



THE UNIVERSITY of EDINBURGH  
Edinburgh Law School



## Scottish Universities Legal Network on Europe

---

### Asylum Law

Written by  
Sarah Craig, University of Glasgow

Contact  
[Sarah.craig@glasgow.ac.uk](mailto:Sarah.craig@glasgow.ac.uk)

With comments from  
Nina Miller Westoby, University of Glasgow  
Maria Fletcher, University of Glasgow  
Rebecca Wallace, Robert Gordon University

## 1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?

### The EU's Common European Asylum System

The Common European Asylum System (CEAS) is a key part of the EU's Area of Freedom Security and Justice (AFSJ). The CEAS establishes common rules for most aspects of the asylum process; identifying which state is responsible for determining a claim; setting out asylum seeker's entitlements and obligations as regards their reception in Member States; regulating the asylum procedure; determining who qualifies for protection. The CEAS scheme draws on the international refugee protection regime and on the 1951 UN Refugee Convention, and its basis in EU law is found in Articles 67-80 of the Treaty on the Functioning of the European Union (TFEU). The UK is bound by the CEAS' first phase instruments, notably the Asylum Procedures Directive (which sets out minimum procedural standards which Member States should follow for determining asylum claims)<sup>1</sup> and the Qualification Directive (which establishes common definitions for Member States to use when deciding who qualifies for refugee or humanitarian protection status).<sup>2</sup> Following the Lisbon Treaty, the UK has a default opt-out position in relation to the CEAS, and a right to opt in to specific instruments. The UK has exercised its opt out in relation to most of the CEAS' second phase instruments, including recast version of the Procedures and Qualification Directives, as well as the Returns Directive (which places a time limit on immigration detention)<sup>3</sup> and the 2015 intra-EU relocation plans for addressing the refugee crisis.<sup>4</sup>

The UK has chosen to opt into those parts of the CEAS' second phase that are aimed at deflecting refugees and restricting access to the asylum process, such as the Dublin Regulation<sup>5</sup> - which determines which country is responsible for determining asylum claims and benefits the UK as a North Western European country over those at the Southern and Eastern external borders of the EU. It has also opted into Eurodac -a scheme for fingerprinting asylum applicants at the borders of Member States, and for information sharing.<sup>6</sup> CEAS measures – including the Procedures Directive and the Qualification Directive- have been transposed into the UK's asylum law framework, which is made up of primary and secondary legislation,<sup>7</sup> supplemented by Home Office policy guidance and instructions.

From the above it is clear that the UK is already on the “non-cooperation” end of the spectrum of Member States in relation to the CEAS, and this suggests that withdrawing from the EU would, on the face of it, simply confirm that “non- cooperation” position more completely.

### Losses

Following its withdrawal from the EU, the UK would suffer the following losses:

- A loss of influence as a result of no longer cooperating in the development of future CEAS instruments;

---

<sup>1</sup> 2005/85/EC

<sup>2</sup> 2004/83/EC

<sup>3</sup> 2008/115/EC

<sup>4</sup> Council Decision (EU) 2015/1523 OJ 15.9. 2015 L239/146

<sup>5</sup> Regulation (EU) No 604/2013

<sup>6</sup> Regulation (EU) No 603/2013

<sup>7</sup> Immigration Rules HC395

- The human rights that would otherwise have been protected in those CEAS instruments would also be at risk;
- The jurisdiction of the Court of Justice of the European Union (CJEU) extends to asylum law, and that court plays an important role in clarifying the human rights principles of the EU acquis, and their application to the UK as a Member State, as discussed further below. This would be a further area of loss.

### Influence and cooperation

On withdrawal from the EU, the UK would no longer participate in CEAS discussions, and would lose the opportunity to cooperate in those discussions. Member State cooperation in the CEAS is often aimed at deflecting refugees from the EU and national borders as much as at achieving a harmonised approach to protecting their rights and the UK would lose the opportunity to influence both aspects. For example, the UK's cooperation in helping to secure an inclusive definition of international protection which encompasses the situation of people fleeing indiscriminate violence can be seen in the Qualification Directive,<sup>8</sup> while at the same time, the UK's involvement in the Dublin regime has focussed on excluding asylum seekers from the UK rather than burden sharing. More recently, where the UK has responded to calls to suspend the Dublin regime, this has happened in response to court rulings (as discussed below) rather than in response to calls from other Member States for an EU wide response to the refugee "crisis". The UK has also dragged its feet regarding the [family reunion rights of child asylum seekers at Calais with close relatives in the UK](#). The consequences for the UK of non-involvement in future CEAS discussions are not yet clear:<sup>9</sup> the UK might seek to continue its involvement in the Dublin regime and other parts of the CEAS and AFSJ as part of its withdrawal negotiations with the EU. While all this is negotiated, further delay, uncertainty, as well as demolitions, are likely to face asylum seekers stuck at Calais, including those with family members in Scotland, with obvious impacts on their human rights.

### Human rights within the EU legal order: the role of the Court of Justice of the European Union

Following withdrawal from the EU, the UK will remain bound by the international refugee law framework and the 1951 UN Refugee Convention. This is the framework which the CEAS aims to give effect to through the establishment of minimum common standards in instruments such as the Qualification Directive. While it will still be bound by international law, and by the terms of instruments it has already opted into (which will presumably become part of national law under the Great Repeal Bill), the UK's withdrawal from the EU will, in future, also result in the loss of the CJEU's influence in this area. For example, in *Elgafaji*, the CJEU recognised the protection needs of people facing indiscriminate violence in a situation of armed conflict,<sup>10</sup> and in *Bolbol*, the protection of stateless persons was clarified.<sup>11</sup> The CJEU has also referred to the Charter of Fundamental Rights as forming part of the EU's legal order in cases affecting the UK.<sup>12</sup> National courts have also invoked EU instruments in asylum cases.<sup>13</sup> As Cathryn Costello observed, in the context of protracted litigation

<sup>8</sup> EU Qualification Directive 2004/83/EC Article 15( c)

<sup>9</sup> Non-involvement in the Dublin regime could jeopardise the future of bilateral arrangements such as the Le Touquet deal between the UK and France (which allows the UK to operate extra-territorial border controls in Calais).

<sup>10</sup> C-465/07 *Elgafaji*

<sup>11</sup> C-31/09 *Bolbol*

<sup>12</sup> *NS and ME v UK and Ireland* (Joined cases C-411 and 493/10)

<sup>13</sup> *K and Fornah v SSHD* [2006] UKHL 46

on immigration detention in the UK, and the UK's opt outs from the CEAS, "the addition of EU legal rules and judicial scrutiny could helpfully bolster the rule of law in the UK."<sup>14</sup>

**For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.**

Asylum is a reserved matter.<sup>15</sup> In addition, the approach of successive UK Governments to legislation which has an immigration control purpose, but which also reaches into the devolved area, has been to treat the immigration reservation very broadly, and to proceed as if the legislation had only a single reserved purpose, rather than both reserved and devolved purposes.<sup>16</sup> The UK Government has resisted arguments that Legislative Consent Motions should be sought from the Scottish Parliament in these areas.<sup>17</sup> While this approach further reinforces the idea that Scottish devolved institutions have little influence on immigration and asylum matters, this approach has not only led to institutional unease,<sup>18</sup> [but also to discussion about the need for reform](#).<sup>19</sup> Further devolution of power, and/or a different approach to the need for legislative consent, as well as greater inter-governmental cooperation would be required in order to protect rights in asylum law.

On the face of it, the scope for the Scottish devolved institutions to protect rights in the asylum field would therefore not be affected by withdrawal from the EU. In practice, however, different approaches to those of the UK Government have nonetheless been taken in some areas which impact on asylum seekers and refugees, including legal aid, health, and education.<sup>20</sup> [The "New Scots" integration strategy](#), and the earlier policy of integrating asylum seekers from arrival in Scotland rather than from when refugee status is later given are examples of such initiatives, and they give a flavour of how Scotland could continue to protect rights. Developing such approaches would be particularly important given the Scottish Government's commitment to welcoming refugees and migrants.

**Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).**

The principal measures are:

---

<sup>14</sup> C. Costello, *The UK and the CEAS – A leaving matter* Compas Breakfast Briefing 45, June 2016

<sup>15</sup> Scotland Act 1998 Sched 5 Part II Head B6:Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents.

<sup>16</sup> See e.g. housing provisions in the Immigration and Asylum Act 1999, the Immigration Acts 2014 and 2016.

<sup>17</sup> See Letter of 13 October 2015 from James Brokenshire, Immigration Minister, to Margaret Burgess MSP, Minister for Housing and Welfare, published during the passage of the Immigration Act 2016.

<sup>18</sup> Scottish Commission for Children and Young People, *Memorandum by Scotland's Commissioner for Children and Young People to the House of Commons Select Committee on Home Affairs, Fifth Report, 2005-06*

<sup>19</sup> Provisions in the Immigration Act 2016 on support for child asylum seekers have raised further concerns about protection gaps for this vulnerable group, in an area where the Scottish Government's policy is to promote the wellbeing of all children in Scotland.

<sup>20</sup> Separate Immigration Rules for Scotland have also been negotiated in the past through the Fresh Talent initiative.

Universal Declaration of Human Rights

1950 European Convention of Human Rights

1951 UN Refugee Convention

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; ( Procedures Directive) *OJ L 326, 13.12.2005, p. 13–34*; Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Recast) (OJ 2013 L 180/60)

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) *OJ L 304 30.9.2004, p. 12–23* ; Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ 2011 L 337/9)

EC Reception Conditions Directive 2003/9/EC

EC Returns Directive 2008/115/EC

Dublin Regulation (EU) No 604/2013

EURODAC Regulation (EU) No 603/2013

Human Rights Act 1998

Scotland Act 1998

The Asylum (Procedures) Regulations 2007 (SI 2007 No.3187)

The Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules (SI 2014 No.2604)

Immigration Rules (HC395) Part 11 Asylum

**2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.**

Provisions of the Procedures Directive and the Reception Conditions Directives give practical effect to the right to seek asylum. These include: the right to basic living conditions, the right to an interpreter, to an interview, to information in one's own language and to information about appeal rights. These rights were important in the case of *NS*, which concerned decisions by the UK authorities to return people seeking asylum in the UK to other Member States through which those individuals had travelled *en route* to the UK. In principle the Dublin Regulation permits this provided those other countries satisfy certain criteria. While the applicants claimed that their return would lead to a risk of their human rights being breached because the conditions for asylum seekers in the destination states were low, the UK Government argued that it could presume – on the basis of the existence of the CEAS system set up by a number of pieces of EU legislation- that conditions in other Member States were adequate and the UK could apply its national rules accordingly. The CJEU held that the UK must interpret its law in a way which is not in conflict with the fundamental rights protected by the EU's legal order or with the other general principles of EU law.<sup>21</sup> This decision resulted in the suspension of so called "Dublin" removals of asylum seekers from the UK to Greece.

The Qualification Directive specifies in detail the criteria for giving international protection. In *Elgafaji*, the CJEU relied on Article 15 (c) of the Qualification Directive to recognise the protection needs of people facing indiscriminate violence in a situation of armed conflict,<sup>22</sup> and in *Bolbol*, the protection of stateless persons was clarified.<sup>23</sup> These decisions flesh out the international framework for refugee protection and fill protection gaps.

---

<sup>21</sup> Joined Cases C-411 and 493/10

<sup>22</sup> C-465/07 *Elgafaji*

<sup>23</sup> C-31/09 *Bolbol*

**3. What are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).**

**How might this be found out and explored further (contacts in Brussels/Strasbourg?)**

The Dublin Regulation is currently being re-drafted. Council Decisions on the relocation of refugees and migrants have also been arrived at, and both of these initiatives are indicative of the kind of developments which Scotland may wish to take part in.<sup>24</sup>

**4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)**

**You may wish to consider: a) current devolved position;**

Asylum is a reserved matter and so, as noted in Q 1 above, further devolution of power, and/or a different approach to the need for legislative consent, as well as greater inter-governmental cooperation would be required in order to protect rights in asylum law.

**b) with further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader);**

Further devolution of power, enabling the Scottish Parliament to legislate on asylum matters, would be required in order for Scotland to be a leader in the area of refugee law rights. In their [submission to the Smith Commission](#), the Scottish Refugee Council recommended greater inter-governmental cooperation, the devolution of executive powers to Scottish Ministers, as well as changes in Home Office policy, so that temporary residence permits, rights to work and social security rights could be granted to asylum seekers and refugees by Scottish Ministers.

**c) as an independent nation.**

If Scotland were to join the EU as an independent nation, it could face a choice between participating in the EU's Schengen arrangements, or continuing to participate in the Common Travel Area (CTA) with the UK and Ireland. If Scotland wanted to remain part of the CTA, it might seek similar opt-out arrangements in relation to the CEAS and the AFSJ to those negotiated by the UK and Ireland. This choice could have an impact on Scotland's ability to be a leader in refugee protection.

---

<sup>24</sup> Council Decisions (EU) 1523/2015 and (EU) 1601/2015