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The Common European Asylum System: Inconsistent, Incoherent and Lacking Credibility

By Liza Schuster

The refugee crisis of 2015 put the European Union's warm words about cooperation to the ultimate 'stress test', and it could hardly be said to have passed with flying colours.

Since the signing of the Maastricht Treaty against the backdrop of the Yugoslav wars, the EU has been committed to the development of a common asylum policy. This went on to become a Common European Asylum System (CEAS) including:

- A common definition of who qualifies as entitled to refugee status and subsidiary protection
- A mechanism to offer [temporary](#) protection rapidly in situations where large numbers of refugees arrive in a relatively short period of time (Temporary Protection Directive)
- Common standards of reception for those claiming asylum
- Common procedures for the examination, granting and withdrawal of protection
- A mechanism for establishing which state is responsible for examining a claim ([the Dublin Regulation](#))
- Common definition of who may be removed from the territory of Member States and under what conditions

Yet we still see significant differences in all these areas, impacting the chances of receiving protection. Although perfectly suited to deal with the spike in arrivals in 2016, the TPD has not been used; reception conditions range from leaving thousands to camp in the centre of capital cities, to housing new arrivals in hostels to detaining them in closed camps with insufficient food, medical care, legal advice or sanitary facilities. The Dublin Regulation has been amended four times, but is still in force despite clear evidence it is costly and utterly pointless (all states exchange roughly the same number of asylum seekers, so it provides no benefit, but considerable costs, to states and causes huge problems for asylum seekers).

But perhaps the starkest evidence of the failure of the common asylum system is the difference in recognition and deportation rates across the EU. Recognition rates vary across the EU from 6 per cent (Estonia, Slovenia, Slovakia) – 80 per cent (Ireland) and while some states deport aggressively to countries in conflict such as Afghanistan and Iraq, others declare those countries unsafe. These differences make a mockery of the principles on which the European asylum system rests. The key elements of the common asylum system – the Qualifications Directive, the Procedures Directive, the Reception Directive, the Returns Directive and above all, the incorrigible Dublin Regulation – all pre-suppose that every asylum seeker has a fair and equal opportunity to have his or her case heard, and that that case will be treated equally by all member states, but this is patently not the case. People with the same fears and subject to the same risks on return will or will not access protection depending on where they make a claim.

The treatment of Afghans illustrates this very well. After Syrians (33 per cent /175,855), Afghans were the second largest national group (19 per cent /100,705) to receive protection in the EU in 2017. Across all EU countries, the discrepancy in recognition rates is huge. In the first six months of 2017, rates vary from 0.5 per cent in Bulgaria and less than 10 per cent in Hungary to more than 80 per cent in Spain, France, Luxemburg and Italy. It cannot be that those with the strongest cases for recognition target particular countries, while those who are not at risk on return congregate in Bulgaria or other East European countries. Almost a third of Afghans arriving in Europe (31 per cent) applied for asylum in Germany, and 63 per cent of Afghans who received protection in Europe, received it in Germany, even though the recognition rate for Afghans in Germany (47 per cent) was below the European average of 56 per cent for this nationality (there are also significant differences in recognition rates between German federal states).

The primary ground for recognition as a refugee remains individual persecution 'for reasons of race, religion, nationality, membership of a particular social group, or political opinion' (Art.1 Geneva Convention on the Status of Refugees). However, the Qualifications Directive (QD) specified that those who did not meet those criteria would be eligible for subsidiary protection where that person would face a real risk of suffering serious harm as defined in Article 15, that is: the death penalty or execution; torture or inhuman or degrading treatment or punishment; serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

All Member States rely on the QD definition, UNHCR [eligibility](#) guidelines and/or relevant jurisprudence. The European Asylum Support Office also produces Country of Origin Information reports that describe conditions in countries of origin and the risks faced by those returned. Despite this, Afghanistan is variously considered by Member States as wholly unsafe, or as unsafe in some areas. In the latter case, this enables states to argue that the refugee did not need to seek international protection but could have ‘internally relocated’ to another province or city, most often citing Kabul or Mazar-i-Sharif and to justify deportations of Afghans to Kabul.

It is possible that those from particular ethnic groups (Hazara, Pashtun, Tajik, Uzbek) or particular provinces will be drawn to particular countries where there are established communities, as suggested by network or chain migration theories. According to this explanation, Member States with a high proportion of Hazara applicants (a minority persecuted for their ethnicity and religion) would have higher recognition rates. Or those Member States with high numbers of Afghans from Bamyan or Panshir, provinces with low levels of conflict, would have low recognition rates. There is insufficient data to test this hypothesis and it would still not explain the extremely low rates in Eastern Europe, ie in transit countries, before people head to separate destinations.

An alternative suggestion – that those receiving most applications from Afghanistan are most likely to be restrictive in order to deter future arrivals – does not stand up. In absolute terms, Germany had by far the highest the number of Afghan applications, but is about average in terms of recognition rates. France received the second highest

number of applications (6,555) from Afghanistan and granted protection to more than 80 per cent. Switzerland and Bulgaria received 1180 and 1050 respectively, but the recognition rate in Switzerland was 90 per cent while in Bulgaria it was less than 1 per cent.

The variation in recognition rates is more likely due to divergent interpretation of the relevant directives. According to a 2015 study by the European Asylum Support Office, Art.15(c) of the QD 'is the provision where the most diverging interpretations and practices could be identified in the Member States'. On 21 March 2018, the highest Dutch administrative court found that while '[t]he general security situation in Afghanistan is worrying and has worsened in some provinces' it was nonetheless safe to deport Afghans. Less than two weeks later, on 3 April, the administrative court of appeal in Lyon France, declared that Afghans should not be returned to European countries that had rejected their applications because of the risk that they would be returned to Afghanistan and instead should re-examine their claims. The Upper Tribunal in the UK decided in May that single young men could be returned to Kabul, while Italy has declared the whole country unsafe.

Decisions on the credibility of individual asylum claims rest on the coherence and consistency of those claims. They are expected to be internally and externally coherent, and reasonable. The facts of the case should not contradict each other and they should be consistent with what is known of the situation in the country of origin. The actions described should be reasonable in the circumstances. Evaluating the credibility of the European asylum system, the same criteria should apply.

Currently eight EU Member States do not return Afghans to their 'country of origin' (**Croatia**, the **Czech Republic**, **Estonia**, **Italy**, **Latvia**, **Luxembourg**, **Malta** and **Portugal**), somewhat ironic given that a significant number of Afghan asylum seekers have been born raised in exile in Iran and Pakistan, countries where they face discrimination and exclusion. Most of them don't return them because they have too few Afghan asylum seekers to justify the cost. Another group of Member States do not apply the Dublin regulation to return Afghans to other EU Member States who do deport to Afghanistan, while still others no not deport directly to Afghanistan but do return to other Member States, even where that person is at risk of return. Aside from the inconsistency of these recognition processes – both within and between Member States – in too many cases, the decisions taken are also inconsistent with the situation in Afghanistan and do not reflect the deteriorating security situation.

Kabul has become the most dangerous province in Afghanistan with 1,831 civilian casualties (479 deaths and 1,352 injured) in 2017, 88 per cent as a result of suicide and complex attacks carried out by Anti-Government Elements in Kabul city (a recent Human Rights Watch report detailed the devastating impact of these casualties in a country where existing medical facilities are stretched to breaking point and there is no meaningful social support, urgently needed since many of those affected will be the sole breadwinners for their families).

UNHCR guidelines on internal relocation note the importance of social networks and of the possibility of finding work and accommodation, but Afghans, including families

with small children, who have grown up in exile and have no contacts in Kabul are returned there from Norway, Sweden and Denmark. Even for young single men, most often the target of deportation procedures, accessing employment and or accommodation is close to impossible without social networks.

Given an unemployment rate of approximately 45 per cent, and a system that relies almost exclusively on personal contacts (especially for unskilled work), it is simply not possible for an Afghan without contacts or resources to find work. And given the security situation and cultural context, it is equally difficult for a single man without resources to find more than the most basic, temporary accommodation. Single men without families are treated with suspicion and mistrust.

A note from the European Commission on the subject of 'enhancing cooperation on migration, mobility and readmission with Afghanistan' recognised 'the worsening security situation and threats to which people are exposed' but nonetheless argued that 'Despite this, more than 80,000 persons could potentially need to be returned in the near future'. In the light of the risks on return to Afghanistan and the difficulties facing those returned, there is considerable resistance to being returned among rejected asylum seekers. In addition, the Ministry for Refugees and Repatriation has not cooperated enthusiastically in the forced return of their nationals.

Although in 2016, the number of Afghans refused protection by the EU jumped from approximately 20,000 annually to 44,000, the numbers forcibly returned are relatively low – in 2016, forced returns from Europe were just over 500, and in 2017, 720. While the Afghan government is frequently blamed for these low numbers, in reality forced removals are difficult to carry out, there are networks of campaigners across Europe supporting Afghans, and Member States have been forced to suspend deportations in the wake of attacks, such as that near the German Embassy in May 2017, which led to its evacuation for a number of months. The EU delegation has cut back its personnel from 34 to 10, and all EU Member States have closed their consular services, retaining only skeleton staff.

As a result, in spite of conditions in Afghanistan, in 2016 EU Member States took advantage of the Brussels Donor Conference, when the international community pledged continued aid to Afghanistan to try to improve deportation rates to Afghanistan. The Joint Way Forward is an agreement obliging the Afghan government to facilitate returns and prevent irregular migration in exchange for an ‘incentive package’. It was signed on the eve of the conference, following extreme pressure from the EU ambassador to Afghanistan and a handful of EU Member States, including warnings that donor states would be unlikely to contribute generously if it was not signed.

There are two distinct but related issues here: the diverse probabilities of receiving protection in the EU depending on the country in which one makes a claim, and the

credibility of decisions that are made. There is currently no European institution implementing these directives or ensuring that criteria are uniformly applied – instead considerable discretion remains at national level, with the result that where one makes one's claim matters enormously, a fact ignored by the Dublin regulation. This evident injustice is amplified by the Dublin regulation which prevents asylum seekers from choosing where to make their claim. Such discrepancies in recognition rates have important consequences for asylum seekers, in terms of whether they are condemned to leave without papers and excluded from the rights and protections enjoyed by others in the same situation in other countries, but also in terms of the risk of being removed to their country of origin, a country still in conflict. So for the CEAS to have credibility and ensure those who need protection receive it, it needs to harmonise its decision-making to the highest standards applying in the EU ~~pertaining in the EU~~.