The Aznar Protocol: Diminishing the Geography of Refugee Protection in Europe

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1. Introduction

The Aznar Protocol No. 24 is a protocol to the Treaty of the European Union (it became part of the EU treaties in 1999). The Aznar Protocol was an initiative of Spain. Spain was dissatisfied with the way Belgium and France dealt with asylum request from and offered protection to Spanish citizens who had committed or were suspected to have committed terrorist activities for the ETA.1 At first, Spain proposed to exclude EU-citizens from the right to seek asylum within the EU as follows: ‘Every citizen of the Union shall be regarded, for all legal and judicial purposes connected with the granting of refugee status and matters relating to asylum, as a national of the Member State in which he is seeking asylum. Consequently, no State of the Union shall agree to process an application for asylum submitted by a national of another State of the Union.’2 The text that finally was adopted is ‘less’ far reaching.

The Aznar Protocol contains one single Article stating in short that Member States do not grant asylum to citizens of another Member State.3 The reason for this is, according to the text of the Protocol, the level of protection of fundamental rights and freedoms by the Member States of the European Union. This level is such that: ‘Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may not be taken into consideration or declared admissible for processing by another Member State’. Belgium is the only EU country that has made a separate declaration, emphasizing the conditioning of the application of the Protocol.4 Subsequently, specifically enumerated exceptions are listed. An asylum application by an EU-citizen may be taken into consideration or declared admissible by another Member State only in the following cases:

‘(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

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1 ETA is an acronym of Euskadi Ta Askatasuna, ‘Basque Homeland and Freedom’, an armed Basque nationalist and separatist organisation.
3 This contribution is partly based on an unpublished paper: A. Terlouw, C. Grütters and K. Zwaan, Implementation of the Aznar Protocol, March 2014.
(b) if the procedure referred to Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national;
(c) if the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national or if the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national;
(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.’

What does this imply for an asylum seeker having well-founded fear for persecution coming from an EU Member State? In principle his country of origin will be considered to be a safe country, able and willing to protect, meaning that the asylum claim will be rejected. There are a few exceptions. Only if the country of origin of the asylum seeker has formally derogated from its human rights obligations, or if that has been determined through a political process that this Member State is a serious and persistent violator of human rights, an asylum application can be dealt with by another EU Member State. In any other circumstances, an asylum request can only be received if there is a unilateral Member States decision, which is communicated to a political organ of the EU, the Council.5 The preamble justifies the protocol on the following grounds: The TEU recognizes rights, freedoms and principles as set out in the EU Charter of Fundamental Rights and as guaranteed by the ECHR; The Court of Justice of the EU has the power to ensure fundamental rights are respected within the scope of EU law; The TEU provides that membership of the EU is only open to states which comply with European fundamental rights and a mechanism for sanction exists against states which fail to live up to their commitments; EU citizens are entitled to a special status and have the right to move and reside freely across the territory of the Member States in an area without internal frontiers; and finally The institution of asylum should not be used for purposes alien to those for which it was intended.

In this contribution the consequences of the Aznar protocol will be analysed, and special attention will be given to the ‘protection’ gap that exists due to this Protocol

for specific categories of EU-citizens. Also Elspeth Guild in her work has given much attention to this ‘Geography of Refugee Protection’.

2. Mutual Trust?

The Aznar Protocol is based on the idea of mutual trust between EU Member States. The principle of mutual trust is based on Article 2 TEU: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality and the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. The presumption of the Aznar protocol is that EU-citizens come from safe countries of origin. There is no general sovereignty clause in the Protocol and the exceptions to the mutual trust of the Aznar system are rather restrictive and require from a Member State that wants to examine an application of an EU-citizen on the substance at least to inform the Commission but preferable to consult other Member States. This restriction of the sovereignty can be understood by the character of a decision to grant a refugee states to an asylum seeker fleeing from another EU Member State. Although granting asylum officially always has been seen as a matter to be viewed separately from criticism of the country of origin, and as a peaceful and humanitarian act, protection against persecution by other states, is based upon distrust or disapproval of other states or on a judgment that this other State has abused its authority. Granting asylum to an EU-citizen therefore is an implicit statement that this Member State is persecuting its citizens or failing to offer protection.

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The landmark cases *M.S.S.* by the ECtHR\(^{10}\) and *N.S.* by the CJEU\(^{11}\) have shown that non-rebuttable trust is not allowed when this would jeopardise the protection of the fundamental rights of the individual.\(^{12}\) Moreover, the mutual trust principle is set-aside in cases of unaccompanied minors.\(^{13}\) Relevant for the mutual trust which forms the basis of the Aznar protocol is that these Court decisions make clear that an escape to blind trust is necessary even if it concerns trust between EU-countries. The CJEU has not reviewed a case regarding asylum seekers, who are EU nationals yet. So far, the closest-related case to the problematica of the Aznar Protocol in the jurisprudence of CJEU is the *N.S.* and *M.E.* case, concerning the possibility of rebuttal of mutual trust in cases of risk of ill-treatment of asylum seekers under the Dublin system.\(^{14}\) But the absoluteness of mutual trust was confirmed in Opinion 2/13 of the CJEU which emphasized the fundamental importance of mutual trust.\(^{15}\)

It can be concluded that there is at least a tension between the Aznar Protocol, and international obligations that are incorporated in the Refugee Convention, the Convention Against Torture, and the ECHR.\(^{16}\) It can have as a consequence that asylum requests are not dealt with, that refugees are not recognised as such, and that asylum seekers are returned to a country where they have to fear for persecution (in this case an EU Member State). In this regard it is interesting to refer to the *Kadi* case, in which

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10 ECtHR, 21 January 2011, appl. no. 30696/09, para. 345: ‘The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the K.R.S. case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case’, *M.S.S. v Belgium and Greece*, m.nt. Spijkerboer *A&sMR* 2011, nr. 1 p. 32/33 and m.nt Battjes *A&sMR* 2011, 2, p. 66-74.

11 CJEU 21 December 2011, NS v SSHD, C-411/10, para. 83: ‘At issue here is the raison d’être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.’ CJEU 21 December 2011, N.S., C-493/10, and M.E et al. C-411/10.


13 CJEU 6 June 2013, C-648/11, *MA and Others v Secretary of State for the Home Department, England and Wales*.


the CJEU judged that the protection of fundamental rights forms part of the very foundations of the Union legal order. Accordingly, all Union measures must be compatible with fundamental rights.

While Article 33(1) of the Refugee Convention provides that ‘No Contracting Party shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social ground or political opinion’, the Aznar Protocol permits a Member State to limit its obligations to a refugee where his/her state of origin is a Member State of the EU. The principle set out in the Aznar Protocol of the exclusion of nationals of the Member States from international protection in another Member State has been reflected in the other instruments forming part of the secondary legislation of the EU on asylum, the personal scope of which is limited to third country nationals – that is persons who are not nationals of the Member States.

The fundamental role of the mutual trust principle has an impact on both extradition law and asylum law, as well as on the intersection between asylum and extradition in political offence cases like that of Puigdemont. Carles Puigdemont is a Catalan pro-independence politician and journalist from Spain, currently living in Belgium. On 6–7 September 2017, he approved laws for permitting an independence referendum, and the juridical transition and foundation of a Republic, a new constitution for Catalonia that would be in place if the referendum supported independence. On 30 October 2017 charges of rebellion, sedition and misuse of public funds were brought against Puigdemont and other members of the Puigdemont Government. Puigdemont, along with others, fled to Belgium. However, the application of mutual trust to asylum and extradition does not have an extensive theoretical basis. Just the contrary: The reason for the introduction of mutual trust to asylum and extradition of political offenders in the EU legislation can be narrowed down to one single case, as also the case of Puigdemont shows.

International protection may be needed for EU nationals in another Member State. Seeking and being granted asylum on the grounds of political opinion or cumulative discrimination is very unlikely in the EU, but, as the Puigdemont and Roma cases indicate – not an impossibility. Puigdemont has become the face of a very uneasy problem the EU is confronted with upholding mutual trust for the sake of long-term cooperation, while facing an asylum claim.

While Carles Puigdemont, whose potential asylum application has not been filed, is the sole EU national with a public face and a specified name, to illustrate the norm-

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18 See e.g. the Qualification Directive, Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9-26, Art. 1.
19 See Dace Winther, Extradition, Asylum and Mutual Trust in the European Union One man’s terrorist is another man’s freedom fighter, yet another man’s asylum seeker, yet another man’s fugitive, Master Thesis Spring 2018.
20 See e.g. the fact sheet of the ECtHR on Roma and Travellers, april 2019, https://www.echr.coe.int/Documents/FS_Roma_ENG.pdf
conflict in the Aznar Protocol, he is far from being the only individual whose rights are concerned.21

3. Asylum Applications of EU-citizens in EU Member States and non-EU Member States

First some data on asylum applications by citizens of EU Member States in other Member States will be presented (Table 1). The ratio behind this is the hypothesis that probably the main social group or minority in Europe that may have in certain regions a well-founded fear of persecution, are Roma. If that is a correct assumption, the majority of asylum applications that are made by EU citizens in an EU Member State could be Roma.22

The available data over the period 2000-2018 show that most EU Member States do not ‘produce’ asylum seekers, or if they do, the relevant numbers are very small, e.g. less than five. These asylum requests therefore can be labelled as incidental. There are, however, a few Member States that have ‘produced’ on a more ‘regular’ basis larger numbers of asylum seekers who have applied for asylum in one of the EU Member States. In the following the focus is on the asylum applications from citizens of these states. These states are: Bulgaria, the Czech Republic, Hungary, Romania and Slovakia. As is listed in Table 1, the estimated total population of Roma in these 5 Southeast- and Central European (SEE) countries is 3 million, which is roughly one fourth of the total population of Roma in Europe.23

All of these countries have become a Member State of the EU in the last decade. The Czech Republic, Hungary, and Slovakia joined the EU in 2004, whereas Bulgaria and Romania became a Member State in 2007. This implies that the data that will be provided in the following graphs reflect asylum applications, partly by citizens from non-EU states, and partly by citizens from EU Member States, depending on the reference point in time. However, this may also illustrate the possible quantitative effect of becoming a Member State of the EU on the number of asylum applications submitted by citizens of these new Member States in other Member States.24

Although the Aznar Protocol is not implemented in the national legislation in every Member State, applications from EU-citizens are in one way or another rejected and in some EU Member States not even processed or registered.\textsuperscript{26}

If the assumption is correct that the Aznar Protocol does prevent EU citizens, such as Roma, from applying for asylum in one of the EU Member States, it might be relevant to look at other countries of asylum outside the EU. The first option is in Europe. Nearby and not bound to EU regulations: Switzerland and Norway. From Table 2 it shows, that even though it is only in very rare cases that asylum is actually granted to an EU national in another EU Member State, asylum claims have indeed been filed by EU nationals both inside and outside the EU. In the past decade asylum outside the European Union has been granted to nationals from nearly every EU Member State. Incomparably more positive decisions on granting asylum have been made outside the EU, comparing to inside of the EU.\textsuperscript{27}

\textbf{Table 1.}\textsuperscript{25} Total \# first instance decisions on asylum applications in EU 28 of citizens from Bulgaria, Czechia, Hungary, Romania, Slovakia

\begin{figure}[h]
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\includegraphics[width=\textwidth]{chart1.png}
\caption{Chart showing the number of asylum applications by year in EU 28 countries.}
\end{figure}

\textsuperscript{25} Tables 1 and 2 made by mr.dr.C. Grütters on the basis of Eurostat data.

\textsuperscript{26} See also Report on the evaluation of the EU Framework for National Roma Integration Strategies up to 2020, COM (2018) 785 final.

Table 2. Total # first instance decisions on asylum applications in Norway and Switzerland of citizens from Bulgaria, Czechia, Hungary Romania, Slovakia

In most countries it is possible to rebut the presumption of safety of EU Member States that no well-founded fear exists, but the burden of proof is heavy or the time pressure of the accelerated procedure is high. In the details there are important differences between the different EU countries. The asylum seeker for example may have difficulties in rebutting the presumption if no interview on the merits takes place. Also if his appeal has no suspensive effect, or if he cannot benefit from reception measures, he may encounter problems to rebut the presumption of safety.

A far more interesting picture comes up if the asylum applications of EU-citizens in Canada are analysed. The recognition rates of Canada prove that EU-citizens can be refugees and as such can fall under the scope of the Refugee Convention, Article 3 ECHR, Article 3 Convention Against Torture and Article 18 EU Charter of Fundamental Rights. Rules with regard to the qualification as refugees and on asylum procedures must pursuant to Article 78(1) TFEU first clause be in accordance with the Refugee Convention and relevant international law. Moreover, Article 52(3) of the Charter provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, ‘the meaning and the scope of those rights shall be the same as those laid down by the said Convention.’ The meaning and the scope of the guaranteed rights are determined not only by the text of the ECHR, but also by case law of the ECtHR and by the Court of Justice of the EU. The explanations state that ‘in any


event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.30

The circumstances in asylum cases must always be judged on an individual basis. Therefore the provisions of the Aznar Protocol create an exceptionally high threshold for an asylum claim by an EU national in another EU Member State.

4. Concluding Remarks

Landgren takes a strong view:

‘The purpose of the Protocol is radically to reduce, or to remove, asylum possibilities within the EU for Union-citizens. It violates the letter and the spirit of the 1951 Refugee Convention, as well as other human rights instruments and principles in five broad areas. It makes asylum decisions subject to a political process, which includes the alleged violator state; it does not (as a general principle) examine the individual grounds for fear of persecution; it restricts access to any form of status determination procedures; it discriminates on the basis of nationality, and it evades international obligations through reliance on the obligations of another state.’31

This contribution argues that there are at least tensions between the Aznar Protocol and international obligations laid down in the Refugee Convention, the Convention Against Torture, the ECHR and the EU Charter of Fundamental Rights. The Aznar Protocol and the exclusion of EU-asylum seekers from the EU asylum acquis can have as a consequence that asylum requests are not dealt with, that refugees are not recognised as such and that they are returned to a country where they have a well-founded fear of being persecuted. In this regard this situation is comparable to the one in the Kadi case, in which the CJEU judged that the protection of fundamental rights forms part of the very foundations of the Union legal order.32 Accordingly, all Union measures must be compatible with fundamental rights.

Apparently, there is a protection gap for EU-citizens who have a well-founded fear of persecution. In most EU countries they cannot apply for asylum or their applications are rejected in accelerated procedures. A possibility to rebut the presumption of safety of their country of origin is not always foreseen or realistic. All Member States are presumed to respect freedom, democracy, the rule of law and human rights, based on the principle of mutual trust. That is why it is particularly complicated to grant asylum to a refugee from another Member State. The fact that asylum claims by EU nationals – from EU-Roma and from those comparable to Puigdemont- would have to be treated as ‘manifestly unfounded’, shows that the threshold set in the Aznar Protocol is very high. Mutual trust prevails.