

TOWARDS COMMON STANDARDS ON ASYLUM PRACTICE

European Commission working document 6072/99

1. These comments on the Commission's working document are based upon work that we and others have carried out on effective asylum determination systems (*Providing protection, 1997*) and on recent developments in UK law which relate to the development of common EU policy and practice in this area.
2. JUSTICE has for some time argued for the need to bring asylum and immigration policy firmly within the competence of the EU and within the jurisdiction of the European Court of Justice, in order to prevent harmonisation 'by stealth' and to a lowest common denominator. In our view, harmonisation should have three essential features
 - it should establish common criteria for assessing claims to protection (including claims under the 1951 Refugee Convention, Article 3 ECHR and the Torture Conventions), which rely upon interpretations that are accepted internationally and by the international bodies charged with overseeing those Conventions;
 - it should set down broadly agreed procedures for determining such claims, which aim to make good, sustainable decisions as early as possible in the process, and which allow appellate and court review of administrative decisions before any removal action can be taken;
 - it should ensure that all those granted protection, even if only temporarily or on the basis that it is at present impossible or unsafe to remove them, should be granted an effective status, with the right to reside and either work or be supported during the period of protection.
3. We also argued strongly, in our reports and interventions during the IGC process that led to the Treaty of Amsterdam, that such harmonisation must be underpinned by better democratic structures, both at the level of domestic parliaments and the European Parliament; and that it must be overseen by the European Court of Justice, in order to ensure that common standards and criteria are consistently and rigorously applied.
4. We welcome the Commission's initiative in putting forward proposals for discussion on common standards in asylum procedures. However, we have some concerns, and additional proposals, in respect of the programme and the measures suggested.

General comment

5. The first point that we would make is that this paper deals only with one of the essential features of harmonisation: the move towards common procedures for determining claims. It is our view that this cannot be dealt with in isolation from the criteria that states use to make those decisions, and the outcome for those so dealt with: the status they are granted. Without this, the central principle behind the Dublin Convention, that asylum-seekers should make a single and effective application for protection within the Union, cannot safely and consistently be implemented.
6. We believe that this is clear from the recent judgment in *Adan, Aitsegeur and Subaskaran* in the Court of Appeal (23 July 1999). The Court was asked to rule on whether the

Secretary of State had acted lawfully in issuing certificates to the effect that certain asylum-seekers could be returned to Germany and France (a Somali and a Sri Lankan Tamil to Germany, and an Algerian to France). The Secretary of State had done so under procedures in UK law which allow him to certify that other EU countries are 'safe third countries' in which asylum claims can and should be dealt with; the issuing of a certificate triggers a fast-track procedure in which an applicant for asylum may be removed without the decision being reviewed by the appellate authorities. The courts, however, retain their general jurisdiction, on judicial review, to examine the lawfulness of such administrative decisions.

7. The court found that in these cases the certificate had been issued unlawfully, and that it was not safe to return the asylum-seekers to those EU countries. It pointed to two factors that the Secretary of State must take into account in deciding whether to issue a certificate: first, whether the third state's practice is 'consistent with the Convention's true interpretation' (which is a matter of law); and second whether the state 'imposes such practical obstacles in the way of the claimant as to give rise to a real risk that he might be sent to another country otherwise than in accordance with the Convention' (which is a matter of fact).
8. The first point therefore relates to the criteria for deciding asylum claims, and the interpretation of the refugee definition in Article 1(A)(2) of the 1951 Convention. Germany and France take the view that the definition of persecution in this Article relates only to persecution which is carried out by, or with the complicity of, the state itself. The Court of Appeal unequivocally disagreed. Relying upon majority practice in other signatory states, and upon the interpretation provided by UNHCR, the court found that the Convention 'is apt unequivocally to offer protection against non-State agent persecution, where for whatever cause the State is unwilling or unable to offer protection itself'. The Court also pointed out that there was no binding EU agreement as to the Convention's interpretation, and no court with an over-arching jurisdiction to ensure compliance.
9. On the second point, also, the Court dealt with the issue of the complementary forms of protection, which might be offered to persons who were not given Convention refugee status, but were not to be immediately returned to another country. The Court was clear that, in order to protect against the possibility of indirect refoulement, such statuses must carry certain minimum rights to prevent 'so destitute an existence, if he were wholly excluded both from the right to work and from access to any social provision....that he would be driven to return to the country of feared persecution'.
10. The certification procedure under challenge has been put into place to seek to make the provisions of the Dublin Convention effective and enforceable. It is the UK government's view, shared with most other Member States, that that Convention is at present ineffective and is preventing, rather than assisting, a swift and single determination of protection claims. It should be noted that present legislative proposals go even further: clause 9 of the Immigration and Asylum Bill seeks to remove the supervisory jurisdiction of the courts in 1951 Convention cases certified for return to other EU countries, by defining those countries in legislation as ones which can be presumed to apply the 1951 Convention. That presumption has now been comprehensively rebutted by the Court in these cases. Yet the new proposals are justified by Ministers as being essential in order to make the Dublin Convention workable: in their view, it is being 'seriously undermined by disputes exploiting differences in interpretation and procedural application of the 1951 Refugee Convention in different Member States'.
11. In our view, the *Adan* judgment underlines the point that we make in paragraph 4 above. Common procedures are one of three essential prerequisites for common and consistent

EU policies and practices: the others are common, enforceable criteria applied to the highest standards of international law, and minimum rights attached to status for all those in need of any kind of protection. In particular, any attempt to short-cut procedures, by erecting admissibility hurdles (such as the Dublin arrangements) will immediately be undermined by inconsistent and narrow interpretations of protection requirements, or the provision of ineffective and unsafe 'twilight' statuses.

12. We would therefore question the Commission's 'General approach', set out in para.8(b), and the value of a binding instrument on asylum procedures without a common and legally enforceable position on interpretation and reception.

Specific comment

Common procedure for all protection issues

13. In commenting on the specific proposals, we rely upon the principles that were set out in the *Providing protection* report, jointly published by JUSTICE, the Immigration Law Practitioners Association and the Asylum Rights Campaign in 1997. That report stressed the importance of 'front-loading': putting in place effective first instance decision-making procedures, where a properly-advised applicant could put all relevant facts before a properly-informed specialist decision-maker. Putting adequate resources into these early stages results in fairer and more sustainable decisions, with consequent savings in time and resources later on in the process. It also questioned the value of 'fast-track' procedures, which rarely in practice save time or resources; and underlined the need for effective appellate procedures. In addition, it pointed to the value of independent, objective and up-to-date information on the countries and circumstances from which asylum-seekers come. This can assist decision-makers, representatives and judges in reaching good early decisions. We also stressed the importance of competent legal advice throughout the process; this can ensure that the relevant material is put before decision-makers, and therefore assist the process, as well as the applicant.

14. One of the obstacles to effective asylum determination procedures that was identified in the report was the existence of parallel, or consecutive processes for determining claims to different kinds of protection. We pointed in particular to the experience of Canada, where determination of a Refugee Convention claim, and any subsequent legal challenges, were followed by separate consideration of other grounds of protection, equally subject to challenge and review. We argued strongly for a single process which could determine all claims to protection concurrently. For that reason, we would very much support the proposal in para.11 for a single procedure. We understand the concerns expressed about the timescale. However, we would point out that the most likely ground for alternative protection claims will be Article 3 ECHR. That Article has been extensively litigated at the ECtHR, and there is binding jurisprudence on its scope and effects. Arguably, therefore, it is easier to identify common criteria on its application than for the 1951 Convention, which has no supervisory international court.

15. At the least, we would therefore urge that Article 3 ECHR protection claims are included within the first stage of the work programme and that a common procedure for 1951 and ECHR protection claims is developed.

Dublin Convention: revision

16. In para.12, the Commission raises the possibility of a 'fundamental revision' of the Dublin Convention, and therefore of a new Community instrument to replace it. We would support this approach. It seems to us that the principle behind the Dublin Convention –

that all those seeking asylum within the European Union should have a single opportunity properly to put their asylum claims – is a fair one. However, its practical application in the terms of the Dublin Convention has proved impossible. This is partly because of the differences in interpretation and status referred to above. But it is also because it is practically difficult, and may be unfair on grounds of family or community links, to move asylum-seekers from their chosen EU country of destination to the one through which they entered the Union. It may be more effective, as the Task Force on asylum is suggesting, to move resources (by way of providing Community support to Member States that are experiencing large inflows) than to seek to move people.

17. Given Member States' clear perception that the Dublin Convention is not working, we would support attempts to replace it with a new instrument, which can provide a more flexible basis for the principle of a single EU asylum application. Certainly, until common criteria and effective statuses are in place (see above) the present admissibility tests cannot operate as intended.

Other 'safe third country' admissibility tests

18. Like UNHCR and ECRE, we are concerned about any procedures which are designed to remove Member States' obligations to consider asylum claims. It is helpful that the Commission document clearly distinguishes such 'admissibility' decisions from 'fast-track' consideration of the substantive asylum claim.

19. The Commission document sets out certain requirements in respect of non-EU countries which may be considered 'safe' and where asylum-seekers can therefore be returned for determination of their claims. We support those, for example the need to make individual assessments of whether a particular country is 'safe' for a particular applicant, and the need for common assessments of third countries. However, we do not consider that they offer sufficient safeguards to ensure that there will not be indirect refoulement. In particular, we believe that the following are essential:

- an independent review of individual cases, which is able to assess both the facts of about the third country in relation to the applicant, and also the extent to which the criteria it applies are lawful and safe (see comments on *Adan* above). Such a review should take place before any asylum-seeker is removed.
- a source of information about third countries which is independent of governments, and which can be relied upon to produce detailed, objective and up-to-date material, available to applicants and their representatives as well as to government and the courts. This is in line with our recommendation for such a documentation centre at national level.

20. Given the need for these safeguards, it may well be thought that the admissibility procedures themselves would be equally as long and resource-intensive as the substantive consideration of a claim, and therefore provide no tangible benefit to states.

21. For those reasons, we are doubtful that a safe third country concept can operate safely or effectively in states which have no common legal or procedural base, with regard to the minimum safeguards and standards of fairness that we set out.

Speeding up procedures: appellate and 'fast-track' processes

22. We agree with the Commission's position (at para.15) that the minimum procedural guarantees in the previous Resolution cannot be reduced; and we do not argue with the point that there is scope for reducing the duration of procedures. We are concerned, however, that the criterion for doing so should be 'efficiency' alone. In *Providing*

protection, we pointed out that fairness and efficiency are twin pillars of an asylum determination system and in fact support each other: attempts simply to speed up or reduce processes are likely to lead to poor decisions and expensive and lengthy legal challenge.

23. Para. 16 of the proposal somewhat begs that question. It considers that a 'single appeal or review' will normally be sufficient 'provided the necessary safeguards are in place to ensure a good standard of decision-making'. We entirely endorse the need to focus resources on good decision-making (see above). However, we would argue that this has the consequence of reducing the number and complexity of appeals, particularly higher-level and court reviews. We would also argue that a second-tier appellate body, like the Immigration Appeal Tribunal, provided that it is effective, can offer a specialist and necessary filter to deal with points of law and establish sound precedent, to prevent cases needing to proceed to the higher courts. **We therefore support the UK government's decision to retain the IAT, in the context of the UK's legal system, which does not have specialist administrative courts.**
24. We share the concern expressed in para.18 about the effectiveness of setting time limits. The experience of the IAT's 'deeming' provision, whereby appeals are deemed granted unless determined within 10 days, is a case in point. Rather than providing a swift and final decision-making process, it has generated additional delay and expense, because the Tribunal does not have the resources to make defensible decisions within that timescale. As a result, a case which may have had only 15 minutes' consideration at the Tribunal falls to be reconsidered for some hours by a High Court judge, some months later.
25. **Unless states can be compelled to devote sufficient resources (and it is difficult to see how, or by whom, this could be done) time limits impose penalties only on applicants, and not on states. They are likely to lead to rushed and therefore unsafe decisions, and to generate satellite litigation with consequent delay and expense.**
26. The Commission paper also deals with the question of the standard of proof. We believe that a common approach to this could derive from common criteria on interpretation of the protection requirements of the various Conventions, and should draw upon the UNHCR handbook. However, even if common standards can be developed (and we accept that there may be problems with this), we do not believe that the question of whether the evidence reaches that standard, and in particular assessments of the credibility of the applicant, should be decided under accelerated or 'fast-track' procedures.
27. We therefore agree with UNHCR, ECRE and with the Commission's preliminary view (in para.21) that any categories of 'manifestly unfounded' cases which may be subject to accelerated procedures should not include assessments of credibility, internal flight or exclusion under Article 1F. We also share with UNHCR the view that lack of, or false, documentation should also not be a reason for such categorisation: the reasons for such behaviour, and the fact that it should not be penalised, are well set out in the recent Divisional Court judgment in *Adini and Ors*. In addition, accelerated decision-making in certain categories of case does not mean that decisions can be made by category of group: each decision must be made, and justified, individually. Nor should it remove or reduce appeal rights (indeed they are arguably more necessary if decisions are taken in haste).
28. Because those safeguards are necessary, we concluded in *Providing protection* that it was difficult to find examples of accelerated procedures which were not in practice 'too

safe to be fast, or too fast to be safe.’ **We remain unconvinced that it is not better to devote resources to dealing swiftly and fully with all cases, rather than concentrating them on certain specified categories.**

29. As stated in paragraph 29, we consider that accelerated procedures still require individual decisions. For that reason, we do not support the designation of ‘safe countries of origin’. It is one that has now been dropped by the UK government, on grounds that it is neither fair nor effective. **We would therefore support option (a) in the Commission paper’s para. 22.**

Other issues

30. **We support moves for specific provisions for vulnerable groups**, such as children and women, and would support the addition of torture survivors, those suffering psychological damage, and victims of persecution of a sexual nature.

31. **We support, in principle, the proposal to develop common Community standards and procedures for the cessation, as well as the grant, of refugee status.** However, we think that they are of less immediate priority than the need to align determination and status processes. If common standards were developed, it should be along the lines suggested in para. 24: ensuring individual decisions, and with the same safeguards (such as appeals, independent documentary evidence etc) as we have identified as necessary for the determination process. In addition, it is difficult to see how cessation decisions can be carried out without some form of readmission agreement with the country of return, with certain guarantees and safeguards at the point of return.

32. Finally, we would stress the importance of providing, at all stages of the determination process

- **competent and accessible legal advice, to assist in presenting the facts of the case and challenging any refusal of protection;** such advice to be provided free where the asylum-seeker cannot afford to pay for it;
- **a source of information, independent of the decision-maker and the applicant, on the countries and circumstances from which asylum-seekers come;** this can expedite legal proceedings and ensure better decision-making.

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