Refugees and Higher Education in the European Union

The European Union provides a legal framework for the education of the holders of international protection status (refugee and subsidiary protection) and their family members. However, many seekers of international protection have the potential for skilled work on the basis of the qualifications obtained either in the home State or abroad, the recognition of which is again regulated by EU Law. An individual granted international protection may also wish to travel to another Member State to either study for a higher education qualification or simply to work utilising the skills acquired through higher education, both situations that are again regulated by EU Law. This paper will critically analyse these rules, including the latest proposals for Recast Directives, and suggest solutions to any problems identified.

Introduction

Immigration and education of citizens create policy conflict between national and European institutions. The question as to who is to be a national of a State and how they are to be educated are matters that are traditionally fixed within the domain of national sovereignty. Indeed at the time of the Treaty of Rome in 1957 the European Economic Community was concerned with the economic issue of the free movement of workers (ex-Article 48EEC) and the implementation of a common policy on vocational training of those workers (ex-Article 128EEC) only. Gradually the competence of the European Union has been extended into the areas of immigration.

1 Council Directive 2004/83/EC 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, O.J. 2004 L304/12.
and asylum of third country nationals and education. First the Treaty of Maastricht supplemented the activities of the now European Community with the need to make “a contribution to education and training of quality” in Article 3(p)EC. The provision on vocational training was expanded and renumbered as Article 127EC and a new Article 126EC was introduced on education. This provision made it clear that teaching content remained the preserve of the Member States but the Community was “to contribute to the development of quality education by encouraging co-operation between Member States and, if necessary, by supporting and supplementing their action”. Article 126(2)EC provided the aims of any Community action whilst paragraph 4 specified that such action had to be for incentive only and not harmonisation. By the time of the Treaty of Amsterdam the articles on education and vocational training were not added to but were renumbered Articles 149 and 150EC. However, the Amsterdam Treaty did introduce a new Title IV to the EC Treaty entitled “visas, asylum, immigration and other policies related to free movement of persons” and “establishing progressively an area of freedom, security of justice (henceforth AFSJ)” (Article 61EC). Article 63EC mandated the Council, acting unanimously, to adopt measures on asylum, in accordance with the Geneva Convention 1951 and the 1967 Protocol (henceforth Geneva Convention), for “minimum standards with respect to the qualification of nationals of third countries as refugees” (Article 63(1)(c)). The result was the Refugee Qualification Directive adopted in 2004.

Refugee Qualification Directive

The purpose of the Directive was to “lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection” (Article 1), specifying the content of that protection and the minimum set of rights for the individual. The Directive applied to third country national refugees, as defined in Article 2(c)6, and third country national

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6 Article 2(c): “‘refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the
or stateless persons who came within the definition of a person who was eligible for subsidiary protection, as defined in Articles 2(e)\(^7\) and 15\(^8\). Once granted refugee or subsidiary protection status, the content of such international protection was then set out in Chapter VII, that was “without prejudice to the rights laid down in the Geneva Convention” (Article 20(1)). The benefits set out in the Chapter could be reduced, although not below those specified in the Geneva Convention, if refugee or subsidiary protection status was obtained on the “basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee or a person eligible for subsidiary protection” (Article 20(6) & (7)). It should be noted that the Directive did not include all the rights specified in the Geneva Convention such that reducing rights further, although not in breach of the Member States’ international commitments, nevertheless reflected a lingering suspicion of those claiming refugee or subsidiary protection status\(^9\).

Article 27(1) obligated the Member States to provide access to employment immediately after refugee status had been granted but for persons granted subsidiary protection status the Member States could prioritise their access for a limited time depending on the situation in the labour market of that Member State (Article 27(3)). Coupled with the right of access to employment, the Member States had to offer employment related educational opportunities for adults, vocational training and practical workplace experience to refugees under equivalent conditions as nationals or under conditions to be decided by Member States for those with subsidiary protection status. This difference in treatment between refugees and

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\(^7\) Article 2(e): “person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.

\(^8\) Article 15: “Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

subsidiary protectees was heavily criticised. First the House of Lords Select Committee noted that an individual’s needs were the same regardless of the status granted\textsuperscript{10} with subsidiary protection status not supported by empirical evidence as a temporary status\textsuperscript{11}. Second the maintenance of Member State discretion ensured that there was a failure to harmonise the rights for persons with subsidiary protection status and thus fragmentation across the EU. As McAdam noted it “effectively counteracts the benefit of allowing beneficiaries immediate access to employment”\textsuperscript{12}.

Rights to education were set out in Article 27. The first paragraph granted a right of access to education for minors granted refugee or subsidiary protection status under the same conditions as nationals. However adults were only granted access to the general education system, further training or retraining under the same conditions as third country nationals legally resident. This caused significant problems for adult refugees attempting to enter the higher education system. First they were required to satisfy the same entry requirements as other third country nationals, a condition often difficult to satisfy through lack of documentary evidence, be that certificates of educational qualifications left behind on fleeing or a refusal by the individual’s home State to confirm them if approached and asked. Of more significance however was that fees for access to higher education could be charged at the normally higher rate applicable to third country nationals rather than nationals or EU citizens, with student maintenance grants also possibly limited.

The first problem was attempted to be resolved with Article 27(3) mandating Member States to ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications. However this provision failed to overcome the practical difficulties encountered by

\textsuperscript{10} House of Lords Select Committee on the EU, Defining Refugee Status and Those in Need of International Protection (The Stationery Office, London 2002) para 110.
\textsuperscript{11} Ibid, GS Goodwin-Gill, A Hurwitz, ‘Minutes of Evidence to the Select Committee’ para 19: “it is a poor reason for a lesser standard of treatment”.
refugees over the lack of documentary evidence. Furthermore it did not appear to satisfy the requirements of the Council of Europe’s Lisbon Convention on the Recognition of Higher Education Qualifications that specified that procedures should be “designed to assess fairly and expeditiously whether refugees, displaced persons and persons in a refugee-like situation fulfil the relevant requirements for access to higher education, to further higher education programmes or to employment activities, even in cases in which the qualifications obtained in one of the Parties cannot be proven through documentary evidence”. In 2005 the Directive on the Recognition of Professional Qualifications was adopted by Parliament and the Council. As this legislative measure was adopted after the Refugee Qualification Directive it could be assumed that it would take account of the situation with third country nationals legally resident in Member States qualified but without evidence to support that qualification. Unfortunately the scope was limited in Article 2(1) to nationals of a Member State.

Right to Free Movement

The right to freedom of movement is a fundamental right enshrined in the EC Treaty. This right was however initially limited to workers (Article 39EC) and their family members but was extended to those wishing to establish themselves to provide services, retired persons, students and those with sufficient resources and health insurance. The introduction of EU citizenship with the Maastricht Treaty provided a more general right to freedom of movement such that “[e]very citizen of

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14 Council of Europe, Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, 1997 Article VII.
the Union shall have the right to move and reside freely within the territory of the Member States” (Article 18EC) that could be limited by provisions of the Treaty and subsequent implementing legislation. In 2004 the Citizens Directive\textsuperscript{21} was adopted but only applied to Union citizens and their family members as defined in Articles 2(2) and 3(2). If a refugee were to become a family member of an EU citizen, possibly by marriage, then the rights contained within the Directive and the right to education enshrined in Article 12 of Regulation 1612/68\textsuperscript{22}, including student maintenance allowances\textsuperscript{23}, could then be relied on\textsuperscript{24}.

The treatment of refugees continued to be a balancing act between national interests and the competence of the EU. Although the EU adopted legislation that could regulate the standards for the qualification of refugee or subsidiary protection status, it remained the preserve of the Member States to grant that international protection, predominantly as a result of national sovereignty and the fact that the EU was not a signatory of the Geneva Convention\textsuperscript{25}. This meant that the Directives on the admission of third country nationals for the purpose of scientific research\textsuperscript{26} and study\textsuperscript{27} specifically exclude refugees and beneficiaries of subsidiary protection from their scope. Furthermore the benefits, including the possibility of moving to another Member State, of long term residency were denied to refugees or persons with subsidiary protection under the personal scope of the long term resident third country national Directive\textsuperscript{28}. In June 2007 the Commission put forward a proposal to extend the LTR Directive to TCNs with international protection as defined in Article 2(a) of

\textsuperscript{22} Council Regulation 1612/68/EEC on freedom of movement for workers within the Community, O.J. Sp Ed 1968 L257/2.
\textsuperscript{24} Case C-127/08 Metock v Minister for Justice, Equality and Law Reform [2008] ECR I-6241.
\textsuperscript{27} Council Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, O.J. 2004 L375/12 Article 3(2)(a).
Dir. 2004/83\textsuperscript{29} that would include TCNs granted refugee and subsidiary protection status, with any calculations of duration for residence purpose commencing from when the application for protection was lodged. Unfortunately at the November 2008 JHA Council meeting\textsuperscript{30} agreement was reached amongst all the MSs except one on the text of the Directive and so negotiations were set to continue but this has not been discussed at Council level since. Thus a refugee wishing to take advantage of the right to freedom of movement was highly limited by the Union’s secondary legislation with significant hurdles and suspicions curtailing opportunities for higher education studies in another Member State.

Refugees and beneficiaries of subsidiary protection could however take advantage of the possibilities for studying abroad in another Member State through the Lifelong Learning Programme 2007-2013\textsuperscript{31} that took over from Socrates and Socrates II. This could either be for those in higher education through the Erasmus programme (Chapter II of Decision 1720/2006), those undertaking vocational education and training within the Leonardo da Vinci programme (Chapter II of Decision 1720/2006) or for adult education under the Grundtvig programme (Chapter IV of Decision 1720/2006).

**Education Policy Considerations**

As noted throughout this paper, the interaction of policy considerations for both higher education and refugees create conflict at the national level, that become even more complex at the European level. The ability of the EU to act decisively in the field of education has been curtailed through limitations on adopting harmonisation measures imposed by Article 149EC. The European Council at the Lisbon summit in


March 2000\textsuperscript{32} introduced the Open Method of Coordination\textsuperscript{33} as a model to encourage Member States to coordinate their policies in a range of areas that included education, vocational education and training, and lifelong learning\textsuperscript{34}. The aim was to modernise the social model for the benefit of the peoples of Europe by developing a dynamic economy\textsuperscript{35}. The Council followed this up with a report on “The Concrete Future Objectives of Education and Training Systems”\textsuperscript{36} and a detailed work programme (ET2010)\textsuperscript{37} that outlined three strategic objectives for education and training to be achieved by 2010: to improve the quality and effectiveness of education and training systems in the EU; to facilitate the access of all to education and training systems; and, to open up education and training systems to the wider world.

Six months before the Lisbon Council, at the European Council meeting at Tampere, an aim was presented to ensure the integration of third country nationals into the societies of the Member States\textsuperscript{38}. It was through the concept of integration\textsuperscript{39} that the two policy areas dealing with education and the treatment of third country nationals coalesced. Much of this new direction has evolved through soft law under the OMC as the legislative option is unavailable\textsuperscript{40}, the implementation of which is patchy\textsuperscript{41}, although one hard legislative instrument has had some impact. The European Refugee Fund (ERF)\textsuperscript{42}, adopted by Decision, allocates a set amount of funds to Member States with a further amount dependent on the number of persons with

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\item\textsuperscript{32} Council of the European Union, Presidency Conclusions of the Lisbon European Council of 22-23 March 2000.
\item\textsuperscript{33} Ibid. at para.7.
\item\textsuperscript{34} Ibid. at para.26.
\item\textsuperscript{35} Ibid. at para.5.
\item\textsuperscript{36} Education, Youth & Culture Council, Report to the European Council on the concrete future objectives of education and training systems, Council Document 5980/01.
\item\textsuperscript{37} Council of the European Union, Detailed work programme on the follow-up of the objectives of Education and training systems in Europe, O.J. 2002 C142/1. The three strategic objectives were further split into 13 specific objectives.
\item\textsuperscript{38} Council of the European Union, Presidency Conclusions of the Tampere European Council of 15-16 October 1999, para.4.
\item\textsuperscript{39} For a discussion on the meaning of the integration concept see K Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’ (2004) 6 EJML 111.
\item\textsuperscript{40} AF Atger, ‘Education and Political Participation of Migrants and Ethnic Minorities in the EU: Policy Report’ CEPS Special Report, September 2009 at 1.
\item\textsuperscript{42} European Parliament and Council Decision establishing the European Refugee Fund for the period 2008 to 2013 as part of the general programme ‘Solidarity and Management of Migration Flows’, O.J. 2007 L144/1.
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refugee or subsidiary protection status. These funds can be spent on a range of actions integrating beneficiaries of international protection that include “measures focusing on education, vocational training, or recognition of qualifications and diplomas” (Article 3(3)(d)).

The follow up to the Tampere Council conclusions, the Hague Programme of 2004\textsuperscript{43}, confirmed the importance of integration of third country nationals\textsuperscript{44} that extended to education policy\textsuperscript{45}. At the Justice and Home Affairs Council meeting in November 2004\textsuperscript{46} a series of Common Basic Principles (CBP) for immigrant integration policy in the European Union was adopted, with CBP5 (of the 11 CBPs) encouraging efforts in education. The Commission in a Communication from September 2005\textsuperscript{47} attempted to put flesh on the bones of the CBPs, although the constraints over EU competence were noticeable with a highly limited agenda for CBP5 involving the incorporation of integration objectives into the EU’s educational programmes, the promotion of education of third country nationals through the ET2010 Work Programme and the facilitation of transparent recognition of qualifications\textsuperscript{48}. This latter policy has now been strengthened by the establishment of the European Qualifications Framework (EQF)\textsuperscript{49}, although again strengthening is illusory as the instrument for its adoption is a Recommendation, an instrument of soft law without binding legal force on the Member States, and is without prejudice to Directive 2005/36\textsuperscript{50}.

\begin{footnotesize}
\textsuperscript{45} Ibid. at 5.
\textsuperscript{46} Council of the European Union, Conclusions of the JHA Council of 19 November 2004 at 15.
\textsuperscript{48} Ibid. at 8.
\textsuperscript{50} Recital 11.
\end{footnotesize}
The final policy complication is provided with the development of the European Higher Education Area (EHEA). The EHEA is an intergovernmental construct at international law level, to which all the Member States and the Commission are signatories, involving 46 States and numerous international organisations.\(^{51}\) It is frequently called the Bologna Process, named after the initial meeting of European Education Ministers in June 1999 and effectively attempts to standardise the requirements for the award of degrees at undergraduate and postgraduate levels. The result of the Bologna Process is incongruous with no possibility of adopting harmonising legislation to standardise university degree programmes at the EU level whilst at the international law level, Member States have actively participated in standardising university degree programmes. National sovereignty and the overriding protection of national interests clearly dominate the actions of the Member States. This is evident in the attempts by Member States to coordinate quality assurance in higher education. In 1998 a soft law Recommendation\(^{52}\) was issued by the Council recommending the establishment of transparent quality assurance systems\(^{53}\), specific features of such systems\(^{54}\) and promoting cooperation between higher education institutions and national quality assurance authorities\(^{55}\). This was a soft law instrument that provided no legally binding enforceable rights for individuals. However, it was in the Member States’ interests to adopt the provisions of the Recommendation and by 2006, in a new Recommendation\(^{56}\), the Council confirmed the general implementation by the Member States of the 1998 essential features of quality assurance systems\(^{57}\). This new Recommendation recommended the introduction or development of internal quality assurance systems for all higher education institutions\(^{58}\), the encouragement of the independence of quality assurance agencies in applying the features of a quality assurance system as set out

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\(^{52}\) Council Recommendation 98/561/EC on European cooperation in quality assurance in higher education, O.J. 1998 L270/56.

\(^{53}\) Ibid. Recommendation IA.

\(^{54}\) Ibid. Recommendation IB, IC and Annex.

\(^{55}\) Ibid. Recommendation ID & E.

\(^{56}\) Council Recommendation 2006/143/EC on further European cooperation in quality assurance in higher education, O.J. 2006 L64/60.

\(^{57}\) Ibid. Recital 4.

\(^{58}\) Ibid. Recommendation 1.
in Recommendation 98/561/EC\textsuperscript{59}, the setting up of a European Register of Quality Assurance Agencies\textsuperscript{60} and cooperation between agencies\textsuperscript{61}. These limited aims will only be achieved if the Member States decide that it is in their interests to achieve them as the objectives are not legally binding.

### Recent Developments

#### Lisbon Treaty

The long gestation of the Lisbon Treaty\textsuperscript{62} came to an end on 1 December 2009 when it eventually came into force. The changes that have taken place do not change the relationship between refugees and education enormously. The Treaty on the Functioning of the European Union (TFEU) sets out the areas of Union competence in Title I with Article 6TFEU specifying that the Union has the competence to carry out actions to support, coordinate or supplement actions of the Member States in areas that includes education and vocational training (Article 6(e)). As Article 2(5)TFEU points out this does not supersede the competence of the Member States nor can it entail the harmonisation of Member States’ laws and regulations. The old EC Treaty provisions on education and vocational training have been retained but renumbered as Articles 165 and 166TFEU. The provisions on asylum and immigration have now been rationalised under Title V of the TFEU and entitled “An Area of Freedom, Security and Justice”. Article 67(1)TFEU points out that “the Union shall constitute an AFSJ with respect for fundamental rights” with paragraph 2 providing for the absence of internal border controls for persons and a common policy on asylum, immigration and external border controls that is fair towards third country nationals, the definition of which is to include stateless persons.

\textsuperscript{59} Ibid. Recommendation 2.
\textsuperscript{60} Ibid. Recommendations 3-5.
\textsuperscript{61} Ibid. Recommendation 6.
Probably the most interesting development is in the area of the respect for fundamental rights, the legal standing of which is laid out in Article 6TEU with the Charter of Fundamental Rights63 being given legally binding status, and thus becoming justiciable (Article 6(1)TEU). Among the Charter’s many rights, two are notable. The first in Article 14(1) provides that “[e]veryone has the right to education and to have access to vocational and continuing training” whilst Article 16 guarantees the right to asylum with respect to the Geneva Convention and in accordance with the Treaties.

Refugee Qualification Directive Recast

On 21 October 2009 the Commission issued a proposal for a Recast Refugee Qualification Directive, which was then reissued with corrections two days later64. The major point with the recast is that the Commission appears to have taken onboard the criticism of the differentiation between rights granted to those with refugee and subsidiary protection status such that the rights contained in Chapter VII would apply to all beneficiaries of international protection that includes all persons who have been granted refugee or subsidiary protection status (Article 2(b)), with Member States’ ability to reduce benefits removed. Article 26(2) would then be amended so that employment related education opportunities for adults and vocational training (that are to include training courses for upgrading of skills, practical workplace experience and counselling services available from employment offices) would have to be offered to beneficiaries of international protection under equivalent conditions to nationals. Furthermore paragraph 3 would require Member States to facilitate this by providing for maintenance grants and loans or for study to take place on a part time basis.

The provision on access to education would likewise be amended to apply to beneficiaries of international protection with paragraph 3 on qualifications deleted. This is because a new Article 28 would be inserted entitled “Access to procedures for recognition of qualifications”. First Member States would have to ensure equal treatment of beneficiaries of international protection and nationals when it comes to the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications. Second there would have to be access to appropriate schemes for the assessment, validation and accreditation of prior learning when documentary evidence of qualifications could not be provided, that would also have to respect Articles 2(2) and 3(3) of Directive 2005/36. Third cost could not be used as a justification for the prevention of the recognition of qualifications, other evidence of formal qualifications or accreditation of prior learning.

The UK government has indicated that it is comfortable with the changes to Articles 26-28. However, the government has also indicated that it is concerned that the removal of the differentiation between the two categories of international protection and of the Member States’ discretion to reduce the benefits of Chapter VII should be retained by Member States. The UK opted into the initial Refugee Qualification Directive but has yet to indicate whether this option will be chosen this time. Furthermore Germany insisted on retaining the distinction between refugee and subsidiary protection status in 2004 and may still not be comfortable with this. There is likely to be a long road of negotiation before a final definitive Directive emerges but for now the Commission proposal is to be welcomed.

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65 Individuals may be permitted by Member States to pursue a regulated profession on its territory in accordance with its rules. In some professions there will be minimum training requirements.
66 If the individual has three years of professional experience in the profession concerned, evidence of formal qualifications issued by a third country will be regarded as evidence of formal qualifications.
68 Ibid. at 20.
69 Protocol on the Position of the UK and Ireland.
71 Op. cit. n.12, McAdam 1 at 498, McAdam 2 at 91.
In 2008, under the auspices of the French Presidency, the European Council adopted the European Pact on Immigration and Asylum (EPIA)\textsuperscript{72} that made five basic commitments, including, within the commitment on legal immigration, the encouragement of integration\textsuperscript{73} that envisaged balancing third country nationals’ rights (including the right to education) with their duties (legal compliance)\textsuperscript{74}. The EPIA has been one of the policy documents that has underpinned the next stage of the development of the AFSJ as laid down in the Stockholm Programme\textsuperscript{75}, to be adopted at the European Council meeting held today and tomorrow, that builds on the progress made by the Tampere Council Conclusions and the Hague Programme. As an indication of the importance now attached to the AFSJ the Tampere Conclusions amounted to 19 pages, the Hague Programme 33 and now the Stockholm Programme consists of 82 pages of closely argued policy statements. The Programme refocuses the objects of the AFSJ onto the Union citizen\textsuperscript{76} and as such third country nationals do not make an appearance until the latter third of the document\textsuperscript{77}. Paragraph 6.1.5 deals with integration of third country nationals maintaining the new direction formulated under the EPIA of balancing rights of third country nationals and their duties\textsuperscript{78}. The role of education is mentioned but in a highly superficial way as another policy area that plays out alongside integration rather than as a key part of integration\textsuperscript{79}. There is a though an interesting development included in the final document where, subject to a Commission report on the legal and practical difficulties, the EU is to seek accession to the Geneva Convention\textsuperscript{80}. The effect of the EU’s accession is difficult to gauge but Article 22(1) requires equal treatment for refugees as that of host State nationals in respect to

\textsuperscript{73} EPIA ibid. at 4.
\textsuperscript{74} Ibid. at 6.
\textsuperscript{76} Ibid. at 2.
\textsuperscript{77} Ibid. at 56.
\textsuperscript{78} Ibid. at 65.
\textsuperscript{79} Ibid. at 66.
\textsuperscript{80} Ibid. at 69.
elementary education, which is not defined. Furthermore in Article 22(2) there is a right to public education other than elementary education with treatment as favourable as possible and at least to the same standard as aliens generally. It is suggested that it is possible in some circumstances that higher education could be argued to be elementary education and if so then this could extend the scope of the Refugee Qualification Directive.

**Education Policy Considerations**

In May 2009 the Council endorsed a new ten year strategic framework for education and training cooperation up to 2020 (ET2020)\(^{81}\) identifying four new strategic objectives\(^{82}\): making lifelong learning and mobility a reality; improving the quality and efficiency of education and training; promoting equity, social cohesion and active citizenship; and, enhancing creativity and innovation, including entrepreneurship, at all levels of education and training. To assess progress made so far and to determine concrete objectives at the national and EU level, the Commission has recently published a number of documents\(^{83}\) supporting the main draft joint progress report of the Council and Commission\(^{84}\) that outlines a set of indicators and benchmarks to track progression.

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82 Ibid. at 3.
Within the Bologna Process and the development of the EHEA, the Commission has reported significant progress with the implementation of the EQF\textsuperscript{85} and has recently issued a report on the progress of quality assurance in higher education\textsuperscript{86}. Both are obviously of interest for refugees although the former is unqualified by the Commission. Quality assurance has also been at the centre of a policy debate within the Education Council\textsuperscript{87} over the question of diversity and transparency as drivers for excellence in European higher education although the conclusions of the Education Council in November 2009\textsuperscript{88} were decidedly ephemeral.

**Complexity upon Complexity**

The outline of the interaction of the two policy areas of international protection of individuals and their education at the European level demonstrate considerable complexity and are implicitly imbued with the strong desire of the Member States to retain control of the operational aspects of the two policies. The development of both policy areas has involved a delicate balance of supranational and intergovernmental interests that is set to continue over the next few years and possibly descend into more heterogeneous and contradictory complexities.

Many of the recent developments in these policy areas (the Proposal for a Recast Refugee Qualification Directive, the new legal standing of the Charter of Fundamental Rights and the ET2020) present significant opportunities to advance the fair treatment of beneficiaries of international protection generally and specifically for their integration in host States through higher education. However, the Recast Refugee Qualification Directive is likely to face protracted negotiation, especially as it will now need approval by both the European Parliament and Council under the

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\textsuperscript{85} Commission Communication of the 2\textsuperscript{nd} implementation report for the Community Lisbon Programme 2008-2010, COM(2009) 678 final at 3.
\textsuperscript{86} Commission report on progress in quality assurance in higher education, COM(2009) 487 final.
\textsuperscript{87} Swedish Presidency’s note on diversity and transparency – drivers for excellence in European higher education, Council Document 15466/09.
ordinary legislative procedure (Article 289TFEU). The rights of those seeking international protection contained in the original Refugee Qualification Directive were significantly curtailed at the behest of Germany in particular. Now the Recast version will not only have to pass through the Council, that traditionally has sought to protect States’ interests, but also the Parliament, whose members are democratically elected and as such is considered to protect citizens’ interests. Furthermore the UK has not decided whether to opt in to this new version\(^89\). If the UK does opt in then a level of complexity will be removed as there will be a uniform law across the European Union. However, if the UK opts out then the final version of the Recast Refugee Qualification Directive will become operative law across the EU except in the UK where the original version of the Directive will be the active legal instrument.

The Charter of Fundamental Rights would appear to provide an interesting route to the right to education, particularly for those seeking international protection as the right in Article 14(1) applies to “everybody”. However, the Charter has yet to be tested before the ECJ as it was merely “declared” by the EU’s institutions at the time of its drafting and thus did not have legally binding status. This has meant that the ECJ has utilised the Charter but only in a supporting role to Fundamental Rights enunciated as General Principles of EC Law, although the wording employed by the ECJ is interesting\(^90\). The new legal status of the Charter does mean that the Court now has an opportunity to employ the Charter as the legal basis of judgments and to interpret the rights enshrined within it. It is likely however that the Court will move cautiously when interpreting the Charter. First, the Charter, according to Article 6(1)TEU, is only to have the same legal value as the Treaties and thus the rights in the Charter, even though it is often considered that human rights have superior standing over other rights\(^91\), will have to interpreted by the ECJ on an equal footing.

\(^{89}\) At the Treaty of Amsterdam, the UK negotiated a complex opt out from the measures adopted under Title IV of the EC Treaty and the Schengen Agreement with the option to opt in if the UK requested it and the other Member States agreed. This opt out/opt in has been retained in the Lisbon Treaty.

\(^{90}\) Case C-491/01 \textit{R v Secretary of State for Health ex parte British American Tobacco (Investments)} [2002] ECR I-11453 at para 144 where it was held that the right to property, which was recognised as a fundamental human right in the Community legal order, was protected by “Article 1 of the First Protocol to the ECHR and enshrined in Article 17 of the Charter of Fundamental Rights of the European Union” (emphasis added).

\(^{91}\) The Federal Republic of Germany’s Constitution (the Grundgesetz) is made up of eleven chapters of which the first chapter, entitled Basic Rights that can be equated to human rights, takes precedent over the other chapters.
to those contained in the TEU and TFEU. Second, paragraph 3 of Article 6(1)TEU requires the Charter to be interpreted in accordance with Chapter VII of the Charter entitled General Provisions and the explanations referred to in the Charter that set out the sources of the Charter’s provisions. Third, the Court has little experience as a human rights court, even though it has interpreted fundamental rights as general principles of Community law. As such the ECJ is likely to move forward in a pragmatic and incremental fashion rather than justifying their reasoning in abstract and principled terms. Finally the Charter has proven to be controversial with the UK, this time alongside Poland, negotiating an opt out from the Charter in the Lisbon Treaty, that arguably simply restates the position and scope of the Charter. The overall effect is that the Charter “might promise more than it can deliver.”

The ET2020 provides a major opportunity to strengthen the delivery of education and training in the next twenty years including the integration of those with international protection status. However, the complexity involved in the development of the European higher education sector is layered with policy and operational involvement at the national stage, EU level and pan-European arena. Therefore any opportunities for dynamic advancement and uniform improvement are likely to be highly limited due to the operational aspects of education and training remaining the preserve of the Member States.

Conclusion

93 Article 6(1) para 3 actually labels Chapter VII as Title VII. It could be argued therefore from principle that as there is no Title VII in the Charter then the reference to it in the TEU should be discounted. However, the ECJ would more than likely interpret this provision teleologically.
95 Protocol 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the UK.
From the discussions above it is has become clear that the most significant problem encountered is the desire by the Member States to retain protection of their national interests in the treatment of beneficiaries of international protection and in those beneficiaries’ education. It is understandable and logical that Member States determine the content of the operational curriculum for education as there is considerable diversity in Member States’ educational systems, let alone the many different languages of the European Union. However, it is incongruous for the Member States to then set up an intergovernmental arrangement to standardise the requirements for the award of degrees at undergraduate and postgraduate levels through international law, whilst linking this with EU Law. The integration of third country nationals would be considerably easier to achieve and monitor if the competence of the EU was extended in the field of education.

National sovereignty also permeates all aspects of immigration, asylum and the protection of those claiming international protection in the EU. Unfortunately the supranational ideal offered by the European Union is often subjugated by a Member State’s desire to protect national interests. This can be clearly seen in the Refugee Qualification Directive and the protection afforded by the Charter of Fundamental Rights. A former judge of the ECJ once observed that the judgments of the Court were underpinned by “une certain idée de l’Europe”98 and although the Member States retain mastery of the Treaties99 it is submitted that it would be in the interest of Europeans in general but in particular those less fortunate than most (e.g. those with or claiming international protection) if a greater spirit of Europe imbued policy considerations and policy making.