



Statewatch Analysis

The Revised Directive on Asylum-seekers' Reception Conditions:

How much lower can the Member States go?

Steve Peers

Professor of Law, Law School, University of Essex

Introduction

As part of the project to create a 'Common European Asylum System', the EU adopted legislation between 2003 and 2005 on four key issues: the definition (ie, 'qualification') for refugee status; asylum procedures; reception conditions for asylum-seekers; and responsibility for asylum-seekers (ie the 'Dublin' rules, which in principle require asylum-seekers to apply in one Member State only, which is determined by those rules).

These measures were considered to form the 'first phase' of the Common European Asylum System, and the EU's Hague Programme, which set out an agenda for the development of EU Justice and Home Affairs Law from 2005-2010, set the objective of adopting legislation establishing the second phase of the Common European Asylum System by 2010. This deadline was later extended to 2012, but obviously even this later deadline will soon expire.

The European Commission then tabled in 2008 and 2009 proposals to revise all of the four key measures referred to above. The European Parliament (EP) and the Council agreed in mid-2011 on the revision of the Qualification Directive, which was then officially adopted in November 2011. However, the Council had difficulty agreeing on how to revise the other rules, and in particular agreeing on the proposals relating to reception conditions and asylum procedures. So the Commission tabled amended proposals on those two issues in June 2011 in order to restart discussions.

In the June 2011 Statewatch analysis of these proposals, it was argued that taken as a whole, the amended proposals would not require Member States to raise their standards very much, in particular to the extent that raising those standards would cost money. If these Directives were adopted as then proposed, the second phase of the Common European Asylum System would therefore look a lot like the first phase. There would be largely cosmetic

changes to the current inadequate standards. To borrow President Obama's phrase, this would be like putting 'lipstick on a pig'.

What has happened since then? While discussions on the asylum procedures proposal are apparently still moving slowly, in February 2012, the Danish Council Presidency tabled a proposed compromise draft of the revised reception conditions Directive to the Member States' representatives to the EU (known as 'Coreper'). It is not known yet whether a sufficient number of Member States agreed to this proposal (a qualified majority of participating Member States is needed), and in any event, the text will still have to be agreed with the EP, since the EU's ordinary legislative procedure (previously known as the 'co-decision' procedure) applies to the adoption of this text. Nevertheless, this seems an opportune point to consider the current state of negotiations on this proposal within the Council.

The reception conditions Directive

'Reception conditions' are the rules which apply to asylum-seekers when their claims for asylum are being considered, other than the rules related to their asylum claim as such. They include rules on access to health care, housing, employment, social assistance and education.

The current EU rules on this subject are set out in Directive 2003/9 (the '2003 Directive'), which applies to all Member States except Denmark and Ireland. The UK has opted out of the 2008 proposal (as revised in 2011) to amend these rules, but the 2003 Directive will continue to apply to the UK regardless.

The Commission proposal of 2011 compared to the 2008 proposal

As noted in the previous Statewatch analysis, the key changes in the 2011 version of the Commission's proposal as compared to the 2008 proposal are as follows:

- a) the Directive would explicitly apply to asylum-seekers within the Member States' territorial waters (Article 3);
- b) as regards detention (Article 9), there is less detail concerning time limits for detention; it will be possible for administrative authorities to order detention; and there will be no requirement to inform asylum-seekers of the maximum period of detention;
- c) as regards detention conditions (Article 10), it will be possible to detain asylum-seekers in prisons, and other exceptions to basic standards will be permitted;
- d) as regards vulnerable asylum-seekers (Article 11), derogations will be permitted from the obligations to permit children to play (there is no equivalent exception in the EU's Returns Directive), to require privacy for

detained families, and to detain female asylum-seekers separately from unrelated male asylum-seekers;

e) access to the labour market for asylum-seekers could in some cases be delayed for up to a year, rather than six months (Article 15);

f) it is now clear that equal treatment compared to nationals as regards social assistance will not be required (Article 17);

g) the requirement for equal treatment with nationals as regards health care has been dropped (Article 19); and

h) it will now be possible to withdraw reception conditions entirely, and in a greater number of cases (Article 20); and there will no longer be an obligation to ensure the basic subsistence of asylum-seekers in all such cases.

While Member States will still be free to set higher standards for asylum-seekers (Article 4), almost all of the key changes in the 2011 version of the proposal lowered standards as compared to the 2008 proposal.

The more significant changes were: the reduction in the requirements as regards social assistance and health care; the possible complete withdrawal of support for asylum-seekers; the lowering of detention standards, most notably as regards the possible detention of asylum-seekers in prisons (there is still no maximum time-limit to their detention, unlike the time-limits for detaining other immigration detainees set out in the EU's Returns Directive).

The Commission proposal of 2011 compared to the 2003 Directive

Despite this reduction in standards, the 2011 proposal would still have made some changes to the 2003 Directive. In particular:

a) the Directive would be extended to persons who apply for subsidiary protection status, not just (as at present) applicants for refugee status (Article 3(1) of the proposal). However, the impact of this change would be limited, since most applicants either apply for refugee status first or for both types of status simultaneously, and anyway most Member States apply the 2003 Directive to applicants for subsidiary protection anyway.

b) the definition of family members would be amended, to drop the requirement of dependence for children, and to add some married minor children and siblings to the definition (Article 2(c) of the proposal);

c) the Directive would explicitly apply to applications made in Member States' territorial waters or transit zones (Article 3(1) of the proposal);

d) a new clause (Article 6(6) of the proposal) would ban documentation requirements for asylum-seekers to obtain benefits;

e) a general power to restrict asylum-seekers' free movement would be dropped (Article 7(3) in the 2003 Directive), and detailed rules on detention of asylum-seekers would be added (Articles 8-11 of the proposal);

f) the rules on education would be strengthened (Article 14 of the proposal; compare to Article 10 of the 2003 Directive), to reduce a possible waiting period for access to education, add a requirement for Member States to provide for preparatory classes and oblige Member States to offer an alternative form of access to education if access to the regular education system is not possible.

g) the rules on access to employment (Article 15 of the proposal; compare to Article 11 of the 2003 Directive) would: cut the 12-month maximum wait for access to employment down to 6 months, subject to two exceptions inserted into the 2011 version of the proposal; drop a clause requiring some waiting period to be applied for access to employment; also drop a clause concerning priority in access to employment for EU citizens, et al; drop the condition that access to employment would only have to be granted if the Member State authorities had failed to make a decision within the waiting period; and require effective access to the labour market;

h) the rules on social welfare (Article 17 of the proposal; compare to Article 13 of the 2003 Directive) would add a new Article 17(5), which would require Member States to establish a point of reference for social welfare for asylum-seekers, although this can be lower than the rate of social assistance for nationals, if 'duly justified';

i) the rules on 'modalities' for social welfare (Article 18 of the proposal; compare to Article 14 of the 2003 Directive) would: add a reference to transit zones; add a cross-reference to the detention rules, and references to counsellors, NGOs and family members; insert a new clause on taking account of specific situations; and include stronger provisions on violence and assault;

j) the rules on health care (Article 19 of the proposal; compare to Article 15 of the 2003 Directive) would: add references to post-traumatic disorders and mental health;

k) the rules on withdrawing or reducing reception conditions (Article 20 of the proposal; compare to Article 16 of the 2003 Directive) would: clarify the rules on repeat applications; drop a clause on a possible request for a refund of benefits; drop the possibility of abolishing benefits if an application was not made 'as soon as possible'; and ensure that all health care (not just emergency care) must be retained as a minimum even if benefits were otherwise withdrawn;

l) the rules on vulnerable groups (Article 21 of the proposal; compare to Article 17(1) of the 2003 Directive) would add 4 categories of persons to the list of such groups; there would also be a more elaborate clause on the

identification of persons with special needs (Article 21 of the proposal; compare to Article 17(2) of the 2003 Directive);

m) the rules on minors (Article 23 of the proposal; compare to Article 18 of the 2003 Directive) would: add a new sentence on minors' standard of living; add new details on the best interests of the child; insert a requirement concerning access to leisure; and add a qualification to the rule that minors should stay with their family members;

n) the rules on unaccompanied minors (Article 24 of the proposal; compare to Article 19 of the 2003 Directive) would: clarify some points regarding the role of representatives; add a requirement that accommodation with adults must be in the best interests of the child; improve the rules on tracing of parents; and require continuing training of those working with unaccompanied minors;

o) the rules on torture victims (Article 25 of the proposal; compare to Article 20 of the 2003 Directive) would add a reference to rehabilitation and to training of persons who work with them;

p) the rules on appeal (Article 26 of the proposal; compare to Article 21 of the 2003 Directive) would clarify the scope of the right to appeal, require a review of both facts and law and strengthen the right to legal aid; and

q) the rules on guidance of national authorities (Article 28 of the proposal and the annex; compare to Articles 22 and 23 of the 2003 Directive) would require Member States to provide additional information on the application of the Directive.

The 2012 draft compromise

As compared to the 2011 version of the proposal - already significantly weaker than the 2008 version of the proposal - the 2012 compromise put forward by the Danish Council Presidency would set lower standards. In particular:

a) the changes to the definition of family members (Article 2) would be cut back, so that only parents of unmarried minors would be added to the definition;

b) the proposed new clause (Article 6(6)) banning documentation requirements for access to benefits would be dropped;

c) there would be several additional grounds to detain asylum-seekers (Article 8(3));

d) there would be less precise obligations as regards judicial review of detention (Article 9(2));

e) there would be more exceptions to the right of legal aid regarding detention (Articles 9(7) and (8));

f) as for detention conditions (Article 10), prison detention would no longer be a temporary exception and the requirement of separate detention from other immigration detainees would be dropped;

g) regarding detention of vulnerable persons (Article 11), there would no longer be a rule against their detention in principle, just a requirement to take their position into account; the guarantees concerning detention of minors would be shorter, and the rule requiring release in principle would only apply to unaccompanied minors; and all of the exceptions proposed by the Commission as regards children's play, women's safety, and privacy would be retained;

h) access to employment would depend again on whether the State authorities had failed to take a decision on the application within the waiting period (Article 15, as revised in annex II of the Council document);

i) there would be greater elaboration of the grounds for unequal treatment as regards social welfare (Article 17(5));

j) the specific reference to post-traumatic disorders would be dropped as regards health care (Article 19(1));

k) it would again be possible to reduce (but not refuse) benefits because an asylum-seeker had not applied for asylum immediately (Article 20);

l) the rules on vulnerable persons (Article 21) would be revised to refer to serious illness or mental disorder more generally;

m) there would not be a requirement to take account of the background of minors (Article 23(2)(b));

n) the reference to rehabilitation services for torture victims would be dropped (Article 25); and

o) the rules on access to legal aid (Article 26(2) to (4)) would be revised to allow for additional exceptions, including for a prior review by a legal aid board on the chances of success of the planned action.

If the 2012 proposal for a compromise text were accepted, how much would the resulting Directive change the *status quo*? The extension of the rules to applicants for subsidiary protection would not really change much, for the reasons explained above. There would be a very limited extension of the definition of 'family members'. The application of the Directive to territorial waters and transit zones just confirms the correct interpretation of the current Directive. Asylum-seekers could arguably still be subject to documentation requirements.

Any rules on detention would be an improvement on the current brief reference to this issue in the EU asylum legislation, given that the EU's Returns Directive (including its rules on detention) does not apply to asylum-seekers (see the judgment of the Court of Justice in Case C-357/09 *Kadzoev*). But there would be a large number of grounds to detain asylum-seekers and some disturbing possibilities for exception as regards women's safety, families' privacy and children's play, along with an unfortunate weakening of the proposed rules on the obligations not to use prisons and to release all children from detention in principle. The rules on legal aid and judicial review have also been weakened. Crucially, unlike the Returns Directive, there would be no time limits on the detention of asylum-seekers. While the proposed asylum procedures directive would place Member States under a time limit to make a decision on applications, it would also allow for many exceptions to this rule, including the possibility in some cases of putting a decision off indefinitely - and therefore detaining an asylum-seeker indefinitely.

The rules on access to education would be strengthened, and the 2012 compromise would not weaken the 2011 proposal on this point. There would be some improvement in access to employment, in particular with a shorter waiting period in principle, but with a significant condition placed on this possibility and furthermore the possibility of an extra waiting period - surely now unjustified in light of the condition to be placed upon access after the initial six months' wait. More asylum seekers would therefore depend on social welfare for a longer period, but the rules on the level of social welfare would not improve much. Moreover, the possibilities to withdraw or reduce benefits would only be modestly curtailed. The clarifications on vulnerable persons and minors would be useful, but would not amount to huge changes. Finally, the rules on appeal would be improved in some respects, but the effect of this would be undercut by extensive limitations on the right to legal aid.

So while an agreement on this Directive would doubtless be 'sold' or 'spun' as a further step towards developing the second stage of the Common European Asylum System, the initial assessment of the June 2011 proposals - that the EU would simply be putting 'lipstick on a pig' - would only be confirmed even more strongly if the 2012 compromise is agreed.

If the Council does accept this compromise, it will remain to be seen whether the European Parliament will consider it acceptable to have a 'deal at any cost', or whether it will take the opportunity to press for much needed improvements concerning issues such as access to benefits without documentation, detention conditions, grounds for and time limits for detention, legal aid, subsistence and health care, and vulnerable asylum-seekers.

February 2012

Sources

Directive 2003/9:

<http://www.statewatch.org/news/2011/jun/eu-oj-2003-L-31-reception.pdf>

COM (2008) 815 - initial proposal:

<http://www.statewatch.org/news/2011/jun/eu-com-815-2008-reception.pdf>

COM (2011) 320 - amended proposal:

<http://www.statewatch.org/news/2011/jun/eu-com-2011-320-reception.pdf>

Statewatch analysis, June 2011: 'lipstick on a pig'

<http://www.statewatch.org/analyses/no-132-asylum.pdf>

Proposed 2012 compromise:

Council document 6394/1/12, 20 Feb. 2012:

<http://www.statewatch.org/news/2012/feb/eu-council-reception-6394-rev1-12.pdf>

© Statewatch ISSN 1756-851X. Personal usage as private individuals/"fair dealing" is allowed. We also welcome links to material on our site. Usage by those working for organisations is allowed only if the organisation holds an appropriate licence from the relevant reprographic rights organisation (eg: Copyright Licensing Agency in the UK) with such usage being subject to the terms and conditions of that licence and to local copyright law.