is straightforward. However, the second and third paragraphs of Article 12 provide for exceptions to this rule. These two exceptions are not found in the proposals for the Directive. The first exception allows Member States to require this evidence where either the sponsor or a family member has special links with a third county that qualifies as a realistic alternative for family reunification. The second exception allows Member States to

[120] *Ibid*, para 98.

[121] These are: the nature and solidity of the person's family relationships, duration of residence in the Member State and the existence of family, cultural and social ties with his or her country of origin.

[122] Above n 4, paras 99–101.

[123] Above n 1, Art 12(1).

[124] Amended 2002 proposal, above n 33, at 9.

request this evidence if the application for asylum was not lodged within a period of three months after the refugee status was granted. A further watering down of the rules on family reunification is the derogation from the qualification period in Article 8, thus allowing refugees to be reunited with their family members as soon as their status has been recognised by the Member State.[125] A final restriction is found in the second paragraph of Article 7(2), which provides that integration measures may be imposed on family members only after those persons have been granted permission for family reunification.

Procedural Requirements

Besides the substantive conditions which have been discussed above, the Directive also establishes a number of procedural conditions that can be imposed on applicants for family reunification. These conditions are set out in Article 5 of the Directive.[126] The text proposed by the Commission in its amended 2002 proposal 'incorporates a series of amendments inspired by points agreed in the Council'.[127] This provision applies to applications made by refugees, albeit on condition that no application may be rejected solely on the fact that documentary evidence is lacking.[128] Where no official documentary evidence is available, Member States are explicitly obliged to take other evidence into account, which is to be assessed in accordance with national law.[129]

Article 5(1) leaves it to Member States to determine whether the application is to be lodged by the sponsor or (one or more of) the family member(s).[130] The Commission's initial proposal provided only for an application to be made by the sponsor 'in order to exercise his right to family reunification'. From the individual's point of view, allowing the sponsor to apply for family reunification has advantages. The chosen compromise will mean that, depending on the choice made by a Member State, an application will have to be lodged with the authorities in the host Member State (sponsor applies) or with the consular authorities where the family members are resident at the moment of application (family applies). By allowing Member States a choice, 'the two types of procedures applied by the Member States . . . [could] be reconciled'.[131] The compromise is unfortunate as the sponsor, 'being resident, will find it easiest to handle the

[125] Above n 1, Art 12(2).
[126] Art 7 in the initial proposal, above n 14.
[127] Explanatory Memorandum, amended 2002 proposal, above n 33, at 7.
[128] Above n 1, Art 11.
[129] *Ibid,* Art 5(2).
[130] *Ibid,* Art 5(1).
[131] Explanatory Memorandum, amended 2002 proposal, above n 33, at 7.

administrative formalities as he will be familiar with the language of the country and the practices of national administrative authorities.'[132] Moreover, the sponsor will find it easier to obtain legal aid with a view to lodging the application.

The second requirement concerns the documentary evidence that has to be submitted when an application for family reunion is lodged. Documentary evidence that may be required concerns, on the one hand, proof of the family relationship and, on the other, compliance with the conditions set out in Articles 4 and 6–8 of the Directive. In addition, an application has to be accompanied by certified copies of the travel documents to be used by family members.[133] As far as proof of a marital relationship is concerned, Member States should be obliged to accept a marriage certificate issued, or a copy from the marital records drawn up, by the competent authorities in the state in which the marriage was celebrated. Likewise, a birth certificate or copy from the birth registers establishing the parents of the child should be sufficient proof of the relationship between a child and its parents. For adopted children, the decision establishing adoption should suffice. It can be expected that Member States will require such documents to be authenticated. This does not appear to be at odds with the Directive. Special provision is made concerning unmarried partners: proof of their relationship can be established from the presence of common children, previous cohabitation or registration of the partnership.[134] This list is not exhaustive, as indicated by the words 'such as'. Other evidence may be found in joint bank accounts, the fact that the couple has bought a house together or made out wills in favour of each other. Where documentary evidence of the family relationship is insufficient, evidence may also be acquired through interviews with the sponsor and family members or by virtue of 'other' investigations where this is found to be necessary.[135] Interviews and investigations should be geared to establishing family ties and performed in such a way that the private life of the family members is respected. I would argue that investigations may be the only means to establish the family ties if no written evidence is at hand, which may be the case when a family does not come from a Western country. It is unfortunate that no explanation is given of when 'investigations might be found necessary' or the nature of such investigations. As drafted it leaves Member States a wide margin of discretion, where privacy is at stake. As far as travel documents are concerned, Member States have to abide by the European rules on external border crossing.[136] Documentary evidence of

[132] Explanatory Memorandum, initial proposal, above n 14, at 16.
[133] Above n 1, Art 5(2) first para.
[134] *Ibid*, Art 5(2) third para.
[135] *Ibid*, Art 5(2) second para.
[136] Explanatory Memorandum, amended 2002 proposal, above n 33, at 7.

housing, health insurance and resource conditions will be issued by the Member State itself and should not prove controversial in practice.

The family members may not be present in the Member State when the application is lodged. Member States may derogate from this rule 'in appropriate circumstances'.[137] No explanation is given in the amended 2002 proposal of when circumstances are to be classed as 'appropriate', thus leaving it to Member States' discretion how to apply this exception. The Explanatory Memorandum to the initial proposal provides the following clues: the family member is already in the territory for some other reason and merely wishes to change status, and humanitarian considerations, eg a child whose only resident parent cannot be returned to the country of origin.[138]

Member States are under an obligation to process an application for family reunification within a period of nine months after its submission.[139] This period may be extended 'in exceptional circumstances linked to the complexity of the examination of the application'.[140] No details of when a case may be deemed 'complex' are found in the documentation available. Boeles and Lodder have argued that the discussions in the Council regarding the possibility of extending the period for decision-making where not all documentary evidence has been submitted imply that an incomplete file cannot be a reason to extend the nine-month period.[141] In a further attempt to clarify the right to extend the processing period, I would argue that the extended period should not exceed three months, thus putting the maximum period at 12 months in total, as this is the duration of the equivalent period in the Long-term Residence Directive.[142] When an application is rejected, the reasons for this rejection have to be given. Where no reasons are provided, the decision should be quashed for not satisfying procedural requirements. As far as the consequences of a failure to decide on an application are concerned, it is up to the Member States to make such provision in their national law. Finally, where children are concerned, special consideration should be given to their position.[143] It follows from the Court's ruling in the annulment proceedings between the European Parliament and the Council that the obligation to consider the

[137] Above n 1, Art 5(3).
[138] Initial proposal, above n 14, at 17.
[139] Above n 1, Art 5(4). This was 6 months in the initial proposal.
[140] *Ibid*, Art 5(4) second para.
[141] Boeles and Lodder, above n 70.
[142] Art 19(1) of Dir 2003/109/EC of 25 Nov 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.
[143] Art 5(5) of Dir 2003/86/EC, above n 1.

position of children applies to all situations where Member States enjoy discretionary powers when processing an application for family reunification.[144]

Rights Acquired by Family Members

Family members admitted under the Directive enjoy a number of rights found in Article 14 of the Directive. The list in this provision includes the right to work, education and vocational guidance, initial and further training and retraining. In Article 15 we find rules concerning the issue of a residence permit. Although strictly speaking not a right, possessing a residence permit has proven to be of great importance for foreigners in the sense that, in practice, it is conducive to actually exercising the rights listed in Article 14 of the Directive. I have, therefore, chosen to include this provision in this section.

The first right is the right to take up an economic activity as a (self-)employed person. The Directive bestows a right of access to the labour market, be it as a worker or self-employed person, on family members 'in the same way as the sponsor'.[145] The final text reflects the opposition of many Member States to linking the principle of equal treatment to EU citizens, which was thus reduced to the more limited right enjoyed by the sponsor.[146] The rationale for including the right to work in the Directive was its capacity to help integrate family members into the host Member State. Including the right to work also reflects the Tampere Council's commitment to equal treatment, albeit with the sponsor and not with EU citizens. The right to work is not absolute, as Article 14(2) permits Member States to decide on the conditions under which this right is exercised. Thus, a time limit for exercising this right may be set, as long as it does not exceed a period of 12 months. During this period, Member States can examine the situation of their labour market prior to authorising family members to exercise their right. A further restriction concerns first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) of the Directive applies, who may be excluded from this right.[147] Their exclusion is justified by the fact that they have been granted permission to reside in the Member State because they

[144] Above n 4.

[145] Above n 1, Art 14(1)(b). See on the negotiations concerning the right to work and similar provisions on labour market participation in other Title IV Dirs; K Groenendijk, 'Access of Third-country Nationals to Employment under the New EC Migration Law' in Julien-Laferrière *et al*, above n 29, at 141.

[146] *Ibid*, at 156.

[147] Above n 1, Art 14(3).

are dependent on the sponsor.[148] Besides a right to take up paid employment, family members are entitled to have access to education in the same ways as the sponsor,[149] as well as vocational guidance, initial and further training and retraining.[150] Like the right to take up work as a (self)employed person, the right to education, etc is granted to family members 'in the same way as the sponsor'.

Although not formulated as a right of the individual, the fact that Member States are obliged to grant 'every facility for obtaining the requisite visas' after they have authorised entry of family members[151] reverses the obligation to be in the possession of a visa issued with the least possible inconvenience. Once admitted, family members are entitled to a renewable residence permit of at least one year's duration[152] In practice, the duration of validity of the residence permit reflects the date of expiry of the sponsor's residence permit.[153] The conditions relating to the granting of an autonomous residence permit, as well as the duration of its validity, are to be determined by national law.[154] Article 15 does, however, include a number of obligations for Member States. Thus, the spouse, unmarried partner and children who have reached majority are entitled to an autonomous residence permit, independent of that of the sponsor, after five years.[155] This period corresponds with the five-year period in Article 4(1) of the Long-term Residence Directive that allows a third country national to apply for the status of long-term resident. A Member State can choose to issue an autonomous residence permit to adult children and relatives in the direct ascending line to whom Article 4(2) of the Directive applies.[156] Likewise, a Member State has a choice to issue an autonomous residence permit upon application in the event of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line where the applicant has entered by virtue of family reunification. There is no choice concerning the obligation to lay down 'provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances'.[157]

[148] Initial proposal, above n 14, at 22.
[149] Above n 1, Art 14(1)(a).
[150] *Ibid*, Art 14(1)(c).
[151] *Ibid*, Art 13(1).
[152] *Ibid*, Art 13(2).
[153] *Ibid*, Art 13(3).
[154] *Ibid*, Art 15(4).
[155] *Ibid*, Art 15(1).
[156] *Ibid*, Art 15(2).
[157] *Ibid*, Art 15(3) second sentence.

WITHHOLDING OR REVOKING PERMISSION

The Public Policy Exception

Member States can reject an application for family reunification if this is justified on grounds of public policy, public security or public health.[158] These exceptions may also be invoked by a Member State to withdraw or refuse to renew a residence permit issued to a family member under the terms of the Directive.[159] An illness or disability suffered after the residence permit has been issued cannot, however, be invoked to withhold renewal of a residence permit or justify removal from the territory by a Member State.[160]

The Explanatory Memorandum to the amended 2002 proposal states that '[t]he only change to this Article is to specify in paragraph 2 that the residence permit for family members may be withdrawn, or renewal may be refused, on grounds of public policy and domestic security'.[161] The need for this amendment is explained with reference to the Commission's Working Paper on the relationship between safeguarding internal security and complying with international protection obligations and instruments, albeit without further consideration of the relevance of this document.[162]

Although the Commission's submission in the 2002 Explanatory Memorandum states that the amendment enjoyed consensus in the Council, it can be deduced from the final wording of the text that this was not the case. The most important amendment that was made at this stage is the deletion of the provision establishing that the public policy and national security exceptions (in the drafts: domestic security) 'must be based exclusively on the personal conduct of the family member concerned'. It follows from the Explanatory Memorandum that the Commission had envisaged that the public policy concept would mirror the public policy concept in Directive 2004/38/EC.[163] The question is whether this is actually the case. Unlike Directive 2004/38/EC,[164] Article 6 does not establish when a person can be classed as being a danger to public policy. Paragraphs 1 and 2 merely state that an application may be rejected, or a residence permit withdrawn or

[158] *Ibid*, Art 6(1).
[159] *Ibid*, Art 6(2).
[160] *Ibid*, Art 6(3).
[161] Amended 2002 proposal, above n 33, at 8.
[162] Commission Working Document, The relationship between safeguarding internal security and complying with international protection obligations and instruments, 5 Dec 2001, COM(2001)743.
[163] Initial proposal, above n 14, at 20.
[164] Art 27(1) and (2) of Dir 2004/38/EC, above n 41.

refused for renewal, on grounds of public policy. According to the final sentence in Article 6(2) Member States do, however, have to take into consideration:

— the severity or type of offence against public policy or public security committed by the family members, or
— the dangers emanating from the family member.

From the wording of the text it is not clear whether it is sufficient that there is danger emanating from the family member's presence in the Member State *or* that there has to have been an infringement of the public policy or security of the Member State before a breach of the public policy is a fact.[165] Recital 14 clarifies that 'the notion public policy may cover a conviction for committing a serious crime'. The word 'may' suggests that a conviction is not a *sine qua non* for invoking public policy as a reason to refuse or withdraw entry/residence permission. This finding is confirmed by the final sentence of Recital 14, where we find that the notion of public policy also covers cases 'in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations'. The changes made to the public policy exception, I find, reflect the changes in climate following the attacks in the US on 9/11.

In its decision to refuse entry/residence permission or to withdraw or not to renew a residence permit on grounds related to public policy and national security, a Member State has to take the following into consideration:

— the nature and solidity of the person's family relationships;
— the duration of residence in the Member State; and
— the existence of family, cultural and social ties with the country of origin.[166]

These conditions are taken from the European Court of Human Rights case law on Article 8 ECHR.[167] They are also included in Article 28 of Directive 2004/38/EC (free movement of Union citizens) which, however, also mentions age, health situation and the family and economic situation of the person concerned. Requiring a Member State to take these points into consideration implicitly obliges that Member State to motivate any decision adopted for reasons relating to the public order, thus enabling applicants to understand and contest why their application has been rejected.[168] The obligation to give reasons requires consideration of each

[165] See, in this sense, Boeles and Lodder in their commentary on Dir 2003/86/EC, above n 70.
[166] Above n 1, Art 17.
[167] App no 54273/00, *Boultif v Switzerland,* 2 Aug 2001 (2001) 33 EHRR 50, para 48.
[168] Amendment 11, report A5–201/2000, at 10.

case on its own merits; expulsion as a means to set an example to other foreigners is no longer an option. In addition, it implies that a decision that is not substantiated will have to be quashed when reviewed.

Other Grounds

Besides invoking reasons relating to public policy and national security, Member States can also reject an application and/or withdraw or refuse to renew a residence permit by invoking Article 16 of the Directive which provides Member States with six additional grounds for this purpose. The list of grounds in this provision has grown over the years. Where the initial proposal included two grounds (use of falsified documents or fraud and the convening of a marriage or adoption for the sole purpose of obtaining a right of entry/residence), the list that made it to the final text is far more extensive. The following six grounds can be distilled from this provision:

(i) the conditions for family reunification in the Directive are no longer satisfied;[169]
(ii) the sponsor and family member(s) no longer live in a real marital or family relationship;[170]
(iii) it is found that the sponsor or the unmarried partner is married to or in a stable long-term relationship with another person;[171]
(iv) false or misleading information, false or falsified documents have been used, fraud was otherwise committed or other unlawful means were used to obtain permission for family reunification;[172]
(v) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State;[173] and
(vi) the sponsor's residence comes to an end before the family member enjoys an autonomous right of residence under Article 15 of the Directive.[174]

[169] Above n 1, Art 16(1)(a).
[170] *Ibid*, Art 16(1)(b).
[171] *Ibid*, Art 16(1)(c).
[172] *Ibid*, Art 16(2)(a).
[173] *Ibid*, Art 16(2)(b).
[174] *Ibid*, Art 16(3).

It must be stressed that this enumeration is exhaustive.[175] Therefore, Member States cannot invoke any other grounds for refusing or withdrawing rights under the Directive. It is also important to note that, according to the Commission, checks may not amount to arbitrary interference in family and private life, thus restricting checks to those cases where suspicion of illegality exists. Article 16(4) explicitly establishes this principle in relation to points (iv) and (v) listed above: checks and inspections are permitted 'where there is reason to suspect …'. However, the last sentence of paragraph 4 broadens the possibilities for checks where it specifies that '[s]pecific checks may also be undertaken on the occasion of the renewal of family members' residence permit'. It is not clear whether 'specific checks' may always be performed when a request for the renewal of a residence permit is made or whether 'specific' imposes a restriction to situations where there is a suspicion that justifies such a check. Needless to say, it is hardly desirable that each request for a renewal should trigger a check on, for example, the authenticity of the documents used, especially where there has never been any doubt about the authenticity of documents used in the past for the purpose of acquiring a residence permit.

The situations mentioned in points (ii), (iii) and (v) relate to the question whether a relationship exists that justifies residence in a Member State. In terms of Article 8 ECHR, they reflect the question whether there is family life that requires protection. When applying these grounds the Member State will have to ensure that any decision, although compatible with the Directive, does not contravene Article 8 ECHR. Thus when deciding whether a marital or family relationship is 'real' (second ground) a Member State will have to take into consideration the European Convention standards. Where spouses divorce, it may safely be assumed that they no longer satisfy the condition of real marital life,[176] thus justifying termination of the rights enjoyed under the Directive by virtue of their relationship. However, where parents are (or are in the process of getting) divorced/separated and there are children born out of that relationship, family ties between the parent who is no longer the primary carer and the children may not be considered to have been severed for the mere reason that the relationship between the parents no longer exists. The ties between the children and both of their parents could mean that Article 8 ECHR requires permission for both parents to remain resident in the Member

[175] Initial proposal, above n 14, at 20 and amended 2002 proposal, above n 33, at 10 where the Commission states that '[p]rovision is now made for all the situations in which applications may be rejected and family members' residence permits may be withdrawn or not renewed'.

[176] *Abdulaziz*, *Cabales and Balkandali*, 28 May 1985, Series A, Vol 94, para 62.

State.[177] Likewise, a child who enrols in a course of education—a right it explicitly enjoys according to Article 14(1)(a) of the Directive—and for this purpose no longer lives in the parental home has not severed the family ties to such an extent that there is no longer family life within the meaning of Article 8 ECHR. The requirement that parents and children have to live in a 'real family relationship' should, therefore, not be interpreted as not allowing a child to take up a course of education and leave the parental home for this purpose.

JUDICIAL REVIEW

In order to have an effective right to family reunification, an individual has to have the opportunity to have a decision on an application for family reunification reviewed by an independent body. Article 18 of the Directive obliges Member States to ensure the 'right to mount a legal challenge' against a rejection of an application for family reunification and non-renewal or withdrawal of a residence permit. The opportunity to appeal against a decision has to be given to either the sponsor or the family members, or to both. In my opinion, the sponsor, who is resident in the Member State and thus more likely to be familiar with the judicial review proceedings and in any case in a better position to seek legal aid, should have a right to start review proceedings on behalf of his or her family members where an application for admission is at stake. Ultimately it is his or her right that is at stake. Moreover, the sponsor, being the only one present in the Member State, should find it easier to start judicial proceedings. In cases where a residence permit is being withdrawn or the application for renewal has been turned down, however, I feel it should be the family member that should be given a right to start judicial review proceedings. It is then the right of the family member that is at stake. It is not difficult to imagine the problems for a spouse whose residence permit is being withdrawn because his or her marital relationship has been dissolved if only the sponsor has a right to start judicial review proceedings and is unwilling to do so on his or her behalf. Obviously where a minor is concerned the right to start judicial review proceedings should be given to the legal guardian.

The choice left to Member States as to who can appeal against a decision is just one example of the discretionary powers left to the Member States to organise review proceedings to suit their needs. They can not only choose to establish judicial or administrative review proceedings, but also whether an appeal has suspensive effect or not, the inclusion of a right to

[177] *Berrehab v the Netherlands*, 21 June 1988, Series A, Vol 138; App no 29192/95, *Ciliz v Netherlands*, judgment of 11 July 2000, Reports 2000-VIII.

request interim measures, the nature of review, procedural requirements and the right to legal aid.[178] This provision has, not surprisingly, been criticised as a 'very weak, almost void, guarantee' establishing a level of protection falling short of international norms.[179]

Initially, the provision on review was less open-ended as it required review proceedings by a court of law, even in those Member States that provided for administrative review proceedings.[180] An obligation to review both facts and law, albeit subject to national legislation, is spelled out in the amended 2002 proposal,[181] but is not found in the final text of the Directive. The setting of Community standards for review proceedings, so it appears, proved a bridge too far. The obligation in Article 18 is merely 'to ensure' a right to mount a legal challenge and establish procedures to this end.

Although Article 18 leaves much to the discretionary powers of the Member States, it is arguable that in organising their review proceedings they are not completely free to act as they like. When reconsidering decisions, they will have to take Article 17 of the Directive into account, a point that has already been made.

A further obligation that may also be relevant for review proceedings is found in Article 5(4) of the Family Reunification Directive which obliges Member States to give reasons for any negative decision following an application for family reunification. Where adequate reasons are lacking, the decision should not be endorsed by the review body, but annulled for not satisfying procedural requirements.

It is more than unfortunate that the Directive falls short of the level of judicial protection granted to (family members of) EU citizens, whose right to review is provided for in detail in Article 31 of Directive 2004/38/EC. According to that provision, Member States are compelled to provide for review by a judicial body, and review proceedings have to include both the facts and the law that underlie the contested decision. Suspensive effect and the right to appear in court to defend one's case are also found in this provision. Where extensive review proceedings have to be available for EU citizens and their family members, it should not be too difficult to extend them to other beneficiaries of Community law. Providing the same level of judicial review should serve the goal of equal treatment of third country nationals, as laid down in the Tampere Conclusions.

[178] Boeles and Lodder, above n 70.

[179] Commissie Meyers, Letter to the European Commissioner for Justice and Home Affairs, Mr Vitorino, 20 Feb 2003, CM03–02.

[180] Art 16 of the initial proposal, above n 14.

[181] Explanatory Memorandum, amended 2002 proposal, above n 33, at 11.

CONCLUSIONS

One thing the Directive on family reunification does not do is make national law on family reunification superfluous. First of all, there are the EU citizens who have not exercised their right to free movement and, therefore, do not benefit from Community law when seeking permission to be reunited with third country national family members. I find it a missed opportunity that Member States objected to the Commission's proposal to give EU citizens who have not exercised free movement rights the same right to family reunification as their fellow citizens who do benefit from Community law. To extend the terms of Directive 2004/38/EC to all EU citizens would have put an end to reverse discrimination in this field that has resulted in what is now referred to as 'abuse of Community law' by nationals of the Member State seeking permission for their third country national family members to enter and reside with them in their home country.[182] Besides EU citizens who have not exercised free movement rights, national law will still determine the right to family reunification of children over 15 in those Member States where the derogation found in Article 4(6) of the Directive applies and where Member States choose to provide for more favourable provisions, as permitted by Article 3(5) of the Directive. Moreover, national law will apply to the extended family members in Member States that choose not to extend the rights found in the Directive beyond the nuclear family.

In answering the question put forward in the title of this chapter, I would argue that, at the outset, the Directive was geared towards preserving family unity. The Commission, when drawing up the initial proposal, envisaged equal treatment with EU citizens and, therefore, chose to extend the generous provisions of existing Community law regarding family reunification for family members of EU citizens to third country nationals. The Commission also took great pains to ensure compliance with international obligations regarding family life. Harmonisation was seen as a means to ensure that the right to family reunification would not depend on the Member State of residence, and have the additional bonus that forum shopping by third country nationals seeking the Member State with the most lenient rules on family reunification would cease.[183] However, the inclusion of discretionary powers, the watering down of the public policy exception and the open-ended provision on judicial protection, which have found their way into the final text, are all indications that the Directive now primarily serves as a means to preserve Member States' interest.

[182] See on this issue: Cases C–459/99 *MRAX* [2002] ECR I–6591; C–109/01 *Akrich* [2003] ECR I–9607; C–157/03 *Commission v Spain* [2005] ECR I–2911; and AG Geelhoed in his Opinion in Case C–1/05 *Jia*, above n 48.

[183] Initial proposal, above n 14, at 9.

Although the watered-down text does prevent further deterioration of the right to family reunification in the national law of Member States, it does cry out for serious reconsideration, which is, fortunately, provided for by Article 19. I hope that the Member States will then be ready to take seriously the commitment to ensure equal treatment to third country nationals and, as a consequence, revise the text of the Directive accordingly by taking Directive 2004/38/EC as a starting point. The first provision I would like to see changed is Article 6 on public policy and public security.

In the meantime, I have been reassured by the Court of Justice's ruling in the annulment proceedings initiated by the European Parliament. It provides confidence that, should a case concerning this Directive be referred to it, it will test the provisions in the Directive, the national implementation measures and practice against the general principles of Community law, ie non-discrimination, proportionality and the fundamental right to family life. Its recognition of the Convention on the Rights of the Child as one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law is an important development that, I feel, will have repercussions beyond the scope of the Family Reunification Directive. As far as the Family Reunification Directive is concerned the Court's decision will serve the purpose of restricting the discretionary powers of Member States when children are involved. The activist approach of the Court will also mean that Member States are prevented from adopting national measures that will adversely affect a third country national's right to family life, and thus contribute towards the protection of the right to family life.

16

The European Union and Labour Migration: Regulating Admission or Treatment?

BERNARD RYAN

INTRODUCTION

LEGAL LABOUR MIGRATION to EU countries has increased in recent years for a variety reasons, including falling birth rates and ageing populations, and the greater ease of international travel and communication. There is at the same time a growing consensus among Member State policy-makers that migration is economically desirable and that previous restrictive policies, usually in place since the 1970s, are no longer appropriate. At the European Union level, labour migration policy has been actively debated since the Commission's July 2001 proposal for a Directive on entry for employment and self-employment.[1] The main aim of that proposal was to achieve a framework for the regulation of Member State decisions concerning the admission of third country nationals for economic purposes.[2] After the 2001 proposal failed to attract support within the Council of Ministers, in January 2005 the Commission launched a consultation based on its *Green Paper on an EU Approach to Managing Economic Migration*.[3] The Commission's revised thinking on the subject was then set out in its December 2005 *Policy Plan on Legal Migration*, which included proposals for Directives on the admission of

[1] Proposal for a Council Dir on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001)386.

[2] In this chapter, the term 'third country national' refers to persons who are not nationals of EU Member States, the three other members of the European Economic Area (Iceland, Liechtenstein and Norway) or Switzerland. The equal treatment of workers from the EEA states and Switzerland is required by Art 28 of the EEA Agreement ([1994] OJ L 1/3) and Art 9 of Annex I to the Agreement on the Free Movement of Persons with Switzerland ([2002] OJ L 114/6), respectively.

[3] COM(2004)811.

highly skilled workers and seasonal workers, and a 'horizontal' measure on the rights of migrant workers.[4] It remains uncertain, however, whether there will be legislation on labour migration at the EU level or, if so, what its eventual content will be.

This chapter offers a review of the question of EU-level action in relation to labour migration by third country nationals. The first section considers what EU policy on labour migration *ought* to be. It expresses doubts about the necessity for EU regulation of Member State admission decisions, and argues that the focus should instead be on upholding the rights of third country workers. That general position is developed in detail in the remainder of the chapter. The second section summarises the Commission's proposals to date concerning the regulation of admissions, and highlights the political and theoretical difficulties in the way of such action. The third section then looks in detail at three post-admission entitlements: the right to change employer, the right to move between Member States for employment and equal treatment in the labour market. While there is currently some legislation in each area, there is a case for action to extend these rights to third country workers in general.

WHAT IS THE ROLE OF THE EUROPEAN UNION?

The question of the role of EU action in relation to labour migration is approached here from a starting point of respect for the principle of subsidiarity. On that view, Member States should be left to regulate a given subject unless it can better be dealt with at the EU level. The application of the principle of subsidiarity is plainly appropriate in the context of labour migration. The Member States vary in their labour market conditions, as regards employment levels, demographic trends, patterns of migration, etc. They also differ in their policy choices, in relation to labour market and social policy regimes and in the extent and nature of the inward migration which they favour. Against that background, the concrete question to be examined here is whether there is a legitimate rationale for EU action which limits Member State freedom of action with respect to labour migration policy.

Links Between Economies?

One possible argument for EU regulation of admission decisions is based on the presumed connections between the Member States' *economies*. On

[4] COM(2005)669.

this view, the Member States' economic prosperity is interdependent, so that it is legitimate to have EU-level intervention to ensure that individual Member States pursue policies which are economically desirable. Something like that view was found in the Commission's 2005 Green Paper, when it argued that 'more sustained immigration flows could increasingly be required to meet the needs of the EU labour market and ensure Europe's prosperity'.[5] This presumed EU economic interest is likely to lead to EU intervention to promote a more liberal policy by Member States.

The 'linked economies' line of argument does not seem capable of meeting the challenge of the principle of subsidiarity, however. On the one hand, this is because the economic consequences of a given Member State's labour migration policy for *other* parts of the EU are likely to be limited. On the other hand, Member States themselves have powerful incentives to address labour migration policy, since the consequences of any deficiencies in labour supply are experienced directly by individual Member States, in pressure on welfare state funding, economic growth or employment levels. It is precisely for that reason that recent years have seen many Member States actively addressing labour migration policy in the light of demographic and economic considerations.[6] This activity on the part of Member States makes EU regulation even harder to justify. At most, what is needed is a mechanism for the sharing of information among Member States as to their policies and experiences, similar to that proposed by the Commission in 2005.[7]

Links Between Labour Markets?

An alternative argument for EU intervention with respect to admission starts from the presumed links between Member States' *labour markets*. The argument here is that Member States' labour admission policies have consequences for one another, since workers admitted to one state can move elsewhere. This argument could be couched in pro-immigration terms: on that view, the fact that other states need labour migrants would make it desirable to ensure that the separate policies of the Member States generate a sufficient supply. In practice, however, the argument tends to be advanced for reasons of immigration control: the claim is that EU action is

[5] COM(2004)811, above n 3, at 4.

[6] See the summary and country reports in J Niessen and Y Schibel (eds), *Immigration as a Labour Market Strategy: European and North American Perspectives* (Brussels, Migration Policy Group, 2005).

[7] See the Proposal for a Council Decision on the establishment of a mutual information procedure concerning Member States' measures in the areas of asylum and immigration, COM(2005)480.

needed to ensure that the policies of individual Member States take the restrictive objectives of other states into account.

On either version, this approach to justification is plausible in the abstract: mobility does give Member States an interest in one another's initial admission decisions. It is when one looks to the concrete situation in the EU that the 'labour market' case for the regulation of labour migration policy appears weak. One difficulty is that the legal rights of mobility between Member States are quite limited. This can be seen by a consideration of the three specific entitlements referred to in the Green Paper as an argument for EU-level legislation.[8] The first of these arguments, that there is a right to travel within the Schengen area, is unconvincing because the Schengen right to travel is temporary and does not entail a right to take up employment. The second argument was that third country workers can be involved in cross-border service delivery—but this too is a temporary entitlement, and is anyway derivative from the employer's right to engage in cross-border economic activity.[9] Thirdly, the Commission highlighted the possibility for third country nationals to move between Member States under the Long-term Residents Directive.[10] We will see in the third section, however, that that right is subject to significant limitations: at least five years' residence in one state is required in order to qualify, and other Member States may limit labour market access.[11]

Of course, the current legal position is not the only consideration. What if—as proposed elsewhere in this chapter—rights of mobility between Member States were strengthened? In such a scenario, while the case for regulation of initial admission decisions would be strengthened, the limits to the factual integration of EU labour markets would also have to be taken into account. The extent of intra-EU migration by EU nationals has, historically, been limited, particularly across linguistic boundaries.[12] There is no reason to believe that things would be any different for third country nationals if their rights were more extensive than at present. The probability that there would be a low level of actual mobility means that there would be limits to the 'labour market' argument for the regulation of admission decisions even if the legal position were strengthened.

[8] COM(2004)811, at 4.

[9] Note that the position of third country posted workers is not examined in this chapter, precisely because they are not admitted to the labour market of the state of posting.

[10] Council Dir 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44. The Directive came into force on 23 Jan 2006. It does not apply to Denmark, Ireland or the UK.

[11] On these restrictions under the Long-term Residents Directive see further Ch 14 in this volume.

[12] The Eurostat estimate is that in 1995, among the first 15 Member States, 353.5 million persons were living in their state of nationality, 5.8 million (or 1.6%) were EU citizens living in another Member State, and 12.3 million (3.5%) were non-EU nationals: see *European Social Statistics: Migration* (Luxembourg, Eurostat, 2002) 25.

It may be added that the question of labour market mobility providing a justification for EU intervention has recently been posed at the EU level. This occurred in the criticism of Spain's decision to regularise unauthorised workers in 2005, on the ground that those workers, once regularised, would move to other parts of the EU.[13] As a result of that criticism, a Council resolution on 4 April 2005 set out the view that 'questions regarding migration and asylum are of common interest', and called on the Commission to develop a proposal for a 'mutual information' system, with the implicit objective of discouraging liberal policies.[14] Yet, the Spanish initiative appeared an appropriate and legitimate response to the presence on its territory and labour market of large numbers of irregular workers.[15] It was hard to see that the remote prospect of those persons moving to other Member States—given the legal and factual obstacles to so doing—gave other states a sufficient interest to seek to curtail Spain's actions.

Cross-border Mobility

Even if the factual links between Member States' labour markets do not appear sufficient to justify the regulation of admission decisions, should EU intervention nevertheless seek to strengthen mobility rights between the Member States? The case *against* rights of cross-border mobility for third country workers is that these impose requirements as regards admission upon Member States. That, for example, has been Britain's reason for declining to participate in the Long-term Residents Directive.[16] This criticism has an undoubted logic, since rights of this kind do require a second state to permit the residence and employment for someone they might not otherwise have admitted.

The main argument for legislation on cross-border mobility for migrant workers is that it would have advantages in the economic sphere. As a Commission staff paper published with the 2005 Policy Plan put it, in relation to highly-skilled workers:

> Including a form of intra-EU mobility should allow an easier and more efficient reallocation of already residing highly skilled third country nationals in function

[13] See 'Alarm over Spanish plan to legalise more than a million migrant workers', *Independent*, 7 Feb 2005.

[14] Press release PRES 05/74, Council of Ministers meeting on Justice and Home Affairs, Luxembourg, 14 Apr 2005. This call for action led to the Commission proposal referred to in n 7 above.

[15] In the event, there were approximately 700,000 applications: 'Spain grants amnesty to 700,000 migrants', *Guardian*, 9 May 2005.

[16] See the Home Office's June 2001 memorandum published in House of Lords Select Committee on the European Union, *The Legal Status of Long-term Resident Third Country Nationals,* 5th Report, Session 2001–02, HL 33.

> of the fluctuating demands of the Member States' labour markets. From the point of view of the third-country nationals concerned, intra-EU mobility would allow them to increase their competences and experiences, and to take up a job where they are most needed, without having to go through lengthy and cumbersome procedures.[17]

This argument is plainly applicable to all workers, irrespective of skill level. Allowing intra-EU mobility would tend to secure a more efficient allocation of labour, by permitting migration from places where conditions are less attractive—perhaps because of an economic downturn—to those where they are more so. At the same time, entitlements of this kind would make *initial* migration to Member States more attractive to third country nationals.

The logic of such a step from a legal perspective is that it would complete the single market in labour within the EU. To allow third country workers to move between Member States would entail the extension to third country *workers* of a principle of mutual recognition, which currently applies to decisions about *nationality*. Once the question of rights of cross-border mobility is understood in that way, it becomes clear why EU action is preferable to unilateral decisions by the Member States. The alternative is that Member States would seek to tilt the single market in labour to their own advantage, through selectivity in decisions over the entry of third country nationals from other Member States.

Protecting Migrant Workers

A further possible rationale for EU action on labour migration is the upholding of the economic and social rights of workers.[18] In general, the concept of an *economic* right refers to guarantees of economic freedom, and in this context refers in particular to the right to work. That right is recognised, for example, by Article 1(2) of the 1961 Council of Europe Social Charter, which states that '[e]veryone shall have the opportunity to earn his living in an occupation freely entered upon'.[19] The possible components of the right to work include not just the freedom to take employment, but also the possibility to resign and change employer. The

[17] European Commission, *Annex to the Communication from the Commission: Policy Plan on Legal Migration: Impact Assessment*, SEC(2005)1680, at 13.

[18] The civil right of family life, though significant for workers, is not considered here, as it does not raise issues specific to labour migrants.

[19] For similar statements see Art 6(1) of the 1966 International Covenant on Economic, Social and Cultural Rights, and Art 14(1) of the 2000 Charter of fundamental rights of the EU.

significance of the freedom to resign and to change employer is that it is a means by which workers can seek to ensure employers' respect for legal, contractual and other norms.

The concept of *social* rights refers to state interventions which aim to protect the economic position of citizens, workers and others. In this context, the main issue is whether migrants are entitled to equal treatment by employers and in access to state social benefits. The principle of equal treatment in these fields is recognised for all workers by fundamental rights instruments such as the European Social Charter.[20] It is also recognised in the particular case of migrant workers by the Council of Europe and United Nations Conventions on Migrant Workers.[21]

In general, upholding the economic and social rights of migrant workers has a dual significance: it leads to the protection and integration of migrant workers, while ensuring a level playing field among workers and their employers in the labour market. The question here, however, is whether the protection of such rights is a legitimate matter for action at the EU level. Why not leave it to Member States to decide how, and to what extent, they wish to protect the economic and social rights of migrant workers? What is the basis for the EU, or a majority of its states and/or population, specifying for a minority what their policy should be in this area?

To that question two kinds of reply may be given. The first approach takes as its starting point the Member States' policy that other states which do not respect fundamental rights should not be admitted into the EU, or tolerated within it. Respect for fundamental rights is, accordingly, a condition of membership of the EU, and it is possible to suspend states which are guilty of serious breaches of fundamental rights.[22] The membership requirement of respect for fundamental rights also underlies EU legislation, such as the Directives on asylum and family reunion or the Directives prohibiting discrimination in employment and in other contexts.[23] For our purposes, the point is that detailed legislation can provide a concrete elaboration of the general requirement of respect for fundamental rights upon Member States.

[20] Arts 12, 13 and 19 of the European Social Charter. See too Arts 7 and 9 of the International Covenant of Economic, Social and Cultural Rights.

[21] See Arts 16, 18 and 19 of the 1977 European Convention on the Legal Status of Migrant Workers, and Arts 25, 27 and 28 of the 1990 International Convention on the Protection of the Rights of Migrant Workers. These instruments have not so far commanded consensus among EU Member States, only six of which are parties to the European Convention, and none of which is a party to the International Convention. The Member States' lack of support for these conventions does not take from their authoritativeness as a statement of the fundamental rights of migrant workers.

[22] See Arts 6, 7 and 49 EU Treaty.

[23] The Directives on asylum and family members are referred to elsewhere in this chapter. The most recent measures on discrimination are Dir 2000/43 on equal treatment irrespective

The alternative justification for EU action on migrant workers' rights is that it is necessary in order to ensure 'fair competition' in the EU single market. It is straightforward that economic and social rights can impose costs on employers—direct costs in their dealings with employees, and indirect costs through state taxes and insurance contributions. Given those costs, EU action may be desirable to avoid the distortion of competition by differences in standards: that is, to prevent less efficient firms in low-regulation states from prevailing over more efficient firms in high-regulation states. Alternatively, EU standards may be thought desirable in order to prevent Member States from engaging in a form of competitive deregulation. Member States which fail to protect migrant workers implicitly pursue a cheap labour policy, both because the cost of migrant workers is lowered and because of the downward pressure exerted on the terms and conditions of other workers. It is legitimate for Member States, acting through the EU, to seek to prevent the obtaining of competitive advantage in such ways within the single market.

ADMISSION FOR EMPLOYMENT

The European Union has never to date had legally binding standards concerning admission of third country nationals for the purposes of employment. This section discusses the main developments since the mid-1990s in this area. It will be shown that in recent years the dynamic has been for the Commission to propose EU-level regulation of admissions and for Member States to resist it.

The 1990s: Maintaining Restrictions

The first concrete step towards EU regulation of admission policy was a non-binding Resolution on the subject adopted by the Council of Ministers in 1994.[24] That Resolution proceeded on the assumption that there was only a limited need for inward labour migration to the EU. It proposed that admission for employment should require a job offer and prior authorisation issued by the national authorities.[25] It specifically stated that visitors and students 'should not in principle be permitted to extend [their]

of racial or ethnic origin [2000] OJ L 180/2, Dir 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, and Dir 2004/113 on equal treatment between men and women in access to and supply of goods and services [2004] OJ L 373/37.

[24] Council Res of 20 June 1994 on limitation of admission of third-country nationals to the territory of the Member States for employment [1996] OJ C 274/3.

[25] *Ibid*, cl C (i) and (ii).

stay for the purpose of taking or seeking employment'.[26] It set out a rule of preference under which admission would be permitted only where vacancies could not be filled by EU nationals or by third country workers 'lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market'.[27] An initial work authorisation was 'normally … restricted to employment in a specific job with a specified employer' and was for a maximum of four years, with at least the first extension of a work permit dependent upon compliance with the original criteria.[28] The Resolution also provided that the number of seasonal workers should be 'strictly controlled', that these workers could be admitted for a maximum of six months in any 12-month period, that they were not permitted to switch to other employment, and that they were to remain outside the EU for a period of at least six months before being readmitted for employment.[29]

The next development was the Commission's July 1997 proposal for a Convention on Admission to the Member States, which included a set of rules governing admission for the purposes of employment.[30] These rules followed the earlier Resolution in taking a restrictive view of the need for third country labour. As the Commission put it:

> The economic circumstances which once pushed the Member States to encourage a steady, regular inflow of immigrant workers and their settlement on the territory of the Union no longer apply. Member States have therefore adopted selective policies on admission for paid employment and self-employed activity. In the Commission's view, the current economic and labour market situation does not permit those policies to be abandoned …[31]

As in the Resolution, prior authorisation to work was required for third country nationals, and depended on a specific job offer.[32] Persons admitted for short-term reasons were precluded from switching to a permanent admission status, while students were allowed to switch at the end of their studies.[33] The proposed Convention also followed the Resolution in providing that seasonal workers were not to be allowed to work for more than six months in a calendar year.[34] Preference in the labour market was again to be given to EU nationals and to third country nationals who were

[26] *Ibid*, cl C (v).
[27] *Ibid*, cl C (ii).
[28] *Ibid*, cl C (iv) and (v).
[29] *Ibid*, cl C (i).
[30] Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States, COM(97)387.
[31] *Ibid*, at 4.
[32] *Ibid*, Arts 3 and 8.
[33] *Ibid*, Arts 3 and 18.
[34] *Ibid*, Arts 8 and 9.

part of the labour force of the given state.[35] One change, however, was that long-term residents in other Member States were added to the preferred group within the labour market test (see the third section, below).

2000–2001: A Change of Direction

The proposed Convention on Admission was always unlikely to be acted upon in that form, given that the Treaty of Amsterdam, with its new competences over immigration matters, had been agreed by the time it was published. The Commission first set out its post-Amsterdam thinking on labour migration in its November 2000 *Communication on a Community Immigration Policy*.[36] This document marked the Commission's break with the earlier more restrictive policies. Its starting point was that there was 'growing recognition that the "zero" immigration policies of the past 30 years [were] no longer appropriate', and that 'as a result of growing shortages of labour at both skilled and unskilled levels, a number of Member States have already begun to actively recruit third country nationals from outside the Union'. It followed that 'channels for legal immigration to the Union should now be made available for labour migrants'.[37]

The 2000 Communication also put forward the view that the required new labour migration policy was a matter to be addressed at the EU level:

> Given the present economic and labour market situation the Commission believes that it is now time to review longer term needs for the EU as a whole, to estimate how far these can be met from existing resources and to define a medium-term policy for the admission of third country nationals to fill those gaps which are identified in a gradual and controlled way.[38]

Based upon that analysis, the Commission proposed a system of co-operation and periodic reporting between the Member States in relation to their policies on admission. It also proposed the development of a 'common legal framework' which would guarantee the transparency and rationality of decisions, while defining the status of those admitted. The overall objective was to provide a flexible scheme, but one which would 'facilitate rather than create barriers to the admission of economic migrants'.[39]

In relation to economic migration, the 'common legal framework' was the subject of the Commission's 2001 proposal for a Directive on the

[35] *Ibid*, Art 7.
[36] COM(2000)757.
[37] *Ibid*, at 3.
[38] *Ibid*, at 13.
[39] *Ibid*, at 17.

admission of third country nationals for employment and self-employment.[40] On the one hand, this proposal had many restrictive elements. For example, third country workers would still have required a job offer and prior authorisation to work.[41] Seasonal workers were again limited to six months in any calendar year.[42] Member States were also to be permitted to restrict the total number of admissions for employment, either through a numerical ceiling or by limiting the period of the year within which applications could be made.[43]

Nevertheless, the Commission's new thinking on the subject of labour migration was reflected in a number of liberalising proposals. One such proposal was that switching to work permit status should be permitted in all cases where an individual was already legally resident or present in the given Member State.[44] Further innovations concerned the labour market test.[45] Formally, it continued to be the case that applications were to be assessed according to whether suitable EEA or legally resident third country workers were available. The test would, however, be deemed satisfied if a post had been advertised for four weeks and no acceptable application had been received by the employer. States were also given several ways to avoid individual assessment of the labour market test: quotas for particular sectors and periods, the exemption of posts for which the annual income exceeded a defined amount and the exemption of posts for which a defined amount of money had been paid to Member States' authorities. Finally, Member States were permitted to make 'more favourable' provision—which in practice meant the non-application of the labour market test—for six categories of worker: researchers and academics, religious personnel, sports professionals, artists, journalists and the representatives of non-profit organisations.[46]

The proposed Directive also departed from the 1994 and 1997 texts in seeking to confer entitlements upon third country workers within the admission process. Applications for residence and employment were to be dealt with at the same time, and workers were to be issued with a single permit covering both.[47] The permit was to be applied for by the individual worker, with employers' applications allowed only as an alternative.[48]

[40] COM(2001)386. The proposal was preceded by a Commission-funded survey of Member States' policies: see *Admission of Third Country Nationals for Paid Employment or Self-Employed Activity* (Brussels, ECOTEC, 2000). Only the parts of the proposal which concerned employment are considered in the text here.

[41] COM(2001)386, above n 40, Arts 4 and 5.

[42] *Ibid*, Art 12.

[43] *Ibid*, Art 26.

[44] *Ibid*, Art 5.

[45] *Ibid*, Art 6.

[46] *Ibid*, Art 3(4).

[47] *Ibid*, Art 4.

[48] *Ibid*, Art 5(1).

Permits were not to be issued with respect to specific employers, but instead were to allow changes of employer (see the third section, below).[49] The permits were to be valid initially for a fixed period of up to three years and were to be capable of renewal.[50] Finally, the proposal set out a number of procedural entitlements, including that a decision be made within 180 days, that reasons be given for any negative decision and that it be possible to bring legal proceedings with respect to negative decisions.[51]

When the 2001 proposal came to be discussed by a working party of the Council of Ministers between March 2002 and October 2003, it was the subject of numerous objections by the Member States.[52] It became apparent that there were many respects in which the details of the proposal concerning admissions conflicted with Member States' practice. For example, the six months limit for seasonal work was rejected by those with both shorter and longer periods.[53] Member States resisted the possibility of switching by persons with a short-term right to stay in a Member State.[54] The requirement to allow the labour market test to be met through advertising was thought both unrealistic and excessively prescriptive.[55] The possibility of temporary quotas was criticised as being too rigid in the light of existing Member State quotas systems, and also for failing to provide for the alternative of a points system.[56] The list of special cases where more favourable provision was allowed was thought to be too narrow, and it was argued, in particular, that it should include the highly skilled.[57] The requirement to re-examine the labour market test upon the renewal of work permits during the first three years was criticised as too onerous by states which did not do so and as not onerous enough by others which required a re-examination throughout the first five years.[58] Finally, Member States in which the issuing of permits was discretionary objected to the notion that there should be a *right* to a work permit.[59]

The Member States' reluctance to accept the 2001 proposal is of great significance when it comes to the assessment of EU policy on labour migration. At one level, the problem with the proposal was simply the

[49] *Ibid*, Art 8.
[50] *Ibid*, Art 7(1).
[51] *Ibid*, Art 29.
[52] A record of the general discussion at the meeting on 21 Mar 2002 can be found in Council doc 7557/02. The details of the proposal were discussed on 21 Mar, 16 Apr, 10 June and 8 July 2002, and on 22 Oct 2003. A consolidated record of the latter discussions is to be found in Council doc 13954/03. Note that the names of Member States in question have been deleted in the public version of these documents.
[53] Council doc 13954/03, above n 52, at 30 in relation to Art 12.
[54] *Ibid*, at 11 in relation to Art 5.
[55] *Ibid*, at 17 in relation to Art 6(2).
[56] *Ibid*, at 18 in relation to Art 6(3).
[57] *Ibid*, at 8 in relation to Art 3(4).
[58] *Ibid*, at 21 in relation to Art 7.
[59] *Ibid*, at 9 in relation to Art 4, and at 43 in relation to Art 29.

variety of Member States' policies and practices in the area. Member State diversity makes progress with legislation difficult in any circumstances, and particularly when the matter in hand is a subject of political controversy. Nevertheless, it is arguable that the Commission's inability to secure support for the proposal had deeper causes than that. The underlying problem was that it could not convince the Member States that there were reasons to overcome the diversity of their approaches so as to achieve an EU standard. That it could not do is evidence of the argument made in the first section, that a strong justification for EU regulation of admission policies is lacking.

2005: Reconsideration

During the time the proposed Directive was before the Council of Ministers, there was a further indication of the Member States' intention to maintain control over admission for employment. In mid-2003, during the final stages of the European Convention's drafting of the Constitution for Europe, a clause was added to the effect that EU competence over immigration matters would 'not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.[60] It is generally accepted that this clause was inserted in the draft at the request of the German government.[61] As a legal matter, there is room to argue that this provision did not preclude EU rules concerning the admission of economic migrants. Nevertheless, in political terms, it offered additional evidence of Member States' reluctance to agree to binding EU standards on that subject.

The events of 2002 and 2003 led the Commission to a reconsideration of its strategy in relation to labour migration.[62] A new set of policy developments began with the Commission's obtaining a mandate from the November 2004 European Council for the preparation of a 'policy plan on legal migration', which would include 'admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market'.[63] This time, the Commission proceeded with greater caution than it had in 2001. It re-presented many of the key ideas from

[60] This appeared as Art III-168 of the Draft Constitution for Europe (European Convention document 850/03, 18 July 2003), and Art III-267 of the final version of the proposed Constitution agreed by the Member States in Oct 2004.

[61] 'Germany gets its way on immigration', *EUobserver*, 9 July 2003.

[62] The 2001 proposal was officially withdrawn in Mar 2006: see [2006] OJ C 64/8.

[63] See Presidency Conclusions, Brussels European Council 4–5 Nov 2004 (Council doc 14292/1/04 rev 1) at 20.

2001 in the January 2005 *Green Paper on Economic Migration*, but now as options for consultation, rather than as definite proposals.

The Green Paper generated a great deal of interest, with 130 written replies, from Member States, third states, NGOs, trade unions and others.[64] The reservations of the Member States concerning EU standards over admission were once again in evidence. The German response was typical of that of many Member States, when it stated:

> [EU action] must continue to allow each Member State to react flexibly and to take into account the needs and characteristics of its own national labour market. This is necessary for the simple reason that no unified European labour market yet exists, nor is one to be expected.[65]

The French contribution also emphasised that any EU migration policy had to take into account the specificity of each country's demographic, employment and immigration situation and opposed a 'rigid system of management of migration'.[66] Similar statements were included in the comments of many other Member States.[67]

Against that background, the Commission's *Policy Plan on Legal Migration*, published in December 2005, conceded that a legal framework governing economic migration could not be achieved at the EU level. It linked its change of direction both to the fact that 'the Member States themselves did not show sufficient support' and to the 'need to provide for sufficient flexibility to meet the different needs of different labour markets'.[68] This latter consideration also appeared in a Commission working document published with the Policy Plan, which concluded that 'from the economic point of view, a comprehensive framework would probably not be able to respond to the different needs of the EU economies' and that it would 'risk stiffening the labour market in the EU'.[69] These statements suggest that the Commission has come to accept that there are limits to the case for regulation of admission policies at the EU level.

Instead of a comprehensive measure concerning admission, the Policy Plan set out the Commission's intention to present Directives on specific categories of migrant worker.[70] One of the specific measures was a

[64] These responses are available at http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm.

[65] *The Federal Government's Response to the Green Paper on an EU Approach to Managing Economic Migration* (available at the website referred to above n 64) at 3.

[66] *Contribution Française au Débat Lancé par le Livre Vert de la Commission sur une Approche Communautaire de la Gestion de la Migration Economique* (Oct 2005, available at the website referred to above n 64), at 3 and 5.

[67] See the responses of Belgium, Denmark, Finland, Ireland, Malta, Poland, the Slovak Republic, Sweden and the UK.

[68] COM(2005)669, above n 4, at 5.

[69] SEC(2005)1680, above n 17, at 16.

[70] In addition to the two proposals discussed in the text, the Policy Plan proposed legislation on the admission of intra-corporate transferees and paid trainees.

proposal on seasonal workers, which was more flexible than in 2001, in that it contemplated a permit which would allow employment for 'a certain number of months per year for 4–5 years'.[71] The intended Directive on highly skilled workers was the most significant of the specific measures outlined.[72] It reflects the Commission's view that international competition for highly skilled workers necessitates EU-level action. To quote from the working document which accompanied the Policy Plan:

> [F]or highly skilled workers, international competition from the US, Canada and Australia is really strong and the EU needs to put in place a series of attractive conditions if it intends to encourage top-end migrants to choose Europe instead of going to these other States.[73]

The Policy Plan itself contemplated 'a common special procedure to quickly select and admit such immigrants' and that there should be provision for 'intra-EU mobility' or 'an EU work permit' for such workers. It also suggested that the Directive on highly skilled workers could leave open the possibility of extension to other workers.

The proposed Directives on seasonal workers and on the highly skilled suggest that the Commission has not given up on the prospect of regulation of admissions at the EU level. Given the Member States' scepticism concerning the need for EU regulation, however, it remains to be seen how successful the Commission will be with its new agenda.

THE RIGHTS OF MIGRANT WORKERS

In addition to its proposal for the regulation of some categories of admission, the Policy Plan announced a 'horizontal' Directive dealing with the status and rights of third country workers. The main purpose of this Directive would be 'to guarantee a common framework of rights to all third country nationals in legal employment already admitted in a Member State, but not yet entitled to long-term residence status'.[74] The Policy Plan and the related staff document lacked detail, however, on what such a Directive would cover. The only concrete suggestions were that provision be made for the recognition of migrant workers' qualifications and (as in 2001) that there should be a single permit covering both residence and employment.[75] Beyond that, it was unclear which rights would be included in any proposal and whether exceptional rules would apply to particular categories of worker.

[71] COM(2005) 669, above n 4, at 7.
[72] *Ibid*.
[73] SEC(2005)1680, above n 17, at 13.
[74] COM(2005)669, above n 4, at 6.
[75] *Ibid* and SEC(2005)1680, above n17, at 13.

It was argued in the first section that the difficulties in justifying EU regulation of admission decisions at the EU level do not necessarily extend to other aspects of possible EU action on labour migration. This section will consider EU legislation on the rights of migrant workers in three key areas: changes of employer, movement between Member States and equal treatment in the labour market. In each case, the discussion will first summarise the existing legal provision on the subject, in order to illustrate that these questions are already known to EU law, before going on to indicate the direction of possible future action.

Changes of Employer

Current Law

The only case in which the right to change employer is expressly recognised for *migrant workers* is in Decision 1/80 of the EC–Turkey Association Council. The Decision applies to Turkish workers 'duly registered as belonging to the labour force' of a Member State, which term has been interpreted to cover all persons in a lawful employment relationship with a close connection to the territory of the Member State in question.[76] Under Article 6 of the Decision, after three years' employment, Turkish workers are entitled to take any job, subject to the priority given to EU citizens. After four years' employment, Turkish workers are entitled to 'free access' to any paid employment in that Member State. In addition, Article 13 of the Decision sets out a standstill clause, according to which the rules on access to employment cannot be made more restrictive for Turkish workers who are legally resident in the given Member State. It may be added that Articles 6 and 13 have each been held to have direct effect.[77]

EU law also confers a right to change employer upon third country nationals who are *long-term residents*. That subject was initially addressed in a non-binding Council Resolution in 1996, which provided that long-term resident status, and with it the right to engage in gainful employment, should arise after 10 years' residence in a Member State.[78] The Convention on Admission proposed in 1997 went further: it would have conferred the status of long-term resident, including full access to employment, upon persons with five years' legal residence and a residence

[76] See Case C–36/96 *Günaydin* [1997] ECR I–5143 and Case C–98/96 *Ertanir* [1997] ECR I–5179.

[77] Case C–192/89 *Sevince* [1990] ECR I–3461.

[78] Council Res of 4 Mar 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States [1996] OJ C 80/2.

authorisation covering a further five years.[79] The position of long-term residents is now regulated by Directive 2003/109 in all Member States other than Denmark, Ireland and the United Kingdom. Its basic principle is that third country nationals who have been resident in a Member State for five years are entitled to the EU law status of long-term resident vis-à-vis that state. Most categories of resident qualify for the purposes of the Directive, including workers, self-employed and family members.[80] Long-term resident status leads to a number of significant entitlements, including that of equal treatment in access to employment.[81] For present purposes, the significance of that provision is that it confers a right to change employer.

EU law also implicitly provides for the right of third country nationals to change employer when it recognises a right of employment for migrant categories *other than workers*. The Directive on refugee status confers an automatic right of employment on Convention refugees, while persons with subsidiary protection status have a right of employment which may be limited for labour market reasons.[82] The Directive on reception conditions for asylum seekers provides a right of employment for those who have not had an initial determination of their asylum claim within one year.[83] The Directive on the admission of third country students permits employment outside the hours of study.[84] Finally, EU law provides for the employment of family members (as variously defined) of migrant EU

[79] COM(97)387, above n 30, Art 32.

[80] The starting point under the Directive is that the reason for residence is irrelevant. However, an individual is not eligible for long-term resident status if on the qualifying date his or her residence is as a student, a trainee, a beneficiary of or applicant for international protection, a temporary worker, or a diplomat: Art 3(2). In addition, periods of residence as a temporary worker or diplomat do not count, while periods spent as a student or trainee count only for half: Art 4(2).

[81] *Ibid*, Art 11(1)(a).

[82] Council Dir 2004/83/EC on the qualification and status of refugees or as persons who otherwise need international protection [2004] OJ L 304/12, Art 26. The Directive does not apply to Denmark, while Ireland and the UK have opted in to it.

[83] Council Dir 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18, Art 13. The scope of this entitlement is uncertain, since the obligation to allow employment arises only where 'the delay cannot be attributed to the applicant', while the duty on Member States is merely to 'decide the conditions for granting labour market access to the applicant'. The Directive does not apply to Denmark or Ireland, while the UK has opted in to it.

[84] Council Dir 2004/114/EC on the conditions of admission of third-country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12, Art 17. Member States may impose the following restrictions: a labour market test, a maximum of not less than 10 hours a week, and a prohibition during the first year of residence. The Directive does not apply to Denmark, Ireland or the UK.

citizens,[85] of third country residents[86] and of Convention refugees.[87] It also confers a right of employment upon the family members of Bulgarian, Croatian, Macedonian, Romanian and Turkish workers, once the given Member State has admitted the family members in question.[88] In all of these cases, the right to take employment is unrestricted, in the sense that the third country national in question is not tied to a particular employer.

Future Action

The question for the future is whether rights to change employer should be protected *in general*, so that third country workers will be protected where they are not long-term residents and do not qualify under the various directives and international agreements. That subject was addressed in the Commission's proposal for a Directive in 2001.[89] As we saw in the second section, the Commission's model was that a work permit would have been sought on the basis of a job offer from a particular employer, but would have been issued to the worker. A worker would not have been tied to a particular employer, but rather to 'the exercise of specific professional activities or fields of activities', and possibly to a given region. After three years, all restrictions on employment would have been removed.

In the discussion of the 2001 proposal within the Council of Ministers, there were objections to the notion that a work permit could be sought and obtained by a worker.[90] This was defended by the Commission on the basis that it was 'aimed at taking into account the rights of the workers'.[91] Member States also had reservations concerning the absence of an initial restriction to a particular employer.[92] That proposal was justified by the Commission as a logical solution within the labour market, once the need for labour of a particular type had been established.[93] In the Green Paper, the Commission continued to defend the model in similar terms.[94] It

[85] Council Dir 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the European Union [2004] OJ L 158/77, Art 23.

[86] Council Dir 2003/86/EC on the right to family reunification [2003] OJ L 251/12. The Directive does not apply to Denmark, Ireland or the UK.

[87] Dir 2004/83, above n 82, Art 23(2).

[88] See Art 38 of the Europe Agreement with Bulgaria ([1994] OJ L 358/3), Art 45 of the Stabilisation and Association Agreement with Croatia ([2005] OJ L 26/3), Art 44 of the Stabilisation and Association Agreement with the Former Yugoslav Republic of Macedonia ([2004] OJ L 84/13), Art 38 of the Europe Agreement with Romania ([1994] OJ L 357/2) and Art 7 of Dec 1/80 of the EU–Turkey Association Council.

[89] COM(2001)386, above n 1, Art 8.

[90] Council doc 13954/03, at 10.

[91] *Ibid*.

[92] *Ibid*, at 23.

[93] *Ibid*. See too the discussion of Art 8 in COM(2001)386, above n 1, at 13.

[94] COM(2004)811, above n 3, at 10.

argued that the worker should hold the work permit, since otherwise the worker 'could be exposed to the risk of being unduly controlled, even "owned", by his/her future EU employer'. It also continued to argue for the right to change employer, since 'no real problem for the economy of the host country would arise if the worker has been admitted … and is offered a more rewarding job'.

By contrast, the subsequent Policy Plan was more cautious. As we saw in the second section, the intended Directive on highly skilled workers would confer rights of mobility between EU Member States, which implicitly included a right to change employer.[95] The announced horizontal Directive on the rights of migrant workers would also provide for a work permit to be held by a migrant worker.[96] What was missing was any indication that the planned 'horizontal' Directive would include the right to change employer among those to be granted to all or most third country workers.

The Commission's own earlier statements show why it would be a significant omission if future EU legislation did not make provision for the right to change employer. As we saw in the first section, the possibility to resign and take another job is an aspect of the right to work and an important sanction for workers in ensuring correct treatment by their employers. Allowing changes of employer also leads to a more efficient allocation of labour, since workers are then able to move to jobs with better terms and conditions. These considerations imply that any limitations on the right to change employer should be as narrowly drawn as possible.

The case for restrictions on the right to change employer also appears weak. One argument which could be made for such restrictions is that employers incur extra costs in the recruitment of third country workers. The difficulty with that argument, however, is that recruitment costs are an inherent aspect of business and at most justify only temporary restrictions on changes of employer. A second possible argument is that changes of employer should be limited because of the preference accorded to EU nationals and third country workers already established in the given state. While this is a more substantial argument, it does not appear to preclude changes of employer within an occupation, once a labour market test has been applied. In addition, any such negative effects upon the preferred group of workers must be balanced against the potential effects upon them of competition from third country workers who lack bargaining power because their possibility to change employer has been curtailed. Overall, it may not even be in the interests of the preferred groups of workers that changes of employer by third country workers are subject to restriction.

[95] *Ibid*, at 9.
[96] COM(2005)669, above n 4, at 6.

Mobility Between Member States

Current Law

We saw in the first section that EU law currently provides third country workers with only limited rights of mobility between Member States. The question of rights of mobility for the purposes of employment was first addressed at the EU level in the provisions on long-term residents contained within the proposed Convention on Admission in 1997. A long-term resident in one Member State was to have the right to apply for vacancies in other Member States.[97] At the same time, long-term residents in the Member States were to be part of the preferred category whose non-availability was a condition of a work permit for other third country nationals.[98] Taken together, these two elements implied something like a right to take up employment in other Member States for long-term residents.

Rights of mobility for long-term residents are now covered by the 2003 Long-term Residents Directive. It permits persons with a minimum of five years' residence in one Member State to take up residence and employment elsewhere in the EU.[99] These rights are, however, hedged about with significant limitations. The possibility of employment is qualified by the right of the Member State to 'examine the situation in their labour market' and to apply 'national procedures' as regards the filling of vacancies and the exercise of the given activity. Member States may also give preference to their own citizens, to third country nationals provided for in EU law and to other third country nationals resident in that state. There are restrictions on temporary work: long-term residents may not use the Directive to become posted workers and Member States may define their own rules as regards seasonal work. Finally, states which previously had a numerical limit on all third country admissions may continue to apply such a limit to long-term residents coming from other Member States. The implication is that states can deny much of the potential benefit of the Long-term Residents Directive as regards mobility for employment.

Future Action

The question now is whether EU legislation should confer rights of cross-border mobility upon persons other than long-term residents, or which go beyond those set out in the Long-term Residents Directive. In the Commission's proposal for a Directive in 2001, that result was to be

[97] COM(97)387, above n 30, Art 35.
[98] *Ibid*, Art 7.
[99] Dir 2003/109, above n 10, Art 14.

achieved by including the following group within the preferred category for the purposes of the labour market test: 'third-country nationals who are legally resident in a Member State and who are and have been legally exercising activities as an employed person in that Member State for more than three years'.[100] This element of the proposal was related to the freedom to change employer *within* a Member State after three years (discussed above). The Commission's 2005 Green Paper then included preference for third country workers in other Member States among the matters on which it wished to consult.[101] By the time of the Policy Plan, however, cross-border rights had all but disappeared from view. As we have seen, this latter document included 'intra-EU mobility' among the intended rights for the highly skilled.[102] There was no reference, however, to any such entitlement in the proposed 'horizontal' Directive on the rights of third country workers in general.

The continuing absence of rights of cross-border mobility for workers is a significant lacuna in EU law. As was argued in the first section, allowing workers to move to other Member States permits a more rational allocation of labour within the EU, while making the EU as a whole more attractive to third country workers. It may be added here that recognition of rights of cross-border mobility also has a potential role in upholding the right to work. In sectors where there are few employers in a given state, allowing the right to move to another Member State may be crucial to making the right to change employer effective.

In concrete terms, the simplest solution would be to follow the Commission's approach in 2001, by linking the right of mobility between Member States to the right to change employer. In other words, once EU law permits a third country worker to change employers within one Member State, he or she should be free to take employment in any Member State. The implications of that right should also be elaborated more fully than was done in the 2001 and 2005 texts. There, the focus of the proposals was on inclusion of third country workers within the preferred category for the purposes of the labour market test. What is also desirable is a clear statement that the third country worker is entitled to take up employment in other Member States, to look for work there and to be admitted there for these purposes.

[100] COM(2001)386, above n 1, Art 6(1)(e).
[101] COM(2004)811, above n 3, at 6.
[102] COM(2005)669, above n 4, at 7.

Equal Treatment in the Labour Market

Current Law

A final question concerns guarantees of equal treatment in the employment sphere, understood here to cover treatment within employment relationships and in state social provision. This question is dealt with in current EU law both in Directives which recognise rights of employment for third country nationals and in international agreements with particular countries. These instruments are obviously incomplete, in that they leave many categories of migrant worker unprotected. A close examination also reveals that there are many inconsistencies and deficiencies in the protection which they provide.

Among the Directives, the most developed position is that in the Long-term Residents Directive. Of particular relevance here are the requirements for the equal treatment of long-term residents as regards 'conditions of employment and working conditions, including conditions regarding dismissal and remuneration', 'social security, social assistance and social protection' and 'freedom of association and affiliation'.[103] Long-term residents are also entitled to equal treatment as regards education and vocational training, recognition of qualifications, tax, access to goods, services and housing and freedom of movement within the state's territory. These rights of equal treatment apply both in the state in which long-term residence is acquired and in other states to which the long-term resident subsequently moves.[104]

Other Directives concerning the employment of third country nationals either make more limited provision for equal treatment or do not refer to it at all. The Directive on EU citizens and their family members states that third country family members who have a right of residence under the Directive are entitled to equal treatment 'within the scope of the Treaty'. While this formulation probably includes both employment relationships and state social provision, the lack of detail means that uncertainty about its coverage remains. For refugees and persons with subsidiary protection status, the rule is that 'the law in force in the Member States applicable to remuneration, access to social security systems … and other conditions of employment shall apply'. This statement appears to guarantee equal treatment within the employment relationship only if that is provided for within national law. Finally, there are a number of cases where there is no express reference at all to equal treatment in the employment sphere. The Directives on asylum seekers, students and the family members of third

[103] Dir 2003/109, above n 10, Art 11.
[104] *Ibid*, Art 21(1).

country nationals are all silent on this subject, even though they provide for third country nationals' access to employment.

Within the international agreements, the major inconsistency is that some countries' nationals are guaranteed equal treatment in relation to both employment and social security, while others are granted equal treatment with respect to employment alone. The first group of states are those whose agreements with the EU have a longer history. In the case of Turkish workers, Decision 1/80 of the EC–Turkey Association Council provides for equal treatment with nationals of the given Member State 'as regards remuneration and other conditions of work',[105] while Decision 3/80 of the same body entitles Turkish workers and their families to equal treatment under social security legislation. A similar position is to be found in the Euro-Med Agreements with Algeria (2005), Morocco (2000) and Tunisia (1998), which build upon earlier instruments. Each of these Agreements provides that nationals of those states who are legally employed are entitled to equal treatment with nationals of a given Member State 'as regards working conditions, remuneration and dismissal' and in relation to social security matters.[106] It may be noted that the right of Euro-Med workers to equal treatment as regards dismissal is a more extensive protection than is given to Turkish workers.[107]

The list of countries for which international agreements make provision solely for equal treatment in the employment relationship is far longer. In all of these cases, there is a prohibition on discrimination against legally employed nationals of the third country, by comparison with nationals of the given Member State, 'as regards working conditions, remuneration or dismissal'. The Association Agreements with Bulgaria (1994), Croatia (2005), Macedonia (2004) and Romania (1994) provide that the employment of the nationals of those states 'shall be free of any discrimination'.[108] Article 23 of the Partnership and Co-operation Agreement with the Russian Federation provides that the Member States 'shall ensure' the absence of discrimination against Russian nationals.[109] A subtly different formulation is contained in similar Agreements with eight other former Soviet states: what is stated there is that the Member States 'shall

[105] Art 10 of Dec 1/80, above n 88.

[106] Arts 64 and 65 of the Agreement with Tunisia [1998] OJ L 97/2, Arts 64 and 65 of the Agreement with Morocco [2000] OJ L 70/2 and Arts 67 and 68 of the Agreement with Algeria [2005] OJ L 265/2.

[107] The earlier Co-operation Agreements with the Euro-Med countries did not include reference to dismissal: see Art 38 of the Agreement with Algeria [1978] OJ L 263/2, Art 40 of the Agreement with Morocco [1978] OJ L 264/2 and Art 39 of the Agreement with Tunisia [1978] OJ L 265/2.

[108] See the provisions cited in n 88 above.

[109] The Agreement with the Russian Federation is published at [1997] OJ L 327/3.

endeavour to ensure' non-discrimination.[110] Finally, Article 13 of the 2000 Cotonou Agreement with 77 African, Caribbean and Pacific (ACP) states provides that the treatment of nationals of those states 'shall be free' from discrimination.[111]

Difficult questions arise as to the reach of the equal treatment obligations set out in the Directives and international agreements. It can be presumed that the various provisions for equal treatment in Directives will have direct effect and that they will, as a result, be enforceable against public employers. The direct effect of the equal treatment provisions in Decisions 1/80 and 3/80 concerning Turkish nationals is clearly established.[112] There is also little doubt that the equal treatment provisions of the Euro-Med Agreements are directly effective, given that similar provisions in predecessor agreements were.[113] There is authority too for the direct effect of the Europe Agreements, which presumably covers not only the agreements with Bulgaria and Romania, but also those with Croatia and Macedonia.[114] The equal treatment clause in the Partnership and Co-operation Agreement with Russia was held to be directly effective in *Simutenkov*.[115] That decision has implications for nationals of the ACP states: the similarity of Article 13 of the Cotonou Agreement with the clause in the Russian Agreement suggests that it too should have direct

[110] The other provisions are in the Agreements with Armenia ([1999] OJ L 239/3, Art 20), Azerbaijan ([1999] OJ L 246/3, Art 20), Georgia ([1999] OJ L 205/3, Art 20), Kazakhstan ([1999] OJ L 196/3, Art 19), Kyrgyzstan ([1999] OJ L 196/48, Art 19), Moldova ([1998] OJ L 181/3, Art 23), Ukraine ([1998] OJ L 49/3, Art 24) and Uzbekistan ([1999] OJ L 229/3, Art 19).

[111] The Agreement is published at [2000] OJ L 317/3. The following 76 ACP states were initial participants: Angola, Antigua and Barbuda, the Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, the Comoros, the Democratic Republic of Congo, the Republic of Congo, the Cook Islands, Côte d'Ivoire, Djibouti, Dominica, the Dominican Republic, Eritrea, Equatorial Guinea, Ethiopia, Fiji, the Gabonese Republic, the Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, the Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, the Rwandese Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tomé and Prıncipe, Senegal, Seychelles, Sierra Leone, the Solomon Islands, South Africa, Sudan, Suriname, Swaziland, Tanzania, the Togolese Republic, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Zimbabwe. According to the Council database on international agreements (available at http://ue.eu.int, accessed on 3 May 2006), Timor-Leste became a participant in the Cotonou Agreement on 19 Dec 2005.

[112] In relation to Art 10 of Dec 1/80, above n 88, see Case C–171/01 *Wählergruppe Gemeinsam Zajedno* [2003] ECR I–4301. In relation to Art 3 of Dec 3/80 (not published in the OJ), see Case C–262/96 *Sürül* [1999] ECR I–2685.

[113] In relation to the provisions for equal treatment in employment conditions in the earlier Co-operation Agreements see Case C–416/96 *El-Yassini* [1999] ECR I–1209. In relation to social security see Case C–18/90 *Kziber* [1991] ECR I–199.

[114] Case C–162/00 *Pokrzeptowicz-Meyer* [2002] ECR I–1049.

[115] Case C–265/03 *Simutenkov* [2005] ECR I–2579.

effect.[116] The *Simutenkov* precedent may not, however, carry over to the agreements with other former Soviet states, since their wording ('shall endeavour') is not obligatory.[117]

The more important question is whether these various obligations of equal treatment are enforceable against private organisations—both those which regulate professional activity and individual private employers. The Court of Justice has applied the equal treatment principle to private regulators under the Europe Agreements (which presumably covers Bulgaria, Romania, Macedonia and Croatia) and under the agreement with Russia.[118] It is reasonable to anticipate a similar result under the Directives which guarantee equal treatment in employment, Decision 1/80 for Turkish nationals, the Euro-Med Agreements, and the Cotonou Agreement. By contrast, there is as yet no reason to believe that individual private employers are covered by these guarantees of equal treatment. Directives and international agreements have never yet been held to have this 'pure' horizontal effect. It is not even clear whether the various guarantees of equal treatment oblige the Member States to require private employers not to discriminate, since such an obligation upon the Member States, arguably, requires express language.

Future Action

One approach to future legislation in this area would be to extend the benefit of the list set out in the Long-term Residents Directive to all or most third country workers. That was more or less the approach taken in the Commission's proposal for a Directive in 2001. It proposed that holders of a work permit should be entitled to equal treatment as regards 'working conditions, including conditions regarding dismissals and remuneration', vocational training, recognition of qualifications, 'social security including healthcare', access to goods, services and housing, and freedom of association.[119] The Green Paper, published in early 2005, expressed support for the same idea in a more cryptic manner:

[116] The status of Art 13, or of similar provisions in previous Lomé agreements with ACP states, does not appear to have been the subject of comment by the ECJ.

[117] In *Simutenkov*, above n 115, AG Stix-Hackl relied upon the difference between the Russian Agreement and the other Partnership and Co-operation Agreements in order to justify the conclusion that the Russian Agreement created an obligation for Member States: see para 23 of the Opinion.

[118] See Case C–438/00 *Kolpak* [2003] ECR I–4135 for a Europe Agreement and *Simutenkov*, above n 115, for the Partnership and Co-operation Agreement with Russia.

[119] COM(2001)386, above n 1, Art 11. Member States would have been permitted to deny equal treatment as regards vocational training in the first year of residence, and access to public housing in the first 3 years.

> [T]hird country workers should enjoy the same treatment as EU citizens in particular with regard to certain basic economic and social rights before they obtain long-term resident status.[120]

There would, however, be advantages to addressing the question of equal treatment, not as part of an immigration law measure, but as a social policy question. This could be done by relying upon Article 137 EC Treaty, which allows legislation inter alia on 'social security and social protection of workers' and on 'the conditions of employment for third-country nationals legally residing in Community territory'. Approaching the matter in that way would ensure that the protection of migrant workers was treated as a discrimination law question. EU legislation on this point should follow other equal treatment Directives, and prohibit all discrimination on grounds of nationality, including that between different groups of migrant, and not just that between migrants and the nationals of the state in question. Consideration should also be given to the prohibition of discrimination by employers based on immigration status, as distinct from nationality, in order to address cases where an individual's status is the source of differential treatment. A final question which would arise is whether any such legislation should apply to all workers, irrespective of the legality of their presence or employment in the given state.

CONCLUSION

This chapter has sought to argue that EU policy on admission for employment and on the treatment of migrant workers need not be analysed in the same way. In relation to admissions, the Commission has in recent years consistently sought to promote a more liberal approach by Member States. Even the more limited agenda set out in the 2005 Policy Paper is consistent with that objective: the Commission sought to regulate the admission of the highly skilled and seasonal workers and left open the possibility that other categories could be covered by a measure on the highly skilled. At the same time, there is extensive evidence of Member States' resistance to EU regulation of their admission decisions. The claim here is that that reluctance reflects not just the differences in Member States' policies and practices, but also the difficulty of making a convincing argument for binding standards on admission at the EU level.

Different considerations apply to policy on the entitlements or rights of migrant workers once they are present on the labour market of the Member States. In this area, the evidence of the *Policy Paper* is that the

[120] COM(2004)811, above n 3, at 10.

Commission has lost much of its earlier enthusiasm for legislation concerning the treatment of migrant workers. While the principle that Member States' policies should be accorded priority may be argued here too, there is also an EU interest in recognising migrant workers' rights at the EU level. There is an economic rationale for the completion of the legal integration of the EU labour market through the recognition of rights of cross-border mobility for third country workers. At the same time, EU action to confer a right to change employer and to ensure the equal treatment of migrant workers appears desirable in order to respect fundamental rights and to achieve fair competition within the EU. The wider point is that the question facing the EU and its Member States today is not simply how many third country workers to admit, but also the position of those workers once they join a Member State labour market.[121]

[121] For a similar emphasis in the rights of third country workers see the Mar 2005 policy statement of the European Trade Union Confederation, *Towards a Pro-active EU Policy on Migration and Integration* and House of Lords Select Committee on the European Union, *Economic Migration to the EU,* 14th Report, Session 2005–06, HL 58, chs 4 and 5.

17

Citizenship and the Expanding European Union: The Rights of New EU Nationals

NICOLAS ROLLASON

INTRODUCTION

ON 1 MAY 2004, 10 new Member States[1] joined the EU. This prospect of such an unprecedented enlargement, involving an increase in the EU land mass of 34 per cent and increasing the EU's population by 29 per cent to around 500 million, raised significant concerns amongst the EU-15 Member States that the extension of full free movement rights to accession nationals could have significant social and economic impacts. The resulting debate, polarised between, on the one hand, scaremongering among the national media and by EU and independent research on the other, led to the insertion of transitional provisions on the free movement of workers into Annexes to the Accession Treaty

This chapter will examine the transitional provisions, problems with their application at national level in the United Kingdom and their impact on the concept of citizenship of the Union.

Impact of Enlargement on Labour Markets

The prospect of enlargement had always raised the spectre of increased migration from East to West. This perceived threat, felt mainly by countries on the EU's eastern border, led some Member States, such as Germany and Austria, to seek long transitional periods during which nationals of the acceding states would not have full free movement rights. Naturally, the accession states busied themselves with completing research

[1] Cyprus, Poland, Hungary, the Czech Republic, Estonia, Slovenia, Latvia, Lithuania, Slovakia and Malta.

which showed that net immigration, particularly from accession countries, would not be as great as was feared. To its credit, the European Commission commissioned independent research which concluded that the entry of the 10 Central and Eastern European Countries (including Bulgaria and Romania) would lead to around 335,000 additional net immigrants a year to the current 15 EU members if there were immediate freedom of movement from accession.[2] Of these immigrants, only 70,000–150,000 would be workers, the rest being dependants. The report emphasised that the economic impacts of accession would be negligible, while having significant effects on particular industries in the EU, particularly on EU border regions in Germany and Austria, with Germany being most likely to receive around two-thirds of additional migrants from the accession states. It was also anticipated that net migration in the year immediately after accession (if there was full free movement on accession) would drop to around 150,000 in total.

Further projections published shortly before accession, notably by the DIW (Deutsches Institut fur Wirtschaftsforschung),[3] assess the potential inflow from accession countries over the next 25 years as almost 3.7 million in total, with an annual inflow to the EU-15 of between 318,000 and 400,000—at most only 1 per cent of the EU-15 population. Further studies[4] appeared to confirm the relatively minor impact of post- accession flows. The above estimates of migratory flows and their seemingly negligible economic impact undermined the argument for transitional arrangements to be applied to workers.

TRANSITIONAL PERIODS IN PREVIOUS ACCESSIONS

The Commission set about seeking a consensus from the Member States on the length of any transitional periods during which full free movement for nationals of accession countries could be delayed. The most vociferous supporters of immediate free movement rights were the most recent members of the EU, in particular Spain, Portugal and Greece. It should be remembered that after their respective accessions to the EU in 1981 and in

[2] H Brucker and T Boeri, *The Impact of Eastern Enlargement on Employment and Labour Markets in the EU Member States*, Milan and Berlin, European Integration Consortium, 2000)).

[3] Potential Migration from Central and Eastern Europe into the EU 15—An Update (Berlin, DIW, 2003), available at http://ec.europa.eu/employment_social/employment_analysis/report/potential_migr_update.pdf.

[4] S Drinkwater, *Go West? Assessing the Willingness to Move from Central and Eastern European Countries*, Flowenla Discussion paper (Hamburg, Hamburg Institute of International Economics, 2003); H Krieger, *Migration Trends in an Enlarged Europe* (Dublin, European Foundation for the Improvement of Living and Working Conditions, 2004).

1986, Greece and then Spain and Portugal were faced with seven-year transitional periods. The transitional period was shortened by one year when it became clear that the numbers of nationals from those countries actually moving into the EU labour market were minimal. In the current accession negotiations, Germany and Austria, on the other hand, set about seeking to protect sensitive sectors of the economy from service providers in the future Member States.

THE NEW TRANSITIONAL PROVISIONS

In respect of the new accessions, the Commission proposed five options[5] ranging from full and immediate free movement, through a 'flexible' system of transitional arrangements to other possibilities, such as fixed quota systems and general non-application of the free movement *acquis* for a limited period of time.

On 11 April 2001, the European Commission agreed to propose transitional arrangements to phase in full rights to free movement of workers over a total period of seven years. The transitional arrangements relating to workers are contained in Articles 2–12 of the Annexes to the Treaty on Accession. Malta and Cyprus, however, were not subject to these transitional arrangements.

Article 2 of the Annex provides a derogation from Articles 1–6 of Regulation 1612/68 by providing that present Members States shall apply national measures (or those resulting from bilateral agreements) regulating access to their labour markets by accession nationals. The derogation applies only to free movement of workers and services. Freedom of establishment (of the self-employed) or other free movement rights for any other categories, such as students, pensioners or self-sufficient persons, are unaffected and apply immediately on accession. Importantly, all remaining provisions of the Regulation, covering equal treatment, family reunion and the rights of family members, will apply once an accession worker is authorised to join the labour market in an EU-15 Member State. Existing rules on social security and mutual recognition of qualifications will also cover such workers.

The free movement Annex to the Accession Treaty provides for a step-by-step opening of labour markets to accession nationals over the seven-year transitional period, with extensive safeguards for the EU-15 states. Before the end of a two-year period, the Council is required to review the functioning of the transitional provisions on the basis of a

[5] Information Note, *The Free Movement of Workers in the Context of Enlargement* (Brussels, Commission, 6 Mar 2001).

report from the Commission.[6] The accession states may also request a review, but the findings of any review are not binding. Before the end of a two-year period, the EU-15 must notify the Commission whether they will continue to apply national measures or whether they will apply Articles 1–6 of Regulation 1612/68. If no such notification is received, Articles 1–6 of the Regulation will apply. The EU-15 may continue to apply such measures until the end of the five-year period following the date of accession. They may continue to apply transitional provisions until the end of the seven-year period in the event of 'serious disturbances' to the labour market and must notify the Commission. Finally, EU-15 Member States which have applied full free movement retain a safeguard to suspend free movement unilaterally 'in urgent and exceptional cases'. This 'ejector seat' clause is subject to their first obtaining the Commission's permission, which permission may in turn be overruled by the Council.

The Annex seeks to ensure preservation of rights of those already in the labour market who have worked for an uninterrupted period of 12 months or longer prior to accession: they will enjoy access to the labour market of that Member State, but not to the labour markets of other Member States. A8 nationals who work in an EU-15 state for 12 months following accession will also enjoy access to the labour market of that Member State. They lose this right if they voluntarily leave the labour market.

Article 14 of the Annex, which contains a standstill clause, underpins the transitional provisions:

> The effect of application of paragraphs 2–5 and 7–12 shall not result in conditions for access of [A8 nationals] to the labour markets of the present Member States which are more restrictive than those prevailing at the date of the signature of the Treaty of Accession.

Community preference is also given to nationals of Member States. Importantly, A8 nationals and their families legally resident and working in a Member State 'shall not be treated in a more restrictive way than those from third countries resident and working in that Member State'.

The Position of Family Members: Diluting of Rights

A particular problem is the position of family members. It will be recalled that under the Europe Agreements (see Article 37 of the Czech Agreement):

> The legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of

[6] European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (Period 1 May 2004— 30 April 2006)* (Brussels, European Commission, 2006).

> workers coming under bilateral Agreements in the sense of Article 42, unless otherwise provided by such Agreements, shall have access to the labour market of that Member State, during the period of that worker's authorised stay of employment.

Yet under Article 8 of the Annexes, the right of access to the labour market of family members of workers legally residing in the EU-15 at the date of accession was extended, but only where the A8 national had been a worker for more than 12 months. In addition, the family member of a worker legally residing in an EU-15 state after accession will have access to the labour market only once he or she has been resident for at least 18 months or from the third year after accession, whichever is earlier. The accession itself has, therefore, seen a clear dilution of the rights of family members in the Europe Agreements.

APPLYING NATIONAL RULES: THE UNITED KINGDOM'S WORKER REGISTRATION SCHEME

When the EU welcomed 10 new Member States in May 2004, the UK and Ireland were, along with Sweden, the only countries to grant unlimited access to their labour markets to the citizens of eight central and eastern European countries. However, in the face of public concern about the effects of doing so, the UK instituted shortly before the accession date measures requiring A8 nationals to register under the Workers' Registration Scheme (WRS). The purpose of the scheme was clearly stated as being a facility to measure the numbers entering the labour market and identify trends in age, job type and location. It was, however, also to have the effect of restricting access to benefits.

The Accession Monitoring Reports produced by the Home Office provide quarterly updates on applicants to the WRS. The second report,[7] while showing that the government's estimate of 13,000 new entrants to the labour market was extremely conservative, appeared to confirm that the government's decision to allow individuals from the new Member States to work in the UK had been largely beneficial to the UK economy, with a total of 176,000 workers from the new Member States applying under the WRS between 1 May 2004 and 31 March 2005, of whom up to 30 per cent were already in the UK before 1 May 2004. The level of applications peaked in June and July 2004 and workers from the new Member States were finding jobs in sectors where there were a high number of vacancies. Accession nationals consisted of about 0.4 per cent of the total working age population and no major impact on employment,

[7] Available at http://www.ind.homeoffice.gov.uk/6353/aboutus/accessionmoniotoringreport4.pdf.

unemployment or wages was reported. The UK employment levels and the average earnings index were unchanged from May 2004. A separate study by the Department for Work and Pensions also concluded that, overall, the effect of EU enlargement on the UK labour market had been broadly positive.[8] Most recent evaluations in 2006 conclude that up to half a million workers have entered the UK.[9]

The Legality of the United Kingdom's Workers Registration Scheme

We will now examine whether the introduction of a registration scheme is compliant with Article 14 of the free movement Annexes. These state, for example:

> Czech migrant workers and their families legally resident and working in another member State or migrant workers from other member States and their families legally resident and working in the Czech Republic *shall not be treated in a more restrictive way than those from third countries resident and working in that Member State* or in the Czech Republic respectively [emphasis added].

This provision, therefore, prohibits the introduction of measures which would be more restrictive for new A8 accession nationals in comparison to other immigration requirements applied to third country nationals. However, it should be recalled that under the UK's national immigration rules, third country national spouses of British citizens and dependants of those coming within long-stay categories (work permit holders, business persons, etc) have no restrictions on taking employment in the UK from the date of their arrival. This also applied (before a change in February 2005) to Commonwealth working holiday-makers, who were eligible to take any employment they wished throughout the period of a two-year visa. Similarly, domestic workers and those under the Highly Skilled Migrant Programme (HSMP), who have been admitted to the UK, are also permitted to change employer without first obtaining permission to do so.

Does the application of a registration scheme for A8 nationals and their families who are working or wish to work in the UK result in treatment which is more restrictive than that applicable to these third country nationals? As these third country nationals are not required to register each time they change employment in the United Kingdom, or indeed to obtain any further authorisation, it appears that any registration scheme could treat new A8 nationals in a more restrictive way. Could it be that the

[8] *The Impact of the Free Movement of Workers* available at www.dwp.gov.uk/asd/asd5/wp18.pdf.

[9] See Accession Monitoring Report, May 2004–June 2006 available at http://www.ind.homeoffice.gov.uk/6353/aboutus/Revised_data_MT.final.pdf.

registration scheme as a whole cannot be applied to A8 nationals unless similar requirements are applied to other third country nationals who wish to change employment in the UK?

SERVICE PROVISION: STILL AN ELUSIVE REALITY?

It should be recalled that Germany and Austria negotiated a derogation in respect of service provision limited to a number of key industries where there were fears of social dumping (construction, cleaning and horticulture, for example) from both new accession nationals, employees and non-EU employees of accession state companies. However, looking across the EU, the issue of service provision as a direct result of enlargement has not been a major concern. Recent publicity on the conditions of pay of posted workers in French shipyards, for instance, centred mostly on workers from EU-15 states such as Portugal. And short-term service provision by third country nationals lawfully employed in another Member State does not, on the whole, raise an issue, as this can be completed within the ambit of the Schengen rules where Member States only require a residence permit after three months. While fears of mass influx and social dumping proved unfounded, the old problems of applying the principles of *Van der Elst,*[10] as recently reconfirmed by the Court in *Commission v Luxembourg,*[11] remain. The Netherlands, which has applied national provisions in the initial two years of the transitional period by establishing a quota or permits to be given to new accession nationals (20,000) is now the subject of infringememnt proceedings for maintaining work permit requirements as against A8 nationals who fall under the ambit of service provision.[12] One of the main problems created by enlargement and the failure to extend the Schengen rules to the new Member States is that there is discrimination between EU-15 and A8 companies and undertakings in the context of provision of services. While third country national employees of EU-15 undertakings may cross internal EU borders and provide short-term services on behalf of their employers, without the need for a visa, non-EU employees of A-8 undertakings are faced with the obstacle of having to obtain visas. The playing field will not be levelled until the internal Schengen borders are lifted (see below).

[10] Case C–43/93 *Van der Elst v Office des Migrations Internationales* [1994] ECR I–3803 dealing with the right of firms to post third country nationals workers to other Member States.

[11] Case C–445/03 *Commission v Luxembourg*, judgment of 21 Oct 2004.

[12] Commission Press Release IP/05/337, 18 Mar 2005.

CITIZENSHIP

Enlargement naturally creates a problem: with accession, we have the creation of a large number of new EU citizens. The problem is that accession will effectively create two classes of citizens—those with full free movement rights and those without. It should be remembered that Citizenship of the Union includes Article 18 EC Treaty, which states:

> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
>
> 2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously throughout this procedure.

In the case of *Martínez Sala*,[13] Advocate-General La Pergola stated:

> Now, however, we have Article [18] of the Treaty. The right to move and reside freely throughout the whole of the Union is enshrined in an act of primary law . . . The limitations provided for in Article [18] itself concern the actual exercise but not the existence of the right.

The Advocate-General then went on to state:

> Article [18] extracted the kernel from the other freedoms of movement – the freedom which we now find characterised as the right, not only to move, but also to reside in every Member State: a primary right, in the sense that it appears as the first of the rights ascribed to citizenship of the Union. . . . *It is not simply a derived right, but a right inseparable from citizenship of the Union* . . . Citizenship of the Union comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national State to which he belongs . . . Let us say that it is the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union . . . .[emphasis added].

The Court has since confirmed that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC Treaty.[14] That right is not unconditional, however. It is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect. The measures most frequently

[13] Case C–85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I–2691.

[14] See Case C–413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I–7091, para 84.

invoked are those of self-sufficiency under Directive 90/364 (see, in particular, *Baumbast*[15] and *Trojani*[16]).

While new citizens of the EU clearly have the right to move and reside, that right is severely curtailed by being limited to those exercising rights only as the self-employed, service providers and recipients, the self-sufficient and students, together with their family members as defined in Community law. The main category of 'movers', those who would complete the integration of the single market by moving freely within the EU labour pool, are excluded on the basis of their accession nationality.

Yet is this 'total' exclusion real or imagined? For while the political imperatives have been served (at least by the Member States) by applying these reassuring transitional provisions, the reality is less worrying. Take these examples:

— A Pole wishes to take employment in Germany. He agrees with his wife that she will be a self-employed cleaner. They move to Germany, where she establishes herself in business, providing cleaning services to a number of clients for 20 hours per week. Her husband has a recognised right to work as the family member of his wife.
— A Latvian wishes to respond to an offer of work in Spain. Her husband enrols on an IT course in Madrid. As the spouse of a student, she has an immediate right to work.

While Article 8 of the Annexes on free movement enable Member States to derogate from Article 11 of Regulation 1612/68, this is only in respect of the family members of workers. The transitional provisions do not derogate from the provisions on access to the labour market for family members of the self employed and the self-sufficient. This right is now contained in Article 23 of the Citizens' Rights Directive 2004/38 and applies to family members in all categories. The Directive had to be transposed by April 2006.[17] What is certain is that the transitional provisions may have the effect of creating new norms of self-employed work in sectors where employment may previously have been the norm. In the UK, the Construction Industry Scheme provides the perfect example of this shift.

[15] *Ibid.*

[16] Case C–456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I–7573.

[17] In the UK see the Immigration (European Economic Area) Regs 2006, SI 2006 No 1003.

ENLARGEMENT AND SCHENGEN—INSIDERS AND OUTSIDERS

We have focused so far on the implications on free movement of workers from acceding countries. What is the position of these countries post-accession in terms of internal movement within the enlarged EU?

The Schengen project, which started as an inter-governmental club for states wishing to progress free movement, has now grown to include all Member States, bar the UK and Ireland. It has achieved the lifting of internal border controls with compensatory measures to ensure safe external borders. Further, for all participating Member States (except Denmark), Schengen has now been incorporated into ECIEU law.

The Commission made it clear that accession to the EU would not immediately lead to the lifting of border controls between the old and new Member States; this would be the subject of a separate Council Decision once the readiness of the new Member States had been assessed. The Schengen regime has traditionally been linked to the installation of firm external borders, tightening of immigration control, curbing of asylum flows and increased visa restrictions. There is naturally a conflict between the inclusive nature of enlargement and the exclusive nature of the Schengen regime.

In February 2002, the Enlargement Commissioner, Gunther Verheugen, confirmed that the movement of persons between the new Member States and the then EU would be restricted for some years after accession. He also confirmed that border controls between the present Member States would be maintained until the Schengen criteria could be fully respected. The issue received heightened attention following the attacks on 11 September 2001 and the EU's activity in looking to strengthen internal security measures. This clearly created even greater pressure on the candidates who will form the new external border of the Union to control their frontiers with countries like Ukraine, Russia, Belarus, Turkey and south-eastern European countries.

On 6 April 2005, the European Commissioner for Justice and Home Affairs, Franco Frattini, confirmed that the 10 accession states are set to become part of the Schengen agreement in 2007. However, joining by the target date of October 2007 would depend on each of the 10 having the necessary Schengen-related data exchange and information systems fully working. In accordance with the European Council's Decision of 5 November 2004, the enlargement of the Schengen area will start with evaluations of the Member States in the first half of 2006 and their ability to join the Schengen Information System (SIS) II. Accession states are vying to be first in line to take part in the planning and implementation of the Visa Information System (VIS) data communication network.

Yet this accession to Schengen (the accession within the accession) may yet cause problems. What if, for example, the Czech Republic enters Schengen before Slovakia? Would a new iron, lace or paper curtain be created ending the old bilateral treaties regulating cross-border movement? Would the requirement to produce a passport at the border, rather than the standard identity card and the restriction to crossing borders only at designated entry points, create major problems? In view of the close cultural and social links between the two states, the possibility of the Czech Republic having to opt out of Schengen to maintain its existing preferential regime could be a possibility.[18]

These issues raise another question: is a two-speed accession to Schengen possible and desirable? If it is not, then the difficulty is that full extension of Schengen to accession states will be delayed until the laggards catch up with the rest. This would have a particular impact on third country nationals lawfully resident in accession states, but also, of course, on new Union citizens themselves.

Saying Goodbye to Old Neighbours

The other major difficulty as regards the free movement of persons as between the new Member States when they join is their immediate neighbours. The hardening of the new external border of the EU may risk damaging neighbouring economies and populations on the periphery of the enlarging EU. For example, many Ukrainian and Balkan people's livelihoods depend directly on being able to trade with and work in richer neighbouring countries. By way of example, approximately 1.7 million people, the majority of them Ukrainians, cross the Ukrainian/Polish border (or 'lace curtain') each month under a visa-free regime. Some 300,000 Ukrainians are thought to work in Poland, often as nannies, fruit pickers and construction workers. This cross-border movement brings major economic benefits to the border regions and the Ukrainian economy, which may be significantly impeded if Poland is required to adopt the EU Common Visa List under which Ukrainians must have the necessary Schengen visas. One by one, acceding states have announced the imposition of visa regimes for neighbouring countries.

The main difficulty with failing to enlarge the Schengen area on accession is that new members would face what has been described as 'double jeopardy': the burden of imposing Schengen visas on their non-EU

[18] This problem is likely to be avoided by the work of the Visegard 4 Working Group for Schengen Cooperation, under which Poland, Hungary, the Czech Republic and Slovakia have agreed to progress to Schengen integration together.

neighbours and the insult of confronting internal frontiers between themselves and the old members of the Union. While the European Commission has repeatedly rejected the principle of a multi-speed Europe, this is effectively what will be created in the years following accession.

Conclusion

Citizenship of the EU, established by the Maastricht Treaty, remains an elusive goal for the nationals of accession states. The transitional provisions in the Annexes to the Accession Treaty effectively created a group of second-class citizens of the Union, insiders yet outsiders, shut out of full integration into the EU. The rights of free movement attached to EU citizenship described as 'an integral part of the legal heritage of every citizen of the Union'[19] have been denied to these citizens. The failure to move more quickly towards extending Schengen eastwards, with its impact on service provision, only reinforces this perceived exclusion. A similar pattern is being repeated with the accession of Romania and Bulgaria in 2007.

[19] Commission Communication on the Follow-up to the Recommendations of the High-level Panel on the Free Movement of Persons, COM(1998)403.

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