

Refugee Law Initiative

International Refugee Law Seminars, 2nd Series, London

Title: The right to asylum in EU law
Speaker: Raza Husain QC, Matrix Chambers
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The present document constitutes a summary of some of the main points discussed during the seminar. It is not a full record of proceedings and the views expressed do not necessarily represent those of the Refugee Law Initiative.

Mr Husain delivered the following paper.¹

The right ‘to asylum’ protected by Art 18 of the Charter of Fundamental Rights of the European Union (Charter) is ‘with due respect for the rules’ of the Refugee Convention and ‘in accordance with the Treaty establishing the European Community’. Art 19(2) of the Charter contains a separate provision prohibiting *refoulement* where this would result in serious violations of certain human rights. More generally, a right to seek and enjoy asylum from persecution is expressed in Article 14 of the Universal Declaration on Human Rights. Certain European States, such as Germany and the United Kingdom, argue that these provisions all have the same scope – is this really the case? To address this issue, it is necessary to ask three separate questions about Art 18 of the Charter.

The first question is to whom the right to asylum accrues – is it individuals or States? The granting of asylum has traditionally been regarded as a right of States, as in the UNGA Declaration on Territorial Asylum. However, Gil-Bazo has persuasively argued that the Art 18 right accrues to individuals, since (i) the Charter recognises individual rather than State rights, (ii) the drafting history shows a majority understanding of the provision as referring to a right of individuals, and (iii) this accords with the constitutional traditions of various member States. Secondary EU legislation, such as the Qualification Directive which refers to rights of individuals to be granted refugee/subsidiary status, confirms this understanding that Art 18 refers to an individual right which the State has a duty to grant.

This result can also be arrived at via construction of the Refugee Convention, which is respected by Art 18 of the Charter. A contingent duty to determine an individual’s claim and to recognise her refugee status where the criteria are met and where the full range of rights guaranteed by the Refugee Convention are not *otherwise* granted is implicit within the Refugee Convention (e.g. Arts 1A(2), 1C(4), 1C(5) and 9). This accords with the ‘declaratory’ theory of refugee status, which is fundamental to refugee protection, and any argument for a duty of a State to determine an individual’s claim must be compatible with this theory. Domestically, the Court of Appeal in *Saad, Diriye and Osorio* [2002] EWCA Civ 2008 held that, since refugee status is a gateway to all the rights in Arts 2-34 of the Refugee Convention, there is a duty to determine refugee status even where an individual is not facing removal. Finally, the concept of asylum as a right of individuals appears to have been recently confirmed by the International Criminal Court in *Katanga* ([2011] ICC-01/04-01/07).

Therefore, not only does the right to asylum accrue to individuals but - contrary to assertions that it is not accompanied by a strong State duty to grant it – there is an implicit duty upon States under the Refugee Convention to determine such a claim. Given the strong reference to the Refugee Con-

¹ Report drafted by Helen Hayford and David Cantor.

vention, this analysis can be read across to Art 18 of the Charter. Both EU law and wider international law thus suggest that Art 18 comprises a right of individuals, accompanied by a contingent State duty to grant asylum.

The second question is to ask what is the content of Art 18? The Charter expressly reaffirms existing rights rather than creating new ones. Indeed, the text of Art 18 was based on Art 63 of the EC Treaty as amended by the Treaty of Amsterdam, now Art 78 of the Lisbon Treaty, which is in line with the Protocol on Asylum. It is thus clear that the Art 18 right to asylum is based on existing treaty provisions. However, the content of the right to asylum is not simply coterminous with the Directives adopted under those treaty provisions but rather possesses an independent life beyond them. An analogy can be drawn in this regard with the Equal Pay cases in the European Court of Justice. Art 18 therefore cannot be restricted to the negative *non-refoulement* rule in Art 19(2) of the Charter, but rather encompasses positive claims such as the right to fair procedures, to reception conditions, to remedy for an adverse determination, and to be granted asylum if the eligibility criteria are met.

The third question is whether any of this is important as a matter of practice? The answer is undoubtedly 'yes', and for three reasons. Firstly, in the context of responsibility and transfers under the Dublin framework, paragraphs 2-3 of the Advocate-General's conclusions in *NS* contrast mere breaches of secondary legislation, which would not preclude a transfer, with serious risks of violation of fundamental rights, which would. The speaker suggests that the latter may include the procedural and other content of the Art 18 right to asylum. Secondly, a focus on fundamental rights including the right to asylum is important in the context of the decision of some States to opt out of the recast Qualification Directive, thereby undermining the object of harmonisation and promoting instead a two-tier EU asylum system. Nonetheless, these States would not be able to escape their duties vis-à-vis fundamental rights under Art 6 of the Charter, including the right to asylum.

Thirdly, the right to asylum is important in the context of the deficiencies of the Qualification Directive. For instance, EU nationals clearly have a fundamental right to asylum under Art 18 of the Charter which overrides their barring from refugee status under Article 2(c) of the Directive. Article 18 of the Charter also arguably plays a similar protective role with respect to the controversial additional exclusion clauses in Articles 14(4)-(5) of the Directive, which do not reflect the terms of Art 1F of the Refugee Convention as the only grounds permitted for exclusion from refugee status and the rights attaching to that status. This is not to say that the Directive is not positive in other respects, such as its elevation of ad-hoc state practice on humanitarian protection to an international status in the form of Art 15, about which important questions exist regarding its relationship both with the European Convention on Human Rights and international humanitarian law.

In closing, the speaker posed an under-discussed question: when an asylum claim is made in a member State such as the UK, is the claim made under EU law, under the Refugee Convention as domesticated in UK law, or under both? The answer, surely, is both. Otherwise, the Court of Justice would bind all domestic courts of member States on the application of any relevant refugee provision. If a member State's interpretation of a Refugee Convention provision conflicts with the terms of secondary EU legislation, such as the Qualification Directive, the former should be preferred since it goes to the meaning of Art 18 of the Charter and thus concerns a fundamental right. The interpretation of fundamental rights does not turn on secondary legislation. This question arose in the case of *FA*

(Iraq), which was referred to the Court of Justice by the Court of Appeal but ultimately conceded by the UK government, which then amended domestic legislation.

The most salient points of the discussion that ensued were as follows.

Participants discussed some of the implications of potential divergences in the scope of protection offered by, on the one hand, the universal refugee regime and, on the other, increasingly important regional approaches. The speaker observed that, in the absence of a supranational court, the fiction that each state is left to define the true meaning of the Refugee Convention produces an irresistible impetus towards regionalisation. Participants raised the historical shift from asylum in terms of State rights to the present emphasis on the rights of the individual. The speaker responded that the emergence of international human rights law had strongly influenced the position of the individual in international law, including in respect of asylum. Finally, there was also some discussion of whether the right to asylum included individual duties, such as the duty to cooperate on the part of the person seeking asylum.