II. WHOSE RULE OF LAW?
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promotional item. After an objection from a Spanish company, Pepsi’s design was initially declared invalid. The OHIM Board of Appeal reversed this decision, because the designs produced a ‘different overall impression’ on the ‘informed user’, and so did not infringe under the terms of the legislation. The matter was appealed to the General Court, which noted that the question of whether or not a different overall impression is produced requires consideration of the degree of freedom of the designer in developing the design. If this freedom is restricted, minor differences between the designs may suffice to produce a different overall impression. Here, ‘rappers’ are necessarily curved, so that when they are pressed in the centre a sound is made. This severely restricts the freedom of the designer. The General Court considered that the informed users would focus on features that were arbitrary, or different from the norm. Here, the differences between the two designs were too minor to produce a ‘different overall impression’ on the ‘informed user’. Thus, the PepsiCo design application was indeed invalid.\(^{64}\)

2. Geographical indications

The Community has a well-established system for the protection of geographical indications and designations of origin for agricultural products and foodstuffs. However, there is currently no such system for the protection of non-agricultural products; such as Carrara marble or Solingen knives. The Commission is concerned that this leads to an un-level playing field in the Single Market, and has recently announced plans to review the existing national frameworks with a view to possible legislation at EU level.\(^{65}\)

CATHERINE SEVILLE*

II. WHOSE RULE OF LAW? AN ANALYSIS OF THE UK’S DECISION NOT TO OPT-IN TO THE EU ASYLUM PROCEDURES AND RECEPTION CONDITIONS DIRECTIVES

A. Introduction

The United Kingdom (‘UK’) has indicated its intention not to opt-in to two proposals from the European Commission aimed at further developing the Common European Asylum System through the replacement of existing instruments on asylum procedures and reception conditions. The purpose of the European Union (‘EU’) amendment process is to establish rules that more closely align the legal framework for asylum in the Member States so that asylum seekers receive the same higher standard of treatment in any Member State in which they choose to make their application, and to address criticism that the Directives are incompatible with human rights obligations. The UK asserts that its asylum procedures satisfy the standards imposed by its obligations under

\(^{64}\) Case T-9/07 Grupo Promer Mon Graphic v OHMI - Pepsi Co (Représentation d’un support promotionnel circulaire) (18 March 2010), a decision upheld by the Court of Justice in Case C-281/10, Pepsi Co v Grupo Promer Mon Graphic (20 October 2011).

\(^{65}\) See COM(2011)287 3.4.2.

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international and European law, and does not view further harmonization of asylum matters at EU level as necessary or appropriate. Its decision not to opt-in raises issues regarding sovereignty, subsidiarity, the rule of law and European integration. This article will explore these issues, as well as provide an overview of select provisions from the proposals in light of UK asylum policy.

B. The EU Proposals

The revision process has a rather long history. It began in 2008, with the Directive on reception conditions, and was followed in 2009 with a proposal to amend the procedures Directive. Although the UK had opted in to the original instruments, it announced that it would not be opting in to the amended proposals, and stated its intention for the continued application of the Directives, as currently in force. Due to an inability to garner political consensus, the European Commission tabled the amended proposals.


3 Letter of 6 March 2009 from Phil Woolas MP, Minister of State, Home Office, to Lord Roper; House of Commons in its 2nd Report of the European Scrutiny Committee during Session 2010–11, para 13.5. There is some debate as to whether the current Directive would continue to apply, despite indications in the newest versions of the proposed amendments confirming the UK’s position. Art 4a of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice reads that, if the UK does not make a notification of its intention to opt in to the measure at issue, the existing measure will cease to be binding on the UK. However, art 4a is drafted to deal with the situation of a new measure to amend, rather than wholly replace (as is the case with the two Directives) the previously existing measure. It is therefore questionable whether a measure wholly replaced by recast legislation would continue to apply in the UK. This question, which was asked in the above-mentioned House of Commons report at para 13.16, was answered in the preambles to both revised proposals, whereby it was stated that indeed, the original Directives would continue to apply in the UK. Such a situation has not yet happened within the EU and it is impossible to tell how, in practice, these two regimes will operate.

The two proposals elevate the level of protection of asylum seekers’ rights in the EU from the minimum standards that currently derive from the instruments in force. In particular, the proposals include new provisions aimed at improving asylum procedures and conditions by making them more fair and efficient. Three subjects of the proposals are especially relevant to UK practice. First, the proposed reception conditions Directive requires that any administrative decision to detain an individual be subject to judicial review within seventy-two hours, and strictly limits the use of detention to four specific circumstances. This is a marked change from the Directive as currently in force, which does not refer to detention in this context. Moreover, it imposes a requirement that detention be proven as necessary on an individual basis. Second, the proposed procedures Directive introduces a six-month limit on the process for examining asylum applications, with a permissible extension of six months in prescribed situations. It allows for the examination of asylum applications under accelerated procedures, but only on seven (as down from 15) grounds. If none of the grounds apply, the application may be capable of prioritised processing if the application is likely to be well-founded. Otherwise, the application must be examined via normal procedures (ie within six months, or twelve in certain circumstances). Third, the proposed procedures Directive grants applicants a general right to remain in the Member State concerned pending the outcome of an appeal, and limits the circumstances under which a Member State can require an unsuccessful applicant to leave the territory pending the outcome of his or her appeal, ie impose a non-suspensive right of appeal.

C. UK Asylum Policy

When viewing current UK asylum policy and practice, in light of the above-mentioned provisions in the proposed Directives, several areas of disharmony are revealed. With regard to detention, in the UK the decision to detain is made by an administrative authority, and is frequently used in connection with accelerated procedures, described below. Detention orders can be challenged by an applicant by applying for bail, a writ for the effective application of the Dublin Convention (UK has opted in), Council Directive 2004/83/EC ([2004] OJ L 304/12) 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 (the UK has opted in to this)—proposal is COM(2009)551 final. Indeed, the Commission inserted into the proposal four entirely new articles concerning the issue of detention. Currently, the procedures Directive includes in art 18 a broad prohibition on the detention of individuals for the sole reason that they are making an asylum application. Second RCD proposal, art 9(2).

Second PD proposal, art 31(3): (a) where complex situations of fact and law are involved; (b) where a large number of third country nationals or stateless persons simultaneously request international protection, and (c) where the delay is clearly attributable to the applicant’s failure to cooperate in accordance with the Directive. The six and six rule may arguably be interpreted as a limit on the length of detention as well. Second RCD proposal, art 8(1) and (2).

Second PD proposal, art 31(5)(a). 11 ibid art 31(6).


Nationality, Immigration and Asylum Act 2002 c 41 (‘NIAA 2002’), s 68.
of habeas corpus,\textsuperscript{14} or through judicial review, but there is no procedure by which an administrative order for detention will receive confirmation by the judiciary, as envisioned in the proposed procedures Directive. The decision to detain is to be made in view of several factors, with each application individually evaluated against a strong presumption of temporary admission or release.\textsuperscript{15} Although the UK employs criteria to determine whether detention is suitable in the specific circumstances of a case, the list of factors is non-exhaustive and leaves much to the discretion of the examining officer.\textsuperscript{16} Its ability to employ detention for administrative purposes, ie in order to carry out its accelerated examination procedures, would be limited by the proposed Directives if they become binding on the UK.

The UK routinely employs accelerated procedures to deal with the myriad of asylum claims it receives annually.\textsuperscript{17} Any asylum claim may be considered suitable for fast-track processing if it appears to be one in which a quick decision can be made,\textsuperscript{18} and indeed, there is a presumption that the majority of asylum applications are capable of resulting in a quick decision.\textsuperscript{19} Each claim is therefore assessed on the basis of factors making it unlikely that a decision can be reached quickly. Depending on the type of application at issue, an applicant may be put through the Detained Fast-Track procedure, the Detained Non-Suspensory Appeal Procedure (DNSA), or be transferred out of the UK under the Dublin II Regulation.\textsuperscript{20} Each of these tracks brings with them different procedures and rights. Decisions under the Detained Fast-Track system are expected to be reached within twenty-four hours, and decisions under the DNSA procedure should be resolved within five days.\textsuperscript{21} The UK policy of considering all applications for placement in the accelerated procedures tracks is at odds with the proposed procedures Directive which prescribes limited circumstances under which accelerated procedures are permissible. Moreover, the UK does not distinguish between applications that may be prioritized (ie applications that have a good chance of succeeding) and applications that can be accelerated (ie applications that are very likely to fail).

As noted above, the DNSA procedure used in the UK does not permit the applicant to remain in the territory of the UK while an appeal is pending, although the application for an appeal can be made while the applicant is still in the UK. The current practice in

\textsuperscript{14} G Clayton, Textbook on Immigration and Asylum Law (3rd Ed, OUP 2008) s 15.11.3, stating that although an asylum applicant has the same right to apply for habeas corpus as a British national, it is of little use in the context of challenging detention, as there is almost always a legal justification for detention in British statutory law.

\textsuperscript{15} Enforcement Instructions and Guidance (n 12) s 55.3.

\textsuperscript{16} ibid s 55.3.1.

\textsuperscript{17} In 2010, the UK received 17,790 applications for asylum (excluding dependents), 25 per cent of which were initially accepted. The Migration Observatory, briefing on ‘Migration to the UK: Asylum’, 23/3/2011.


\textsuperscript{19} ibid s 2.2.2.

\textsuperscript{20} Council Regulation 343/2003/EC ([2003] OJ L 50/1) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II).

\textsuperscript{21} Targets as noted by Home Office officials in meeting with the authors on 13 September 2011. Meeting notes are on file with the author.
the UK is to apply the DNSA procedure to clearly unfounded applications.\textsuperscript{22} The meaning of ‘clearly unfounded’ has been explored by the UK courts, and essentially signifies that a claim is bound to fail.\textsuperscript{23} This includes applicants who originate from a safe country of origin as designated in the Nationality, Immigration and Asylum Act 2002.\textsuperscript{24} The UK does not, therefore, strictly limit the use of non-suspensory appeals in the way envisioned by the proposed procedures Directive. The UK system would therefore be affected by the imposition of a system which prohibits the use of non-suspensory appeals in all but a few situations.

D. The Opt-in

When the UK refused to opt-in to the first set of amended proposals in 2009 and 2010, it cited a variety of reasons. Meg Hillier, then Parliamentary Under-Secretary of State, reiterated the fact that the Government’s main policy priority was to maintain strong borders, even if that resulted in somewhat lower standards for reception than in the rest of the EU.\textsuperscript{25} Indeed, Christophe Prince, Director of International Policy at the UK Border Agency acknowledged that should the UK refrain from opting-in to the proposal, in some respects, the UK would be inferior.\textsuperscript{26} With regard to both of the proposals, it was claimed that the ability of the UK to deal swiftly with unfounded claims would be impaired,\textsuperscript{27} and the new detention arrangements were labelled as too onerous.\textsuperscript{28} In their view, the detention requirements in the EU proposal would reduce the UK’s capacity to achieve its objectives on asylum.\textsuperscript{29} The UK was also concerned that the procedures as revised in the reception conditions Directive, eg, judicial review of administrative orders for detention, would interfere with its ability to employ accelerated procedures and swiftly dispose of cases.\textsuperscript{30} The witnesses referred to the fact that reception conditions in the UK are superior to the conditions of many (unnamed) Member States.\textsuperscript{31}

Although the UK Government has acknowledged that the new proposals are in some ways less cumbersome and complex than their predecessor proposals, it feels that the effect of an opt-in on the UK’s asylum system would be detrimental overall.\textsuperscript{32} On the subject of detention, the Minister noted that the suggested provisions, ‘… particularly

\textsuperscript{22} Home Office Explanatory Memorandum concerning the proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and withdrawing International Protection Status, submitted June 2011 by the Home Office (‘Home Office PD Memo’) para 42. The UK also evaluates all applications in order to determine whether they are clearly unfounded.

\textsuperscript{23} R v Secretary of State for the Home Department ex p Thangasara and Yogathas [2002] UKHL 36. ‘Clearly unfounded’ has also been interpreted to mean ‘unarguable’ in R (on the application of Razgar) v Secretary of State for the Home Department [2003] EWCA Civ 840; ZL and VL v SSHD [2003] 1 All ER 1062: ‘The test is an objective one: it depends not on the Home Secretary’s view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not… if the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.’

\textsuperscript{24} NIAA 2002 s 94(3).

\textsuperscript{25} HL Paper 55 (n 18) Minutes of Evidence, at Q25 read in conjunction with Q6.

\textsuperscript{26} ibid Q6.

\textsuperscript{27} ibid Q28.

\textsuperscript{28} ibid Q36.

\textsuperscript{29} ibid Q22.

\textsuperscript{30} ibid Q37, 40.

\textsuperscript{31} ibid Q6, 24, 25.

\textsuperscript{32} House of Commons European Scrutiny Committee, 36th Report, Session 2010–12, HC 428-xxii, 14 July 2011, Ch 9, para 9.30.
the requirement for judicial authorisation or confirmation of all detention, would place significant, and unnecessary, administrative and financial burdens on the courts in the UK.\(^3\) Moreover, it was thought that the restrictions on the use of accelerated procedures would ‘greatly complicate the use of accelerated procedures in the UK, making them less flexible and more liable to disruption by legal challenges’.\(^3\) In support of this contention, the Government underscored the importance of its Detained Fast Track procedure to asylum practice in the UK and indicated that ninety-seven per cent of fast track decisions in the most recent financial year have been upheld on appeal.\(^3\) Similarly, the Government cited restrictions on its ability to certify cases as clearly unfounded for purposes of DNSA procedure as preventing the UK from employing its current practice with regard to non-suspensory appeals, and interfering with their ability to deflect abusive applications.\(^3\)

The UK’s non-participation also raises the issue of whether the European Commission will invoke article 4a of the UK’s opt-in Protocol\(^3\) to eject the UK from participation in the current version of the Directives based on the belief that its non-participation in the renewed legislation will impair the functioning of that legislation for the rest of the Member States or the EU. This issue was flagged by the Minister for Immigration, Damian Green, before the House of Commons in its recent scrutiny of the reception conditions proposal.\(^8\) He dismissed the issue as being ‘unlikely to arise’ because of the non-reciprocal nature of the obligations in the instruments. The House of Commons was not so easily swayed, however, and noted the potential impact of the European Commission’s view that the elevated and more harmonized standards in the two proposals are ‘indispensable’ in ensuring that asylum applicants subject to the Dublin Regulation receive the same treatment and have their applications examined under the same conditions in all of the Member States.\(^8\)

However, beyond its objection to individual provisions in the proposals, or the impact of its non-participation on the rest of the EU, the UK fundamentally believes that its system for asylum satisfies its obligations under international law. Explicit reference is made in the Explanatory Memorandum on the proposed reception conditions Directive to its obligations under article 5(4) of the European Convention on Human Rights in support of the contention that detention in the UK already complies with accepted international standards: ‘Given these existing safeguards, we are not convinced that further restrictions proposed by the European Commission are necessary.’\(^4\) Indeed, the practice of the UK with regard to accelerated procedures and administrative detention was upheld by the European Court of Human Rights in Saadi.\(^4\) The UK also asserts in


\(^{34}\) ibid para 40.

\(^{35}\) ibid para 40.

\(^{36}\) ibid paras 42–5.

\(^{37}\) Protocol No 21 to the Treaty on the Functioning of the European Union.

\(^{38}\) (n 32) para 9.32.

\(^{39}\) ibid, quoting para 3.8, p 8 of the Commission’s explanatory memorandum accompanying the revised procedures Directive.

\(^{40}\) (n 33) para 24.

a few instances that its current arrangements either already comply with the requirements in the proposals, or go beyond the requirements. For example, in relation to the right to legal information and assistance as proposed in articles 19–23 of the draft asylum procedures Directive, the UK states that its current system for legal aid in the initial stages of the asylum application process exceeds the requirements of the proposal. Nevertheless, there is some evidence that the UK’s framework for legal aid in asylum matters is suffering due to a proposal in the Legal Aid, Sentencing and Punishment of Offenders Bill to cut legal aid for asylum support applications due to the ‘straightforward nature’ of the process and the ‘availability of other routes’. However, viewing this claim alongside evidence of recent cuts to immigration and asylum advice services throughout the UK, the ‘availability of other routes’ seems less than satisfactory.

The UK’s position with regard to the two opt-ins is unfortunate. The system for examining asylum applications in the proposed procedures Directive promotes greater and equal access to justice across the EU for all asylum applicants. The proposals together comprise an efficient and fair asylum system which ensures that similar applications are treated alike across the EU. The European Commission believes that the proposed texts present a system that respects fundamental rights, simplifies existing rules and is flexible enough to be incorporated into the Member States’ different legal systems. Conversely, the UK feels that the inroads made in the proposals are, to a large extent, unnecessary. It considers that its framework for asylum protection satisfies international obligations and in some areas, excels beyond the standards currently imposed at the European level. While this may be the case, the decision not to opt-in will have the effect of making the UK inferior, in some respects, to the other Member States that have chosen to elevate their standards through the implementation of the recast reception conditions and procedures Directives. This fact was acknowledged explicitly by the UK Border Agency. The UK could have taken the opportunity to

42 (n 22) paras 34–7. It feels similarly about its framework for the identification and protection of vulnerable applicants (Home Office RCD Memo (n 33) para 34–5).
43 The current text of the bill is available at <http://services.parliament.uk/bills/2010-11/legalaidsentencingandpunishmentofoffenders.html>.
44 Ministry of Justice, ‘Proposals for the Reform of Legal Aid in England and Wales’ (Nov 2010) para 4.223. The paper goes on to explain that the other available routes to which it refers are the voluntary sector organizations, which provide free and independent legal advice on applications.
45 The Immigration Advisory Service, which represented approximately one-third of legally-aided immigration and asylum claims in England and Wales and was the last remaining large provider of legal assistance to whom clients could be directly referred, closed its doors in 2011 allegedly due to changes in legal aid (see The Guardian, ‘Tens of thousands lose support as Immigration Advisory Service closes’, 11 July 2011, available at <http://www.guardian.co.uk/law/2011/jul/11/immigration-advisory-service-closes-blames-government>). Similarly in 2010, Refugee and Migrant Justice, the largest national not-for-profit provider of advice and representation in the asylum field at the time, was forced to close after allegedly not receiving payment it was owed by the Legal Services Commission (see The Guardian, ‘Funding crisis over legal aid threatens UK asylum chaos, ministers are warned Migrants charity goes into administration’, 30 May 2010, available at <http://www.guardian.co.uk/uk/2010/may/30/asylum-refugee-migrant-justice>).
47 HL Paper 55 (n 18) Q6.
improve upon its already advanced framework by opting-in to the proposals and raising
the quality of its own asylum practice, but it chose not to do so. In order to understand
this decision, one should not look merely at its choice regarding these two proposals,
but should also look at broader issues, such as the general relationship between the UK and
the EU.

E. The Broader Context of the UK Decision Not to Opt-in

The UK’s relationship with the EU has been ambivalent since it began nearly forty years
ago. Its policy towards European integration, understandably, changes with each
Government. However, the current Government seems to especially object to further
integration, not only in the context of asylum, but in a more general sense. As to the
former, those ministries in the Coalition Government that are concerned with asylum
matters are, in principle, opposed to a Common European Asylum System that involves
harmonisation beyond minimum standards at EU level, as it is not considered to be in
Britain’s interests. Like Meg Hillier in the context of the first round of revisions,
Damian Green noted before the House of Lords that Britain would find it ‘very difficult’
to protect its national interests if it participated in the Common European Asylum
System. Britain’s more general feeling with regard to EU integration can be witnessed
in recent comments by Foreign Secretary William Hague to the effect that the UK could
excel by distancing itself from Europe. His remarks formed part of a short editorial
highlighting the fact that approximately one hundred thousand people have signed a
petition calling for parliamentary debate on the issue of having a referendum on EU
membership.

Even more illustrative is the passing through Parliament of the European Union Act. Broadly speaking, the Act prevents any further expansion of EU competence by
requiring a national referendum before any such changes can be made. A significant
and more publicized portion of the Act is what is known as the ‘sovereignty clause’. This clause reiterates the fact that it is only by virtue of an Act of Parliament that directly
effective EU law is able to be recognized and enforced in the UK. That is to say,

48 (n 22) para 14.
49 House of Lords Select Committee on the European Union, Home Affairs (Sub-Committee F), ‘Evidence session on Developments in EU Policies on Immigration and Asylum’, 11.00am, response to question 31.
51 Ibid.
52 2011 c 12. The Act received Royal Assent on 19 July 2011.
53 The so-called ‘referendum lock’ entered into force on 19 August 2011.
54 Clause 18: ‘Status of EU law dependent on continuing statutory basis. Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.’ The sovereignty clause entered into force on 19 July 2011.
55 The exact origin of the notion of Parliamentary sovereignty is under intense debate. In that regard, see House of Commons, European Scrutiny Committee, 10th Report of Session 2010–11, ‘The EU Bill and Parliamentary Sovereignty’ HC 633-I paras 49–63. Indeed, such was the concern that the Government amended the Explanatory Notes to Clause 18 and removed reference to the common law principle of Parliamentary sovereignty.
UK Parliament is the ultimate authority in the UK; not the European Court of Justice or the European institutions. In a written Ministerial Statement to the House of Commons, the Government admitted that while the judiciary has offered sufficient protection of Parliamentary sovereignty in the past, the sovereignty clause is aimed at putting the matter ‘beyond speculation’. The Government expressed a concern that in the future, the courts might erode the notion of Parliamentary sovereignty. In light of that concern, the clause was viewed as serving as an additional authority to be relied on in the event that someone should put forth an argument that EU law comprises a higher autonomous legal order. This concern was not echoed by the House of Commons or by the majority of legal experts interviewed. Thus, one can extrapolate a dedicated interest in ensuring that EU law does not encroach upon the UK legal framework anymore than has been explicitly agreed. Any further encroachments must be justified by a referendum. A similar situation is occurring presently with regard to a private member’s bill on the UK’s withdrawal from the European Convention on Human Rights. It is motivated by fear that the powers given to the European Court of Human Rights under the Convention have resulted in the micro-management by Strasbourg of Member State domestic legal systems. Although the Bill is unlikely to result in an enforceable Act due to the existence of the UK’s Commission on a Bill of Rights, it serves as another example of the UK’s sentiment toward European regulation of domestic matters generally.

It would seem, therefore, that the UK is driven not only by its specific policy on asylum, or its instinct to preserve Parliamentary sovereignty, but also by a belief that supranational harmonization of standards is not always appropriate. This raises interesting questions in terms of whether it is indeed appropriate for a regional body, such as the EU or the Council of Europe, to develop uniform standards not only on asylum practice, but also on human rights protection. The UK is willing to participate to a certain degree in measures that touch those areas traditionally thought of as being within the sovereign’s purview, such as criminal law and immigration. After all, it has chosen to opt-in to recent EU legislative measures developed in the context of the Stockholm Programme and its Roadmap to strengthen the procedural rights of suspects in criminal proceedings. The fact that these instruments do not go beyond the

56 ibid para 30.  
57 ibid para 32.  
58 ibid. This argument was advanced in 2002 before the Divisional Court of the High Court in Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) by Eleanor Sharpston QC (as she was then known) who argued that EU law was a higher legal authority entrenched autonomously in the UK by virtue of the European Communities Act 1972. This argument was rejected by Lord Justice Laws who cited Parliamentary sovereignty: ‘...there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament’s legislative supremacy in the United Kingdom.’ (para 59). Because this was a first-instance decision, there was some concern by the Government, in the context of drafting the sovereignty clause, that it could be overturned on appeal.  
59 (n 55) ch 5.  
61 One commentator cites the decision by the Strasbourg Court to give prisoners the right to vote in the UK as a motivating factor behind the Bill. This was an issue before the Strasbourg Court in 2005 in Hirst v United Kingdom (No 2) [2005] ECHR 681, and again in 2010 in Greens and MT v United Kingdom [2010] ECHR 1826.  
62 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009 C-295/1. Thus far, the UK
imposition of minimum standards was undoubtedly attractive to the UK. While it may generally be favourable (and preferable) to harmonize human rights standards, the UK has indicated that it has trouble digesting harmonization of the minutiae of these rights. For example, in its explanatory memorandum to the proposed reception conditions Directive, the Home Office indicates its apprehension regarding the proposal’s attempt to further regulate access by asylum seekers to the labour market by requiring the Member States to grant access after a period of six months, rather than one year as currently required under the Directive as in force.63 Similarly, the UK objected to the proposal’s endeavour to require that access to material reception conditions, such as social welfare assistance, be granted to asylum applicants on a basis equivalent to that employed with respect to nationals.64 The UK is a nation that abides by the respect for human rights and the rule of law. However, it seems to have some difficulty in determining exactly whose rule of law should prevail: that of the UK, or that of Europe. While the rest of Europe increases its standards, the UK may inevitably be faced with the situation of having to raise its own standards in order to match those of Europe. These tensions contribute to what is often an incoherent policy toward European integration that sends mixed signals concerning the UK’s willingness to participate in the European project generally, a subject that is beyond the scope of this article.

F. Conclusion

The UK’s attitude toward the proposed Directives on asylum reception conditions and procedures is fuelled by a number of considerations ranging from the specific, such as the text in individual provisions of the proposals, to broader considerations such as its relationship with Europe generally, and the need for supranational regulation of certain areas of policy. Together these factors have prevented the UK from taking an opportunity to enhance its legal framework for asylum and provide better protection for asylum applicants in a manner consistent and equal to the other Member States. As a result, the UK asylum framework will be, in some respects, inferior to the framework applicable in the other Member States. Consequently, asylum seekers will not receive the same protection across Europe. While the UK struggles to define its relationship with Europe, it may miss other opportunities to act as a leader in the field of human rights and the rule of law.

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