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THE COMMON EUROPEAN ASYLUM SYSTEM (CEAS) with particular reference to the Qualification Directive (2004/83/EC) (QD) and the Procedures Directive (2005/85/EC) (PD)

by

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Introduction

The purpose of this paper is twofold;

(1) to consider in broad terms the origins and nature of the Common European Asylum System (CEAS) and its relationship to international human rights law.

(2) to comment on the strengths and weaknesses of the two directives with which the judiciary of the Member States is primarily concerned – namely the QD and the PD.

These are huge topics in their own right and in my oral presentation I shall be able only to highlight what seem to me to be the essential issues. I have therefore sought to point to more detailed consideration and reference sources in the text to this paper supplemented by the footnotes.

But, in general terms, UNHCR has published detailed (but non-binding) papers on all major issues arising under the Geneva Convention[2] and more generally its views on human rights issues which do not fall strictly within the ambit of the Convention. They are readily accessible on the internet.[3]

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[2] References to the Geneva Convention are to the 1951 Convention relating to the Status of Refugees done at Geneva and to its 1967 Protocol done at New York, adopting the definition in Article 2b QD.

[3] Those interested in further reading through academic writings, may find the following of interest: (a) The Refugee in International Law, 3rd Edition (2007) by Guy S. Goodwin-Gill and Jane McAdam; (b) The Law of Refugee Status (1991) by James C Hathaway; and (c) European Asylum Law and International Law (2006) by Hemme Battjes. The last is the only major work concerned solely with detailed consideration of EU legislation from which the CEAS is derived, including extensive analysis of the QD and the final draft of the PD.

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The legal basis of the CEAS

1. The legal basis of the CEAS currently derives from Article 63 of the Consolidated Version of the Treaty Establishing the European Community (TEC) incorporated under the Amsterdam Treaty of 2 October 1997 which came into force on 1 May 1999.

2. The CEAS is not confined to issues of recognition of international protection needs with which the judiciary are primarily concerned. Its scope is much wider. It extends to immigration policy generally (Article 63(3) and (4) TEC).

Article 63(1) TEC

3. Article 63(1) is directly concerned with refugee issues. It provides as follows:

> *'The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:*
>
> *1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:*
>
> *(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,*
>
> *(b) minimum standards on the reception of asylum seekers in Member States,*
>
> *(c) minimum standards with respect to the qualification of nationals of third countries as refugees,*
>
> *(d) minimum standards on procedures in Member States for granting or withdrawing refugee status.'*

4. Note that the Geneva Convention is specifically referred to but that there is also a general reference to *'other relevant treaties'* in the introductory wording of sub-article 1.

5. Note also the reference to *'minimum standards'* in sub-paragraphs (c) and (d) which are directly concerned with the derivative QD and PD.

Article 63(2)(a) TEC

6. Article 63(2)(a) is concerned both with refugees and 'displaced persons':

> *'2. measures on refugees and displaced persons within the following areas:*

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection'

Note again the reference to '*minimum standards'*.

Article 63(3)(a) TEC

7. Finally, Sub-article 3(a) bears on the provisions relating to those in need of international protection:

'3. measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion'

The scope of Article 63

8. Arriving at the precise scope of Article 63 is not easy save for the obvious requirement as to a minimum standards approach and the clear reference to international treaties relative to asylum issues. Hemma Battjes[4] carefully analyses these provisions and concludes:

'Contrary to the first impression that Article 63 TEC might give, Community powers on asylum are not restricted to the areas listed in Article 63(1) and (2). Article 63(3)(a) attributes to the Community the competence to issue measures on entry, residence and procedures for third country nationals, including asylum beneficiaries, asylum seekers and persons in need of temporary or subsidiary protection, addressed under paragraphs (1) and (2) of Article 63 TEC.

Article 63(1) and (2) serve to carve out the obligations for the Community to adopt measures on the areas mentioned there within five years, to exempt Article 63(1)(a) measures from the limitation to minimum harmonisation applying to Article 63(3)(a), and, arguably, to state with emphasis the requirement of accordance with international asylum law of the issues listed in Article 63(1).'

The scope of the CEAS

9. Currently, the scope of the CEAS is necessarily limited by the provisions of Article 63 TEC and it is on these provisions that EU legislation to date is based, with the *'minimum standards'* approach firmly entrenched in the QD and the PD.

[4] *op.cit. at Chapter 3.*

10. It was clear, however, since the Tampere Conference of October 1999 that implementation of Article 63 TEC was a first and transient stage towards the full concept of the CEAS.

11. The Conclusions of the Presidency at that Conference deal with this issue. They record that the CEAS was to include, in the short term, a clear and workable determination of the state responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers and the approximation of rules on the recognition and content of refugee status. These were to be supplemented with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. Up to that point, these were matters within the TEC competence. In addition, the Conclusions made clear, however, that, in the longer term, community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. This second stage of the development of the CEAS from 'minimum standards' to 'uniform status' is reflected in Article 78 of the Lisbon Treaty, yet to be ratified. Finally, the European Council in Tampere urged the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.

The principle of freedom of movement within the EU

12. Freedom of movement of workers and their dependants has been a pillar of the European Union since its original inception in March 1957 as the European Economic Community, and subsequently as the European Community.

13. In principle it has long been accepted that such freedom of movement should extend to those third country nationals and stateless persons lawfully resident in a Member State provided that certain conditions are fulfilled. Their position has now been regularised in the Directive on EU long-term resident status (2003/109/EC) which it is proposed should be extended to those enjoying long-term refugee or subsidiary protection status.[5]

Article 63(4) TEC

14. In this connection Article 63.4 TEC provides:

[5] Council Memo/07/228 of 6 June 2007 contains proposals for a Council directive aimed at extending to beneficiaries of international protection the possibility to obtain long-term resident status. The proposed requirements are legal and continuous residence for five years; the ability to maintain himself and his family without recourse to social assistance; sickness insurance covering all risks; fulfilment of any integration conditions of the Member State; and that he does not pose a threat to public policy or public security of the Member State. The proposed Directive will amend Directive 2003/109/EC. Thus, whilst Directive 2003/109/EC currently forms no part of the CEAS, it will do so if and when it is amended in the manner proposed in Council Memo/07/228.

'4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.'

15. The earlier provisions of Article 63 TEC are concerned with issues relating to the reception and recognition of protection status. Once a claimant is recognised as in need of international protection, he will become lawfully resident in the Member State concerned so long as that recognition continues. It is clear that the development of the CEAS envisages that third country nationals enjoying long-term protection status should be in a similar position to other lawfully resident third country nationals.

16. I would suggest that Article 63.4 TEC has a central importance in the scheme of the CEAS, which needs to cover not only the application of consistent criteria for qualification for protection and the procedure to be followed when dealing with claims, but also to take into account the long-term effect of recognition having regard to the principle of freedom of movement with the EU.

The restriction to the 'worthy' applicant

17. Once this is accepted, the purpose of the restriction of status under the QD to 'worthy' applicants by the application of the exclusion provisions of Articles 12 and 17 QD – which has attracted so much criticism – becomes apparent. A Member State which receives a claim for status from, e.g., someone with a terrorist background may be unable to remove him because to do so would be in violation of its treaty obligations under Article 3 of the European Convention on Human Rights (ECHR), but such a claimant would have been excluded from protection status under Article 1 F, Geneva Convention, the concept of which is extended by the QD also to subsidiary protection status. It would be unacceptable that the principle of freedom of movement within the EU should be capable of extending to such a claimant, notwithstanding that the receiving Member State may be unable to remove him from its territory.

18. Further, it explains the emphasis which the QD puts on cessation of status because of changed circumstances (Articles 11 and 16 QD) – an issue with which judges may become more concerned in the future because it is one of the decisions against which an effective remedy must be provided (Article 39.1(e) PD).

19. I do not suggest that freedom of movement is the sole factor driving the CEAS but its importance as a pillar of EU philosophy should not be underestimated.

20. Further, it makes clear that the CEAS is and has always been conceived as a regional instrument taking into account the interests of the Member States that, under the principle of solidarity, will share the burden of receiving asylum claimants, as well as the ultimate rights of freedom of movement of those who become effectively permanently established in the EU as persons in need of long-term protection. It is for this reason that the CEAS will require in the long term uniform standards of qualification and procedure in protection claims.

The first stage of the CEAS

21. In addition to the QD and PD with which we are concerned, there are a number of EU instruments and policies which are concerned with the first stage of the development of the CEAS.

These include:

(a) the Decision (2000/596/EC) establishing the European Refugee Fund;

(b) the Regulation (2725/2000/EC) concerning the establishment of 'Eurodac' for the comparison of fingerprints;

(c) the Directive (2001/55/EC) laying down minimum standards for giving temporary protection in the event of a mass influx of displaced persons;

(d) the Reception Conditions Directive (2003/9/EC) guaranteeing minimum standards for the reception of asylum seekers, including housing, education and health;

(e) the Dublin Regulation (2003/343/EC), establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national;

(f) the Hague Programme.

The coming into force of the PD completed the first phase of the CEAS.

An overview of the QD and the PD

22. The two Directives are:

(a) Council Directive 2004/83/EC of 29 April 2004 (which came into force on 10 October 2006) 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; and
(b) Council Directive 2005/85/EC of 1 December 2005 (which caome into force on 1 December 2007) on minimum standards on procedures in Member States for granting or withdrawing refugee status.

23. I shall seek to deal with certain issues in more depth later but I think it is helpful at this point to give an overview of the most important features of the Directives.

1. The Directives apply only to third country nationals or stateless persons – not to citizens of Member States – so that they lack the universality of the Geneva Convention and ECHR.

2. The QD introduces minimum standards allowing Member States to operate more favourable standards *'in so far as those standards are compatible with this Directive'* – there has been much controversy as to the effect of this provision. If the second stage of the CEAS proceeds, then, as will be seen, the problem caused by the *'minimum standards'* concept of Article 63 TEC will disappear.

3. The primary objective of the QD is twofold: (a) to provide common criteria through procedures meeting minimum requirements of fairness in order to identify those who should be recognised as being in need of international protection either as refugees under the Geneva Convention or under international human rights norms as defined in Article 15 of the Qualification Directive (subsidiary protection status); and (b) to ensure a minimum level of benefits for those so recognised in all Member States (Recital (6)).

4. A secondary and closely linked motive is to reduce 'asylum shopping' by applicants since the application of common criteria will render this pointless (Recital 7).

5. The need for protection follows from recognition of an existing status either of refugee or *'person eligible for subsidiary protection'* – the second category comprises those who, although not qualifying as refugees, can show substantial grounds for believing they would face *'a real risk of suffering serious harm'* in their country of origin.

6. *'Refugee'* has the same meaning as in the Geneva Convention but various articles of the QD make provisions as to relevant criteria for recognition which settle differences of approach towards interpretation of that Convention which had previously existed between Member States. The most extreme example is acceptance that non-state actors can be actors of persecution – a view which had been rejected in the past by France and Germany who only recognised persecution if it emanated from the State, albeit they might have granted discretionary protection in cases where the persecution feared was from non-State actors.

7. '*Serious harm*'[6] in subsidiary protection status is defined in Article 15 QD as liability to suffer the death penalty or execution;[7] torture or inhuman or degrading treatment or punishment <u>in the country of origin</u> [emphasis added];[8] and *'serious and individual threat to a civilian's life or person by reason of*

[6] The Explanatory Memorandum of 12.9.2001 states that the definition is based on international human rights instruments relevant to subsidiary protection. The most relevant of them were Article 3 of the ECHR, Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and Article 7 of the International Covenant on Civil and Political Rights.

[7] This reflects Article 2.2 of the European Charter which provides that no-one shall be condemned to the death penalty or executed.

[8] This partially reflects the provisions of Article 3 of the ECHR: but, there are important differences.

indiscriminate violence in situations of international or internal armed conflict'.[9]

8. Subsidiary protection status is a formalisation for the first time of what has in the past generally been dealt with by way of discretionary complementary protection with one important difference - the concept of exclusion from subsidiary protection on a basis similar to that applying under the Geneva Convention has been introduced.

9. Much more emphasis has been placed on cessation and disqualification from protection in both categories of status, including posing a threat to internal security or commission of serious crimes – notwithstanding that under the absolute terms of Article 3 ECHR the person concerned may not be removable.

10. The PD lays down minimum standards of procedure to be adopted in asylum applications [emphasis added][10] including the right to interview, a right of appeal from or review of the initial decision, requirements as to the qualifications of decision-makers and the circumstances in which accelerated procedures (mainly deemed 'safe country of origin' cases) and inadmissibility of claims may be provided for in the Member States' individual transposing legislation.[11]

11. Member States are to report back to the Commission on the functioning of the Directives on a comparatively short timescale.[12]

12. The general thrust of the provisions may be seen as demonstrating an ultimate intention, when the second phase of the CEAS has been concluded, that those recognised as in need of protection status on a long-term basis should have

[9] This is the most controversial provision and the one which has in practice been causing most difficulty in interpretation. It must be doubted whether the judgment of the ECJ in *Elgafaj and another v Staatssecretaris Van Justitie* ECJ Case C-465/07 can be said to have resolved the issues.

[10] This causes a serious asymmetry between the two Directives.

[11] The delay between the coming into force of the two Directives was largely attributable to difficulties in framing the provisions of the PD. Member States apply fundamentally different procedures in their courts. Most European States follow an inquisitorial procedure whereas Common Law jurisdictions like the United Kingdom follow an adversarial procedure. In contrast to the civilian systems, where administrative law is a long-standing concept, it has developed only comparatively recently in countries such as the United Kingdom adopting the adversarial approach. Such development has in part stemmed from issues arising in asylum and immigration jurisprudence where the State is a constant party to litigation involving issues which are not *inter partes* but require a judgment as to the credibility of the claimant on facts which in personal terms are outside the knowledge of the respondent State. In the result procedures adopted in the specialist asylum and immigration tribunals in the United Kingdom have tended to be rather more interventionist. Nevertheless, it is likely that the difference between the inquisitorial and adversarial systems adopted by Member States will throw up procedural difficulties which may ultimately have to be resolved by a common procedural system at a later stage in the harmonisation process as foreshadowed in Recital 3 PD.

[12] The advantage of the Directive mechanism, although appropriate under the principle of proportionality, is that transposition of the QD and PD by Member States has quickly thrown up problem areas in the harmonisation of law and procedure under the CEAS. This will facilitate identification of problem areas in the second phase of the CEAS.

freedom of movement within the EU in the same way as its citizens and lawfully resident long-term third country nationals now enjoy.

The CEAS and International Human Rights Law

24. The CEAS cannot be seen in isolation from the body of international instruments regulating the concept of international surrogate protection for those for whom their national state (or in the case of stateless persons, their country of habitual residence) fails to provide adequate protection having regard to international law norms.

25. The principal United Nations international instruments are, in date order:

Charter of the United Nations, 1945

Universal Declaration of Human Rights, 1948

Convention on the Prevention and Punishment of the Crime of Genocide, 1948

The Geneva Convention relating to the Status of Refugees, 1951 and the New York Protocol, 1967 (the GC)

International Covenant on Civil and Political Rights, 1966

Optional Protocols to the International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social, and Cultural Rights, 1966

Convention on Elimination of Discrimination Against Women, 1979

Convention Against Torture, 1984

Convention on the Rights of the Child, 1989

26. The principal European regional instruments are:

The European Convention on Human Rights, 1950 (ECHR)

The European Union Charter of Fundamental Human Rights, 2000

27. For present purposes, there are three instruments to which specific reference is required These are the Geneva Convention; the ECHR; and the European Charter of Fundamental Human Rights, 2000 (the European Charter).

The Geneva Convention

28. As already noted, it is only the Geneva Convention which is referred to by name in the EU treaties and legislation concerned with the CEAS. The reference in Article 63(1) TEC to *'other relevant treaties'*, although none are specified, signifies that the corpus of international instruments relative to asylum issues are relevant to at least the refugee aspect of the CEAS.

29. Further, the Geneva Convention is the touchstone from which the QD derives its qualifications for refugee status but it does not directly inform the provisions of the PD because the Geneva Convention is silent on such matters and UNHCR, the body charged with its administration, has always left questions of procedure relating to recognition of refugee status to be dealt with in accordance with the laws and practices of the signatory states.[13] For practical purposes the QD largely transposes relevant provisions of the Geneva Convention into EU Law.

30. Recital 2 of the QD records that the establishment of the CEAS is *'based on the full and inclusive application of the Geneva Convention*' and Recital 3 notes that it provides *'the cornerstone of the international legal regime for the protection of refugees'*.

The ECHR

31. The ECHR was adopted by the Council of Europe in 1950. The Council of Europe currently comprises 47 signatory states (some of which have their territory outside Europe) and the Council and its institutions are wholly distinct from the EU although there are areas of co-operation between them including the international enforcement of justice and human rights. If the Lisbon Treaty is ratified then the European Union will become a signatory member of the Council of Europe as are all its current Member States. Any breaches of human rights claimed by the newly created Citizens of the EU will then be justiciable in the European Court of Human Rights (ECtHR) in the same way as already applies to Member States. The ECtHR is unique in the range of recourse it gives to those who claim their human rights have been breached in violation of an international treaty obligation by a signatory state.

32. Since the ECtHR is not an EU institution, it has no jurisdiction in relation to litigation arising under any EU legislation in respect of which the ultimate recourse is to the European Court of Justice (ECJ) in Luxembourg. Nevertheless, since all EU Member States are bound by the jurisprudence of the ECtHR, the ECJ generally follows and applies that jurisprudence when relevant to issues before it.[14]

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[13] The Executive Committee of the UNHCR made recommendations in October 1997 as to the basic requirements which should be met by national procedures. Although generally observed, they have no binding force but their thrust is generally reflected in the provisions of the PD. They are set out at paragraph 192 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (the UNHCR Handbook).

[14] Hemme Battjes in his seminal work *op cit* notes at para 125: *"The [ECJ} persistently emphasises that the Community is not bound by the [ECHR] and other relevant treaties: it does not apply their provisions, but rather 'draws inspiration' from them when formulating 'principle', not rules of Community law concerning human rights. … But paraphrases of this test by the [ECJ] itself … suggest that there is little difference between applications of principles of Community law and application of*

33. In so far as litigation before the ECJ concerning subsidiary protection raises issues in respect of which there is relevant ECtHR case law, it is likely to be applied by the ECJ. If and when the EU becomes a signatory to the ECHR, then the relevance of ECtHR jurisprudence will increase.

34. Article 3 ECHR is part of the inspiration for the status of subsidiary protection as defined in Article 15 QD by reference to Article 2(e) and (f) QD.[15]

The European Charter

35. The European Charter will be incorporated into EU law if the Lisbon Treaty is ratified. Until then, however, it has limited effect as it is not currently an instrument of the EU but rather a Charter 'solemnly proclaimed' by the European Parliament, the Council and the Commission.

36. Nevertheless, there are two ways in which it may currently have some limited effect.

37. First, as a source for general principles of Community Law. Although the scope to be accorded to this approach has yet to be considered by the ECJ, Article 47 (right to fair trial) has at first instance been referred to as a reaffirmation of a general principle of Community law and some domestic courts have referred to Charter articles when identifying obligations under international law - Article 19 prohibiting refoulement is a further example. But, there are already ways in which international law norms may have effect independently of EU legislation as already noted.

38. Secondly, the Charter provisions may have some relevance through references in secondary CEU law. For example, Recital 10 to the QD provides:

> *This Directive respects the fundamental rights and observes the principles recognised in particular by the [European Charter]. …*

But, for practical purposes such a generalised observation in a recital may have little additional impact to the clearer references to it being based on the full and inclusive application of the Geneva Convention (Recital 2 QD).

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The over-arching effect of existing treaty obligations of Member States

39. All Member States are signatories to at least the Geneva Convention and ECHR, and will remain bound by the provisions of those instruments additionally to the

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the corresponding international law norms. … As far as is relevant for asylum, application of general principles of Community law in practice leads to results equivalent to application of the concerned human rights law provisions."

[15] Neither the ECHR nor any other international instrument (except the GC) is referred to in the QD but in its Explanatory Memorandum to the proposal for the QD, the EC stated that the most pertinent of the international instruments on which subsidiary protection was based were Article 3 ECHR, Article 3 of the Convention against Torture, and Article 7 of the International Covenant on Civil and Political Rights.

obligations and duties imposed on them by the EU legislative measures which underpin the concept of the CEAS.

40. This is important because, as already noted, the QD lacks the universality of the Geneva Convention and the absolute nature of Article 3 ECHR in the following important respects:

> (a) it applies only to third country nationals or stateless persons and not to citizens of Member States both in regard to refugee status and subsidiary protection status (Article 2(c) and (e) QD), and then only to serious harm feared in the country of origin;
>
> (b) claimants whose removal would be in breach of Article 3 ECHR where their own past conduct is irrelevant to their right under Article 3, will not be eligible for subsidiary protection if their past conduct merits exclusion from protection under Article 17 QD.

41. The CEAS is intended to create a general framework under which applications made within a Member State should be initially considered and determined including provision for appeal against or review of the first instance decision before a court or tribunal which shall provide an effective remedy to the claimant (Article 39.1 PD).

42. Where a claimant does not qualify for international protection under the QD, it may still be necessary to consider his position under the provisions of specific relevant international instruments binding on the Member State.[16] In addition to the Geneva Convention and the ECHR (bearing also in mind that there are a number of qualified articles falling entirely outside the provisions of the QD), other potentially relevant international instruments include the Convention against Torture, 1984 (note the prohibition of *refoulement* under Article 3); the obligations of the state under the Convention on the Rights of the Child, 1989 (in particular Article 22 concerning child asylum applicants whether accompanied or unaccompanied); the International Covenant for the Protection of Civil and Political Rights, 1966.[17]

43. The most familiar example is where the claimant cannot succeed under the QD or Geneva Convention because his own past conduct excludes him from such protection. But, if removal would expose him to torture or inhuman or degrading treatment or punishment, he would still be entitled to claim that under Article 3 ECHR his removal would be in breach of his human rights and unlawful.

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[16] This is clearly recognized in terms of the CEAS because the PD makes specific provision in Article 3.4 that '*Member States may decide to apply this Directive to procedures for deciding on applications for any kind of international protection.*'. It is, of course very much in the interests of Member States to have a 'one-stop' procedure in protection cases.

[17] See Goodwin-Gill and McAdam 'The Refugee in International Law' at Chapter 8 para 2.1 for a summary of its effect.

The second stage of the CEAS

44. As we have seen in the reference to the Conclusions of the Presidency following the Tampere Conference, the first phase was always seen as a transitory stage in the development of the CEAS.

The EC Green Paper of October 2008

45. The EC's view of the important objectives to be achieved by the second phase of the CEAS are set out in the Commission's Green Paper published in 2008 following extensive consultation:

> *'A genuinely coherent, comprehensive and integrated CEAS should:*
>
> *ensure **access to those in need of protection:** asylum in the EU must remain accessible. Legitimate measures introduced to curb irregular migration and protect external borders should avoid preventing refugees' access to protection in the EU while ensuring a respect for fundamental rights of all migrants. This equally translates into efforts to facilitate access to protection outside the territory of the EU;*
>
> *provide for a single, **common procedure** for reasons of efficiency, speed, quality and fairness of the decisions;*
>
> *establish **uniform statuses** for asylum and for subsidiary protection, which shares most rights and obligations, whilst allowing for justified differences in treatment;*
>
> *incorporate **gender** considerations and take into account the special needs of **vulnerable groups;***
>
> *increase **practical cooperation** in order to develop, inter alia, common training, as well as jointly assessing Country of Origin Information and organising support for Member States experiencing particular pressures;*
>
> *determine **responsibility and support solidarity:** the CEAS must include rules on the determination of the Member State responsible for examining an asylum application and provide for genuine **solidarity** mechanisms, both within the EU and with third countries;*
>
> *ensure **coherence with other policies** that have an impact on international protection, notably: border control, the fight against illegal immigration and return policies.'*

46. Again, these objectives emphasise the broad remit of the CEAS but, they also have a direct and important bearing on protection status law and practice – the two areas with which we are concerned. The Green Paper recognises the problems in implementation of the QD and PD which have arisen in practice:

'Member States are nowadays bound by an important asylum acquis. However, large discrepancies between asylum decisions (even within similar caseloads) still exist. This is due on the one hand to the low standards of harmonisation of the current legislation, and on the other hand, to different practices in national administrations. It is therefore necessary to accompany legal harmonisation with effective practical cooperation.

One of the main goals of practical cooperation is to improve convergence in asylum decision-making by Member States, within the EU legislative framework. A substantial number of practical cooperation activities have already been undertaken in recent years. The replies to the Green Paper showed wide support for enhancing practical cooperation activities and for the idea of creating a dedicated structure to support and coordinate such activities in the form of a European Asylum Support Office (EASO) for Asylum.'

47. These shortcomings are considered specifically in relation to the implementation to date of the QD and PD, where the Green Paper has this to say as to future developments:

'3.2. The Asylum Procedures Directive (APD) [18]

Diverse procedural arrangements and qualified safeguards produce different results when applying common criteria for the identification of persons genuinely in need of international protection. This can damage the very objective of ensuring access to protection under equivalent conditions across the EU. In addition, both the Hague Programme and the TFEU call for the establishment of a common asylum procedure. This requires a fundamentally higher level of alignment between Member States' asylum procedures, as confirmed by the Green Paper consultation.

In order to achieve this goal, the amendments to the APD (to be proposed in 2009) will primarily aim at:

setting up of a single, common asylum procedure leaving no space for the proliferation of disparate procedural arrangements in Member States, thus providing for a comprehensive examination of protection needs under both the Geneva Convention and the EU's subsidiary protection regime;

establishing obligatory procedural safeguards as well as common notions and devices, which will consolidate the asylum process and ensure equal access to procedures throughout the Union;

accommodating particular situation of mixed arrivals, including where persons seeking international protection are present at the external borders of the EU; and

[18] It is interesting that the Green Paper puts amendments to the PD before those proposed to the QD, and that they are so very much more fundamental in nature, perhaps reinforcing the reasoning in footnote 11 above. It is also noteworthy that the thrust of the proposed amendments appears to go primarily to first instance procedures and that there is no specific reference to amendment of Article 39 PD.

enhancing gender equality in the asylum process and provide for additional safeguards for vulnerable applicants.

3.3. The Qualification Directive (QD)

The QD has secured a minimum alignment on both the criteria for granting international protection and the content of protection statuses across the EU. The positive impact of the Directive has been evident in many Member States. However, data show that the recognition of protection needs of applicants from the same countries of origin still varies significantly from one Member State to another. To some extent, this phenomenon is rooted in the wording of certain provisions of the QD.

In order to ensure a truly common interpretative approach and to achieve the objective of introducing uniform statuses (as required by the Hague Programme and the TFEU) the Commission will propose, in the course of 2009, to:

– amend the criteria for qualifying for international protection. To this effect, it may be necessary inter alia to clarify further the eligibility conditions for subsidiary protection, to define with more precision when non-state parties may be considered as actors of protection, or when a person may be considered as not in need of international protection if he stays in a certain part of his country of origin; and

reconsider the level of rights and benefits to be secured for beneficiaries of subsidiary protection, in order to enhance their access to social and economic entitlements which are crucial for their successful integration, whilst ensuring respect for the principle of family unity across the EU.

In addition, the possibility of establishing an effective transfer of protection mechanism will be explored, either as part of the amendment to the QD or as a separate instrument.

Finally, a study will be launched on the possible alignment of national types of protection status which do not currently fall under the EU's regime of international protection.'

The relevance of the Lisbon Treaty to development of the CEAS

48. Currently, these changes are put forward on the basis of the changed emphasis in asylum and immigration policy which would follow adoption of Article 78 of the proposed Treaty on the Functioning of the European Union (TFEU), the Lisbon Treaty. This provides for development of a common policy on asylum, subsidiary protection and temporary protection (Article 78(1)), the relevant provisions of Article 78(2) being:

'2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; …

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; …'

49. Note that this is in contrast to the provisions of Article 63 TEC which refers to the establishment of minimum standards in respect of qualification of third country nationals for refugee or subsidiary protection status and minimum standards on procedures for determining the issue of refugee status recognition.

50. There is, of course, no certainty that the Lisbon Treaty will be ratified. But, should this not happen, the EC appears to take the view that there is authority under the Hague Programme at least to consider the imposition of common procedural standards. This follows from the 1999 Tampere Conclusions in the clear terms set out at recitals 3 and 4 of the PD:

'3. The Tampere conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures and, in the longer term, Community rules leading to a common asylum procedure in the European Community.

4. The minimum standards laid down in this Directive on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures.'

51. This would accord with the views expressed by Hemma Battjes as to the effect of Article 63 TEC (see paragraph 8 above).

52. The possibility that the Lisbon Treaty will not become effective does not therefore preclude continued reform and development of the CEAS under the existing legislative basis based on the 'minimum standards' approach of Article 63 TEC. Nor, indeed, does it preclude the ability of the EC to put forward the alternative basis of 'uniform status' as a separate provision if the Lisbon Treaty is not ratified.

53. The importance of the long-term harmonisation of protection law and procedures under the CEAS has been made clear since the commencement of its implementation. The shortfalls in the first stage implementation have been clearly identified. I would suggest that the essential nature of the changes in the second stage make it likely that, failing ratification of the Lisbon Treaty, the EC will seek to bring forward amendments to the existing legislation so far as possible under Article 63 TEC. The extension of the PD to include subsidiary protection issues is an obvious example. Where that cannot be done, I suggest that the importance of progressing with the second stage is such that it would be appropriate for the EC to seek to bring forward enabling legislation for this specific purpose.

Specific Issues under the QD and PD

54. I turn now to the second part of this paper, namely to comment upon what seem to me to be the strengths and weaknesses of the two Directives with particular reference to the issues which primarily concern the discharge of the judicial function of appeal or review under Article 39.1 PD.

55. In this part I shall seek to deal principally with the following specific topics:

(1) Article 39.1 PD and the meaning of *'effective remedy'*;

(2) issues relating to burden and standard of proof;

(3) the distinction between the mandatory and permissive provisions in the Directives;

(4) the "new" regime of 'subsidiary protection' introduced by the QD; and

(5) the essential simplicity , contrary to appearances, of the PD provisions.

But, first, I deal in broad terms with the strengths and weaknesses of the two Directives.

The strengths and weaknesses of the QD and PD

56. The application of the minimum standard approach pursuant to Article 63 TEC may be seen as a fundamental, although perhaps politically necessary, weakness in both Directives. Whilst the use of such an approach is well known in EU legislation, the method of application in these Directives differed from the normal usage in which a specific unqualified saving for existing higher standards than those imposed by the EU legislation normally appears.

57. The relevant provision (Article 3 QD and Article 5 PD) is couched in identical terms:

> *'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.'* [Emphasis added]

It is the qualifying words at the end of the Articles which raise issues as to the extent to which it is open to Member States to apply more favourable standards in the recognition of protection status under the QD. The preponderance of the academic view, supported by UNHCR, is that there is no restriction on more favourable standards since this cannot be incompatible with the purpose of imposing a minimum standard. On this argument Member States have an unfettered discretion to apply any more favourable standard they wish to apply to recognition of status under the QD.

58. That argument, however, effectively treats the qualifying phrase as meaningless. It is clearly at variance with the intentions of the EC as expressed in 14348/02 JUR 449

Asile 67 of 15 November 2002.[19] Whilst those views are not, of course, binding in terms of interpretation, the academic views give no weight to the overall scheme of the first phase of CEAS which included the proposal to extend provision of certificates of long residence to those in receipt of long-term protection already discussed, and the issue of burden-sharing under the principle of solidarity. Both those aspects underline the importance of reasonable uniformity in the application of the QD by Member States, particularly in relation to those requirements of status recognition which are couched in mandatory terms.

59. The arguments are very complex and are rehearsed in more detail in the IARLJ Manual for Refugee Law Judges. The problem will be resolved during the second phase of implementation of the CEAS, although it appears that to date most Member States have tended to adopt a restrictive view of their powers in this connection.

60. A second weakness is the provision under Chapter VII QD for application of differing levels of the content of refugee protection consequent on the recognition of refugee status on the one hand and subsidiary protection status on the other. It is difficult to see on what basis there should be such a distinction between those recognised as in need of international protection (see Recital 6 PD).

61. The third weakness is the restriction of the mandatory application of the PD to refugees, its application to those seeking other kinds of international protection (including subsidiary protection) being permissive (Article 3.4 PD) unless Member States employed a joint first instance determining procedure when the requirements of the PD must be observed (Article 3.3 PD). This creates an asymmetry between the two Directives which are in all other respects complementary. This is compounded by the extent to which Member States may deviate from the basic principles and guarantees of Chapter II PD in the circumstances provided in Chapter III, primarily aimed at curtailment of the basic processing of claims.

62. All these issues are, of course, to be addressed in the second phase of implementation of the CEAS and it appears that to date they have caused little

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[19] Para 5 notes that although the Amsterdam Treaty term 'minimum standards' does not preclude Member States from maintaining or introducing more favourable standards for persons within the scope of the acts in question, *'in order not to annihilate the objective of harmonization, this possibility cannot be unlimited'* and emphasises the need for such standards to be compatible with the QD. Para 7 notes that a number of provisions (including the definition Article and Articles related to it) *'…are fundamental not only for the directive in question, but also have a bearing on other areas, such as the notion of refugee status …'* so that *'any deviation in national law from* [those provisions] *would be incompatible with the objective of harmonizing the contents of those notions, unless the definition itself allows for the inclusion or exclusion of a certain group of persons as part of a wider category'*. Para 8 states: *'The use of the words "shall" or "may" constituted only a rough indicator as to whether or not a provision is intended to allow Member States to retain or adopt more favourable provisions'*. It is pointed out that the use of the word *'may'* in what is now Article 8(1) and (2) (*sur place* claims) *'does not indicate that those provisions are optional: it follows from their context that they define specific facets of the notions "well-founded fear of being persecuted" and "real risk of suffering serious harm" which are part of the definitions in Article 2(c) and (e) from which, as stated before, no derogation is possible'*. The advice then points out that, contextually, the use of the word *'shall'* in Chapter VII of the QD (content of international protection) is concerned with the objective of laying down minimum standards which must be implemented, while leaving it open to Member States to grant more favourable treatment of those recognized as entitled to international protection.

problems in practice save for the extent to which some Member States appear to have disposed of claims by giving subsidiary protection status rather than carrying out a full process designed first to determine the claim for refugee status recognition.[20]

63. There is, however, a very positive side to the Directives and the EC is to be congratulated on having been able to achieve the degree of unanimity which it did in the face of real political concerns on the part of many Member States.

64. First, the supremacy of the Geneva Convention as the primary source of international refugee law is maintained, subject to the glosses in Articles 4 to 10 QD which generally seek to incorporate the effect of international jurisprudence on questions of application of the Convention which have, in the past, raised difficulties.

65. Secondly, it has been recognised that the international protection needs arising from threat of serious harm as defined in Article 15 QD should also attract a specific protection regime by way of subsidiary protection rather than those who meet the requirements for such protection simply being able to avoid *refoulement* and otherwise to relay on such civic rights as the receiving state was prepared to give them.

66. Finally, and arguably the most significant innovation since it is not based on existing treaty obligations, the PD prescribes a code of principles and guarantees to be observed in determining an application for recognition as a refugee, including a mandatory requirement for provision of an effective judicial remedy by way of appeal or review.[21]

Article 39.1 PD and the meaning of 'effective remedy'.

67. Article 39.1 PD provides, with deceptive simplicity, that:

> '*Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal …'*

It then goes on to list the decisions in respect of which this right exists. The list effectively comprises all first instance decisions concerned with the recognition of refugee status, including withdrawal of recognized status.

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[20] UNHCR in its Annotated Comments on the EC Council Directive 2004/83/EC of April 2004 (January 2005) notes, the need to consider refugee eligibility before subsidiary protection is implied by: (i) R3 which states that the Refugee Convention provides the "cornerstone of the international legal regime for the protection of refugees"; (ii) the use of the word "subsidiary"; (iii) the definition in A2 (e) ("'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom …"); (iv) the internal ordering throughout the Directive which deals with refugee eligibility first; and (v) the wording of R24 which defines subsidiary protection as "complementary and additional to" refugee protection."

[21] The degree of controversy raised by procedural issues is apparent from the substantial number of 'exceptional' procedures and the fact that its adoption was delayed. Nevertheless, the standard procedure, which will apply in the vast majority of cases, lays down a significant code of principles to be observed by first instance decision makers.

68 The meaning of *'the right to an effective remedy'* is not defined in the PD but it is a term of art in international law. It appears in numerous international treaties and conventions including the United Nations International Covenant on Civil and Political Rights (Article 2), the ECHR (Article 13) and the EU Charter of Fundamental Rights (Article 47). Under these instruments local remedies must be exhausted prior to seeking the assistance of the relevant treaty body.

H. Battjes (*op cit.*) provides a helpful overview and analysis of the relevant standards of international law and EC law in appeal procedures as well as the specific provisions of Article 39 of the Procedures Directive at Chapter 6.3. Whilst the full text of this chapter can be read with advantage, I set out by way of footnote his conclusions at paragraph 420 in relation to the general international and EC law obligations binding on Member States.[22]

69. In so far as ECtHR has pronounced on the scope of enquiry appropriate to provide an effective remedy, it is potentially very wide-ranging. In *Jabari v Turkey* Case 40035/98, where there had been a complete denial of any substantive consideration of the claim on purely procedural grounds, the language used in the judgment is in similar terms to other cases dealing with issues of effective remedy and it is clear that the Court chose to put their position in broad terms because of the gravity of risk in *refoulement* of a claimant who has not had his or her claim adequately considered.[23]

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[22] *'The Member States must provide for an effective remedy against a decision to expel if the alien can present an 'arguable claim' that expulsion will result in ill-treatment (Articles 13 ECHR and 2(3) CCPR). A claim is arguable for the purposes of Article 13 ECHR if the claimant runs prima facie a real risk of ill-treatment upon expulsion. The remedy must satisfy several conditions. The 'authority', that is to offer the remedy must perform an independent and rigorous scrutiny (article 13 ECHR). This implies that it can do findings of fact for itself, and that the review of the decision to expel is not limited to issues of law (Article 13 and 3ECHR). The principle of equality of arms applies, and the applicant should be offered sufficient time and facilities to prepare the case (Article 34 read in conjunction with 13 ECHR). The authority must have the power to suspend expulsion of those who have an arguable claim that expulsion will result in ill-treatment (article 13 ECHR). Arguably, states cannot expel an alien who appealed to article 3 ECHR, without allowing him to apply for leave to remain to this authority, as it is this authority who decides on the arguability of the claim. If the alien claims to be a refugee, he cannot be expelled until the authority has decided upon the case unless it is beyond reasonable doubt that he is not a refugee (article 33 ECHR).*

International law has served as a source of inspiration for the general principles of Community law concerning appeal proceedings, as well as for Article 47 Charter. But these principles, and this Charter provision offer in several respects more extensive protection. To begin with, they require an effective remedy if the right guaranteed by Community law is affected (the 'arguable claim' requirement does not apply). Moreover, the obligations laid down in article 6 ECHR apply to all Community rights (thus not only to 'civil rights and obligations or criminal charges') - including administrative proceedings, such as asylum procedures. It follows that under Community law, the effective remedy must be offered before a court or tribunal, and legal aid must be available.'

[23] At paragraph 50 the Court said:. *'In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13.'*

In its more recent judgement (January 2007) in the *Case of Salah Sheekh v The Netherlands* [Application No 1948/04] the Court rejected a claim that there had been a breach of Article 13 ECHR but nevertheless proceeded to carry out a full factual review of the Article 3 claim as at the date of the hearing and to find that expulsion would be in breach of the claimant's Article 3 rights.[24]

70. It is important also to emphasise that the ECJ has not accepted the limitation which the ECtHR placed upon the extent of its jurisdiction by classifying asylum and immigration claims as claims to which Article 6 ECHR did not apply. The effect of bringing the issue of effective protection onto a Community law base is, therefore, to increase the scope of the protection offered to claimants to include Article 6 ECHR rights.

71. Although the PD is binding only in respect of refugee claims, a recent ECRE Study[25] found that all reference countries employed a sequential procedure to deal with Subsidiary Protection issues following the conclusion of the asylum claim process. It appears therefore that in practice many Member States have applied Article 3.3 PD.

72. In any event, there is an argument that a claimant seeking the right under the QD to recognition as a person entitled to subsidiary protection status will be entitled to an effective remedy against any executive decision denying such recognition irrespective of the terms of the PD and the way in which such claims are required to be dealt with under Member States' transposing legislation.[26]

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[24] At paragraph 136 the Court expressed its duty in Article 3 cases in the following terms: '*The establishment of any responsibility of the expelling State under Article 3 inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention (see Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, § 67). In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained proprio motu, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. In respect of materials obtained proprio motu, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned without comparing these with materials from other, reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time.*'

[25] 'The Impact of the EU Qualification Directive on International Protection' published in October 2008 following a survey of the practices of nineteen Member States.

[26] In her Research Paper No.134 of November 2006 for UNHCR (The European asylum procedures directive in legal context) Cathryn Costello sets out the basis of such argument:

The competence of the national court.

73. The competence of the national court is a matter which will be regulated by national law. It may be that the jurisdiction of particular courts or tribunals will be so limited that they will not have the ability to provide an effective remedy in the terms set out above. In those circumstances, the claimant may ultimately have to look to the ECJ for his remedy. But, even where the power of the relevant national court of tribunal is limited to review of the lawfulness of a first instance decision, there are important areas of enquiry based on the provisions of the QD and PD which I suggest cannot be excluded from its competence.

74. The issues addressed in Chapter II QD and, particularly, the elements of assessment set out in Article 4.3 QD must demonstrably have been considered by reference to a written decision (Article 9.1 PD), properly reasoned both as to facts and law (Article 9.2 PD), following a personal interview (Article 12 PD), with the benefit of the guarantees contained in Article 10 PD. Moreover, the decision-maker must be a person *'who has the appropriate knowledge or receives the necessary training in the field of asylum and refugee matters'* (Recital 10 and Articles 8.2 (determining authority personnel) and 4.3 PD (other authorised decision makers). Where there has been a failure to comply with these standards and requirements in the first instance decision-making process, it will not be a lawful disposal of the claimant's application.

Issues relating to the burden and standard of proof

75. Article 2 QD, which defines the meaning of refugee, gives no guidance as to how the well founded fear of persecution is to be proved. It is, however, generally accepted in international jurisprudence that in order to be well founded the refugee's subjective fear of persecution must be objectively sustainable.[27] The provisions of Chapter II of the Qualification Directive reflect such an approach in the mandatory terms of Article 4.3(a) requiring Member States to investigate the objective situation in the country of origin. In the definition of *'person eligible for subsidiary protection'* at Article 2(e), however, the definition requires that *'substantial grounds for believing that the person concerned … would face a real risk of suffering serious harm'* as defined in Article 15 are to be demonstrated.

Under the EC general principles, the right to effective judicial protection is well established. Moreover, it applies in all instances where EC rights are at stake, and so is of broader scope than article 13 ECHR. As the ECJ stated in the seminal Johnston case, "Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law." Thus, it applies not only in the context of internal market guarantees, but also when third country nationals have rights under EC law. Even if national law purports to oust strict judicial review, these national provisions are simply ineffective in the EC law context. The right to effective judicial protection has taken shape in order to vindicate individual rights accorded by EC law. This is reflected in Johnston, where the ECJ held that the right to effective judicial protection precluded the acceptance of an official certificate as conclusive evidence, in that case to justify derogation from the principle of equal treatment for men and women. Instead, judicial review had to be available to scrutinise official claims in each individual case.

27 See also generally paras 37 to 50 of the UNHCR Handbook *op cit*.

76. The question has been raised whether the 'real risk' test differs from the Geneva Convention test of 'well founded fear'.[28] Whilst it appears that there may be some differences of academic opinion on the issue, the practical case for construing the standard of proof – or where that is a concept which has no strict application in a Member State's procedural law, the nature of the issue to be proved by the claimant - as being the same in the case of either status has much to commend it. The recognition of each status requires a finding as to whether a claimant is entitled to international protection.[29]

77. For the purposes of the Qualification Directive such a need arises only where there may be persecution for a Geneva Convention reason, or serious harm which may, but for the absence of the nexus of the appropriate Geneva Convention reason, befall the claimant. The only arguable exceptions in the serious harm concept to this direct correlation with the concept of persecution are execution which is lawful under the national law of the country of origin or, depending upon which view as to its meaning prevails, serious harm as defined in Article 15(c) of the Directive. But even in those two cases, the test to be applied remains that of real risk.

78. It is suggested that it would not only be impracticable, but wrong in principle, to impose a difference in the standard of proof for persecution and serious harm.[30] There

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[28] H Battjes *op cit* states at Chapter 5.3.1: *'As to subsidiary protection, article 2(e) QD requires that the 'risk' be 'real'. This criterion occurs in the case law of the [ECtHR]… It can be argued that the real risk criterion sets a stricter standard than well-founded fear. The [QD] does not elaborate on this standard. But it appears that the distinction in risk assessment between qualification for refugee and for subsidiary protection status is intentional, as the real risk criterion also replaces the well-founded fear test that applied to subsidiary protection in the Commissions Proposal for the [QD].'* Gregor Noll in 'Evidentiary assessment and the EU qualification directive' *op cit.*, however, argues the opposite case, namely that well-founded fear under the Geneva Convention imposes a higher standard of proof than the Article 2(e) QD standard of *'substantial grounds for believing …[that] a real risk'* exists (see footnote 5 of his paper).

[29] In its Explanatory Statement *op cit.* the Commission would appear to suggest that the distinctions mentioned in the preceding footnote were not intended to be drawn from the wording of the definition section of the PD as originally proposed. Despite the changes in wording to which H Battjes draws attention, it should be remembered that Recital (6) as enacted clearly identifies one of the main objects of the Directive as being *'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'*: but, the original proposal referred simply to the ensuring of a minimum level of protection. It is equally arguable that the final form referring to 'real risk' rather than 'well-founded fear' was selected simply because the concept of serious harm was more clearly grounded in claims in respect of which the ECtHR had jurisdiction, so that there was already a body of European jurisprudence relevant to that concept: the change to Recital (6) sufficed to clarify that the criteria for recognition for international protection were common to both form of protection status.

[30] The Immigration Appeal Tribunal of the United Kingdom was required to consider precisely this issue when the Human Rights Act 1998 (largely incorporating the ECHR into national law) came into force in October 2000. In *Kacaj* [2000] UKIAT 23044 it was held that there was no difference in the tests for asylum and Article 3 infringements, which was the existence of a 'real risk'. The President, Collins J, said at para 12: *'Various expressions have been used to identify the correct standard of proof required for asylum claims. These stem from language used by Lord Diplock in R v Governor of Pentonville Prison ex p. Fernandez [1971] 2 All ER 691 at p. 697, cited by Lord Keith in Sivakumaran at [1988] 1 All ER 198. Lord Diplock said that the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning. There must be a real or substantial risk of persecution. The test formulated by the European Court requires the decision maker and appellate body to ask themselves whether there are substantial grounds for believing that the applicant faces a real risk of relevant ill-treatment. That is no different from the test applied to*

is also international jurisprudence on the standard of proof of well founded fear of persecution which supports the argument that the standard applicable is one of real risk.[31]

79. The absurdity of applying differential standards in the recognition of claims to international protection status will, of course, be particularly apparent in those Member States who elect to apply the Procedures Directive both to asylum and subsidiary protection status claims. It is suggested that the ECtHR concept of real risk applies equally to the proving of asylum as well as subsidiary protection claims.

The distinction between the mandatory and permissive provisions of the QD and PD.

80. From a judicial viewpoint, the importance of this distinction will arise when it is argued that the transposing legislation of a Member State has failed properly to give effect to the primacy of the mandatory provisions of the QD. The argument is closely linked with the controversy relating to *'more favourable standards'* (Article 3 QD). This is, therefore, a transient issue which will be resolved in phase two of the CEAS by the application of the *'uniform status'* criteria.

81. For the time being, however, the Commission view is that mandatory provisions must be transposed intact into national law in order to comply with EC Law. As regards the permissive provisions, Member States have an area of discretion in terms of their incorporation into the transposing national law, although some provide that, if incorporated, certain elements will then become mandatory.

82. Reference has already been made[32] to the Council's Legal Services Opinion 14348/02 of 15 November 2002 dealing with issues arising from what was then Article 4 in the proposed Directive and is now Article 3. It is perhaps helpful to note here that the advice given was that any deviation from the definitions laid down in Article 2 of the Qualification Directive (the definition section) would be incompatible with the intended harmonisation.[33] The same advice applied to what are now Articles 6 (actors of persecution or serious harm), 7 (actors of protection), 9 (acts of

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asylum claims. The decision maker and the appellate body will consider the material before them and will decide whether the existence of a real risk is made out. The words 'substantial grounds for believing' do not and are not intended to qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established. They merely indicate the standard which must be applied to answer that question and demonstrate that it is not that of proof beyond a reasonable doubt. … In our view, now that the European Court has fixed on a particular expression and it is one which is entirely appropriate for both asylum and human rights claims, it should be adopted in preference to any other…'

[31] See, e.g., *Chan v Minister for Immigration and Ethnic Affairs* [1989] 169 CLR 379 in which the High Court of Australia approved the formulation of the standard as 'a real chance of persecution' – such an expression was to be used 'because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring' per Mason CJ *ibid*. Similar formulations have been applied in New Zealand (Refugee Appeal No 523/92 *Re RS*, 17 March 1995).

[32] Paragraph 58 above.

[33] *'unless the definition itself allows for the inclusion or exclusion of a certain group of persons as part of a wider category'*.

persecution), 11 (cessation), 12 (exclusion), 13 (granting of refugee status), 15 (serious harm), 16 (cessation), and 17(1) and (2) (exclusion).[34]

The "new" regime of 'subsidiary protection' introduced by the QD

83. Before the QD came into force, all Member States had policies in force to deal with claimants who could not meet the requirements of the Geneva Convention, but who, nevertheless, could not be sent back to their own countries without breach of the receiving state's obligations under other international instruments. The most important of these was Article 3 ECHR and, subject to attempts to apply special measures in relation to those who posed a security risk to the receiving state, there was generally little to differentiate them in practice from recognised refugees. There was, however, no enforceable instrument providing for their rights during their enforced stay in their countries of refuge.

84. In broad terms, the QD now provides such persons with a specific status and the content of their protection regime is set out in Chapter VII QD. The EU is, I believe, unique in having afforded a formal status to those who comply with the requirements leading to subsidiary protection, and this is a major step forward in terms of international protection rights.

85. It should be remembered, however, that this new status does not correspond with those who are otherwise irremovable by the State. It applies only to third country nationals and stateless persons. It is further restricted to the 'worthy' claimant by the application of cessation provisions similar to (but not identical with) those applicable to refugees. Article 17 QD is more widely drawn than Article 12 QD (exclusion provisions relating to refugees).[35]

The essential simplicity, contrary to appearances, of the PD provisions.

86. The provisions of the PD require careful analysis but they have become complex because of the number of exceptional procedures which member States have sought to

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[34] The effect of the Opinion was summarised by Jane McAdam (Complementary Protection in International Refugee Law, OUP 2007): *'This background document sets out three main general principles governing the scope and application of Article 3: First, deviations in national law from definitions set out in A2 and related articles 6, 7, 9, 11, 12, 13, 15, 16, 17(1) and (2) would be incompatible with harmonisation unless the definition itself permits the inclusion or exclusion of a particular group of persons as part of a wider category. Secondly, 'shall' or 'may' roughly indicate whether or not a provision allows Member States to adopt or retain more favourable standards. Where 'may' defines the 'normative intensity' of a provision, it normally indicates that the provision is optional. In articles 5(1) and (2), 'may' does not mean that those provisions are optional but rather defines specific aspects of the notions 'well founded fear of being persecuted' and 'real risk of suffering serious harm'. Since these form part of the definitions in A2, no derogation from them is possible. Most of the provisions of the Directive use the term 'shall', yet from their context it is apparent that they leave it open for Member States to grant more favourable treatment, since their objective is simply to set out minimum standards'. Finally, provisions that incorporate the term 'in particular' indicate that elements of the provision are not exhaustive, thus allowing Member States to take into account additional aspects in their national laws.*

[35] The differences are fully considered in the analysis of the QD in Chapter 2 of the IARLJ Manual *op. cit.*

build onto the standard procedure which will apply in the decision process applicable to the vast majority of claims.

87. The three principal areas of complexity of procedure arise in the following circumstances: first, some Member States have different procedures depending on whether the asylum application is being treated as a port application or as an in-country application; secondly, all Member States see the need to apply accelerated and/or curtailed procedures in certain classes of application,[36] particularly where they consider the claimant to be from what they regard as a safe country of origin; finally, there is a further category of claims which they seek to treat as inadmissible, primarily where the claimant is regarded as entering from what is regarded as a safe third country.

88. Whether the classification of claims in this way, and the consequent application of different sets of procedure rules, really achieves the objectives of efficiency and time-saving which legislators attribute to them, is, perhaps, a moot point. The need to provide an effective remedy, by way of appeal or review is not thereby obviated. Refugee law judges may well be more adept at selecting those appeals which may usefully be the subject of fast tracking or joint listing with other similar claims for speedy disposal than legislators appreciate.

89. The safe third country concept is particularly confusing since there are a number of overlapping concepts in this respect.

90. The first category of safe third countries falls outside the scope of the Procedures Directive. It comprises those countries in which the selection of the State appropriate to deal with the asylum application is ascertained by application of the Dublin Regulation, 343/2003/EC. It includes all Member States[37] (which are not, of course, strictly third countries for normal definition purposes under the Directives) as well as certain third countries who have by agreement acceded to the Dublin Regulation, namely Iceland, Norway, and Switzerland. The Dublin Regulation makes detailed provision for identification of the appropriate State to deal with the asylum application and includes its own permissive provision for appeal or review against such a decision.

91. The second category consists of countries identified as safe third countries where the Application may be treated as inadmissible under Article 25.2(b) or (c). This concept is dealt with in Articles 26 and 27 of the Directive. It applies without geographical limitation in respect of countries where the claimant has been recognised as a refugee or otherwise enjoys sufficient protection provided that the country concerned will readmit the claimant and meets the requirements of Article 27. These include not only requirements as to the nature of the protection afforded by the country concerned, but also require there to be a connection between the claimant and that third country which makes it reasonable for him to re-enter that third country.

[36] In the UK, for example, there has on average been one new Act annually for the last ten years in which procedural issues have figured prominently. On one occasion there was even a proposal for ouster of the jurisdiction of the superior courts although it did not survive beyond the initial draft stage.

[37] The admission of Bulgaria and Romania on 1 January 2007 brought the total number to 27.

92. The third category consists of countries which meet the requirements of Article 36 for classification as European safe third countries. Subject to transitional provisions, they must either be approved accession countries or included in a list adopted by the Council. There is currently no approved list under Article 36. There is some doubt as to whether there are any other European countries who would qualify for inclusion on such a list.[38] Until, however, there is a Council approved list, the transitional provisions will continue to apply. Where the claimant is from a country to which Article 36 applies, his application may be subject to no or to a curtailed examination process.

93. Subject to these matters, however, the provisions as to the carrying out of the standard process of evaluation of claims is really straightforward and appropriately comprehensive, both as to the qualifications of the personnel concerned and the nature of the enquiry which is to be made before reaching a written reasoned decision.

94. Article 4.1 requires there to be a single determining authority in each Member State to carry out the prescribed examination and make the first instance decision on it, with particular reference to the requirements of Articles 8.2 and 9. In this respect the most important provisions of the later Articles are that the decision is to be taken *'individually, objectively and impartially'* by personnel who *'have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law'* and on the basis of '*precise and up-to-date information … as to the general situation'* prevailing in the country of origin of the claimant. These are the procedural requirements appropriate to ensure the carrying out of an assessment in accordance with the provisions of Chapter II of the Qualification Directive.

95. The basic principles and guarantees in the asylum process appear at Articles 6 to 22 of Chapter II of the PD.

96. These provisions are at the core of the Directive. They establish the minimum requirements of the asylum process at first instance in applications requiring full consideration under Article 23 of Chapter II, as well as on appeal or review under Article 39, Chapter V of the Directive. They are also highly relevant in the case of the exceptional procedures because they provide the benchmark from which specific derogation is then made.

97. The various Articles cover the following issues: access to the procedure (Article 6); the suspensive effect of making the application (Article 7); the duties of the Member State in carrying out the examination of the claim (Article 8) and the matters to be dealt with in the first instance decision (Article 9); the procedural guarantees to be given to applicants (Article 10) and their obligations (Article 11); detailed provisions in relation to the personal interview to which the claimant is entitled (Articles 12, 13 and 14); the right to legal assistance and representation (Article 15) and its scope (Article 16); special provisions in relation to dealing with applications by unaccompanied minors (Article 17); the prohibition of detention on the sole

[38] Iceland, Norway and Switzerland would all have been obvious candidates but, since they are already full participants in the Dublin Regulation, there is little point in their being placed on the list. European States which are non-EU Member States but are on the Council of Europe have ratified the ECHR and so are potential candidates for inclusion: but, there may in some cases be concerns about their observation of human rights norms which would make inclusion problematic.

ground that the claimant is applying for asylum and the right of judicial review of any such detention (Article 18); procedures on withdrawal (Article 19) and abandonment (Article 20) of the application; the role of the UNHCR (Article 21); and, finally, provisions as to the duty of confidentiality to the claimant (Article 22).[39]

98. Chapter II of the PD provides a straightforward but comprehensive process, the proper application of which will ensure a full and fair assessment of the claim. The basic procedure, unlike the glosses on it, is essentially simple and straightforward of application.

Conclusion

The provisions of the two Directives represent a major step in the progress towards the CEAS.

This is so particularly in the case of the Qualification Directive where many points of difference have been addressed. If the more conservative interpretation of Article 3 as to the limitation on the provision of more generous standards is correct, the harmonisation of the application of the law relating to the recognition of the need for international protection will have been achieved in substantial measure.

Whilst the Procedures Directive inevitably raises many areas of difference and potential difficulty, the core provisions relating to the requirements for processing the majority of applications have set high standards for the determining authorities in all Member States, and formalised important safeguards for asylum claimants. It is particularly in the case of the Procedures Directive that the transposing legislation and the degree to which Member States choose to rely on their pre-December 2005 procedures, will clarify the scope of the task which remains in order to achieve a common procedure throughout the EU.

As we have seen, the EC is clear on many of the areas which now need to be addressed to move forward the concept of the CEAS into its second phase, but the judges of Member States still have a significant role to play in the implementation of the Directives and in pointing the way to realisation of the goal of the CEAS.

They will initially be responsible for providing claimants with an effective remedy against executive decisions in accordance with the requirements of existing Strasbourg jurisprudence. Their judicial independence is preserved by the requirements of objectivity, impartiality and individual consideration of asylum claims which are required under the Procedures Directive. Upon their willingness to share the jurisprudence of other Member States and to seek greater harmony of application of that jurisprudence much of the future of the CEAS will depend.

[39] The IARLJ Manual *op.cit.* contains a full analysis of the PD at Chapter 4.