Recognising peoples' rights: Qualifying for Refugee Status

Gradually the development of the free movement of people within the European Union has given rise to concerns about the differences between the national immigration and asylum systems of the Member States. Throughout the late 1980s and early 1990s, political discussions surrounded the creation of common or coordinated systems of immigration control. This was speeded up with the creation of the Schengen zone of free movement. Gradually the Member States moved closer to create common EU policies. Since 1999, and the ratification of the Treaty of Amsterdam, the EU Member States and institutions have been working on the harmonisation of European asylum and immigration systems.

In order to harmonise asylum application systems and requirements, a common definition of 'refugee' is needed between the EU Member States. Crucially, the scope of this definition is one of the keys to whether the future European asylum system aims to create a tighter 'Fortress Europe', or aims to provide genuine security and protection for those in need of European refuge. Through the so-called 'Qualification Directive' the Member States aim to ensure a minimum level of protection for those in genuine danger. However, the application of the definition of refugee is highly dependent on the harmonisation of asylum procedures (see **Briefing 2**).

In the words of Kofi Annan when addressing the European Parliament in January 2004,
'… when refugees cannot seek asylum because of offshore barriers, or are detained for excessive periods in unsatisfactory conditions, or are refused entry because of restrictive interpretations of the Convention, the asylum system is broken, and the promise of the Convention is broken, too' .

The United Nations High Commission for Refugees (UNHCR) is the guardian of the Geneva Convention on the status of refugees (1951 and amendments 1967), which contains the globally accepted definition of a 'refugee': *someone who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of his/her country; or who, not having a nationality and being outside the country of his/her former residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.*

The Geneva Convention's definition forms the basis of all European asylum systems but is interpreted in quite different ways by the various EU Member States. Therefore, harmonisation has been concentrated on the interpretation of this definition. Moreover, there are vast differences between the Member States' definitions and treatment of those who fail to gain asylum but cannot return to their country of origin.

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WHO DOES THE EU CONSIDER TO BE A REFUGEE?

In 2001, the European Commission proposed a Directive[1] laying down minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection. The Commission proposed two separate but complementary types of beneficiary:

- **Refugee** – as defined by the Geneva Convention above.

  Importantly, the EU Directive accepts that state and **non-state actors** are capable of inflicting persecution. Therefore, those severely terrorised to the point of persecution by private militias (e.g. in Dafur) or their neighbours and communities (e.g. some national minorities, gays and lesbians in some countries) could claim refuge. This is already the case in 13 of the 15 old EU Member States, but not in Germany or France, where the acceptance of persecution by state actors alone has been seen as a means of reducing the numbers of asylum seekers in recent years.

- **Beneficiary of subsidiary protection** – Essentially concerning people who fail to claim asylum successfully, but cannot be returned to their country of origin due to a well-founded fear of serious harm, this is a new form of international protection although it is used already in a number of Member States.

  Currently, in countries like Germany, those who fail to gain refugee status but cannot return to their homes, or a safe third country, are treated abysmally within the *Duldung* system. They and their families have no rights to any form of social integration, help or services, education, housing or the right to work. Consequently, they live in a legal, economic and social limbo. The inclusion of this legal category is therefore an improvement.

The Directive acknowledges the fundamental right of displaced persons not to be expelled from a Member State or sent back to a situation in which their life or freedom are in danger (**non-refoulement**). This right contained in the Geneva Convention has been supplemented by the European Court of Human Rights in Strasbourg to ensure protection for those in danger of torture, cruel, inhuman or degrading treatment if they are expelled or returned.

The proposed Directive also covers minimum rights and benefits to be enjoyed by both refugees and those provided with subsidiary protection. These include importantly, the right to work, multi-annual residence permits, access to integration programmes etc. Although the rights and benefits are the same in principle, to those with subsidiary protection access is made available only on a gradual basis.

However, the Directive opens the possibility for Member States to refuse to provide international protection for people if they judge that there is part of a country of origin where the applicant would not be subject to persecution. While this may sound sensible, there are no common criteria agreed to guide Member States in taking such a decision! Safeguards are necessary to ensure that people can reach these safe internal protection zones safely and that adequate protection and resources are available there. (See concerns about the application of non-refoulement in **Briefing Paper 2**)

[1] Council Directive on minimum standards for the qualification and status of third country- nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001)510)

WHAT HAPPENS NOW? WHAT CAN YOU DO?

The Directive was formally agreed in April 2004 by the national governments in the Council of Ministers. Therefore, it will now be sent to the national parliaments for adoption into national law. Normally there is a two-year transposition period.

This is a crucial stage of the process as Directives can be modified by national parliaments as long as the aims and spirit of the text is guarded. Therefore it is important that we are vigilant of national parliamentary debates.

It is important to contact and press your national parliamentarians to ensure that the text of this Directive is adequately adopted, and to ensure that national governments do not reduce the level of existing national rules as a result of the legislation, rules which are currently higher than the common European minimum standards.

USEFUL LINKS

- National refugee councils and organisations, and the umbrella European Council for Refugees and Exiles (ECRE): www.ecre.org (includes a list of national organisations)
- UNHCR: www.unhcr.org
- Members of the European Parliament can also be contacted: www.europarl.eu.int (for full list)