Odd Man Out?

Myth and Realities in the British Approach to the European Union

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Introduction

EU law is having an increasing impact on asylum policy in Europe. Member States have gradually pooled policy-making competencies in this area in order better to control asylum flows and to share more equitably responsibilities arising from such migratory movements. For many years, the UK was an active promoter of EU initiatives in this area, as intergovernmental cooperation was seen by British policy-makers as a way to deal more effectively with perceived abuses of the asylum system and EU law was seen as an avenue through which restrictive policy measures could be introduced into national legislation without much domestic opposition. Gradually, however, European asylum policy making has in recent years become less intergovernmental and

increasingly influenced by EU institutions. At the same time the focus of EU legal developments has shifted from an exclusive concern about controlling asylum flows towards the setting of European-wide minimum standards for the treatment of asylum seekers and refugees. While the UK had very actively participated in the earlier phase of European asylum cooperation, more recently the government's willingness to cooperate with the other Member States in this area has become more selective, giving rise to claims of British exceptionalism.

Asylum Trends in Europe

During the 1990s there was a great deal of talk about the asylum crisis as the number of asylum applications reached record highs. Many saw this as a new trend that was likely to stay with us, due to changes such as the fall of the Iron Curtain, lower costs of transportations, an expanding global market in human smuggling, etc. While these factors without any doubt have had some impact on migration flows, a look at asylum statistics over the last two decades shows that high asylum numbers in Europe have mostly been driven by particular crises, refugee-producing conflicts such as the Bosnian war in the early 1990s, or the wars in Kosovo, Afghanistan and Iraq at the turn of the century.

The perception among large parts of the general public in the UK and elsewhere, however, has been quite different. *The Sun* reflected popular sentiment about the perceived abuse of the asylum system in one of its headlines: 'Our land is being swamped by a flood of fiddlers stretching our resources – and our patience –

to breaking point'.[1] In a 2003 YouGov poll commissioned by *The Sun*,[2] people in Britain were asked to choose what they regarded as the most important political issue for the UK. The highest number of respondents (39 percent) chose 'immigration and asylum seekers'. In the same survey, 80 percent of respondents agreed with the statement that 'the problem of asylum-seekers is out of control'.

Many in Britain have been convinced that the UK has been the country most affected by this 'asylum problem' as compared with other European countries, believing it to be a particularly popular destination country for refugees and one that consequently has suffered uniquely high 'asylum burdens'. This belief, however, is not borne out in the official statistics.

When comparing Britain with France, the two being quite similar destination countries (in terms of size, wealth, colonial history), we see that the UK was a more popular destination country than France for the ten-year period of 1994 to 2004, but had less of the responsibility share than France in the 1980s as well as more recently. However, even during the high points of UK arrivals in 2000 and 2002, when the UK processed about 100,000 asylum applications annually, numbers were still modest compared to applicants arriving elsewhere. Such as in Germany where more than 420,000 asylum requests were received in 1991, amounting to two thirds of all asylum applications registered in the EU that year. Hence the UK's responsibilities for asylum seekers are not as unique as has sometimes been claimed. Significant variations in asylum applications and the risk of high 'asylum burdens'

in the context of increased mobility have led European states, including the UK, to turn to the European level in order to find more effective ways to regulate the flow of asylum seekers and illegal migrants.

National and EU Policy Responses

The economic crisis of the 1970s had made it difficult for European states to be able to absorb the number of immigrants they had been encouraging in previous decades. The closing of legal immigration routes led to a rise in the number of asylum applications which became the only route of entry to Western European countries. As a result, pressure on national asylum regimes was building with the outcome of 'an almost total paralysis of European asylum systems by the beginning of the 90s' (Boccardi, 2002; 27-8). These difficulties led to the growing awareness amongst some European states for the need for an international approach to the problem of asylum. As Boccardi writes, 'in the face of ever increasing cross-border refugee mobility it gradually became apparent that purely national asylum strategies would inevitably be doomed to failure' (2002; 28).

Intergovernmental cooperation on asylum in the form of ad hoc groups began with the Trevi group, established in 1976 by the 12 EC Member States. Its task was to counter terrorism as well as to coordinate policing and other border-control related tasks within the EC. The UK government was a keen supporter of and participant in the work of the Trevi group (Bunyan, 1997; 21). Bigo has written that traditionally the UK has attempted to 'paralyse certain groups at the European Community

level, not so much because they are against Europe, but because they are opposed to supranationality and federalism. On the other hand, they have firmly supported intergovernmental bodies including Trevi' (Bigo, 1994; 170). Its intergovernmental nature made it an attractive forum for agreeing policy. According to evidence submitted to the Home Affairs Select Committee, Trevi's particular strength lies in the informal, spontaneous and practical character of its negotiations (Home Affairs Select Committee 1990; 5).

In 1986, the UK Presidency organised a meeting in London in view of working towards the implementation of further compensatory security measures in this area. Member States were represented at this meeting by their Ministers of Interior and Justice Ministers. They resolved to set up an Ad Hoc Immigration Group. It was established on the initiative of the UK with the aim of ending abuses of the asylum process (Webber, 1993; 141). Amongst the areas comprising the work of the Ad Hoc Group was visa policy. At a meeting of the Group in April 1987, a year after its establishment, visa policy was considered as playing a 'particularly important role...in the strengthening of controls at external borders'.[3]

The Ad Hoc Group continued to be active throughout the 1980s and 1990s. In 1990 it produced a draft of the Dublin Convention, which was signed by all Member States in 1990.[4] The UK was one of the first Member States to ratify the Convention. Its content was 'lifted wholesale' from Chapter 7 of the Schengen Agreement entitled 'responsibility for processing applications for asylum', which was signed at the same time as Dublin

(Webber, 1993; 142). The Convention was designed to ensure asylum applicants only made one such claim in Europe, while also preventing asylum seekers from being able to choose the country in which they made their claim by requiring that the individual's claim be heard in the first European Member State through which she passes, i.e. the 'safe third country' notion. A 'safe third country' is one through which an individual has passed and *could have* found protection, but has not done so, either because she did not lodge a claim, or her claim was rejected. Where the individual subsequently travels to another State, she is liable to be returned, subject to the existence of a readmission agreement. The 'safe third country' concept was born out of a conviction that the unequal spread of asylum seekers across the EU was due to 'forum shopping' by applicants, who were perceived as making their way to States in which they believed their claims were likely to be treated sympathetically. The Dublin Convention thus established the rules for the determination of the Member State responsible for hearing the claims of asylum seekers, and is founded on the notion that this responsibility lies with the first Member State with which the asylum applicant establishes contact, whether by the issue of a transit visa, the legal presence of a close family member, or in the absence of these, the first physical contact with the territory (4 June 1985 [1985] OJ L 176; see Lavenex, 1998; 130). State Parties are required to readmit individuals transferred on the basis of the Dublin regime, whilst respecting the principle of mutual recognition with regard to the application of its rules.

Despite the adoption of the Dublin Convention, the relative distribution of asylum seekers across Europe has remained volatile over the years, exemplified by the rapid rise of applications in the UK in the late 1990s. Increasingly, differences in the relative restrictiveness of countries' national asylum regimes have come to be regarded as one of the main reasons for disparities in asylum burdens. According to this view, host countries with a high relative number of applications will try to make their asylum policies more restrictive and other host countries will, as a result, become more attractive destination countries. This has sparked a heated debate about whether countries in which asylum applications have increased in recent years represent a 'soft touch' for asylum seekers and economic migrants using the asylum route of entry. It has also raised concerns that European countries, afraid of being seen as a 'soft touch', have become engaged in the competitive downgrading of refugee protection standards. In order to achieve a more stable and equitable distribution of asylum burdens and prevent a 'race to the bottom' in protection standards, policy makers in Europe have turned to policy harmonisation at the European level. Policy convergence in the field of asylum is seen as the key towards more equitable burden-sharing and an end to regulatory competition.

Moves towards the Common European Asylum System (CEAS) therefore have aimed at establishing a common asylum procedure and a uniform protection status applicable throughout the European Union. These objectives were defined first in the Tampere Programme

in 1999 and then confirmed and elaborated in the Hague Programme of 2004. Three main legislative instruments have been adopted. These comprise Directive 2003/9 laying down minimum standards for the *reception* of asylum seekers (OJ L 31, 6.2.2003; 18), Directive 2004/83 on minimum standards for the *qualification* of persons as refugees or those in need of subsidiary protection (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004; 12)) and Directive 2005/85 on minimum standards on *procedures* in Member States for granting and withdrawing refugee status (O J L 326, 13.12.2005; 13).

The Impact of the EU on National Policies

There is a widely held view that these developments in European cooperation and early moves towards a common EU asylum policy in particular have had a restrictive impact on asylum policy in Europe, making it increasingly difficult for asylum seekers to reach European territory and benefit from effective protection. This has become known as the 'Fortress Europe' thesis (Geddes 2000; Luedtke 2009). This thesis argues on a theoretical level that Member State cooperation on asylum and refugee matters has fostered restrictiveness through processes of 'venue shopping' (Guiraudon 2000), 'securitisation' (Huysmans 2000) and the legitimisation of 'lowest common denominator standards' (Lavenex 2001). Cooperation, however, does not have to lead to

restrictive outcomes. It can also have a 'rights-enhancing' impact on domestic asylum legislation as it curtails regulatory competition and in doing so halts the race to the bottom in protection standards in the EU. Rather than leading to policy harmonisation at the 'lowest common denominator', EU asylum laws can lead to an upgrading of domestic asylum laws, strengthening protection standards for groups of forced migrants. Ultimately, the question of the impact of European cooperation on asylum and refugee policy is an empirical one. Through an analysis of the three main EU asylum instruments in this area, it can be demonstrated how European cooperation has strengthened some refugee rights in the Member States.

The Reception Directive

Traditionally, 'states have strong reservations about granting important rights to asylum seekers because no final decision has been taken yet on the substantive issue of their application' (Lambert, 1995; 103). Nevertheless, the Tampere Conclusions of 1999 provided that the Common European Asylum System should include the establishment of common minimum standards of reception conditions for asylum seekers (Tampere Presidency Conclusions, October 1999). Although this directive has been strongly criticized for not providing adequate standards for asylum seekers (UNHCR 2003), there is little evidence to suggest that the Directive has led to further restrictions of existing national standards.[5] On the contrary, it is shown below that key elements of the Reception Directive have triggered a process that can

be expected to lead to an upgrading of domestic standards in several Member States. An analysis of the Directive by the Odysseus Network suggests that EU law on reception conditions does not reflect the lowest common denominator of standards that previously existed in the Member States. The Odysseus Network has noted that the Reception Directive has 'led to the adoption of more favourable provisions at national level than the ones applicable before its adoption in 10 Member States' (Odysseus Academic Network, 2006, 11). The study held that in several Member States the Directive has enhanced protection standards in areas such as provisions for unaccompanied minors, access to health care and access to the labour market. Regarding labour market access, asylum seekers have been given the opportunity to work (after a twelve months waiting period) in countries such as Estonia, France, Latvia, Poland and Slovakia which had previously barred asylum seekers from entering their labour market until a decision on their application for refugee status had been taken (Odysseus Academic Network, 2006, 113). The Odysseus study concluded that the Directive generally did not have the effect of lowering previously higher national standards as would have been possible in the absence of a standstill clause. Possible exceptions noted were Austria and in the United Kingdom where the report states that 'elements of a (potentially) restrictive nature have been introduced'. These consist of limitations on access to employment in Austria and harsher penalties in the UK (Odysseus Academic Network, 2006, 114). Overall the Odysseus Network

report held that 'the positive effects of its transposition overshadow its negative effects' (Odysseus Academic Network, 2006, 114).

The Qualification Directive

The Qualifications Directive sets out the rules and principles to be applied by Member States in their identification of refugees and those deserving of subsidiary protection status, and entered into force on 20 October 2004. Critiques of the Directive have highlighted a number of elements of the Directive which have been seen as having the potential to undermine existing protection standards (UNHCR 2007). Despite these criticisms, the assessment of the impact of the Qualifications Directive has in parts been very positive. The introduction of more detailed rules of evidentiary assessment and a clearer definition of persecution have been widely welcomed. Transposition also significantly advanced standards in some Member States where non-state actors of persecution were recognised for the first time, or subsidiary protection was introduced as a concept (Elena 2008; 5). The Directive's provisions on subsidiary protection have been welcomed (UNHCR 2007; 11) as representing the first supranational legislation in Europe defining qualification for subsidiary protection, and creating an obligation to grant this status to those who qualify. Many EU Member States had pre-existing national provisions to afford individuals some form of complementary protection status. The Directive has also been praised for recognising the fact that persons fleeing the indiscriminate effects of violence

associated with armed conflict, but who do not fulfil the criteria of the 1951 Convention, nevertheless require international protection (UNHCR 2007; 81). As regards non-state persecution, according to the UNHCR, 'the Qualification Directive has resulted in much greater conformity of legal interpretation on non-State actors of persecution or serious harm [...]. The shift to a focus on the availability of protection, rather than the actor of persecution or serious harm, should be commended. In France and Germany, the Directive has enlarged the scope of grounds for granting protection and thereby reinforced the protection system.' (UNHCR 2007; 9) In Germany, the introduction of the concept of non-State actors of persecution is widely seen as having enlarged the scope of protection. This is reflected in the sharp rise in decisions by the authorities granting refugee status to Somalis since this provision has entered into force under German law (UNHCR 2007; 46).

The Procedures Directive

The Procedures Directive was formally adopted on the 1 December 2005. The key elements that fall under the topic of asylum procedures include the question of access to procedures, procedural guarantees such as the opportunity to communicate with the relevant authorities, access to an appeal process as well as the procedure for the withdrawal of refugee status. The Directive faced calls for withdrawal (ECRE *et al.*, 2004), as well as general criticism from the UN High Commissioner for Refugees strongly (UNHCR, 2004) and from within the EU institutions (European Parliament, 2000). However, the

Directive can be seen to have improved standards of protection for individuals accessing EU territory. The 'safe third country' provisions in the Directive can be seen as having undergone rights-enhancement during the negotiations on the Directive. As Doede Ackers reports, 'There were drafting sessions which resulted in considerably improving the text on rules with respect to the individual consideration in safe third country cases'. (Ackers; 2005, 30). The Commission has stated that the first instance procedures are fully in accordance with the essential rights provided for in Section 192 of the UNHCR Handbook on procedures and criteria for determining refugee status (1979) (Ackers; 2005, 32). What is more, on appeal, the provisions it includes on judicial scrutiny go beyond the Handbook in requiring Member States to ensure an effective remedy before a court or tribunal as opposed to merely 'a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system' (UNHCR Handbook 1979). Further, in a report published by the Refugee Council in 2007 on the UK's implementation of the Procedures Directive, the Refugee Council makes clear that the standards of the Directive would require an improvement of standards in the UK. Article 8(1) for example, states that 'Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible' (Refugee Council 2007; 7).

The analysis of the three main EU asylum directives suggests that European cooperation and the development

of the common asylum law on the basis of EU minimum standards in this area has curtailed regulatory competition and in doing so it has largely halted the race to the bottom in protection standards in the EU. In more recent years, rather than leading to policy harmonisation at the 'lowest common denominator', EU asylum law has increasingly led to an upgrading of domestic asylum laws in several Member States, strengthening protection standards for forced migrants. While there currently remain significant variations in Member States' implementation of EU asylum law, we expect that the ongoing 'communitarisation' of asylum policy will help to converge Member States' implementation records of EU asylum law and further strengthen refugee protection outcomes in Europe.

Return to British Exceptionalism?

While the UK has cooperated closely on asylum and refugee policy with the other EU Member States for many years, more recent British policy suggests that we have entered a new period. In a Protocol to the 1999 Treaty of Amsterdam, the UK, Ireland and Denmark secured opt-outs from EU treaty provisions on immigration, asylum and civil law. The British and Irish opt-outs allow for the countries to choose whether or not to participate in the discussions on legislation in this area. However, the Protocol gives both countries the right to 'opt into' legislation in these areas at any point should they decide to do so. In practice until recently, the UK has opted out of nearly all proposals concerning visas, borders, and legal migration, but has opted into to all

proposals concerning asylum and civil law and nearly all proposals concerning illegal migration.[6] Tony Blair, in an interview on 25 October 2004 described the UK's position as follows:

> With the Treaty of Amsterdam seven years ago, we secured the absolute right to opt in to any of the asylum and immigration provisions we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds.[7]

Recently, however, after years of regular 'opt-ins', the approach of the UK and Ireland has changed and their participation in common policies on illegal migration and asylum policy has become more selective, something criticized by former Justice and Home Affairs Commissioner Vitorino, who has argued that opt-outs in this area 'undermine burden-sharing'.[8] In 2008, the UK (and Ireland) decided not to 'opt into' the EU Return Directive which sets minimum standards for the Member States to follow when adopting policies for the involuntary return (deportation) of illegal immigrants and failed asylum seekers. The British government was:

> not persuaded that this Directive delivers the strong returns regime that the EU needs and that's why the UK government has chosen to exercise its right not to participate in this proposal'. The UK government claimed 'that the Directive makes returning illegally staying third country nationals actually more difficult and more bureaucratic – by introducing restrictions on detention, obligations to

provide legal aid to irregular migrants, and increasing the possibilities for challenging the return decision.[9]

In other words, the UK felt that the introduction of EU minimum standards would undermine its highly restrictive deterrence policy on involuntary return, in particular domestic laws which allow for the indefinite detention of asylum seekers and illegal immigrants. It means that the UK is now unique in Europe in insisting on the upholding of policies that allow for indefinite detention while other EU Member States who also had domestic policies of indefinite detention, have now agreed to be to be bound by the minimum standards set out by the Return Directive.

Similarly, the UK government has recently stated that it will not not 'opt into' the changes proposed in the new EU Reception Directive (Reception II), which will establish higher common reception standards for asylum seekers across the EU, including giving them greater access to the labour market (after 6 months). The government claims that the Directive would make the UK too attractive to asylum seekers and encourage bogus claims. It also argues that by not opting-in to the new Directive the UK will automatically cease to be governed by any previous EU legislation on reception conditions (Reception I). In other words, the government has not only decided that it considers the Reception II Directive too liberal, it also sees its opt-out of the new Directive as an opportunity to reverse its policy on Reception I. It is a position that has not only been criticized by human rights organizations, but also in a recent report by the House of

Lords (House of Lords 2009). The House of Lord's EU Sub-Committee on Home Affairs argues that there is real uncertainty as to what the UK's legal position will be following the adoption of the new Directive by other Member States. The Committee states that as the UK has opted in to the previous measure but refused to do so for this [new] Directive, it is very possible that the UK will continue to be bound by the previous unamended legislation even though that is not what the government wants. The report states: 'there is no policy or operational reason why the Directive should not continue to operate in the UK in its unamended form.' Commenting Lord Jopling, Chairman of the House of Lords EU Sub-Committee on Home Affairs, said: 'The current situation with the UK's opt-ins on EU home affairs legislation is a recipe for confusion'. It is also a policy which makes it clear that the government has decided to be the only major country in the EU which refuses to be bound by EU minimum standards for asylum seekers, a position that, as we have argued above, cannot be justified on the basis of the assertion that the UK is exceptional in the asylum pressures it faces.

Conclusion

In recent years, asylum policy has increasingly been regulated at the European level, where initial intergovernmental cooperation has evolved into highly 'communitarised' policy making, with EU institutions playing an increasingly important role and Member States being able to take decisions by Qualified Majority Vote. As a result of this process, European cooperation is

no longer a mechanism where EU policy is determined by the most restrictively minded Member State. Instead, European cooperation has increasingly put pressure on Member States to fall in line with certain EU minimum standards, which in several cases has meant that Member States have had to change their domestic legislation and grant new rights to asylum-seekers and refugees. The UK, as one of the countries which has come under pressure to 'upgrade' domestic legislation to fall in line with EU standards, has become more reluctant to adopt new EU legislation and more willing to use its 'opt out', allowing the Home Office to side-step the rights-enhancing impact of EU policy in this area. While the UK's 'asylum burdens' are hardly exceptional in comparison to the rest of Europe, the government's decision to deny EU minimum standards of protection to asylum seekers in Britain is.

Notes

1 *The Sun*, 9 March 2000.

2 YouGov survey on Immigration and Asylum for *The Sun* conducted between 11 and 14 August 2003, available at www.YouGov.com.

3 'Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community' (Brussels, 28 April 1987) (Trevi Group – 'ad hoc' meeting on immigration), paragraph a.

4 OJ C254/1.

5 And Article 4 of the Directive explicitly allows Member States 'to introduce or retain more favourable domestic provisions'.

6 The Irish practice has been almost identical to that of the UK.

7 'Government pledges to opt out of common EU asylum system', By Nigel Morris and Stephen Castle in Luxembourg, *The Independent*, Tuesday, 26 October 2004

8 Ibid.

9 EP Press release, 'Parliament adopts directive on return of illegal immigrants, Immigration' – 18-06-2008 – 15:05

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