EU Law Analysis

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Relocation of Asylum-Seekers in the EU: Law and Policy

Steve Peers

I last looked at the legal issues surrounding the refugee crisis two weeks ago, focussing on the international law dimension of the issue. But I left out the issue of relocation of asylum-seekers, pending further developments. Subsequently the EU has adopted a second, more controversial Decision on relocation of asylum-seekers within the EU this week (against the opposition of several Member States), following soon after the first Decision on this issue earlier in September. These measures are both provisional, in force for a total of two years, but there's also a proposal for a permanent system of provisional measures. I will be looking at the relocation issue (including the pending proposal) in more detail in a report for a think-tank soon, but for now I'll look briefly at three aspects of these measures: (a) the main content; (b) their legality, particularly since some Member States have threatened to sue to annul the second Decision; and (c) the merits of the relocation policy.

Content of the Decisions

First of all, two points about terminology. Some press reports refer to these Decisions 'resettling' refugees within the EU, but that's not accurate. In both EU and international law, 'resettlement' refers to admitting people in need of protection from their country of origin or neighbouring countries. The EU uses the word 'relocation' instead, when addressing the issue of moving persons between Member States.

But that's the process; how should we refer to the persons concerned? Technically, the most accurate term is 'asylum-seekers', since the relocation Decisions only apply to those who have applied for asylum but whose claim has not yet been determined. So I will use that term in this post. But since the Decisions only apply to those whose application is quite likely to succeed (more on that below), it should not be forgotten that the subsequent refugee determination procedure will likely conclude that the large majority of these asylum-seekers (but not quite all of them) are in fact refugees, or otherwise need

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protection. It would certainly be misleading to use the term 'migrants', since this word is sometimes interpreted as meaning that the people concerned have no protection need.

The first Decision

The first Decision provides for relocating asylum-seekers from Italy and Greece. It only applies to asylum-seekers who have applied for asylum in one of those States, and if that State would normally be responsible for considering the application under the Dublin rules. This will normally be the case, since the asylum-seeker will have crossed the border of Italy or Greece without authorisation. But in some cases, the Dublin rules would give priority to another Member State (if the asylum-seeker has close family there, for instance), and so in those case the Dublin rules would still apply, instead of the relocation procedure.

The relocated asylum-seekers will be split 60/40 between Italy and Greece: 24,000 from Italy and 16,000 from Greece. They will be allocated to other Member States on the basis of optional commitments made by those other States. (The UK, Ireland and Denmark have opt-outs; see discussion of the UK opt-out here). While the intention was to relocate 40,000 people, Member States could ultimately not agree to offer that many relocation spaces, falling several thousand short (see the accompanying Resolution of Member States).

Relocation will be selective, applying only to those nationalities whose applications have over a 75% success rate in applications for international protection (refugee status, and subsidiary protection), on the basis of quarterly Eurostat statistics. On the basis of the most recent statistics, this means that only Syrians, Iraqis and Eritreans will qualify. This might change over time, however, on the basis of each new batch of statistics.

In principle, the selection of asylum-seekers to be relocated will be made by Italy and Greece, who must give 'priority' to those who are considered 'vulnerable' as defined by the EU reception conditions Directive. However, the preamble to the Decision makes clear that the 'contact points' of the relocating Member States (national officials) will indicate a preference for specific asylum-seekers they are willing to accept. To this end, the preamble states that 'specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation'. But this preference is not binding: the main text of the Decision states that the relocation States must accept the asylum-seekers nominated by Italy and Greece, except that they can refuse relocation 'only where there are reasonable grounds for regarding' an asylum-seeker as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions in the qualification Directive (concerning acts such as war crimes, terrorism and genocide).

Relocation can only apply to asylum-seekers who have already been fingerprinted pursuant to the Eurodac Regulation. This simply restates an existing EU law obligation to fingerprint everyone over 14 who applies for asylum or is found crossing the external border without permission, although that obligation is sometimes not applied in practice. Also, 'applicants who elude the relocation procedure shall be excluded from relocation', although this rather states the obvious.

The relocation process should usually take no more than two months after the relocating Member State has indicated how many asylum-seekers it will take. Member States of relocation will be responsible for considering the application. After relocation, asylum-seekers will not legally be able to move between

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Member States, in accordance with the normal Dublin rules; if they do so, the Member State of relocation must take them back. The preamble to the Decision also notes that, to deter 'secondary movements' Member States can limit the suspensive effect of appeals against transfers, impose reporting obligations, provide benefits in kind, and issue national entry bans. They should refrain from issuing travel documents allowing the asylum-seekers to visit other countries. There might be carrots, as well as sticks: as an incentive to stay in the Member State of relocation, the Commission has proposed that relocated asylum-seekers should be allowed to work straight away, rather than after a 9-month wait (the longest period Member States can require under the reception conditions Directive).

As for the asylum-seekers themselves, there is no requirement that they consent to their relocation or have the power to request it. The Decision only requires Italy and Greece to inform and notify the asylum-seekers about the relocation, and the preamble states that they could only appeal against the decision if there are major human rights problems in the country to which they would be relocated. So neither the relocation itself, nor the choice of Member State that a person will be relocated to, is voluntary. It is possible, however, that the asylum-seekers left behind in Italy or Greece will be disappointed that they are not picked. There is no specific remedy for them to challenge their non-selection, although arguably to the extent that Italy and Greece select people who are *not* vulnerable for relocation, vulnerable persons could challenge their non-inclusion, in light of the legal obligation to select vulnerable persons as a priority. Asylum-seekers do have the right to insist that their core family members (spouse or partner, unmarried minor children, or parents of minors) who are already on EU territory come with them to the relocated Member State.

Finally, other Member States have an obligation to assist Italy and Greece, while those Member States must in return establish and implement an asylum action plan. If they do not, then the Commission can suspend the Decision as regards either country. Member States relocating asylum-seekers receive a lump sum of €6000 per person from the EU budget to help with costs. The Decision applies until 17 September 2017, and covers asylum-seekers who arrived after 15 August 2015.

The second Decision

The second Decision follows the same basic template as the first Decision, but there are some key differences. First of all, it applies to 120,000 asylum-seekers, on top of the 40,000 provided for – but not fully committed – in the first Decision (the first Decision remains legally valid; it wasn't amended or repealed by the second one).

Secondly, the numbers of relocated asylum-seekers in the second Decision is not based upon voluntary commitments by Member States, but upon specific numbers set out in an Annex to the Decision. While most Member States agreed to these numbers (the Decision needed a qualified majority vote of ministers in the Council to pass), clearly not all did: Slovakia, Romania, Hungary and the Czech Republic voted against the Decision. This means that there is a legal obligation to take these specific numbers of people.

Thirdly, the distribution of relocation is much different. Reflecting events on the ground over the summer, which has seen a much bigger influx of potential asylum-seekers into Greece, the second Decision provides for relocating 50,400 from Greece, but only 15,600 from Italy. The remaining 54,000 were meant to be relocated from Hungary, but Hungary did not want to be seen as a 'frontline State'. So those 54,000 are 'on ice' for now. They will be relocated in a year's time either from Italy and Greece on the same basis as under this Decision, or relocated on a different basis in light of changes in circumstances (subject to

approval from the Council in either case).

Fourthly, Member States can request a temporary delay of 30% of their intake of asylum-seekers in 'exceptional circumstances', if it gives 'duly justified reasons compatible with the fundamental values' of the EU, such as human rights and non-discrimination. This delay can then be authorised by the Council on a proposal from the Commission. The preamble to the Decision indicates that such circumstances 'could include, in particular' a sudden inflow that places 'extreme pressure' upon even a well-prepared asylum system, or a 'high probability' of such an inflow.

Fifthly, the preamble contains stronger language as regards the 'secondary movement' of asylum-seekers. Member States can take measures as regards social benefits and remedies, and can 'should' detain asylum-seekers in accordance with the Returns Directive if no alternative means of preventing secondary movements are available.

Sixthly, in addition to the lump sum of €6000 per person from the EU budget for Member States of relocation, Italy and Greece will receive €500 per person to help with costs. Finally, the Decision will also apply for two years, but it will apply to all those who have arrived in Italy or Greece since the end of March this year, not just from mid-August.

Legality of the Decisions

Both decisions are based on Article 78(3) of the TFEU, which is a revised version of the 'emergency power' relating to immigration issues that has been in the Treaties since 1993 – but was never used until this month.

Article 78(3) reads as follows:

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

This should be seen in the context of the purpose of Article 78(1), which states that the EU shall have:

a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be 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.

Article 78(2) specifies that the EU shall have power to adopt measures to create 'a common European asylum system', listing seven areas where it can act by means of the ordinary legislative procedure. (Note that the proposed permanent system for relocation would be based on Article 78(2), not Article 78(3), so the legality of that proposal raises different issues; I'm not considering that proposal here).

Several elements of Article 78(3) are obvious: there must be a Commission proposal (which there was for both decisions); the Council votes by qualified majority (this isn't expressly mentioned in the clause, but it's the default rule); and the European Parliament (EP) is only consulted, whereas it has its usual joint decision-making power as regards other asylum legislation. It's implicit that Article 78(3) measures can only relate to asylum, due to the placement of this

clause in Article 78. Moreover, prior to the Treaty of Lisbon, the previous version of this clause had been free-standing, and therefore applicable to all immigration and asylum issues; its placement in the asylum Article was surely no accident and must therefore be legally relevant.

The strongest legal argument against the validity of the second Decision is a procedural one. CJEU case law has always stated that where the EP has to be consulted on a measure, it must be reconsulted if the essential elements of the measure are then changed after it was initially consulted. That certainly applies here, because the removal of Hungary from the list of frontline States changed an essential element of the law. Against this, it might be argued that there is no obligation to reconsult, or a less stringent obligation to reconsult, in 'emergency' cases. But if the claim is successful on this point, it won't accomplish much: the Council will only have to consult the EP again, and the CJEU might (as it often does) keep the Decision in force in the meantime, since the legal flaw is purely procedural.

As to the substance of the emergency measures power, first of all it must implicitly be consistent with Article 78(1), forming part of a 'common' policy, ensuring compliance with 'non-refoulement' and being in accordance with the Geneva Convention. The two Decisions meet those criteria; some alternative suggestions like closing the external border or returning people to unsafe countries would not.

Next, several terms in Article 78(3) have to be defined: an 'emergency situation', a 'sudden inflow', a 'provisional measure' and the 'benefit' of Member States. The idea of an 'emergency' suggests a situation which Member States find particularly difficult to handle, and the current crisis certainly qualifies for that. Some have questioned whether the inflow is 'sudden', given that it has been building up for years, with the Syrian civil war starting back in 2011. But the overall numbers have clearly increased sharply in 2015; the scale of that increase surely qualifies as a 'sudden' inflow, even if the inflow did not start overnight.

Surely it is up to the Member States in question to determine if they will 'benefit' from the measures concerned; that's why it was legally necessary to remove Hungary from the list of beneficiaries. Just because another policy might, in the view of other Member States, be preferable, doesn't mean that the Member States concerned will not benefit. Anyway, it's manifestly clear that Italy and Greece will benefit from having fewer asylum-seekers on their territory, as things now stand.

There's a strong literal argument that the measures in question can only benefit *Member States*, as distinct from (say) Serbia – although the EU could still assist Serbia by other means. But that issue doesn't arise, since the two Decisions are only relocating asylum-seekers from Member States. A purely consequential impact on third States (fewer people will transit Serbia) isn't sufficient to infringe this rule.

This leaves us with the definition of 'provisional measures'. The notion of 'provisional' means that it must be limited in time. Since the Treaty of Lisbon removed the previous limitation to six months, this means that measures can last for longer than that. Although there may be a legal argument that two years is too long, a period of one year (during which time a permanent system may well be agreed) is surely legal. So the most a successful claim could do here is curtail the length of the validity of the second Decision, not annul it completely. If a provisional measure is renewed, or replaced with a similar provisional measure, the 'provisional' nature of the powers would be infringed, but we have not got to that stage yet.

What 'measures' can be adopted? Can they amend existing legislation? This is

relevant because the two Decisions derogate from the Dublin rules, as any relocation system would have to do. The EP's role has been circumvented because it was only consulted. While I previously held the view that for this reason, emergency asylum measures could not derogate from EU asylum legislation, I no longer think that's correct. Because the Treaty refers to a 'common' asylum policy, it must follow that the power to adopt emergency measures would be nugatory if it couldn't amend existing legislation.

Does the EU have power to adopt quotas of asylum-seekers? A power to adopt quota rules is ruled out under Article 79(5) TFEU in the case of those looking for work. But those limitations only apply to 'that Article', and the Treaty drafters chose to regulate asylum issues, including reception conditions for asylum-seekers and the status of refugees (which concern access to employment) on the basis of Article 78 instead. Indeed, as noted already, there's no right to work for asylum-seekers on the basis of EU law unless they have been waiting nine months for a decision (although Member States can choose to be more generous if they wish), and some asylum-seekers will be too young to seek work or otherwise not seek work due to family responsibilities or illness, for example. So asylum-seekers aren't within the scope of Article 79. Moreover, the issue of relocation quotas had been discussed several times before, to the Treaty drafters must have been aware of it. If they had wanted to rule out quotas for asylum-seekers in Article 78(3), they would therefore surely have done so expressly. Article 79(5) has an *a contrario* effect.

Should Article 78(3) be narrowly interpreted? The Treaty drafters chose to use broad wording, and indeed Article 80 TFEU refers broadly to the principle of solidarity and burden-sharing ('including', ie not limited to, financial support). Unlike Treaty provisions which stress the narrowness of the EU's powers, such as the powers over health or education, Article 78 repeatedly refers to a 'common' or 'uniform' policy (there are more such references in Articles 67 and 78(2)). The Treaty drafters placed limits on the scope of the EU's immigration policy (as we have seen already); and in the same Title of the Treaty, there are various special rules relating to competence or voting over various aspects of border controls, civil law, police cooperation, and criminal law. It's quite striking that no comparable limits exist as regards the EU's asylum powers. One may reasonably argue that there *should* be such limits, but I am not convinced that there are such limits at the moment.

Just because those powers exist, however, does not mean that they should necessarily be used. So finally I will turn to the question of whether relocation is a good idea in general, and whether it is wise to force it upon recalcitrant States – even if it is legal.

Appraising the relocation policy

In principle, the objectives of the relocation policy are entirely valid. Article 80 TFEU refers to the need for solidarity and burden-sharing among Member States as regards asylum, and this reflects also the burden-sharing principle of international law, set out in the preamble to the Geneva Convention on refugees. The numbers who have arrived in Greece and Italy in recent months are clearly unmanageable for those countries to handle alone, although it should not be forgotten that some of the (potential) asylum-seekers concerned have moved on to other Member States under their own steam in the meantime. While solidarity also can (and does) take the form of financial support and additional personnel, reception centres cannot be built overnight and officials from other Member States cannot simply become part of the Greek or Italian civil service for a while.

If anything, the relocation Decisions are insufficient. It's clearly an overstatement to say that the EU has 'done nothing' to help those countries: the Decisions won't relieve all the pressure upon Italy and Greece, but equally it should in principle

relieve *some* of it. According to the preamble to the second Decision, it will relieve Greece and Italy of 43% of the asylum-seekers who clearly needed international protection (ie the nationalities with high success rates in asylum claims) who arrived there over July and August. But this is less impressive than it first appears, since it assumes that the further 54,000 asylum-seekers now 'on ice' will be relocated from those countries, whereas this is not yet certain. And while the asylum-seekers in question will be relocated over two years, the numbers referred to in the preamble arrived over *two months*. Although the first Decision will also relieve some pressure, the percentage of the asylum-seekers from priority countries who will arrive in Italy and Greece over the next two years who will be relocated will therefore be much less than 43%. It is even possible that the more systematic application of the obligation to fingerprint applicants will mean that Italy and Greece would end up responsible for more applicants from the priority countries than before.

Overall, then, taking into account the numbers of asylum-seekers not subject to the Decisions because they are not from a priority country, the two Decisions are likely to prove insufficient. This can be addressed in practice by further such Decisions (or the proposed new permanent system for addressing these issues) in the near future.

The question of whether it is possible to reduce the numbers of asylum-seekers who arrive at the EU's external borders in the first place is outside the scope of my analysis here – although this will ultimately determine whether a mass influx continues to occur in the years to come.

As for the details of the Decisions, there are two particularly controversial issues: the role of asylum-seekers, and the wisdom of enforcing quotas upon unwilling Member States. On the first point, it is problematic to compel asylum-seekers to move to a country that they do not wish to be in, since this has already proved unworkable in the original Dublin context. It would have been preferable at least to give asylum-seekers the opportunity to express a (non-binding) preference (with reasons) for particular Member State, or perhaps a list of several preferred Member States. That would increase the likelihood that asylum-seekers will stay put, since they are would be in a Member States where they prefer to be. It will also increase the likelihood that they will integrate into the host State once obtaining protection status (as most people subject to the Decisions will), given that they may prefer particular destinations because they have extended family members, friends or acquaintances there. But it will probably not be possible to respect every asylum-seeker's preferred destination – or every asylum-seeker who wants to relocate.

In the absence of any attempt to consider the asylum-seekers' preferences, Member States instead fell back upon the idea of punishing them if they make secondary movements. Although the Dublin system has notably not worked well at ensuring that asylum-seekers always remain in the State which is responsible for their application, it has worked better when asylum-seekers have been fingerprinted, so that it is easy to ascertain the responsible Member State; and relocation under the Decisions will only be possible for those who have been fingerprinted. While the Decisions correctly state that asylum-seekers who make secondary movements have to be taken back (pursuant to the Dublin Regulation), the preamble to the second Decision wrongly claims that they could be detained pursuant to the Returns Directive. In fact, since that Directive doesn't apply to asylum-seekers (see the CJEU rulings in *Kadzoev* and *Arslan*), the narrower grounds for detention in the Dublin Regulation would apply instead, if the person concerned applies for asylum.

It's also not clear exactly what benefits sanctions and remedies restrictions could be legally applied to asylum-seekers who don't stay in the Member State of relocation, beyond the possibility of limiting the suspensive effect of a legal

challenge. As regards benefits, the CJEU ruled in *Cimade and GISTI* that benefits must still be paid to asylum-seekers even if they have moved to another Member State (by that Member State), until the point when they are transferred back to the responsible Member State under the Dublin rules. This is now reflected in the preamble to the Dublin III Regulation. It might prove more fruitful to take up the Commission's suggestion of allowing relocated asylum-seekers to work at an earlier date.

On the second point, historically calls for asylum burden-sharing have relied upon moral suasion, not legal imposition. The relocation process will in any event be difficult to carry out if the outvoted Member States refuse to cooperate with it. (It's not clear if they will suspend their commitments under the first Decision too – although note that Hungary made no such commitments in the first place). The Commission can begin infringement proceedings for non-cooperation, but this will take time, and the Member States in question might prefer to pay a fine (the sanction for non-compliance with a CJEU infringement ruling) than cooperate with relocation.

While the recalcitrant Member States' objections to burden-sharing are not very convincing, more efforts should have been made to offer them an alternative. The original suggestion of a financial contribution to alleviate the costs of the Member States with the biggest burden was dropped, since it was (wrongly) perceived as a sanction, rather than as an alternate type of burden-sharing. Perhaps a better idea would have been to offer the option of assisting the neighbouring countries hosting Syrians, Iraqis and Eritreans, either by resettling more people directly from those countries or by making bigger financial contributions to those countries (and thereby reducing 'push' factors). Either option could have indirectly relieved the burden on Greece or Italy.

Finally, to what extent can the outvoted Member States (or others) reduce their obligations under the Decisions? As we have seen, the second Decision allows them to reduce their intake temporarily, if the Council approves. They must have good reasons, in particular relating to reception capacity. Given the exceptional nature of the rule, it is hard to see how other reasons can easily be accepted; certainly paranoia cannot. And the grounds for the request must be compatible with EU values, so Islamophobia is equally an impermissible ground too.

Barnard & Peers: chapter 26

Photo credit: Istvan Zsiros

Posted by Steve Peers at 06:49

Labels: asylum-seekers, common European asylum system, Dublin system, refugee quotas, refugees, relocation

4 comments:

Detelin Ivanov 28 September 2015 at 03:15

Dear Prof Peers,

As regards the asylum-seekers eligible for relocation, you have commented that "On the basis of the most recent statistics, this means that only Syrians, Iraqis and Eritreans will qualify".

Please note that the cited Eurostat data refer to selected citizenships only, i.e. citizenships for which the highest number of first instance decisions was issued in Q2 2015.