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*Committee on Civil Liberties, Justice and Home Affairs  
Policy Department C - Citizens' Rights and Constitutional Affairs*

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**LIBE\_PV** PE439.961v01-00

## **MINUTES**

### **ROUND TABLE TOWARDS A COMMON EUROPEAN ASYLUM SYSTEM:**

A study on some horizontal issues

Monday 26 April 2010, 15.00 - 18.30

**COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**POLICY DEPARTMENT C -  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**  
with the participation of the  
**NATIONAL PARLIAMENTS**  
and the  
**ODYSSEUS NETWORK**

European Parliament, Brussels  
Room PHS 3 C 050

#### **1. OPENING**

**OJ809951**

The meeting opened at 15.02 on Monday 26 April, 2010, with **Jean Lambert** (MEP) presiding. In her welcome speech and introduction Jean Lambert pointed out that the context for today's seminar is the differences in the application of the existing asylum acquis. Some Member States feel under pressure and are concerned about the lack of support when facing their responsibility. Jean Lambert informed the audience that in 2008 EP had requested Odysseus Network to prepare a study on the application of the asylum acquis and to bring forward proposals on how to improve it with a view to putting in place a high quality and efficient asylum system in the EU.

## 2. INTRODUCTION BY THE ODYSSEUS NETWORK

**Philippe de Bruycker**, head of the Odysseus Network, explained that he had set up a team of 12 experts from 5 Member States and that the study, which will soon be finalised, consists of three main parts. The first part of the study aims to assess the means and results of the existing different assessments of the acquis on asylum as carried out by the Commission. Phillippe De Bruycker stressed that the assessments focused more on the differences in legal implementation of various instruments rather than on their political impact. He held the view that the Dublin regulation hasn't been correctly assessed, whereas the recast proposals aimed to improve the Procedures Directive based on impact studies. It is crucial to enhance the assessment mechanism and that is not only the responsibility of the Commission but also of the Member States to try to improve the system in accordance with Article 70 of the Lisbon Treaty and the principle of subsidiarity. He further expressed a positive appreciation of the recast proposals of the Commission, even though he had reservations on the Dublin system as such.

The second part of the Odysseus study draws attention to the legal constraints that exist in the realm of procedural safeguards. Regarding the horizontal issues, which run through different legal instruments, identifying vulnerable persons with special needs and detention of asylum seekers stand out as two important issues. Also, consequences of Member States' action when they act outside their territory raise some concerns with regards to refugees. The final part of the Odysseus network study addresses the future proposals for the Common European Asylum System, which is also envisaged in the Stockholm Programme, in order to inject more consistency using Asylum Support Office and rulings brought by European Court of Justice.

## 3. GENERAL PRINCIPLES OF EUROPEAN LAW AS GUIDELINES FOR THE DEFINITION OF PROCEDURAL GUARANTEES FOR ASYLUM SEEKERS

**Jacques Jaumotte** stressed the importance of endorsing basic principles of European law and its impact on procedural safeguards for asylum seekers to revise the Asylum Directive. He pointed out that although the idea is to reinforce minimum safeguards, when it is left to Member States, it becomes harder on the basis of which criteria to define those and what legal value should be conferred on each criterion. While there is no international jurisdiction for controlling Geneva Convention and as such the guidelines and recommendations set up by UNHCR are not mandatory, by the same token, European Convention on Human Rights and the relevant rulings by ECtHR are not obligatory on Member States and do not cover asylum seekers. In the area of European law, Article 47 of the Charter of Fundamental Rights sets out the rights and obligations with respect to minimum safeguards, however there are no specific rulings by European Court of Justice on procedures. Both courts in Luxemburg and Strasburg refer only to general principles and a catalogue of rulings to be transposed into national law guided by current administrative procedures.

In order to elaborate more on the issue raised by Jacques Jaumotte, **Sylvie Sorelea** gave two concrete examples. One concerned the entitlement to legal aid and whether it is appropriate and obligatory to provide asylum seekers with legal aid in first instance. She

stipulated that although no court ruling in this area obliges Member States to undertake such a responsibility, common sense dictates that when someone is particularly vulnerable and the stakes are high in the infringement of human rights, free legal assistance should be provided. The second example she gave concerned the issue of appeals brought by asylum seekers. Sylvie Sorelea pointed out that an appeal is clearly more effective if it has suspensive effect and that this should be borne in mind.

#### 4. CAN MEMBER STATES TRUST EACH OTHER'S ASYLUM SYSTEM?

**Francesco Maiani** started his speech pointing out that the title is tricky in political and legal terms and that it is important to clarify what trust means in that context. It implies that asylum seekers will not be put at risk or subjected to degrading treatment or persecuted if returned to another country. In the scope of Dublin, transfer from one Member State to another should be in conformity with the principle of non-refoulement. Also, he called attention to the fact that this should constitute the basis for the future Common European Asylum System. Under the Geneva Convention and the European Convention on Human Rights, there is qualified trust, not absolute/blind presumption that Member States will respect their commitments. Also, he indicated that according to the sovereignty clause, there is a possibility not to transfer the person to another Member State and the Member State in question may assume the responsibility to examine the claim itself. He mentioned that the rulings by the European Court of Human Rights are clear on this issue. Member States may not automatically rely on the Dublin Regulation. They are responsible for the fate of this person in line with the principle of non-refoulement. In this respect, the sovereignty clause is a crucial safety valve.

In practice, it is very important because asylum conditions and standards vary considerably among Member States, and the sovereignty clause should be strengthened. Francesco Maiani argued that if the current system is maintained, the Common European Asylum System would have two important structural features, namely determination of claim will be left to Member States and individual duty of Member States will remain central, hence there will not be a significant difference than the present system. Therefore, Maiani suggested that instead of trying to establish trust by decree, foundations for trust must be strengthened through burden sharing, monitoring, capacity-building. Also, possibility for introducing legal safeguards and clear effective remedy would be the way to go forward.

In the debate that followed, **Tomas Grulich** from the Senate of the Parliament of the Czech Republic took the floor to state that the Czech Senate had adopted its view but did not have enough time to tackle the shortcomings. The Senate was especially hesitant about granting asylum seekers (or potential economic migrants) access to employment, and against amending the Dublin system.

**Hélène Flautre** (MEP) addressed two questions to the panellists, namely whether accession of the EU to the European Convention on Human Rights would have an impact on improving procedural safeguards and whether setting up of a European Asylum Court can be an option in guaranteeing minimum safeguards.

**Sylvie Guillame** (MEP) asked the speakers whether they could clarify the concepts of

safe third country and safe European country and as from when a person can be considered to be an asylum seeker.

## 5. WHY AND HOW DETAIN ASYLUM SEEKERS?

In the second session chaired by **Sylvie Guillaume** (MEP), **Kay Hailbronner** started by saying that this is quite a new issue. Nevertheless, the legal position is clear-cut in Article 5.1 of the European Convention on Human Rights. He referred to the Sadi case in the UK, which lays down the justification for detaining an illegal immigrant, while he pointed out that there is a wide margin of discretion left to Member States. Although the test of proportionality seems to be the guiding principle, national courts have an immense amount of discretion, which underlines the potential for future steps to be taken in this area. Kay Hailbronner also underscored the 'risk of absconding' by saying that it is important to prevent illegal migrants entering and disappearing in the EU and to tackle that, proper coordination inside the EU based on procedures agreed in Dublin is needed. Also, the concepts of minimum duration and effective legal protection and guarantees deserve further attention. With regards to the latter, he cited Germany as an example. Whereas the number of asylum seekers has fallen dramatically in the previous years, in the year 1992, Germany had to host 438 000 asylum seekers and it is unthinkable to provide legal aid to every asylum seeker. Thus, the practical consequences of the concepts alongside that of legal aspect should be taken into account.

## 6. IDENTIFYING VULNERABLE ASYLUM SEEKERS WITH SPECIAL NEEDS: WHOM AND WHY?

**Laurence Debauche** emphasised that the Reception Conditions Directive is the only instrument of first generation to impose certain obligations on Member States with regards to vulnerable asylum seekers, most notably Article 17. However, the Odysseus Network study revealed that Article 17 had not been implemented properly by Member States and that in terms of identification procedure, it is not specific enough. She also commented that the Commission proposals were welcomed and within the scope of Article 2, Member States are obliged to carry out an identification procedure. She pointed out that there is a twin-track approach regarding concept of vulnerability and asylum seekers with special needs and that that needs to be reviewed. Furthermore, Member States should be obliged to provide adequate funding. Also, the Dublin text does not address these issues adequately, in particular as regards people suited for transfer and children with serious health problems. Hence, the whole procedure should be reviewed. Debauche mentioned that despite the presence of some cross-cutting issues, Member States fall short of its implementation and a better cooperation needs to be ensured among them.

In the debate, **Ioan Enciu** (MEP) took the floor stating that Member States focus on only one category of vulnerable people, namely unaccompanied minors and tend to ignore the other categories. He further stated that there is a need for a common approach to draw up a common list of criteria. **Laurence Debauche** replied saying that it is difficult to say who is more vulnerable, nevertheless unaccompanied minors is *a priori* highly vulnerable and it is true that Member States don't have a common criteria for

vulnerable people. Debauche recommended that the Odysseus Network Study of 2007 could be looked at.

From the Austrian Parliament, **Günter Kössl** took the floor commenting that the procedure should be made more asylum-seeker friendly.

**Cornelia Ernst** (MEP) said that the detention concept is problematic, which involves not only the definition but also cost implications. Also, more thought should be given to how to serve the best interests of vulnerable asylum seekers and what sort of provisions should be in place to help them.

**Kay Hailbronner** commented that different national rules apply for detention. Not only there is need to extend the scope of the provisions not to deprive asylum seekers of their freedoms but on the other hand, proper and legally defensible justifications are needed to restrict their freedoms.

**Laurence Debauche** said that most of the time informal procedures prevail at reception centres. Working with trained people, with whom it is easier to establish trust and formal procedures are necessary to ensure more legal security and transparency.

**Hélène Flautre** (MEP) contributed to the debate saying that detention actually increases the costs and instead of trying to find extra reasons to detain people, proportionality should be ensured.

## **7. WHICH RESPONSIBILITY TOWARDS ASYLUM SEEKERS WHEN THE EU AND ITS MEMBER STATES ACT OUTSIDE THEIR TERRITORY?**

In this part of the debate, chaired by **Rui Tavares** (MEP), **Jean-Yves Carlier** underlined the three critical words in his presentation, namely 'Which', 'Responsibility', and 'When' to be explored further. He started by saying that the EU and its Member States do not have legal obligation but moral responsibility towards refugees. As for legal responsibility, it has some legal responsibility when the EU acts outside their territory. In reply to the question of 'Why do we need it?', in line with the Article 78 of the Lisbon Treaty, Geneva Convention and non-refoulement case law and national jurisdiction, Member States are responsible as soon as asylum seekers/refugees enter the EU territory and as far as there is any link with Community law. Then the questions of 'What's that responsibility' and 'How to take on that responsibility' arise. For instance, in the Mediterranean coast and within FRONTEX borders, the issue at hand is mixed refugee flows but some of them are real asylum seekers and hence they should be treated as such. As to 'How should this be done?' Article 78, paragraph 2 and letter g refers to partnership and cooperation with third countries in managing flows of asylum seekers. In this vein, the Odysseus Network study recommends a comprehensive multi-lateral approach, which is also in line with the Stockholm Programme.

## 8. DO WE HAVE TO ALIGN SUBSIDIARY PROTECTION AND EXCEPTIONS WITH INTERNATIONAL LAW AND MEMBER STATES' PRACTICE AND TO FORESEE EQUAL RIGHTS WITH REFUGEES?

**Lyra Jakuleviciene** pointed out the problem there is limited scope of subsidiary protection – not all persons in need of protection are covered by the Qualifications Directive (QD), and disparities exist in Member States practices, thus undermining the EU harmonisation objective and encouraging onward movement within the Union. She referred to persons protected from expulsion under human rights law (e.g. absolute non-refoulement, protection of family life, interests of the child), victims of systematic or generalized violations of human rights. She also touched upon international obligations that Member States are bound to respect as an objective basis of protection versus discretionary practices of States beyond international law.

In reply to the question 'What is the added value of including these persons?', she outlined the necessity of ensuring minimum level of protection to all those in need and stressed that the logical solution is to harmonise existing Member States' practices based on objective mandatory criteria of international law as well as ensuring consistency with other asylum instruments. Explicit coverage of certain individuals will limit the disparities that exist in Member States' legislation and practice, she further explained, thus reducing the onward movements within the Union.

She also addressed the issues whether the rationale for making rights equal with refugees should be treated as a sound political option or a legal issue and non-discrimination under Article 21 (1) of EU Charter on Fundamental rights and the European Human Rights Convention along with temporary nature of subsidiary protection and different realities.

There were interventions by **Hélène Flautre** and **Jean Lambert**.

**Violeta Moreno Lax**, who co-authored the study with Professor Carlier, commented that there is a need to clarify the responsibility and remit of FRONTEX. Also, she mentioned that there are currently no safeguards with regards to refugees and since post-Lisbon the European Parliament has a greater role, the Support Office (EASO) could be more involved in FRONTEX operations and help with profiling.

## 9. HOW TO MAKE THE COMMON EUROPEAN ASYLUM SYSTEM COHERENT: ACCEDE TO THE GENEVA CONVENTION, REINFORCE THE POWERS OF THE SUPPORT OFFICE (EASO) OR CREATE A EUROPEAN ASYLUM COURT?

In the last session chaired by **Simon Busuttil** (MEP), **Henri Labayle** elaborated on how to make the Common European Asylum System coherent. He started his speech saying that there is choice between reforming/modifying the current system and moving over to a different structure. As people dedicated to European law, they tend to be pragmatic and aim to achieve more coherence and effectiveness and hence opt for modification. He articulated on how to realize that objective from three dimensions. Firstly, from a legal dimension, he said that there are two angles to view the whole

issue. In the first view, looking at Article 18 of the Charter on Fundamental Rights and Asylum law and compare it with the right of asylum guaranteed in Geneva Convention, EU law and the Treaty on the Functioning of the EU (TFEU), he accentuated there is clear constitutional guarantee at the highest level, however that needs to be given legal effect. In other words, support is given for the legal protection of the asylum seekers, nevertheless he posed the following question: "What does that mean in practice?" He also indicated that marrying civil law, temporary protection and Geneva Convention is indeed a complex task.

Henri Labayle stressed that the second issue at hand is the ongoing debate about accession of the EU to the Geneva Convention, which is also part of the Stockholm Programme. He pointed out that this is a technical matter, however it is feasible since the EU has acquired legal personality, there is no problem in principle for accession. Nevertheless, the problem lies in the fact that Geneva Convention goes much further than EU asylum law and makes it more complex to administer because of shared powers at EU level.

Relating to reinforcing the powers of the Support Office, he underscored the fact that it is still too early to predict how developments will shape up, but there are criticisms about the way it is developing. He also drew attention to the need for factual analysis since Member States both individually and collectively want to know where the asylum seekers are coming from. Having said this, he argued that the Support Office could potentially be responsible for transition and resolving disagreements and disputes between Member States. As for creating a European Asylum Court, he reminded the audience about the obstacles underway, most notably the divergences between domestic and European law and a European court intervening at first instance would be a breach of the current judicial structure. This stems from the fact that national courts/judges are not in the same position as European courts/judges where in the latter case appeals concerns procedural evidence rather than factual evidence and access to initial evidence proves to be critical. He concluded by saying that in order to create a level playing field, a clear hierarchy of needs should be established and perhaps the Support Office could facilitate this task by setting guidelines on the overall control of the appeal system in order to prevent the excessively conflictual nature between the national and European levels.

The meeting closed at 18.21.

**ПРИСЪСТВЕН ЛИСТ/LISTA DE ASISTENCIA/PREZENČNÍ LISTINA/DELTAGERLISTE/  
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Simon Busuttil, Sylvie Guillaume, Rui Tavares, Jean Lambert
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Carlos Coelho, Cornelia Ernst, Héléne Flautre, Kinga Gál, Kinga Göncz, Claude Moraes, Valdemar Tomaševski
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Alexander Alvaro, Edit Bauer, Ioan Enciu, Petru Constantin Luhan, Krisztina Morvai, Raül Romeva i Rueda, Joanna Senyszyn

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Günter Kossel, Georg Magerl (Austria - Nationalrat), David Modrzewski (Belgium - Kamer/Chambre), Tomas Grulich, Martin Hrabalek (Czech Republic - Senát), Živilė Pavilonytė (Lithuania - Seimas), Michael Falzon (Malta - Kamra Tar Rappreżentanti), Catarina Marcelino, Carlos Peixoto, Francisco Alves (Portugal - Assembleia Da República), Valeriu Ștefan Zgonea, Tudor Panțiru, Mario Ruse, Daniela Filipescu (Romania - Camera Deputatilor), Mihai Nita (Romania - Senat), Vito Rožej, Mojca Kleva (Slovenia - Državni Zbor)

Съвет/Consejo/Rada/Rådet/Rat/Nōukogu/Συμβούλιο/Council/Conseil/Consiglio/Padome/Taryba/Tanács/Kunsill/Raad/Conselho/ Consiliu/Svet/Neuvosto/Rådet (*)
Bryant, Holleboom (Council secretariat), De Decker (RP BE), Münzbergová (PR CZ), Forman (PR DK), Huchet (PR FR), Bennet (PR IR), Galea (PR MT), Coleman (PR NL), Sousa (PR PT.), Immonen, Vanamo-Alho (PR FI), Knott (PR UK)
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Lazarova, De Sena (Pol. Dep. C.)	

- \* (P) = Председател/Presidente/Předseda/Formand/Vorsitzender/Esimees/Πρόεδρος/Chair(wo)man/Président/Priekšsēdētājs/Pirmininkas/Elnök/Chairman/Voorzitter/Przewodniczący/Preşedinte/Předseda/Předsednik/Puheenjohtaja/Ordförande
- (VP) = Заместник-председател/Vicepresidente/Místopředseda/Næstformand/Stellvertretender Vorsitzender/Αντιπρόεδρος/Vice-Chair(wo)man/Vice-Président/Priekšsēdētāja vietnieks/Pirmininko pavaduotojas/Alelnök/Víci 'Chairman'/Ondervoorzitter/Wiceprzewodniczący/Vice-Présidente/Vicepreşedinte/Podpredseda/Podpredsednik/Varapuheenjohtaja/Vice ordförande
- (M) = Член/Miembro/Člen/Medlem./Mitglied/Parlamendiliige/Μέλος/Member/Membre/Membro/Deputāts/Narys/Képviselő/Membu/Lid/Członek/Membro/Membu/Člen/Poslanec/Jäsen/Ledamot
- (F) = Длъжностно лице/Funcionario/Úředník/Tjenestemand/Beamter/Ametnik/Υπάλληλος/Official/Fonctionnaire/Funzionario/Ierēdnis/Pareigūnas/Tisztviselő/Ufficial/Ambtenaar/Urządник/Funcionário/Fonctionar/Úradník/Uradnik/Virkamies/Tjänsteman