



## Statewatch analysis

### EU law on asylum procedures: An assault on human rights?

#### Introduction

The Council is nearing the deadline of December 2003 set by EU leaders for agreement on a proposed Directive on asylum procedures. This Directive, along with a parallel proposal on the definition of 'refugee' and subsidiary protection status, is at the heart of refugee law. However, there are disturbing developments in the final months of negotiations on the Directive. **It appears that the Council is likely to agree a Directive which in many respects will fall below the minimum standards set by human rights law, with Member States not merely permitted and encouraged to lower their existing standards but in one area even required to lower those standards.**

#### Background

At the moment, asylum procedures are only governed by EU 'soft law', comprising the three 'London Resolutions' of EU Ministers adopted in 1992 (on 'safe third countries', 'safe countries of origin' and 'manifestly unfounded' cases) and a Council Resolution setting out general rules on asylum procedures adopted in 1995. The Commission proposed a Directive on this subject in September 2000. A year later, the proposal fell victim to the Belgian Council Presidency's cancellation of negotiations over most EC immigration and asylum proposals, and the Council instead agreed 'conclusions' on this issue in December 2001. These conclusions took no account of the proposed amendments of the European Parliament, which would have considerably improved the Commission's proposal. Furthermore, the EU summit in Laeken, in December 2001, called for the Commission to present a new version of the proposal.

The Commission presented its revised proposal, considerably lowering the standards in its first proposal, in June 2002, although the Council did not reopen negotiations on it until January 2003. In June 2003, the JHA Council agreed on part of the Directive, concerning the standards applicable when an asylum-seeker first comes into contact with the authorities. These rules cover issues such as detention of asylum-seekers, the right to legal aid and access to a lawyer, and the

right to a personal interview with a trained official. **The rules agreed by the Council in these areas fell well below the standards proposed by the Commission.**

Subsequently, the Council has been negotiating the other provisions of the Directive, concerning 'inadmissible' asylum applications, the scope of special procedures applicable to admissible applications, the rules applicable to withdrawal of refugee status, and the right of asylum-seekers to have access to a court or tribunal, including the question of whether a legal challenge has 'suspensive effect', meaning that the asylum-seeker is entitled to stay in the country pending the decision.

### **Inadmissible applications**

If an asylum application is inadmissible, the national authorities do not have to consider its merits at all. **So even though the situation of the asylum-seeker in the country of origin may be appalling, with the result that his or her case for refugee status may be well-founded, the authorities will not even examine the application.** 'Inadmissible' cases concern those cases where it is believed that the asylum-seeker should have applied somewhere else, or where the asylum-seeker already has protection somewhere else.

The proposed Directive applies this principle to cases where a person already has protection elsewhere or is subject to the EU's 'Dublin' rules allocating responsibility to a single EU Member State for considering asylum applications. More controversially, it allows applications from 'safe third countries' to be considered inadmissible. The latest Council draft considerably weakens the Commission's proposal as regards the human rights and refugee law standards which countries must uphold to be considered 'safe', and also apparently extends the principle to states which the applicant has not even *travelled* through. Moreover there is no longer a clear obligation to consider the application of the principle to each individual applicant. **This approach would leave Member States free to remove asylum-seekers to any country willing to accept them, without any consideration of the merits of their claims or even any detailed consideration of the application of the 'safe third country' principle to the facts of their case.**

### **Special procedures**

One of the most important special procedures for admissible asylum applications is the application of the 'safe country of origin' principle. This means that the application is presumed to be unfounded because the applicant is the citizen of a country where human rights are so well protected that persecution of individuals severe enough to cause them to flee the country never happens. This principle might be uncontroversial if its application was limited to (say) Canada and Norway, **but in practice countries which apply this principle consider that some states with very questionable human rights records are 'safe countries of origin'.**

The Commission proposed that Member States could apply this principle as an *option* in their asylum law, subject to certain safeguards. However, the JHA

Council of October 2003 agreed that Member States would be *required* to apply this principle in their national law, at least for a common list of countries that would be deemed to be safe by all EU Member States. The common list is to be adopted by the Council by a qualified majority vote; the European Parliament will only be consulted and national parliaments will have no input at all. Member States will still be free to add *additional* countries to any national list of 'safe' third countries, but will not have the power by themselves to take any states off the EU list permanently, even if this change were limited to the Member State in question and **no matter what the human rights situation in the supposedly 'safe' States**. The principle will even apply to States where a person was formerly *resident*, regardless of whether that person was a citizen of that State or was stateless; this broadens the traditional application of the principle.

Many Member States do not currently have a list of 'safe countries of origin'. **So for the first time, EU Member States will actually be required by the EU to lower their standards in the field of asylum law.** This development follows on from a call to develop such a list in June 2003 from the 'G5', a new secret grouping of interior ministry civil servants of the five largest Member States, which has begun holding wholly unaccountable meetings to control the development of EU Justice and Home Affairs law. Since the EU is at present limited to setting only 'minimum standards' for asylum procedures, it is highly questionable whether this power can be used to set minimum standards for restriction of individuals, rather than minimum standards for protection.

Other special rules for admissible applications concern the idea of 'accelerated' proceedings for supposedly 'unfounded' cases, including those covered by the 'safe country of origin' principle. The latest draft of the Directive lists no fewer than fifteen cases where Member States could apply this principle—but this is a non-exhaustive list. Member States are also permitted to apply special rules, lower than the standards normally applicable to examination of applications, where a person applies for asylum at the border or where the application is a repeat application. The Council has lowered the standards proposed by the Commission in all these areas. **Some Member States are arguing for the possibility of a further special procedure for applications at the border with even lower safeguards.**

### **Cancellation of refugee status**

Even if a person in need of protection surmounts the obstacles placed in his or her way by national and EC law and obtains refugee status, the planned Directive will make it easy to take that status away. There will be simplified procedures for withdrawing status and in particular, Member States will be free to deny any procedural protection if they claim that refugee status has 'ceased' because of a change of circumstances in the country of origin--

### **Access to a court**

The Council's latest draft still permits access to a court or tribunal, but has weakened the already low standards in the Commission proposal regarding whether appeals have 'suspensive effect'. **Now Member States will apparently be free in any and all cases to deny applicants the right to stay in the country pending**

**decisions on their appeals.** The impact of this is that even if asylum-seekers win their cases on appeal—and increasing numbers win their appeals to the courts in some Member States—this victory will be virtually useless to them if they are already back in the unsafe country which they fled, or another State which might send them there.

## Conclusion

The European Court of Human Rights has repeatedly ruled against Member States with low levels of procedural protection for asylum seekers, requiring an effective examination of a claim that expulsion of a person would result in torture or other inhuman or degrading treatment and limiting the ability of Member States to expel a person in the meantime. However, it seems that this case law, and similar rulings by the Committee which monitors application of the UN Committee Against Torture, has been wholly ignored by the Council in the final months of negotiations on this proposed Directive. **Moreover, with its decision to require Member States to lower their standards as regards asylum law, the JHA Council has crossed the Rubicon.** The Council is no longer solely setting minimum standards for protection, which already runs the risk of a competitive ‘race to the bottom’ by Member States reducing levels of protection in order to deter claims. Now it is at least partly in the business of forcing them to lower standards, setting a low ceiling for protection rather than a low floor.

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## Sources

*Revised Commission proposal on minimum standards for asylum procedures (COM (2002) 326, 18 June 2002); Council docs. 10235/03, 10.6.03, outcome of proceedings of JHA Council, 5/6.6.03 on Articles 1-22 of proposal; 10235/03 add 1, 10.6.03, addendum to outcome of proceedings of JHA Council, 5/6.6.03 on issue of ‘safe countries of origin’; 12639/03, 18.9.03, note to SCIFA/Coreper on issue of ‘safe countries of origin’; 12815/03, 23.9.03, note to Coreper on issue of ‘safe countries of origin’; 12888/03, 25.9.03, note to Coreper/JHA Council on issue of ‘safe countries of origin’; 12888/1/03, 30.9.03, note to JHA Council on issue of ‘safe countries of origin’; 12734/1/03, 3.10.03, outcome of proceedings of working party on 16/17.9.03 and JHA Council, 2.10.03; 13901/03, 25.10.02, note from Presidency to SCIFA; 14102/03, 4.11.03, note to JHA Council on 6.11.03 regarding ‘safe third countries’ and border procedures.*

NB: See <http://www.statewatch.org/news/2003/nov/04asylum.htm> for live links to documents