HOUSE OF LORDS

European Union Committee

1st Report of Session 2009–10

Asylum directives: scrutiny of the opt-in decisions

Report

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The European Union Committee

The European Union Committee of the House of Lords considers EU documents and other matters relating to the EU in advance of decisions being taken on them in Brussels. It does this in order to influence the Government's position in negotiations, and to hold them to account for their actions at EU level.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

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The Members of the Sub-Committee which conducted this inquiry are listed in Appendix 1.

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Introduction

1. The present scrutiny reserve resolution of the House governing the circumstances in which Ministers of the Crown may give agreement to European Union proposals for legislation[1] does not in terms cover the circumstances in which the Government decides whether or not to opt in to a proposal for legislation, even though such a decision is arguably at least as important as agreement on the final text of the proposal.

2. In anticipation of the entry into force of the Treaty of Lisbon, in April 2008 this Committee invited its then Chairman, Lord Grenfell, to discuss with the then Leader of the House, Baroness Ashton of Upholland, a new procedure for improving the scrutiny of legislation subject to the United Kingdom's opt-in. On 9 June 2008 Baroness Ashton placed in the Library of the House a "Statement on JHA Opt-ins" agreeing on behalf of the Government to an enhanced scrutiny process for opt-in legislation. That Statement is printed in Appendix 2.[2]

3. This report, prepared by Sub-Committee F,[3] considers two recent Commission proposals for changes in the Common European Asylum System. Both will apply to the United Kingdom only if the Government decides to opt in. It is the first report to be made after the entry into force of the Treaty of Lisbon, and hence under this new procedure.

The Treaty background

4. In earlier reports on the United Kingdom opt-in we have explained at some length the distinction between first pillar legislation under Title IV of the Treaty establishing the European Community (TEC), where the United Kingdom opt-in applied, and third pillar legislation under Title VI of the Treaty on European Union (TEU), which was not subject to a United Kingdom opt-in.[4] Since the entry into force of the Treaty of Lisbon on 1 December 2009 that distinction no longer applies. The first and third pillars have been merged, and all legislation within the area of freedom, security and justice (AFSJ) will now be made under Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU). This includes legislation on policies on border checks, asylum and immigration (Chapter 2 of Title V); judicial cooperation in civil matters (Chapter 3); judicial cooperation in criminal matters (Chapter 4); and police cooperation (Chapter 5).

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1 See the European Union Committee's *Annual Report 2009* (23rd Report, Session 2008–09, HL Paper 167), Appendix 2.

2 A fuller explanation of the negotiations leading up to agreement on this enhanced scrutiny process is contained in our report *Enhanced scrutiny of EU legislation with a United Kingdom opt-in* (2nd Report, Session 2008–09, HL Paper 25).

3 The members of the Sub-Committee are listed in Appendix 1.

4 See e.g. *The United Kingdom opt-in: problems with amendment and codification* (7th Report, Session 2008–09, HL Paper 55), paragraphs 1–5.

5. For all substantive AFSJ legislation, Commission proposals will be subject to what is now called the ordinary legislative procedure: codecision between the European Parliament and the Council, which acts by a qualified majority. None of this legislation will apply in the United Kingdom unless it exercises its opt-in.[5]

The Common European Asylum System (CEAS)

6. Following the entry into force on 1 May 1999 of the Treaty of Amsterdam, which granted the Community competence in asylum and immigration matters,[6] the European Council met in Tampere in October 1999 to prepare the first five-year policy programme for justice and home affairs, and agreed to develop a Common European Asylum System (CEAS). To achieve this, the Council adopted between 2000 and 2005 the following measures, which constituted the first phase of legislation:

- the EURODAC Regulation,[7] establishing a fingerprint database to assist in the identification of asylum seekers (December 2000);
- the Temporary Protection Directive,[8] on minimum standards for providing temporary protection in the event of a mass influx of displaced persons (July 2001);
- the Reception Conditions Directive,[9] laying down minimum standards for the reception of asylum seekers (January 2003);
- the Dublin II Regulation,[10] determining which Member State has jurisdiction to examine and decide an asylum application (February 2003);
- the Qualification Directive,[11] laying down minimum standards for qualification and status as either a refugee or a beneficiary of subsidiary protection (April 2004); and
- the Asylum Procedures Directive,[12] laying down minimum standards on procedures for the granting and withdrawing of international protection (December 2005).

The Committee considered and reported on all of the proposals which preceded these measures in a series of four reports published in 2001 and 2002.[13]

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5 i.e. unless within three months of a proposal being presented to the Council the United Kingdom notifies the President of the Council in writing that it wishes to take part in the adoption and application of the proposed measure: Article 3 of the Protocol on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

6 TEC Title IV, Article 63 (visas, asylum, immigration and other policies related to the free movement of persons).

7 Regulation 407/2002 on the creation and operation of a database of fingerprints of asylum seekers.

8 Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced people and measures to promote a balance of effort between Member States.

9 Directive 2003/9/EC on minimum standards for the reception and support of asylum seekers.

10 Regulation 343/2003 determining the State responsible for examining an application for asylum.

11 Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals as refugees or as persons otherwise in need of international protection.

12 Directive 2005/85/EC on minimum standards for granting and withdrawing refugee status.

13 See *Minimum Standards in Asylum Procedures* (11th Report, Session 2000–01, HL Paper 59); *Minimum Standards of Reception Conditions for Asylum Seekers* (8th Report, Session 2001–02, HL Paper 49); *Asylum Applications—Who Decides?* (19th Report, Session 2001–02, HL Paper 100); *Defining Refugee Status and those in need of International Protection* (28th Report, Session 2001–02, HL Paper 156).

7. In November 2004 the Council agreed the Hague Programme,[14] the second five-year programme which set out the future development of justice and home affairs policy for the period 2005 to 2009. It stated that the second phase of the CEAS should be completed by the end of 2010[15] by adopting proposals to amend the first-phase measures, following a review of those measures to be conducted during 2007. An evaluation of the first-phase measures was duly carried out and the Commission published a Policy Plan on Asylum[16] in June 2008 which announced the amendments that were to be made.

The first three second-phase proposals

8. In December 2008 the Commission put forward proposals for replacing the two instruments making up the Dublin system (the Dublin II and EURODAC Regulations)[17] and the Reception Conditions Directive.[18] We considered in our report *The United Kingdom opt-in: problems with amendment and codification*[19] the problems which would arise if the United Kingdom did not opt in to these instruments in their revised form.

9. It was generally accepted that if the second phase measure was an amendment of the first phase measure, and the United Kingdom did not opt in to the amending measure, the first phase measure would continue to apply in the United Kingdom. What was at issue was whether the same would happen if, as is the case, the change is to be made by altogether repealing and replacing the first phase measure. Our view, contrary to that of the Home Office, was that, because the repeal was to be made by a provision of an instrument not applying in the United Kingdom, the first phase measure would continue to apply.

10. The Government did not opt in to the proposal to repeal and replace the Reception Conditions Directive. In our view the result will be that, when the new Directive is adopted and comes into force for 24 Member States,[20] the Directive in its current form will continue to apply in the United Kingdom. We have recently received from the Commission a response to our earlier report in which they emphatically agree with our conclusion. We reproduce

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14 [2005] OJ C 53/1. This was the subject of our report *The Hague Programme: a five year agenda for EU justice and home affairs* (10th Report, Session 2004–05, HL Paper 84).

15 That optimistic timetable has now been revised: it is hoped to complete the second phase by 2012.

16 COM(2008) 360 final.

17 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Document 16929/08), and Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No […/…] establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Document 16934/08).

18 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Document 16913/08).

19 7th Report, Session 2008–09, HL Paper 55. The measure to which we refer in this report as the "Reception Conditions Directive" is referred to in that report as the "Reception Directive".

20 The other three Member States are the United Kingdom, Ireland (which also has an opt-in), and Denmark, to which no measures in the AFSJ apply.

that response in Appendix 3.[21] We have asked Home Office Ministers for their reaction to the Commission's views, but have yet to receive a reply.

The two latest second-phase proposals

11. On 21 October 2009 the Commission put forward its proposals for the two remaining directives making up the second phase of the CEAS, and the Council circulated them on 23 October. The three month period for opting in therefore expires on 23 January 2010.

12. Because these proposals were made before the entry into force of the Treaty of Lisbon, they are based on Article 63 of the TEC, within Title IV. This will now change to the equivalent legal base in the TFEU, Article 78(2).

The Qualification Directive

13. The first of the two proposals[22] is for a revised version of the first-phase Qualification Directive, which sets out the criteria for qualifying either as a refugee or a beneficiary of subsidiary protection, and defines the rights resulting from each status. In its report on the proposal for the first-phase Directive the Committee welcomed the measure.[23]

14. We set out in Appendix 4 the Government's explanatory memorandum on the proposal for a new second-phase Qualification Directive. Their overall view is summarised in paragraph 12: "Many of the proposals in the Directive are unobjectionable from our viewpoint as we already comply with the duties that they would impose on us. However there are other proposals, as set out below, that would cause us difficulties." Paragraphs 14 to 33 give the Government's views on particular provisions, and explain their reservations about some of them.

15. The new Directive would create a uniform status for those qualifying as refugees and beneficiaries of international protection by removing Member States' discretion to limit the rights available to the latter category. We welcome this proposal, which would in any event not result in any significant changes to the rules now applying in the United Kingdom as there is already a single procedure in place for both types of claim. Furthermore the United Kingdom does not distinguish between refugees and beneficiaries of subsidiary protection in terms of their entitlements.

16. Provisions of particular concern to the Government include:

- Article 2 which would extend the definition of "family members" to include married minor children, another adult relative responsible for a minor, and minor unmarried siblings;
- Article 7 which would place on Member States the burden of demonstrating that non-State agents who may offer protection to an applicant have the will and ability to uphold the rule of law; and

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21 Our report also dealt with problems which arise in the case of codification, and the Commission's response also deals with these. We do not reproduce in Appendix 3 the parts of the response relating to codification.

22 Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Document 14863/09 + Add 1, Add 2, Add 3 & Add 4).

23 *Defining Refugee Status and those in need of International Protection* (28th Report, Session 2001–02, HL Paper 156), paragraphs 29–30.

- Articles 11 and 16 which would limit Member States' ability to cease protection if the beneficiary can demonstrate "compelling reasons arising out of previous persecution", and which the Government fear would require them to continue to offer protection to persons no longer needing it.

17. The Government, as is their custom, do not at this stage indicate whether or not they intend to opt in to the proposal. In our view it should be possible to deal with their reservations in the course of negotiations; none of these difficulties seem to us to be so significant that the Government should decline to opt in. **Accordingly we urge the Government to opt in to the proposed second-phase Qualification Directive.**

18. Moreover, if the Government do not opt in, they will face exactly the same difficulties as they now do in the case of the Reception Conditions Directive, as we have explained in paragraphs 8 to 10. They might for example find themselves applying a narrower definition of "family members" than that applicable in the rest of the EU. For that reason alone, we believe that it is not so much desirable as essential that the Government should opt in.

The Asylum Procedures Directive

19. The second of the two proposals[24] would revise the current Asylum Procedures Directive, which lays down minimum standards for the procedures for granting and withdrawing international protection. The Government's explanatory memorandum on the proposal for a new Asylum Procedures Directive is set out in Appendix 5. While the Government support the ideals of simplification of procedures and improved efficiency, they believe that the new Directive "does precisely the reverse"; they are "concerned that the proposals in this recast directive would, if adopted, work against Member States' ability to tackle abuses of the asylum system".[25]

20. The Government have particular concerns about Article 27 of the proposal, which seeks to introduce a six month time limit within which a decision must in the first instance be taken on an application for international protection, and which would also reduce the grounds on which such applications may be accelerated by Member States. They are also concerned about Article 34 which seeks to prohibit Member States from considering an application as "manifestly unfounded" where the applicant's country of origin appears on the common list of third countries which Member States are currently required to consider as being safe countries of origin. The proposal omits the provision of the 2005 Directive which allows the adoption of such a list. The Government believe that these provisions will have a detrimental effect on their ability to make what they refer to as "fast and fair" decisions through the Detained Fast Track (DFT) scheme, and will also undermine their continued use of non-suspensive appeals (NSA). We however are not persuaded that these provisions would have a significant detrimental impact on the Government's current system.

21. Although, as in the case of the Qualification Directive, the Government decline to commit themselves on whether or not they will opt in to the

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[24] Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Document 14959/09 + Add 1, Add 2, Add 3 & Add 4).

[25] Explanatory memorandum, paragraph 12.

Asylum Procedures Directive, here their objections appear to be more deep-rooted. Meg Hillier, the Parliamentary Under-Secretary of State at the Home Office, signed the explanatory memorandum on 5 November 2009. Since then her opinion seems to have hardened further. In a written statement made on 26 November in advance of the Justice and Home Affairs Council on 30 November and 1 December, the minister stated: "There will be a state of play discussion on the Common European Asylum System, which is likely to focus on the recently published asylum procedures and qualification directives … The presidency will want to gauge member states' initial reactions to the new proposals. The UK believes these directives are not necessary at this time as they undermine the migration pact[26] and will be seeking to ensure that language in these directives aligns with the conclusions in the migration pact."[27] This statement does not differentiate between the two directives, but we understand that, although opting in to the Qualification Directive is far from certain, the Government's main concerns relate to the Asylum Procedures Directive.

22. When the proposal for the first-phase Directive was under consideration by this Committee in 2001 we took evidence from, among others, the Immigration Law Practitioners' Association (ILPA), JUSTICE, and the United Nations High Commissioner for Refugees (UNHCR). They were critical of the draft. In their view some of its provisions were not compliant with the standards of the Geneva Convention and the European Convention on Human Rights, particularly the adequacy of protection provided against *refoulement*. They also raised concerns about the accelerated procedure and the use of the concepts of "manifestly unfounded applications", "safe country of origin" and "safe third country". These criticisms were all endorsed by the Committee.[28] This proposal to amend the 2005 Directive addresses our original concerns. **We therefore welcome this proposal for a revised Asylum Procedures Directive, and urge the Government to opt in to it.**

23. If the Government do not opt in, again they will in our view find themselves obliged to continue to apply the first-phase Directive in the United Kingdom while other Members States are applying the second-phase Directive. But there will be a further difficulty. The measures making up the CEAS are intended to form a coherent whole, and there are references in some of them to others of them. We have already pointed out the problems caused by the references in the Dublin II Regulation, which the United Kingdom has opted in to, to the Reception Conditions Directive, where it has not opted in,[29] and the Commission agree with us about the problems this may cause.[30] The Asylum Procedures Directive likewise contains a number of cross-references to the Reception Conditions Directive,[31] with similar potential problems.

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26 The European Pact on Immigration and Asylum, adopted by the European Council under the French Presidency on 15 October 2008.

27 House of Commons Official Report, 26 November 2009, column 98WS.

28 *Minimum Standards in Asylum Procedures* (11th Report, Session 2000–01, HL Paper 59); see especially paragraphs 113–115 and 121–130.

29 See *The United Kingdom opt-in: problems with amendment and codification* (7th Report, Session 2008–09, HL Paper 55), paragraphs 13–14.

30 See Appendix 3.

31 See Articles 20(2), 21(1)(a), and 22(2).

Procedure in the House

24. **We recommend this report to the House for debate.**

25. We welcome the fact that, in their Statement of 9 June 2008, the Government have undertaken to make time for such debates.[32] The timing is critical. Decisions on whether or not to opt in to proposals for legislation affect a number of Government departments—potentially, a large number—and are taken collectively by a number of ministers. Ministers in the department with primary responsibility—in this case the Home Office—therefore have to reach a conclusion on their recommendation to their colleagues some weeks before the end of the three month period. Although it is possible for those views to change right up to the deadline for opting in if a new and important factor unexpectedly arises, in practice, if the views of the House are to be taken into account, the Government will need to be made aware of them no later than 8 weeks into the three month period. This in our view is the significance of the undertaking "as a general rule, except where an earlier opt-in decision is necessary, not to override the scrutiny process, by making any formal notification to the Council of a decision to opt-in within the first 8 weeks following publication of a proposal".[33]

26. The Government will of course be aware of the views of this Committee from the date of publication of this report. A debate shortly after publication will give all members of the House—not just members of this Committee—an opportunity to express their views and to seek further information from ministers, especially on the likelihood of the United Kingdom opting in. The debate will be on an amendable motion, rather than a Take Note motion as is usually the case with reports of this Committee, and this could allow members not just to express views contrary to our own, but if thought appropriate to seek the opinion of the House on those views.

27. We retain under scrutiny the proposals for the Qualification Directive and the Asylum Procedures Directive.

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[32] Appendix 2, 5th bullet point.

[33] Appendix 2, 6th bullet point.

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
Baroness Billingham
Lord Dear
Baroness Garden of Frognal
Lord Hannay of Chiswick
Lord Harrison
Lord Hodgson of Astley Abbotts
Lord Jopling (Chairman)
Lord Mackenzie of Framwellgate
Lord Mawson
Lord Naseby
Lord Richard

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:
http://www.publications.parliament.uk/pa/ld/ldreg.htm

APPENDIX 2: STATEMENT ON JHA OPT-INS BY BARONESS ASHTON OF UPHOLLAND, 9 JUNE 2008

The Government believes that it is important for the EU Scrutiny Committees, and Parliament as a whole to have a clear idea of the Government's approach to JHA; individual JHA measures should be seen in this context. The Government is keen to ensure that the views of the Scrutiny Committees, benefiting from expertise in the area and having a strategic overview of the UK policy on the EU and our engagement on Justice and Home Affairs business, inform the Governments decision making process. As such, the Government therefore commits:

- To table a report in Parliament each year and make it available for debate, both looking ahead to the Government's approach to EU Justice and Home Affairs policy and forthcoming dossiers, including in relation to the opt-in and providing a retrospective annual report on the UK's application of the opt-in Protocol;
- To place an Explanatory Memorandum (EM) before Parliament as swiftly as possible following publication of the proposal and no later than ten working days after publication of the proposal. That EM would set out the main features of the proposal, as now, and, in particular, to the extent possible, an indication of the Government's views as to whether or not it would opt-in. Where the Government is in a position to provide them at that stage, the EM will also cover the factors affecting the decision. The European Scrutiny Committees of the two Houses will then be able to fully review the proposal and, where it has been possible to give a view, the Government's approach to the opt-in;
- Provided that any such views are forthcoming within 8 weeks of publication, to take into account any opinions of the Committees with regard to whether or not the UK should opt-in;
- The Committees, as with all proposals, can call a Minister to give evidence and can make a report to the House, if they wish with a recommendation for debate, on a motion that would be amendable (other debates in the Lords to take note of Committee reports are not usually amended).
- For the Commons, such a debate would usually be in Committee. In the Lords, where a Committee determines that a decision on whether or not to opt-in to a measure should be debated, the Government will undertake to seek to arrange a debate through the usual channels.
- As a general rule, except where an earlier opt-in decision is necessary, not to override the scrutiny process, by making any formal notification to the Council of a decision to opt-in within the first 8 weeks following publication of a proposal[34]. Where the Government considers an early opt-in to be essential, it will explain its reasons to the Committee as soon

[34] An example of where an early opt-in may be necessary is on the opt-in to the final text of a readmission agreement. These are often concluded very close to meetings with the third states concerned, to be signed at the meeting. In order to allow signature at the meeting, the Government undertakes to EU partners to complete the domestic opt-in process quickly.

as is possible. The Government will continue to keep the Committees fully informed as negotiations develop;

- To ensure that a Minister is regularly available to appear before the Scrutiny Committees in advance of every Justice and Home Affairs Council.

This package of measures will be reflected in a Code of Practice, to be agreed with the Scrutiny Committees, setting out the Government's commitment to effective scrutiny. The Government believes that the Scrutiny Reserve Resolution should also be amended, or a new resolution brought forward, to incorporate these commitments.

This will be reviewed three years after the entry into force of the Treaty to ensure that the enhanced scrutiny measures are working effectively.

We believe that this package, in addition to the strengthened role for national parliaments in the Treaty, strikes the right balance between ensuring that the Government can exercise the opt-in effectively within the Treaty deadline, whilst ensuring that Parliament's views are fully considered.

APPENDIX 3: COMMISSION RESPONSE

Reply from the European Commission to the Report of the House of Lords "The United Kingdom opt-in: problems with amendment and codification"

The Commission is grateful to the House of Lords for its report "The United Kingdom opt-in: problems with amendment and codification".

This report underlines certain issues of concern regarding the UK's participation in the two Commission proposals amending respectively the Reception Conditions Directive and the Dublin Regulation. It also refers to the Commission's proposal codifying the three Council Regulations laying down a uniform format for visas.

Background

The effect of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community is that those Member States do not take part in the negotiation and adoption of Title IV measures, and are not bound by them, unless within three months of a proposal for legislation being presented to the Council they notify the Council that they wish "to take part in the adoption and application" of the proposed measure.

In the event that the UK and Ireland decide not to take part in the negotiations on a proposed measure, they nevertheless may, at any time after the proposed measure has been adopted, notify the Council and the Commission that they intend to accept it.

The Protocol does not address situations where Title IV measures to which the UK has opted in are amended by subsequent measures.

By contrast the Treaty of Lisbon recognises the difficulties which might arise from the application of the current 'opt-in' system in cases of amended measures: Article 4a of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice provides that if the UK or Ireland do not opt-in to any amendment of legislation which already applies to them, the Council, should it determine that the non participation of those Member States makes the application of the measure inoperable for the other Member States, may decide that the original measure, and any subsequent amendments, cease to apply to them. The Council may also require the UK or Ireland to bear any financial consequences which may result from their ceasing to participate in the existing measure.

Specific issues raised by the Report

The Reception Directive and the Dublin Regulation

The Commission presented a proposal to amend (recast) the Reception Conditions Directive (2003/9/EC of 27.1.2003) and a proposal to amend (recast) the Dublin Regulation (343/2003/EC of 18.2.2003).

On 6 March 2009 the UK officially notified the Council that it wished to take part in the adoption of the proposal amending the Dublin Regulation but not to the adoption of the proposal amending the Reception Conditions Directive.

Codification of legislation

[Not relevant to this report]

Legal issues at stake

1. The first issue is linked to the possible consequences arising from the UK's decision not to opt in to the Reception Conditions Directive proposal which, according to the recast technique, will replace and repeal the Directive which is currently in force and which is binding on the UK. The question therefore is whether the provisions of the current Directive could still be applicable to the UK once the new Reception Conditions Directive is adopted.

The Report of the House of Lords is of the opinion that *"there is at least some doubt"* as to whether the repeal/replacement of the Directive currently in force will be effective in the UK once the Reception Conditions Directive proposal is adopted, or whether the initial measure will continue to apply to the UK because, according to the Report, the repealed legislation will cease to exist and will disappear from the *acquis*.

The Commission considers that the UK would remain bound by the unamended form of the Reception Conditions Directive. That directive would not be repealed for the UK since the UK has not opted into the proposal amending the Reception Conditions Directive and has not participated in the negotiations that will lead to the adoption of the final text. The other Member States would of course be bound by the amended version of that Directive.

In any case, precisely what this will entail in practice will depend to a large extent on the outcome of the current negotiations and on the content of the text which is finally approved and adopted.

Another point that could arise is whether the non-participation of the UK in the amended version of the existing measure makes the application of that measure inoperable for the other Member States within the meaning of Article 4a of the above-mentioned protocol annexed to the Treaty of Lisbon. Should the Treaty of Lisbon enter into force before the conclusion of the negotiations, this will have to be analysed in due course.

2. The second concern is linked to the cross-references to the Reception Conditions Directive proposal which were inserted into the Dublin Regulation proposal.

The House of Lords expressed doubts as to whether the above-mentioned provisions would be applicable to the UK given that it is not participating in the adoption of the proposal amending the Reception Conditions Directive.

The Commission considers that by opting into a measure, the UK accepts the measure as a whole. The opt-in system has never, and should never be seen as giving the Member States that are within that system the possibility of "cherry picking". Therefore, the UK will be bound by all the provisions of the amended version of the Dublin Regulation.

Again, the fact that the technique chosen is one of making cross-references rather than reiterating in the Dublin Regulation the relevant provisions of the Reception Conditions Directive should not lead to divergences in the scope of the amended version of the Dublin Regulation.

3. [Codification of legislation: not relevant to this report]

Margo WALLSTRÖM
Vice-President of the European Commission
Brussels, 28 October 2009

APPENDIX 4: QUALIFICATION DIRECTIVE: EXPLANATORY MEMORANDUM

Explanatory Memorandum on the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Document 14863/09 + Add 1, Add 2, Add 3 & Add 4)

Submitted by the Home Office on 5 November 2009

Subject matter

1. This Explanatory Memorandum relates to proposals to repeal and replace the existing Qualification Directive (Council Directive 2004/83/EC—referred to as "the original Directive" in the rest of this Memorandum). This is part of the second phase of the Common European Asylum System (CEAS).

Scrutiny history

2. The original Directive was the subject of Explanatory Memorandum 13620/01 submitted by the Home Office on 19 November 2001. Further EMs (12620/02 & 14643/02) were submitted on 30 October 2002 and 27 November 2002 to take into account subsequent amendments to the Directive.

3. The ESC[35] considered the document to be both politically and legal … important. Sub-Committee E of the EUC[36] made this proposal the subject of a short enquiry. Angela Eagle MP, former Parliamentary Under-Secretary of State at the Home Office, gave evidence to this inquiry on 15 May 2002.

4. The proposals (13620/01 and 12620/02) were cleared on 11 December 2002, reports 22885 and 22919. However, proposal 14643/02 was not cleared, report 24022.

Ministerial responsibility

5. The Home Secretary has overall responsibility for UK immigration and asylum.

Interest of the devolved administrations

6. Although immigration and asylum policy is reserved to UK Government Ministers, the devolved administrations do have an interest in certain areas of the proposed amendments. The devolved administrations have been consulted and are content with the terms of the EM for their interest.

Legal and procedural issues

7. *i) Legal basis*

The legal bases cited are Article 63(1)(c), 2(a) and 3(a) of the Treaty establishing the European Community. The appropriateness of combining these legal bases has been raised with the Commission.

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35 European Scrutiny Committee of the House of Commons.

36 European Union Committee of the House of Lords. Sub-Committee E now deals with Law and Institutions, but in 2002 was also responsible for Immigration and Asylum. These are now the responsibility of Sub-Committee F, which conducted this inquiry.

ii) European Parliament procedure

Article 63(1)(c) and 2(a)—Co-decision

Article 63(3(a)—Consultation

iii) Voting procedure in the Council

Article 63(1)(c) and 2(a)—Qualified Majority Voting

Article 63(3)(a)—Unanimity

iv) Impact on United Kingdom Law

New measures will require amendments to UK law. The original Directive was implemented in the UK through The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and amendments to the Immigration Rules.

v) Application to Gibraltar

If the UK were to opt in, as a Title IV measure this would apply to Gibraltar by virtue of Article 299(4) TEC.

vi) Fundamental Rights Analysis

The proposal states that it was subject to an in-depth scrutiny to make sure that its provisions are fully compatible with fundamental rights. In particular the proposal will increase access to protection and justice by clarifying and better defining concepts used to limit the grounds for protection, increase access to social protection, remove unjustified differences in the treatment of beneficiaries of subsidiary protection and refugees, reinforce the principle of non-discrimination and enhance the rights of the child.

There is nothing in these proposals that, in our opinion, would detract from fundamental rights. Accordingly the proposal should be regarded as respecting fundamental rights.

Application to the European Economic Area

8. Not applicable

Subsidiarity

9. The proposal is designed to reduce differences and discrepancies in the implementation of EU asylum legislation and the proposal therefore complies with the subsidiarity principle.

Policy implications

10. The proposal will repeal and replace the original Directive, resulting in changes in the following main areas:

- Assessment of applications for international protection
- Qualification for being a refugee
- Refugee Status
- Qualification for subsidiary protection

- Subsidiary protection status
- Content of international protection

UK opt in

11. In accordance with Article 3 of the Protocol on the position of the UK and Ireland, annexed to the Treaty establishing the European Community, these proposals will only apply to the UK if we opt into them.

12. The Government is currently considering whether to do so. Many of the proposals in the Directive are unobjectionable from our viewpoint as we already comply with the duties that they would impose on us. However, there are other proposals, as set out below, that would cause us difficulties.

13. We need to consider the overall impact of the Directive on our asylum system if it were adopted as drafted, and assess our chances of negotiating appropriate amendments to it. We will also need to consider the likely impact of our opt in decision on our broader relationship with the EU on Justice and Home Affairs and other matters.

Scope of the Directive, definitions—Article 1–2

14. The Directive creates a new concept of "beneficiaries of international protection" to include both refugees and beneficiaries of subsidiary protection. In the UK we have a single procedure for both types of claim so there would be no change. However, we are more concerned with the extension of the definition of family members to include married minor children, another adult relative responsible for a minor and minor unmarried siblings, and the provision that minor unmarried children no longer have to be dependent.

Actors of protection—Article 7

15. The proposals seek to ensure that protection is effective and durable and where protection is not provided by the State but by other parties or organisations they are willing and able to enforce the rule of law.

16. We are concerned that this appears to place the burden on Member States to show that non-State agents who might protect the applicant are "willing and able to enforce the rule of law". In the Government's view, this proposal demonstrates some confusion about the purpose of international protection, which is just that—to protect people who would otherwise be at risk of persecution or serious harm from which they cannot find protection in their home countries. A requirement to provide international protection for people who can obtain protection in their home countries, simply because those providing the protection do not operate a formal legal system, seems to us to go too far in this context.

Internal protection—Article 8

17. This requires that, before a Member State can conclude that an applicant could avoid persecution or serious harm in his or her home country by moving to a different part of it, it must be satisfied that the applicant can travel to the area in question safely and legally and must be allowed to gain admittance to and settle in that part of the country.

18. In its Explanatory Memorandum (paragraph 3.1(2)) the Commission argues that this change is necessary to comply with the caselaw of the European Court of Human Rights, and in particular the case of *Salah Sheekh.*

19. At present, the internal relocation alternative can be relied upon if it would be "unduly harsh" for the applicant to relocate to the safe area of the country. We are concerned that the proposal provides for a more onerous test for Member States, such as the requirement that the applicant must be "legally" permitted to access that part of the country, whether or not such access is safe and practicable.

20. The inclusion of a reference for Member States to maintain up to date country information reflects existing practice in the UK.

Reasons for persecution—Article 10

21. The proposal requires gender issues to be given specific consideration when establishing membership of a particular social group. This is already done in the UK.

Cessation—Article 11 & 16

22. The proposal restricts Member States ability to cease protection if the beneficiary is able to "invoke compelling reasons arising out of previous persecution" for refusing to return or take up a previous nationality. This would appear to require us to continue granting protection to people who no longer require it. In our view if there is no longer a risk of persecution or serious harm there is no longer a need for international protection.

Content of international protection, General rules—Article 20

23. We consider the treatment provided by the UK for applicants with special needs to be above the minimum standard required by the Directive. Although we do not take issue with the requirement to "take into account the specific situation" of 'victims of trafficking, persons with mental health problems', we do note that by listing examples there is a risk that if an applicant has a special need, but does not fall into the list, then there is potential for them to fall through the gap.

24. We do have concerns over the deletion of paragraphs 6&7 of this article which allowed Member States to reduce the benefits of this chapter to applicants who have deliberately engaged in activities to manufacture a claim for asylum/subsidiary protection. Although the UK has never made use of these paragraphs, we believe that Member States should continue to have the discretion to reduce the benefits made available to people who have abused the system in this way.

Maintaining family unity—Article 23

25. The deletion of the second part of paragraph 2 removes the discretion of Member States to determine the conditions of access to benefits for family members of beneficiaries of Subsidiary Protection. In the UK, family members of refugees and of people with subsidiary protection are treated equally, so this should not cause us difficulties.

Residence permits—Article 24

26. The Commission seeks to remove the differences between refugees and beneficiaries of international protection by deleting paragraph 2 of this article which had allowed Member States to give reduced length of residence to beneficiaries of subsidiary protection.

27. In the UK we do not make a distinction between refugees and beneficiaries of subsidiary protection. However, we are not convinced that Member States should lose their discretion to treat the two categories differently.

Travel document—Article 25

28. This now requires Member States to issue travel documents to allow individuals with subsidiary protection to travel outside their territory in all cases in which they are unable to obtain a national passport, without the present option to restrict this to cases where "serious humanitarian reasons arise". This will not require any change in UK practice, as we do not make use of the option given us by the current Directive.

Access to employment—Article 26

29. This article seeks to give beneficiaries of subsidiary protection the same rights on access to employment as refugees. The proposed change will make the rules on the right to work of people with subsidiary protection clearer than the overly complicated provisions in the existing Directive. However, it will not require any change in UK practice as we do not make a distinction between refugees and beneficiaries of subsidiary protection for employment purposes.

Access to procedures for recognition of qualifications—Article 28

30. This requires Member States to assist beneficiaries of protection to prove they have the qualifications claimed. It is somewhat unreasonable to expect those with genuine protection needs to be able to provide documentary evidence of their qualifications/skills, so it is sensible to have alternative methods to help provide confirmation.

Social welfare—Article 29

31. This removes the provision in the current Directive that allows Member States to limit the benefit entitlements of people with subsidiary protection to "core benefits"—a provision on which the UK has never relied. The UK does not differentiate between refugees and beneficiaries of subsidiary protection when providing access to welfare.

Unaccompanied minors—Article 31

32. This contains the provision for Member States to "establish procedures in national legislation for tracing the members of the minor's family as soon as possible after the granting of international protection". This reflects a similar provision in the recast Reception Conditions Directive. In our view, the tracing provisions in the existing Qualification Directive are adequate, and we are unconvinced of the need to enhance them.

Access to accommodation and integration facilities—Article 31–33

33. Requirements to prevent discrimination and take into account specific needs would appear to be sensible.

Impact Assessment

34. An assessment has not yet been carried out. The new proposals may, however, have an impact on UK practice if adopted as drafted and this will now be assessed in more detail to see if a full impact assessment is required.

Financial implication for the UK

35. These have not been fully assessed at this stage, as above, but are likely to be small given that the majority of the changes proposed by this Directive are of a technical and legal nature.

Consultation

36. Consultation has been carried out across Whitehall and with the devolved administrations.

Timetable

37. Negotiations will commence under the Swedish Presidency (July–December 2009) and continue under the Spanish Presidency (January–June 2010). We are unable to give an estimate as to when there will be a likely agreement.

Meg Hillier
Parliamentary Under Secretary of State
Home Office

APPENDIX 5: ASYLUM PROCEDURES DIRECTIVE: EXPLANATORY MEMORANDUM

Explanatory Memorandum on the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Document 14959/09 + Add 1, Add 2, Add 3 & Add 4)

Submitted by the Home Office on 5 November 2009

Subject matter

1. This Explanatory Memorandum relates to proposals to repeal and replace the existing Asylum Procedures Directive, as part of the second phase of the Common European Asylum System (CEAS). The proposal aims to ensure a higher degree of harmonisation and better standards of international protection across the EU, as announced in the Commission's Policy Plan on Asylum (17 June 2008).

Scrutiny history

2. The proposal as presented to Council and the European Parliament was deposited on 27 October 2009 and has no previous scrutiny history.

3. Earlier proposals concerning the Asylum Procedures Directive 2005/85/EC had a long and detailed scrutiny history, with Ministers appearing before the Lords Committee twice and with debates in the Commons. Document 7184/04 was cleared by the European Scrutiny Committee on 28 April 2004 and by the European Union Committee on 5 May 2004.

Ministerial responsibility

4. The Home Secretary has overall responsibility for UK immigration and asylum policy.

Interest of the devolved administrations

5. Asylum and immigration policy is reserved to UK Government Ministers. The devolved administrations have been consulted on and are content with the terms of the EM.

Legal and procedural issues

6. *(i) Legal base*

The legal bases cited are Article 63(1)(d) and 2(a) of the Treaty Establishing the European Community (TEC).

(ii) European Parliament procedure

Co-decision.

(iii) Council voting procedure

Qualified Majority Voting.

(iv) Impact on United Kingdom law

If adopted as drafted, measures within the proposal would require amendments to UK law. The original directive 2005/85/EC was implemented in 2007 through a combination of the legislation in force at the time and changes to: the Immigration Rules; the Asylum and Immigration Tribunal (Procedure) Rules; the Asylum (Procedures) Regulations; the Community Legal Service (Financial) Regulations and the Special Immigration Appeals Commission (Procedure) Rules.

(v) Application to Gibraltar

If the UK were to opt in, as a Title IV measure this would apply to Gibraltar by virtue of Article 299(4) TEC.

(vi) Fundamental rights analysis

The Commission notes that the proposal has been subject to in-depth scrutiny to ensure that its provisions are fully compatible with fundamental rights as general principles of the Community. The Commission states that ensuring higher standards on asylum procedures and their consistent application across the EU will have a positive impact for asylum seekers from a fundamental rights point of view. Proposals seek to strengthen Member States respect for the principle of *non-refoulement* and improving access to protection and justice, as well as ones to enhance gender equality and promote best interests of the child principles have been included in this regard.

Accordingly, in the opinion of the Minister the proposal should be regarded as respecting fundamental rights.

Application to the EEA

7. Not applicable

Subsidiarity

8. Title IV of the Treaty Establishing the European Community (TEC) confers certain powers in relation to asylum to the European Community to be exercised in accordance with Article 5 TEC i.e. if the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, be better achieved by the Community. The issues of asylum and international protection are transnational and therefore this proposal complies with the subsidiarity principle.

Policy implications

9. In accordance with Article 3 of the Protocol on the position of the UK and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, these proposals will only apply to the UK if we opt into them.

10. The Government is currently considering whether to do so. In making that decision, we will have particular regard to the following:

- The extent to which we think the proposals can be improved in negotiations if we do opt in;
- The implications of not opting in for our broader relationship with the EU and its institutions, and with other Member States bilaterally—in particular for our ability to promote our own agenda in EU fora and to

secure co-operation and support from other Member States on immigration and wider areas of Justice and Home Affairs; and

- The implications of being partially, but not fully, involved in the CEAS if we have opted in to some but not all proposals that the Commission has recently brought forward for the second phase.

11. The proposal will repeal and replace the original Directive. The Commission states that the main objective of the proposal is to ensure higher and more coherent standards on procedures for granting and withdrawing international protection that would guarantee and adequate examination of the protection needs of third country nationals (TCNs) or stateless persons in line with international and other Community obligations. The proposal further aims at simplifying and consolidating procedural arrangements across the EU in order to lead to more robust determinations of status at first instance so as to prevent abuse and improve efficiency of the asylum process.

12. The Government support the broad ideals expressed in terms of simplification and improved efficiency, however, we are concerned that the proposals in this recast directive would, if adopted, work against Member States' ability to tackle abuses of the asylum system and therefore we believe the new directive does precisely the reverse. Some key aspects of the proposal are discussed below.

Applicants with special needs—Articles 2 and 20

13. The proposal introduces a definition of an applicant with "special needs" as one "who due to age, gender, disability, mental health problems or the consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees". We wish to clarify the definition with the Commission, particularly in respect of the reference to mental health problems, which are not defined.

Territorial waters—Article 3

14. In order to accommodate the situation of asylum seekers arriving at sea the Commission proposes that the territorial scope of the Directive is clarified to include the territorial waters of the Member States. We need to consider this point carefully given the extent of our territorial waters and the situation applicable to Gibraltar.

Training—Articles 4 and 6

15. This Article contains proposals to set down the requirements for training programmes to be made available for personnel dealing with asylum claims, including the content of the training. We appreciate the need to train caseworkers properly, however, we think that this is better done through practical cooperation than legislation, such as the work already progressed by GDISC (General Directors' Immigration Services Conference) on the European Asylum Curriculum and the work to be taken forward by the European Asylum Support Office once it is established.

Information at the border or in detention facilities—Article 7

16. The Commission proposes new requirements that to provide counselling and advice to persons who may wish to apply for international protection and who are present at the border or in detention facilities. We want to clarify the terms of this

proposal with the Commission. At present if an individual indicates that he or she wishes to apply for asylum they are pointed in the direction of UKBA staff at the port on arrival or based at the removal centre. Information on the processes relating to asylum claims is provided to an applicant after the first screening interview takes place. At the point of screening the individuals do not have access to legal representation or any other advice as this part of the process takes place in restricted areas. We are concerned that the proposals might require the permanent presence of such organisations at all such facilities or ports of entry.

Medico-legal reports—Article 17

17. This is a new proposal and although we recognise the need for medical reports in particular cases we are concerned that the proposal will increase the incentive for applicants without medical needs to request them in order to delay processing of their protection claim. We also wish to clarify the precise nature of the obligations on Member States contained in the proposal and the term "medico-legal" report.

Guarantees for unaccompanied minors—Article 21

18. The Government is committed to safeguarding children and this is reflected in the new statutory duty on UKBA to safeguard and promote children's welfare when the Borders, Citizenship and Immigration Act became law in October 2009. We do, however, have some concerns about the proposals that exempt unaccompanied minors from the application of accelerated procedures, and from the safe third country concept in the directive. We believe that it is in children's best interests to clarify their immigration status as soon as possible, which means that it should be possible to accelerate consideration of their claims. We are also concerned that the new provision may lead to more applicants claiming to be minors and therefore increase the number of age dispute cases and the risk of placing adults into Member States' child care systems.

Examination procedures, unfounded applications and remedies—Articles 27, 28 and 41

19. The Government cannot agree that proposals in Article 27 that place restrictions on the use of accelerated procedures will enhance our ability to prevent abuse and improve efficiency. We believe that such proposals will do precisely the reverse. We believe that Member States should be encouraged to give asylum applicants fast and fair decisions rather than have restrictions placed on their ability to do so.

20. We are particularly concerned that the proposals will seriously threaten the UK's detained fast track (DFT) scheme, which delivered over 1200 removals from the UK between April 2008 and September 2009. We believe DFT provides fast and fair decisions for those who go through it and is an excellent deterrent to false claims. We know that the decisions are fair because 97% of them are upheld on appeal. We could not, therefore, accept provisions that risk the loss of the DFT scheme.

21. We are also concerned about the restrictions on declaring cases to be manifestly (or "clearly") unfounded and the impact that this has on the use of non-suspensive appeals (NSA). This is an appeal right which can only be exercised from a third-country; it gives no right to stay in a Member State in the mean time. It is only used when an application is "manifestly unfounded". As we read the

proposals we could still use NSAs for applicants from safe countries of origin, something that we welcome, but the proposals would not allow us to do the same for claims which are clearly unfounded but where the applicant does not come from a safe country of origin (see below). That does not seem right.

22. The proposals in Articles 27 and 41 prevent the UK from certifying claims as clearly unfounded on a case-by-case basis and therefore prevent the UK from continuing to use the NSA system in these cases. This is because case-by-case certification does not fall within Article 41(6) as drafted. On average, this applies to about 120 cases in the UK each year. The new definition of "manifestly unfounded" seems to have little to do with the actual substance of the asylum claim. We find it difficult to see the logic behind applications which are "inconsistent, contradictory, improbable" or otherwise "clearly unconvincing" being excluded from the definition of "manifestly unfounded" claims.

23. We maintain that our NSA process is effective and fair. Applicants can apply for a judicial review of the decision to classify their case as "manifestly unfounded" from within the UK, and it is our strong view that judicial review constitutes an effective remedy for these purposes, supported by national and European Court of Human Rights case law. In addition the approach to NSAs has been upheld in the UK courts as proportionate and reasonable, and the small proportion of appeals that are subsequently upheld demonstrates that the decisions are fair. We also believe our present NSA regime allows us to free up valuable space in our asylum system and deter abuse.

Impact assessment

24. A full assessment has not yet been carried out. The new proposals would, however, have an impact on UK practice if adopted as drafted and this will be assessed as part of the process.

Financial implications for the UK

25. Financial implications will depend on the extent to which, if adopted, the proposed amendments will impact on access to legal assistance and whether other procedural changes would require significant additional financial input. The Impact Assessment mentioned above will provide more detailed analysis in due course.

Consultation

26. The proposal is the subject of on-going consultation across Whitehall and with the devolved administrations. The UNHCR, civil society and interested NGOs will be able to make comments to the UK Border Agency within existing structures for stakeholder engagement.

Timetable

27. A timetable has not yet been set for discussion in the relevant Council working group, which is already considering other proposals for the second phase of the CEAS. Discussions on this text both in Council and the European Parliament will of necessity run in parallel with those on the other second phase proposals. We are unable to give an estimate for likely agreement at this time.

Meg Hillier
Parliamentary Under Secretary of State
Home Office