ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

ILPA Evidence to EU Home Affairs Sub-Committee
Brexit: Future UK-EU Asylum Cooperation

The Immigration Law Practitioners' Association ('ILPA') is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

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ILPA submits that the Common European Asylum System will continue to be of interest to the United Kingdom, and in any event, the UK will be bound by numerous international obligations post Brexit which will serve to uphold a set of minimum standards with regards to dealing with asylum claims.

KEY RECOMMENDATIONS:

- To recognise that the UK will continue to be bound by the European Convention on Human Rights and, amongst other treaties, the Convention on the Law of the Seas.
- The UK's freedom to make its own rules surrounding asylum, refugee and humanitarian protection will be constrained by such international commitments. These constraints will be most apparent with regards to, amongst other things:
    - Ensuring a right of appeal for failed asylum claims
    - Legal aid for asylum appeals
    - Returns of failed asylum seekers; and
    - Where asylum seekers intercepted at sea should disembark
- It is likely to be in the UK's interest to maintain access to Eurodac and Dublin processes.

BACKGROUND

It is a generally accepted rule that States have the sovereign right to control the entry and continued presence of non-nationals within their territory. EU law, and the European Convention on Human Rights ('ECHR') both serve to place some limits upon the exercise of this sovereign right. Thus, EU/EEA nationals have the right to enter other EU/EEA Member States. EU law, and the ECHR both prohibit the rejection of persons at risk of persecution or serious harm at borders. This principle is known in customary international law as *non-refoulement*.

Pursuant to EU law, common rules exist for EU Member States regarding the issuance of short-term visas and the implementation of border controls and border surveillance activity. The EU has rules to prevent illegal entry, and these have been enforced since the creation of Frontex in 2004 to manage the external borders of the EU[1]. The Schengen *acquis* applies in full to most EU Member States. It

[1] See Regulation (EC) 2007/2004, 26 October 2004; Regulation (EU) 1168/2011, 25 October 2011

establishes a unified system for maintaining external border controls and also allows individuals to travel freely across borders within the Schengen area. Not all EU Member States are parties to the Schengen area, and the Schengen system extends beyond the borders of the EU to EEA/EFTA countries in the form of Iceland, Switzerland and Norway. Article 6 of Regulation 562/2006, the Schengen Borders Code prohibits the application of the code in any way that amounts to *refoulement* or unlawful discrimination.

Article 21 of the Convention implementing the Schengen Agreement provides for third-country nationals who hold uniform visas, and who have legally entered the territory of a Schengen state may freely move within the whole Schengen area whilst their visas remain valid[2]. A residence permit, in conjunction with travel documents, may replace a visa. Residence permits must be made pursuant to the uniform format[3], and aliens not subjected to visa requirements may move through the Schengen territory freely for a maximum for three months, provided entry conditions and requirements are met. The Schengen Borders Code also abolishes internal border controls. Thus, the Court of Justice for the European Union ('CJEU') has ruled that states may not conduct surveillance at internal borders which function as de facto border checks[4]. Whilst surveillance through electronic means of internal borders is allowed, such surveillance must be based on evidence of illegal residence, and is subject to limitations on intensity and frequency of such surveillance[5]. Refugees who have received such status in one Member State but then seek to move to another due to superior integration strategies being available in the other Member State remains a pressing issue within the EU[6], but this issue does not affect the United Kingdom to the same degree.

Within the Schengen territory, entry bans are entered into a database called the Schengen Information System ('SIS'). The authorities of signatory to the Schengen Agreement can access and consult this database. In practice, the SIS is the only way in which the EU can ensure that a banned third-country national will not re-enter the territory by means of entry via another Member State of the Schengen area. SIS II replaced the SIS in 2013, and has enhanced functionality e.g. biometric capabilities. Entry bans can be challenged. For those individuals who are subject to an entry ban in conjunction with a return order pursuant to the Returns Directive (EU Directive 2008/115), the ban will be accompanied by an SIS alert and they will be denied access to the Schengen area in its entirety. The Member State that issued the ban will have to withdraw it before any other Member State can grant a visa or admission to the individual concerned. Entry bans that are issued outside the scope of the Returns Directive do not formally prevent other states from allowing access to the Schengen area, though other Member States may take such bans into account when deciding whether or not to allow an individual admission/a visa. An individual placed upon the SIS may also challenge this at the European Court of Human Rights ('ECtHR'). It is the ECtHR's position that a State's margin of appreciation in determining how to provide safeguards against arbitrariness is wider as regards entry into national territory than in relation to expulsion[7].

The EU Charter of Fundamental Rights provides a right to asylum at Article 18, and reaffirms the prohibition of *refoulement* at Article 19. Despite the Charter guaranteeing the right to asylum, EU law does not require Member States to facilitate the arrival of asylum seekers. Individual asylum seekers

[2] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 249/19

[3] Council Regulation 1030/2002, laying down a uniform format for residence permits for third-country nationals, 13 June 2002, as amended by Regulation 380/2008/EC.

[4] Joined Cases C-188/10 and C-189/10 [2010] ECR I-05667 *Aziz Melki and Selim Abdeli* [GC], para 74

[5] Case C-278/12 PPU *Atiqullah Adil v Minister voor Immigratie, Integratie en Asiel* 19 July 2012

[6] See e.g. Case C-438/17 *Ibrahim* ECLI:EU:C:2019:219

[7] *Dalea v France* (dec.) No. 964/07, 2 February 2010, ECtHR

will most likely be nationals of countries that require a visa to enter the EU. Since such individuals may also be unlikely to qualify for an ordinary visa, they may feel compelled to cross the border in an irregular manner. Resultantly, the EU asylum *acquis* only applies the moment an individual arrives at the border. Article 3(1) of the Asylum Procedures Directive (2005/85) applies to all claims made in the territory of an EU Member State, including at the border or in transit zones. Article 6(2) and (5) require Member States to ensure that individuals can access the procedures safely in practice, and these safeguards are triggered by accessing the procedures. Thus, they do not apply to an individual who cannot reach the territory, border or a transit zone. Article 35 of the Asylum Procedures Directive permits the processing of asylum seekers at the border. Certain basic safeguards, such as access to information, an interpreter or a personal interview must be met. Those who qualify for asylum pursuant to Article 13 of the Qualification Directive (2011/95) as a refugee, or Article 18 as a person in need of subsidiary protection, but do not qualify for refugee status, have a right to recognition of their status. Article 24 of the Qualification Directive regulates the right to documentation. Recognition of such status entitles individuals to residence permits: three years for refugees and one year of subsidiary protection. Article 25 entitles refugees (and in certain cases, those with subsidiary protection) to travel documents.

The EU territory may be accessed by air, land or sea. Border surveillance operations carried out at sea must respect human rights, refugee law and the international law of the sea. The seas are regulated by the UN Convention on the Law of Sea, the Safety of Life at Sea Convention and the Search and Rescue Convention. These instruments function to create a duty to render assistance and rescue persons in distress at sea. A ship's captain is further under an obligation to deliver those rescued at sea to a "*place of safety*." In the context of the future UK-EU Asylum relationship, this will prove to be one of the most controversial issues. Any asylum seeker intercepted in e.g. the English Channel will need to be disembarked either in the territory of the UK, or the EU (most likely France).

Article 7(1) of the Asylum Procedures Directive provides that an asylum seeker's presence in an EU Member State is lawful. Asylum seekers are "*allowed to remain in the Member State*" for the purpose of the procedures until the asylum claim has been decided. Article 35(3)(a) makes similar provisions for those being processed at a border point. The Reception Conditions Directive (2003/9), at Article 6 states that all individuals who lodge a claim for asylum must be given, within three days, a document testifying them to be allowed to remain whilst their asylum claim is examined. In the context of Brexit, it is worth pointing out that the ECHR contains no corresponding provisions regarding guaranteeing the status of asylum seekers whilst they seek protection. It is therefore a matter of domestic law in each Council of Europe Member State as to whether asylum seekers are allowed to remain in the territory during the processing of an asylum claim. Article 5(1)(f) of the ECHR allows the detention of asylum seekers to prevent 'unauthorised entry', and any entry will be unauthorised until it is formally authorised by national authorities[8].

Article 39 of the Asylum Procedures Directive provides the right of an effective remedy before a court or tribunal. Member States must provide measures to ensure the right to an effective remedy. Pursuant to the ECHR, which will continue to bind the UK post-Brexit, when an individual appeals against the refusal of their asylum claim, the appeal must have an automatic suspensive effect upon any return measures taken against them[9]. Furthermore, access to a court/tribunal must genuinely be accessible pursuant to Articles 6 and 13 ECHR in conjunction. Therefore, excessive administrative fee burdens, or a lack of legal aid will render access to a court or tribunal illusory for most asylum

[8] *Saadi v the United Kingdom* [GC] No.13229/03, 29 January 2008 para 65, ECtHR

[9] See, e.g. *Gebremedhin [Gaberamadhien] v France* Ni. 25389/05, 26 April 2007, ECtHR; *De Souza Ribeiro v France* No.22689/07, 13 December 2012, ECtHR.

seekers[10]. The ECtHR has also affirmed the Council of Europe recommendations on legal aid, especially for the destitute[11].

The Returns Directive prevents third-country nationals who are staying illegally within the EU from being left in legal lacunae. Member States must either regularise them, or issue a return decision. Article 6 of the Returns Directive compels Members States to issue those without legal authorisation a return decision. Article 6(4) lays out the exceptions to this requirement. Humanitarian reasons, pressing reasons of family and/or private life may form such exceptions. People can be allowed to remain pending the outcome of any procedure seeking to regularise stay is possible, but not mandatory, unless the procedure is one of seeking asylum[12]. The Returns Directive is alive to the realisation that it is not always possible to remove someone without authorisation to remain. Whilst the Directive states that such individuals should be provided with some form of written confirmation of their situation, there is no operative requirement stemming from the Returns Directive. Article 8(4) of the Directive ensures that any removal must be conducted with due respect for the individual's dignity and physical integrity. Within the context of the Council of Europe, post-Brexit, the UK will have to continue to ensure that refusals are not carried out on discriminatory grounds. In e.g. *Kiyutin v Russia* No. 2700/10 10 March 2011, the ECtHR held that a blanket provision requiring the removal of all HIV-positive non-nationals was discriminatory and disproportionate. Furthermore, within the legal framework of the ECHR, there exists a significant body of jurisprudence that allows ECHR rights to act as a barrier to a removal. A prime example would be *Othman (Abu Qatada) v the United Kingdom* No. 8139/09, 17 January 2012, where the applicant could not be removed to Jordan, as it would violate Article 6 ECHR, the right to a fair trial. The applicant was likely to have evidence obtained from torture against him in a retrial.

The UK is part of the first set of measures (highlighted above) arising from the Common European Asylum System, though has opted in to Eurodac and Dublin. Eurodac access would be of interest to the UK as it would allow access to the fingerprints of those claiming asylum within the territory of the EU. Since the UK is likely to continue to view EU Member States as 'safe third countries' access to Eurodac will be inherently desirable for this purpose. However, in the absence of Dublin, it is unclear as to how the UK will negotiate the removal of an asylum seeker back to the country of first application. It is also unclear as to how, if at all, the UK could pursue engagement with the Common European Asylum System whilst simultaneously abrogating the jurisdiction of the CJEU in this fraught area of law.

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[10] *GR v the Netherlands* No. 22251/07, 10 Januaray 2012 ECtHR and *MSS v Belgium and Greece* [GC] No.30696/09, 21 January 2011 ECtHR (para. 319).
[11] See e.g. *Sialkowska v Poland* No.8932/05 22 March 2007 ECtHR – Affirming: Council of Europe, Committee of Ministers (1981) *Recommendation No. R (81)7 of the Committee of Ministers to member states on measures facilitating access to justice*.
[12] Article 6(5) Directive 2008/115