



Statewatch analysis

Implementing the Amsterdam Treaty: Cementing Fortress Europe

The five year deadline for agreement on the common EU immigration and asylum policy expired on 1 May 2004. This article examines the key decisions, how they were taken and what they will mean for asylum-seekers

Introduction

On 1 May 2004 the EU proudly welcomed ten more countries. This date also marked the end of the five year 'transitional period' for the implementation of the Amsterdam Treaty provisions on a common EU immigration and asylum policy. 'Normal' EU decision-making procedures for binding EC regulations and Directives have been suspended during this time because of the 'political sensitivity' of immigration and asylum issues. The European Commission's role as drafter of EU legislation was shared with the member states, and the role of European Parliament in 'co-deciding' policies was limited to 'consultation' on proposals. To complicate things further, the 1997 Amsterdam Treaty also incorporated the Schengen provisions on visa and border controls agreed under the Schengen Convention. This meant that these could now be developed by the EU along with the new immigration and asylum policies. The rationale behind the a common European policy was that without minimum standards set by the EU, there would be a 'race to the bottom' over of the treatment of asylum applicants, with member states adopting ever stricter policies so as not appear a 'soft touch'. Commitments were made at the special EU justice and home affairs summit in Tampere, Finland, in October 1999, where governments and the Commission promised they would listen to refugee and human rights groups and safeguard the right to asylum. So what happened?

Asylum policy

The EU's asylum policy is now dictated by a complex series of Directives and Regulations covering temporary protection (2001/55/EC), reception conditions (2003/9/EC), responsibility for asylum-seekers ('Dublin II', 2003/343/EC) and the definition and content of refugee status (agreed text in 7944/04).

Critically, however, the EU failed to adopt the asylum procedures Directive before the 1 May deadline, though it has agreed the 'general approach' (8771/04). These new rules have serious implications for people seeking asylum in Europe.

Primarily, the EU asylum rules need to be seen in the wider context of more and more measures seeking to prevent authorised, undocumented, irregular and 'illegal migration' into the EU (see further below). These measures make no provisions for people trying to reach the EU in order to seek asylum so genuine refugees are forced into the world of false documents, 'traffickers' and organised crime. Rather than incorporate rules on entry for the purpose of

seeking asylum into EU immigration and asylum law, the EU has plumped for criminalisation, with overbroad definitions in EU criminal law of 'facilitating illegal entry and residence' and 'trafficking in human beings', even going as far as adopting EU legislation on rewarding asylum applicants and other 'victims' with residence permits if they cooperate with the police (by informing).

A decision to create an EU 'temporary protection' (TP) regime does not even provide for lawful entry into the EU, so on the one hand the EU is saying that crises on the EU's doorstep like Kosovo warrant special measures (i.e. a greatly restricted form of protection for a set period only) but on the other hand is taking measures to prevent the entry of the very people taking flight. The TP Directive also encourages the grant of temporary protection as an alternative to refugee status (for alternative forms of protection, read fewer rights). This is indicative of how EU asylum law as a whole has developed: refugees and asylum-seekers derive their rights from the refugee Convention (which only ever envisaged 'temporary' protection) and the European Convention on Human Rights (ECHR). Rather than enshrining these minimum standards into EU law, the Council has incorporated all the methods used by the member states to limit, restrict and undermine these rights. In doing so, it lowered many of standards proposed by the Commission, and enshrined the worst of the soft-law developed under the unaccountable Trevi framework more than a decade ago.

Illegal, inadmissible and accelerated

Asylum-seekers arriving or 'intercepted' at the EU's external borders (including airports) are likely to be told to declare their intention to apply or jeopardise any future application; they may also be told that without adequate documentation, they are not entitled to enter. Applications for asylum made at the border are then subject to 'special', accelerated procedures (for special and accelerated, read fewer rights). If applicants are deemed to have transited through a 'safe third country' they may also be liable for immediate return - readmission agreements, the Dublin Convention and Schengen border manual all potentially encourage illegal refoulement. Arrivals are also checked.

Next, EU law has enshrined a number of highly dubious policies that allow the application to be deemed inadmissible. First, applicants for asylum are subject to the Dublin Convention (updated and replaced by new a EC Regulation) under which the state responsible for the entry of the asylum-seeker is responsible for their application. As ECRE and others point out, this 'clearly has the result of shifting the greater responsibility for asylum applications to those States with extended land and sea borders in the south and east - the principal migration entry points'. This means that those countries with the most under-developed asylum infra-structures in the EU (particularly the acceding states) are liable to greater responsibility - so much for the principle of solidarity between member states, one of the main principles of EU law.

'Safe countries'

Second, EC law has enshrined the 'safe country of origin' concept in EU law, allowing member states to declare applications from certain nationals or regions as 'manifestly unfounded', having the effect of forcing the majority of member states who do not currently apply this principle to lower their standards. Third, the Directive on refugee status (see feature in this issue) also allows people who could have sought 'protection in the region' to be denied protection. This includes, for example, Palestinian refugees (who receive 'UN protection'), and also allows the member states to designate parts of countries safe (i.e. the Kurdish autonomous region could be declared safe for Iraqi Kurds). Fourth, the Directive also asserts that risks to which a population (or section of it) are generally exposed do not normally warrant international protection. This is hotly contested in relation to refugees, since racial, religious or ethnic wars may involve sections of or sometimes whole populations (Tutsis in Rwanda, Tamils in Sri Lanka, Muslims in Bosnia, all Somalis during the clan-based wars). It is even more

hotly contested in the field of subsidiary protection, where the only thing that matters is the reality of the risk of harm. All of these exclusions undermine a fundamental principle of the refugee Convention: the obligation that each application must be considered on its own merits.

Conditions for asylum-seekers

For those applications that are deemed admissible, the EU has gone to great pains to define the types of persecution that produce refugees. But what it gives with one hand, it takes away with the other, encouraging a continuation of the standard national practise of granting 'temporary' or 'subsidiary' forms of protection in place of full refugee status in the majority of cases (for 'temporary' or 'subsidiary' read fewer rights). The Directives fail to take seriously the fact that for a refugee, 'temporary' is essentially a state of limbo, in which people are often forced 'underground' in order get on with their lives.

Applying for asylum is already an horrific ordeal in most of the member states. Taken together, the EC Directives on reception conditions, asylum procedures and temporary protection allow the member states to detain asylum-seekers in 'processing centres', to order applicants to stay in a specific place, to provide demeaning vouchers rather cash to destitute applicants, to restrict access to health-care to emergency treatment only, to prevent asylum-seekers working, to limit schooling for children to education in accommodation centres, and to limit the situations in which individuals can be reunited with a family members. The procedures Directive will allow the member states to limit the right to a personal interview and services of a qualified interpreter, cut entitlement to free legal assistance during all stages of procedures and fails to guarantee the right to a suspensive appeal against a negative Decision. If an appeal does not have the affect of suspending proceedings (especially expulsion orders) it is useless. There is no guarantee that the applicant will even know what is going on: the member states are only obliged to provide information 'in writing and as far as possible, in a language that the applicants may reasonably be supposed to understand'.

Finally, if a person in need of protection surmounts the obstacles placed in their way by national and EC law and obtains refugee status, the Directives 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. The draft procedures Directive still permits access to a court or tribunal, but 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.

The Commission has, as usual, done its best to apologise for the member states, pointing out that the new 'level playing field' leaves member states free to introduce or retain more favourable standards of protection. As the article on p17 points out, this 'an option likely to be taken up only by the Shetland Islands if they gain independence from the UK'.

Registration and surveillance

To prevent 'multiple applications' and to enforce the Dublin Convention, a central EU database containing the fingerprints of all applicants for asylum has been created. The 'Eurodac' Convention had been agreed in 1988 but the Council decided to wait and adopt the text as an EC Regulation (2000/2725/EC) after the entry into force of the Amsterdam Treaty, mainly to avoid a lengthy ratification process in the national parliaments. During the latter stages of the negotiations it was agreed to reduce the age limit for inclusion from eighteen to fourteen-year olds and extend the scope of the database to checks on illegal immigrants.

Eurodac went online on 15 January 2003, in its first year of operations it recorded the fingerprints from a total of 246,902 asylum applications. Importantly, the Eurodac Convention led to the creation of national fingerprint databases in all the member states, many of which have a wider purpose. UK police and immigration services are now equipped with hand held scanners to conduct spot checks for people subject to deportation or criminal proceedings. In Sweden there have been horrific media reports of immigrants mutilating their fingers to render their fingerprints illegible to the new technology with scars from deliberate cuts or burns (ref). After the terrorist bombings in Madrid on 11 March 2004, EU law enforcement agencies renewed their calls for access to the data held on Eurodac, a position apparently supported by the Commission despite its incompatibility with EC law.

Eurodac complements the Schengen Information System (SIS), which went online in 1995. Member states can put records on failed asylum-seekers and illegal immigrants in the SIS under Article 96 of the Schengen Convention and by March 2003, the member states had registered a total of 780,922 people. The EU has now agreed on the creation of SIS II, which will contain more types of data on more people for more purposes; the Commission has conspired with the Council to develop the new database under a veil of secrecy. SIS II will share a technical platform with a new EU Visa Information System (VIS) - a database containing the personal information from every visa application (irrespective of whether the visa was issued or the application refused). VIS will have a 'capacity to connect at least 27 Member States, 12,000 VIS users and 3,500 consular posts worldwide'. A favourable feasibility study has been completed, based on the 'assumption that 20 million visa requests would be handled annually'. Again, key issues have been shielded from public scrutiny by the Council and Commission. The scope and function of VIS were set out in Council conclusions but no details were included in the subsequent Commission proposal on creating VIS. It is also proposed that 'biometrics' (facial scans and fingerprints) should be incorporated into VIS and SIS II (Eurodac already contains biometrics). The Commission has also made proposals on the inclusion of biometrics in residence permits, visas and passports. In April, the EP voted to reject the VIS proposal and decided leave its opinion on the proposals on biometrics for the next Parliament, saying that the 'European Parliament is not in a position to endorse the proposals... as long as the commission does not put its cards on the table and fully inform us of its strategy. We need proper democratic scrutiny of this far-reaching legislation...'

Expulsion policy

There is an obvious if often unwritten link between the EU's policy on registering and placing immigrants under surveillance and its expulsion policy - checks and restrictions on refugees, asylum-seekers, visa residents and third-country nationals are implicitly tied to removing them from the EU and preventing their return. Expulsion policy under Amsterdam began with the French presidency 'crackdown' on illegal immigration during its presidency of the EU in the second half of 2000. This included a draft Directive on the EU wide enforcement of expulsion decisions - an expulsion Decision by one member state now effectively applies EU-wide. The adopted Directive (2001/40/EC) promises an appeal, but again it promises to be non-suspensive. The EP also voted to reject this Directive, the Council simply ignored its position. The EP later voted to reject a supplementary Decision on the reimbursement of costs for expulsions carried out on behalf of another member state.

In April 2002 the Commission produced a consultation document on an EU expulsion policy, though the policy options presupposed the fundamental question of whether the EU should even have a common policy (it had been not been included in the Amsterdam or Tampere proposals). Before the consultation period had finished, one important part of the Green Paper was already implemented, when the Council agreed on extending the policy of pursuing readmission agreements with non-EU states to enable returns and expulsions; Germany also proposed a Directive on assistance in cases of expulsion by air. Under the adopted Directive

(2003/110/EC) each member state will automatically have to accept the word of the state requesting assistance that there is no risk of torture, death or other inhuman or degrading treatment when carrying out returns for another (the draft Directive at least required the officials of the requesting state to tick a box assuring them this was the case). The Commission has recognised the need for 'a clear legal basis for the continuation of the removal operation initiated by another Member State, in particular if the use of coercive force is unavoidable' but has failed to come up with standards to ensure human rights are respected. By the end of 2002, the Council had also agreed two Action plans on expulsion, including one on 'safe and dignified return' to Afghanistan (despite huge doubts that it is safe to return people to this country).

Italy marked the start of its Presidency of the EU (July 2003) with two more proposals on expulsion, one on transit for expulsion by land or sea, and the one on joint EU expulsion flights. The land and sea Directive was dropped (though the Council still adopted the main provisions of the Italian proposal in the form of 'soft-law' Council conclusions), but the Decision authorising joint expulsion flights, which are prohibited under a protocol to the ECHR, was adopted just before the 1 May deadline (6379/04). For what it was worth, the European parliament voted to reject the proposal, its report describing 'collective returns' as 'a deplorable practice'.

Visa policy, Common Consular Instructions and Border Manual

The EU's visa policy is based on a common list of countries whose nationals do not require a visa for short-stays (the so-called 'white list') and a set of 'Common Consular Instructions' (CCI) setting out rules on the application procedure and the grant of the visa. The EU's first 'negative list' of countries requiring a visa to enter the EU (the 'blacklist') was agreed under the Maastricht Treaty in 1995, imposing a visa requirement on 98 countries in Africa, central America, the Middle East, Asia, Eastern Europe and the Southern caucasus. However, the European Parliament successfully sued the Council to annul the measure because it had not been properly consulted.

The legal effect of the 1995 Regulation was preserved until the institutions could adopt a replacement. This they did in 1999, adopting an almost identical text. In January 2000, the Commission drafted a replacement which it revised later in the year following a critical report by the European Parliament. For the first time, the adopted Regulation (2001/539/EC, from which the UK and Ireland 'opted-out') included a 'white list' of 44 countries whose nationals are exempt from the visa requirement (these are central European, Australasian countries, North and some South American countries, Japan, Israel and several others); leaving the rest of the world on the 'blacklist'. There was no objective study to see whether the third countries on the 'negative' list should be there according to the criteria set out by the Regulation, and there is no commitment to review the Regulation (though the Council may amend the list).

In 2001, the Council adopted two Regulations, giving itself sole responsibility for amendment of the Common Consular Instructions (CCI) on visa issue (2001/789/EC) and Common manual on border controls (2001/790/EC) drawn-up in the Schengen framework. This excluded both the Commission and Parliament from further decisions. The EP voted to reject the draft Regulations, while the Commission lodged an application with the Court of Justice to have them annulled. The Advocate General's opinion released last month (Case C-257/01) suggests the ECJ will rule that the Regulations are invalid, along with various amendments to the border and visa rules subsequently adopted by the Council under the terms of these regulations.

Towards an EU Border police

A long awaited draft EC Regulation on the establishment of an EU Border Management Agency was also produced by the European Commission during the Italian presidency. The proposal (EU) aims to provide a basis for the long-term development of an EU Border Police. In context, however, the draft Regulation appeared little more than a window dressing exercise, giving a

'legal basis' to the ad hoc development of a whole host of operational bodies and measures that were already in place. A 'Common Unit' of external border practitioners had already been created in June 2002, reporting to the EU Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). Under the supervision of the Common Unit and well before the draft Regulation was tabled, the EU was setting-up 'operational-coordination centres' on land borders, sea borders and airports; a Risk Analysis Centre and a conducted a number of joint operations using EU funds.

From buffer states to global controls

Under the Amsterdam Treaty the EU has also continued its policy of incorporating migration issues into its dealings with third countries. The buffer state approach of the early 1990s is being extended to a new 'circle of friends', part of preparations for the expansion of the EU to the east and south-east and the full accession of existing buffer states. The 'global approach' to migration control, proposed in the notorious Austrian presidency strategy paper of July 1998, and developed in the Action Plans of the High Level Working Group is now a central tenet of EU policy. The shadowy world of liaison officers posted to third countries has been given an EU legal basis and the policy of using aid and trade to secure readmission agreements under the Lome Convention is being extended to more general 'migration management clauses'.

Whether EU financial assistance extends to the establishment of 'reception centres' for illegal immigrants and off-shore 'processing centres' for asylum applicants remains to be seen. These ideas are at the heart of the UK governments 'new vision for refugees', leaked to the press in January of last year. While the EU has distanced itself from the controversial proposals, which would spell the end of any meaningful refugee protection in the EU, the draft constitution ominously includes a provision on 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'.

Conclusions

EU asylum law can only claim to improve on the least developed asylum systems of the EU member states. It has also not only failed to prevent a 'race to the bottom' in the treatment of refugees, but encouraged member states to enter into such a race, guaranteeing that the 'lowest common denominator' will be the standard for asylum systems in the ten new EU states. The Commission has naively suggested that at least the legislation can be 'improved', assuming that the EU will announce a raft of proposals improving the lot of asylum-seekers at some point in the future. The consultation process may have been a model exercise in lobbying by NGOs, but also demonstrates the extent to which the Council has no intention of listening. 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.

Consultation of the European Parliament has been minimal, and its views were all but completely ignored. The Council has so far failed to win the EP's support for a number of its key initiatives - expulsion, VIS, biometrics - while the Commission's role seems to be one of following the instructions of the JHA Council, rather than impartial interpretation of the Treaties. EU legislation developing the Schengen Common Consular Instructions on visa issue and Common Border Manual are likely to be annulled by the ECJ.

Tampere promised an end to the Fortress Europe of asylum policies based on detention, denial and deterrence. The next five years showed these promises to be false, enshrining these principles and developing an ever more sophisticated framework for the registration, surveillance and expulsion of immigrants and refugees (controls, incidentally, that will

increasingly employed for general surveillance purposes). Meanwhile, the buffer-state policy now extends to global controls, cementing the neo-colonial relationships between western nations and the 'developing world'.

Three new issues have now emerged. Firstly, calls for 'off-shore protection' and 'protection in the region' are unlikely to go away. Second, we can expect increasing discussions about the need for the temporary, regulated entry of highly skilled and unskilled immigrants to do the work EU citizens are unable or unwilling to do. The racist tone of the debate and restrictions on economic migrants from the ten EU countries has set the tone for any future policy. Finally, under the guise of tackling terrorism, we can expect demands that data collected by the EU on visa and asylum applicants and 'illegal' migrants be shared with the US, Canada, Australia and other nations.

From the 1 May 2004, the European Parliament has co-decision on key issues, including those policies that current parliament has opposed. At the same time, voting in the Council switches to qualified majority on key matters, limiting the kind of principled resistance shown by the Scandinavian countries on important issues. However, despite missing the deadline for agreement on the crucial asylum procedures Directive, the Council has decided that because it has agreed the general approach, it need only 'reconsult' the new parliament. The draft EU constitution promises more powers still for the EP but control over 'operational issues' such as border controls and databases will remain in the hands of the Council and national governments. A lot will certainly depend upon how the new parliament uses its new powers where controversial EU policies are concerned. This in turn depends upon the EP elections in June, which may return an even larger conservative majority.

This article by Ben Hayes first appeared on Statewatch bulletin, vol 14 no 2 (March-April 2004)