

**United Nations High Commissioner for Refugees
Briefing to the House of Lords on the adoption and application of the proposed
EU Asylum Procedures and Qualifications Directives**

I. Introduction

UNHCR welcomes the new procedure for scrutiny of legislation subject to the United Kingdom's decisions on whether or not to opt in to European Union proposals for legislation. The procedure follows the entry into force of the Treaty of Lisbon,¹ which commits the EU to establish a common asylum procedure and uniform status of asylum and of subsidiary protection. In accordance with the procedure, Sub-Committee F of the European Union Committee has prepared a report² recommending that Her Majesty's Government exercise the right to opt in to the recast Directives on Asylum Qualifications and Asylum Procedures proposed by the Commission in October 2009. The decision on whether to opt in to the Directives must be given to the Commission no later than the 23rd January 2010.

UNHCR has a direct interest in the proposals by the Commission because of its responsibility to provide international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organisations.³ UNHCR carries out this mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."⁴ This responsibility is reiterated in article 35 of the 1951 Refugee Convention⁵ and article II of the 1967 Protocol relating to the Status of Refugees⁶ and extends to all EU Member States, as all are States Party to these instruments. UNHCR's supervisory responsibility has been reflected in European Community law, including by means of a general reference to the 1951 Convention in article 63(1) of the Treaty establishing the European Community⁷ (now Article 78 of the TFEU). Declaration 17 to the Treaty of Amsterdam

¹ The Treaty of Lisbon amends the Treaty on the European Union, which will retain its name, and the Treaty establishing the European Communities which will be renamed the Treaty on the Functioning of the European Union (TFEU). The Consolidated version of the Lisbon Treaty was published in OJ C 115 of 9 May 2008, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:en:HTML>

² HL Paper 6, European Union Committee 1st Report of session 2009-10 House of Lords European Union Committee, 1st Report of session 2009-10 'Asylum Directives: Scrutiny of the opt-in Decisions' (HL Paper 6), published 4th December 2009, available at: <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/6/6.pdf>

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraphs [1] & [6], available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

⁴ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 8(a), available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

⁵ UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35(1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of this Convention".

⁶ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

⁷ European Union, *Consolidated version of the Treaty establishing the European Community*, Official Journal of the European Union [C 321 E/65, 29.12.2006], available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>

further provides that “consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy.”⁸

UNHCR notes that the stated aim of the two proposals for recasts of the Directives is “to ensure a higher degree of harmonisation and better substantive and procedural standards of protection, on the present legal basis, towards the establishment of a common asylum procedure and a uniform status, as is called for by the Hague Programme.” Specifically, the amendments are expected to:

- a) simplify decision making procedures and lead to more robust decisions at first instance, thus preventing abuse;
- b) streamline procedures for granting rights, thus improving the efficiency of the asylum process; and
- c) ensure coherence with the jurisprudence of the European Court of Justice and the European Court of Human Rights.

In UNHCR’s view, the efforts of the European Union to codify a legal framework on asylum applicable to all Member States has great value in strengthening standards for the treatment of refugees. Yet there remain significant gaps, shortcomings and ambiguities in the application of the European Union’s legal instruments. UNHCR’s 2007 report on application of the Qualification Directive found that key provisions have been interpreted in widely diverging ways, leading to inconsistencies and inaccuracies in asylum decision-making⁹. It also noted a tendency of “downward harmonisation” towards more exceptions and even derogations to established standards. Based on this research, UNHCR believes there is a need to amend key provisions, including on internal protection alternatives, non-State agents of protection and other topics. **If the Lisbon Treaty’s binding obligation to establish a common procedure are to be met, the gaps and weaknesses in the existing instruments must be addressed.**

It is with these concerns in mind that UNHCR welcomes the European Select Committee’s recommendations that the United Kingdom should exercise the right to take part in the adoption and application of the Asylum Procedures and Qualification Directives. The proposed amendments to the Qualification Directive would clarify the legal concepts in the existing provisions whilst amendments to the Asylum Procedures Directive would seek to ensure greater harmonised implementation and streamlined procedures. **In UNHCR’s view, the proposed recast Directives would contribute to, rather than undermine, the objective of swift and fair decision-making in the Member States of the European Union, and would contribute to the reduction of secondary movements between Member States.**

UNHCR is in the process of preparing a detailed commentary on the two recast Directives. In the meantime, the Office sets out in this paper some comments in response to those proposals with which the Government has outlined difficulties.¹⁰

⁸ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX :11997D/AFI/DCL/17:EN:HTML>.

⁹ UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, available at: <http://www.unhcr.org/refworld/docid/473050632.html>

¹⁰ Documents 14863/09 and 14959/09, Home Office Explanatory Memoranda, published as Appendices Four and Five to HL Paper 6 of session 2009-10, *op. cit.*

II. Proposals for the recast Qualification Directive

UNHCR notes that some of the provisions in the proposed recast Qualification Directive are already current practice in the UK.

Scope of the Directive, definitions – Article 1-2

In UNHCR's view, the creation of a new concept of "beneficiaries of international protection" to include both refugees and beneficiaries of subsidiary protection would cause no change to UK practice. The UK already has a single procedure for both types of claim and adoption of the new concept would ensure better standards in other Member States where discrepancies might persist. A more secure status for this group of persons, as well as access to a wider range of entitlements, would provide a good foundation for the full participation in and contribution to society of such persons. In addition, the UK currently grants the same benefits to refugees and persons with humanitarian protection in the areas of family reunification, employment rights and access to welfare benefits, and thus the proposals would require no change to UK rules on these issues.

Similarly, the proposal to extend the definition of family members in the Qualification Directive appears to be in line with current developments in the UK. Since the lifting of UK's reservation to the Convention on the Rights of the Child in December 2008 and the passing of section 55 of the Borders, Citizenship and Immigration Act 2009, the UK has a duty to safeguard and promote the welfare of the child.¹¹

UNHCR considers that the proposal for higher levels of entitlements for family members of subsidiary protection beneficiaries will not serve as a pull factor to the EU, as the proposed amended definition refers to family members "present within the same Member State". As such the provisions do not apply to family members outside the Union, but rather brings a more rational approach to the entitlements of those who are already present.

This proposal would lead to improvements in the situation of family members in other States, which now accord lesser entitlements to subsidiary protection beneficiaries. In those situations, it could reduce the incentive for people granted subsidiary protection to appeal (in order to secure refugee status and better entitlements for their families), or to seek to undertake secondary movements to improve their own or their families' situations.

Internal protection – Article 8

In UNHCR's view, Article 8 of the recast Asylum Procedures Directive serves to codify the caselaw of the European Court of Human Rights. In line with the European Court of Human Rights' judgment in *Salah Sheekh*,¹² the change requires that internal protection should be effectively available and the person should be able to safely and legally travel, gain admittance and settle in the relevant part of the country.

¹¹ Section 55, *Borders, Citizenship and Immigration Act 2009* [United Kingdom of Great Britain and Northern Ireland], Chapter 11, 21 July 2009, available at: http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090011_en.pdf

¹² *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, available at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>

Cessation – Articles 11 and 16

The recast Articles 11 and 16 would ensure that in cases where the circumstances which led to the granting of status have ceased to exist, beneficiaries would remain eligible for status if they are “able to invoke compelling reasons arising out of previous persecution” for refusing to return.¹³ Both Article 1C(5) and (6) contain an exception to the cessation provision, allowing a refugee to invoke “compelling reasons arising out of previous persecution” for refusing to re-avail himself or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence. Application of the “compelling reasons” exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice¹⁴.

In UNHCR’s view, other proposed changes to the Qualification Directive are likely to improve standards generally by reducing the scope for misinterpretation of existing criteria due to the lack of clarity or wide scope for discretion.

III. Proposals for the recast Asylum Procedures Directive

As regards proposals to recast the Procedures Directive, UNHCR is of the opinion that the aim of higher standards and improved quality of decision-making would help redress inconsistencies across Member States by reducing the scope for discretion. UNHCR has for instance noted, with disquiet, vastly varying recognition rates from less than 1% in one country to over 50% in another for the same nationality.¹⁵ The proposals seek to address such discrepancies and provide a more effective set of standards for Member States. UNHCR will issue a report in early 2010 on the application of a selection of its provisions in 12 Member States.¹⁶ Preliminary results indicate that there are a number of areas where the proposed Directives could bring improvements, for example in relation to the assessment of evidence, use of safe country of origin and safe third country or first country of asylum rules, accelerated procedures, and non-suspensive appeals.

However, UNHCR notes that some elements in the recast Asylum Procedures Directive appear to reflect current good practice in the UK, which may be successfully introduced in other Member States. These include the 6-month target period; a screening or admissibility stage to channel the claim into the correct process; high standards of staff training and expertise.

¹³ Commission of the European Communities, *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*, [Article 11] {SEC(2009) 1373} {SEC(2009) 1374}, Brussels, 21.10.2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009PC0551:EN:NOT>

¹⁴ UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html> [accessed 11 January 2010]

¹⁵ European Commission Eurostat, *75 thousand asylum seekers granted protection status in the EU in 2008 - Issue number 92/2009*, Table 5, Page 6, [08-12-09] available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-092/EN/KS-SF-09-092-EN.PDF

¹⁶ Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, Netherlands, Slovenia, Spain, United Kingdom.

In addition, provisions requiring access and/or referral to asylum authorities and procedures for persons wishing to seek asylum will help ensure that asylum seekers are identified as early as possible following an applicant's arrival, which could facilitate evidence-gathering and examination by the case handler. The proposal for better information to be provided to asylum seekers can help them articulate their claim more clearly.

Territorial waters – Article 3

In relation to the territorial scope of the Directive, UNHCR observes that the recast Article 3 is limited to setting out the existing international principles and as such UNHCR considers that the amendment is aimed at providing clarity only, reaffirming what the Commission already indicated in 2007 i.e. that the territorial scope of the Directive includes the territorial waters of the Member State.¹⁷

Training – Articles 4 and 6

Provisions in the Directive on training and competencies of authorities will clarify responsibilities for relevant personnel and ensure high skill level of asylum authorities including decision-makers thus promoting quality throughout the 27 Member States. The reports recommend minimum qualifications for decision-makers (1st report), assessment and accreditation of the competency of decision-makers (1st, 2nd and 5th reports), the provision of specialised in-depth training for particularly complex areas of decision-making (5th and 6th reports), and to ensure flexibility in decision-making procedures to enable quality decisions even with increasing workloads and targets (Recommendation 30 of 5th report).¹⁸ All of these recommendations have been accepted by the UK authorities.

Accelerated procedures – Article 27

UNHCR notes that although the proposals regarding accelerated procedures would apply to a shorter list of cases, Article 27 of the draft Directive enables States to employ accelerated decision-making procedures for cases that are less strong on their merits. The "detained fast-track" system has been criticised by UNHCR and other expert observers, who have expressed concerns at the lack of clarity of its criteria, the absence of essential safeguards and the quality of outcomes it produces. In its 5th report to the Home Secretary on the Quality Initiative, UNHCR pointed out a number of serious flaws with this process, including systematic use of detention essentially on grounds of filing an asylum application, misapplication of criteria to include vulnerable people, lack of access to information and insufficient time for decision-makers effectively to consider claims and apply protection criteria and concepts during their considerations. These defects have not been remedied comprehensively. The APD proposals would, in our view, require application of basic safeguards that should also be available in any detention/fast tracking procedure

¹⁷ European Union: European Commission, *Commission Staff Working Document Study on the international law instruments in relation to illegal immigration by sea* 15 May 2007, SEC(2007) 691, available at: http://ec.europa.eu/justice_home/doc_centre/immigration/illegal/doc/sec_2007_691_en.pdf

¹⁸ All Quality Initiative Reports are available on the UK Border Agency website: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/>

UNHCR London, January 2010

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