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The European Dimension to British Border Control

Bernard Ryan

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Introduction

When the 1997 Treaty of Amsterdam brought immigration and asylum law within the EC Treaty, the British government view was that immigration controls should remain a matter for it alone. As the then Foreign Secretary put it, “policy on border controls ... will be made in Britain, not in Brussels.”¹ This article sets out to show that British practice in relation to immigration controls since 1997 has nevertheless been shaped by developments among continental European states. In the first place, the removal of border controls among Schengen states has contributed to the intensification of British controls in recent years. In addition, Britain has participated to an increasing extent in European-level policy in relation to the external EU/ Schengen border. It is apparent that Britain does not, and probably cannot, remain apart from the developments among continental states as regards border control.

1. Internal borders

The Treaty of Amsterdam included a Protocol on the application of what is now Article 14 EC to Britain and Ireland.² The principal legal consequence of the Protocol concerned the statement in Article 14 EC that “the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, capital and services is ensured”. The Protocol means that that statement cannot lead to a requirement to remove or reduce immigration controls between

¹ Robin Cook, *HC Debs* vol 319, col 910, 12 November 1997.

² Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, OJ 1997 C 340/1, p. 97.

Britain and Ireland on the one hand and the continental member states on the other. It is anyway unlikely that Article 14 EC can lead to such a requirement, given the Court of Justice decision in *Wijnsbeek* in 1999 that internal border controls were allowed under EC law as long as there had not been “harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions.”³

In the political sphere, the main effect of the Amsterdam Protocol was to confirm the separation of Britain and Ireland from the Schengen area. The participating states in the Schengen system are bound not to maintain border controls between them other than for “a limited period” where “public policy or national security so require.”⁴ The abolition of internal border controls pursuant to the Schengen agreements first occurred between Belgium, France, Germany, Luxembourg, the Netherlands, Portugal and Spain on 26 March 1995. The Schengen border-free area was then extended to Italy and Austria on 1 April 1998, to Greece on 26 March 2000, and to Denmark, Sweden, Finland, Iceland and Norway on 25 March 2001.

The fact that Britain is outside the Schengen border-free area has not however meant that it has remained unaffected by it. There is evidence in particular that the introduction of the Schengen system among continental states coincided with a growth in the extent of clandestine entry to Britain. Official figures show an increase in the number of clandestine entrants detected from less than 500 in 1992 to more than 4000 in 1997, 9340 in 1998 and 16525 in 1999.⁵ The humanitarian problems which led to the operation of the Red Cross centre in Sangatte between September 1999 and December 2002 are also significant.⁶ In its short period of operation, the Sangatte centre is estimated to have assisted more than 55,000 persons.⁷ It is known that many of those who arrived in the Calais area in that period were fleeing from zones of conflict - first Kosovo, and later Afghanistan and Iraq. What is significant here is that the possibility for those persons to reach the channel area was much greater with the Schengen arrangements in place than without them.

³ Case C-378/97 *Wijnsbeek* [1999] ECR I-6207, paras 40-44.

⁴ Article 2 of the Schengen Implementing Convention 1990, published in OJ 2000 L 239/19. Since May 1999, the parts of the 1990 Convention which concern the right to cross internal borders (Articles 2 and 19-21) have the status of EC law (other than in Denmark): See Council Decision 1999/436 determining the legal basis for the Schengen acquis (OJ 1999 L 176/17), allocating Article 2 of the 1990 Convention to Article 62 EC.

⁵ Information in para 5 of the judgment of Sullivan J in *International Transport Roth v. Home Office* (QBD, 5 December 2001).

⁶ An outline of the history of the Sangatte centre can be found in L. Schuster, ‘Asylum Seekers: Sangatte and the Tunnel’ (2003) 56 *Parliamentary Affairs* 506, pp. 506-509 and in C. Phuong, ‘Closing Sangatte: The Legal Implications of the Asylum Dispute between France and the UK’ (2003) 17(3) *Immigration, Asylum and Nationality Law* 157, pp. 157-160.

⁷ See French Red Cross, ‘Point info Sangatte’ (June 2002) at <http://www.croix-rouge.fr/goto/actualities/sangatte/fil-2002.asp>.

Increased mobility as a consequence of the Schengen system coincided with the fixation of British policy-makers with the prevention of irregular entry and the reduction of asylum applications. The result was the intensification of British border controls towards continental member states. From a legal perspective, two developments stand out, and are summarised here: the introduction of the so-called ‘civil penalty’ in 1999, and the development of what are termed ‘juxtaposed controls’ from 2000.

The ‘civil penalty’

One legislative response to the perceived threat of irregular entry was the introduction of a system of penalties for carriers found to have transported clandestine entrants. This so-called ‘civil penalty’ was introduced by Part II of the Immigration and Asylum Act 1999, and came into force on 3 April 2000.⁸ Under the scheme, a penalty of up to £2000 may be imposed upon those in whose vehicles clandestine entrants are found to have been transported. The penalty is payable by one or more ‘responsible’ persons, which, in the usual case of a road vehicle, means the owner, hirer or driver of the vehicle involved. The only significant defence is that there is in place an effective system for preventing clandestine entrants in relation to that carrier, that the system was operated on the occasion in question, and that the carrier neither knew nor had reasonable grounds for suspecting of the clandestine entrant.⁹

In February 2002, a majority in the Court of Appeal in *Roth* doubted the compatibility of several aspects of the penalty scheme with the right to a fair trial in Article 6 ECHR and the right to peaceful enjoyment of property under Article 1 of its First Protocol.¹⁰ As a result, the scheme was amended by Schedule 8 of the Nationality Immigration and Asylum Act 2002, with effect from the 8 December 2002.¹¹ After the 2002 Act, the penalty scheme is a flexible one: where previously the £2000 penalty was compulsory and of a fixed amount, now the Secretary of

⁸ Carriers’ Liability (Clandestine Entrants and Sale of Transporters) Regulations 2000, SI 2000 No. 685, Reg 3. The penalties were extended in 2001 to rail freight wagons (SI 2001 No. 280 and SI 2001 No. 311) and to Eurotunnel freight shuttles (SI 2001 No. 3232), but were disapplied in those cases early in 2002 (statement by David Blunkett, *HC Debs* vol 379, col 616, 4 February 2002).

⁹ For these purposes, regard is to be had to a code of practice issued by the Secretary of State. The code of practice was brought into force on 3 April 2000 by the Carriers’ Liability (Clandestine Entrants) (Code of Practice) Order 2000, SI 2000 No. 684.

¹⁰ *International Transport Roth and others v Secretary of State for the Home Department* [2002] 3 WLR 344. The majority judgments were given by Simon Brown and Jonathan Parker LJJ, with Laws LJ dissenting.

¹¹ Carriers’ Liability Regulations 2002, SI 2002 No. 2817.

State has discretion both as to the imposition of the penalty and as to its level.¹² The decision in *Roth* also led to the introduction of a statutory right of appeal against the penalties, where previously the only mechanism of objection was direct to the Secretary of State.¹³ The doubts expressed in *Roth* as to the acceptability of a reverse burden of proof led to its removal by the provision that the statutory appeal is “a re-hearing of the Secretary of State’s decision to impose a penalty.”¹⁴ A further change as a result of *Roth* saw the removal of the requirement for a carrier to show a “compelling need” in order to have a vehicle released when a court finds that there is not a significant risk of non-payment.¹⁵

There remains however the question of the compatibility of the civil penalty scheme with the rules on the free movement of goods and services in Articles 28 and 49 EC.¹⁶ In the High Court in *Roth*, Sullivan J found that the scheme had a restrictive effect upon the import of goods and services, and that, since it was unreasonable and disproportionate, it could not be justified on public policy grounds. That conclusion was overturned unanimously by the Court of Appeal, who agreed with the Secretary of State that the scheme’s effects on imports were “too indirect, remote and uncertain” to amount to a restriction which called for a public policy justification. Sullivan J had also expressed the view that the scheme might be discriminatory in practice, given that non-British carriers appeared to be more often affected by it. By contrast, the judges in the Court of Appeal held that the scheme was not discriminatory, as it applied to both British and non-British carriers. Despite the decision in the Court of Appeal, it cannot be ruled out that the scheme (even as amended) may yet be found incompatible with EC law. It is arguable that the scheme does indeed involve sufficient hindrance to cross-border trade for Articles 28 and 49 to be engaged, so that justification is required. The scheme is also open to criticism for being discriminatory – whether because in practice non-British carriers are more often affected by it, or because in any case its likely effect is to favour domestic over cross-border trade.

¹² Sections 32 and 32A of the 1999 Act, as amended and inserted by Sch 8, paras 2 and 3 of the 2002 Act. In decisions with respect to penalties, the Secretary of State is to have regard to a code of practice: see Carriers’ Liability (Clandestine Entrants) (Level of Penalty: Code of Practice) Order 2002, SI 2002 No. 2816.

¹³ Section 35A of the 1999 Act, inserted by Sch 8, para 8 of the 2002 Act. The Divisional Court had earlier concluded in *Balbo* that the penalty scheme could be brought into line with Article 6 ECHR on this point by permitting a carrier’s defence to be raised when the Secretary of State sought to enforce the penalty by way of an action for debt: *R (Balbo) v Secretary of State for the Home Department* [2001] WLR 1556. In *Roth*, that analysis was accepted by Sullivan J in the High Court and Simon Brown and Laws LJ in the Court of Appeal, but was rejected by Jonathan Parker LJ.

¹⁴ Section 35A(3) of the 1999 Act, inserted by Sch 8, para 8 of the 2002 Act.

¹⁵ Section 37 of the 1999 Act, as amended by Sch 8, para 11 of the 2002 Act.

¹⁶ See paras 196-205 of the High Court judgment, and paras 64-68, 112 and 203-206 of the judgments in the Court of Appeal.

Juxtaposed controls

A second set of developments in the law relating to internal borders has followed from a renewed interest in what are termed (in a literal translation from the French) 'juxtaposed controls'. Formally, these are reciprocal arrangements which Britain has entered into so far with France alone, under which each state is permitted to operate frontier controls on the territory of the other. The original provisions of this kind were in the Sangatte Protocol of 1991, which permits all kinds of frontier control to be applied by the British authorities at Frethun and by the French authorities at Folkestone to persons travelling through the Channel Tunnel with motor vehicles.¹⁷ The Sangatte Protocol specifically allows for persons to be arrested, detained and conducted to the territory of the state whose controls are being enforced.¹⁸ It also provides that, where persons are refused entry, or decide not to proceed to the other state, the state of departure must take them back.¹⁹

Recent developments in relation to juxtaposed controls have focused on immigration controls alone. The starting-point for these developments was an increase in 1998 in undocumented arrivals and asylum claims by those arriving in Britain on Eurostar.²⁰ With respect to Eurostar, the 1991 Protocol had provided only for frontier controls to take place on board during train journeys, and the same principle had later been extended to Eurostar trains between Britain and Belgium by an agreement in 1993.²¹ The perceived inadequacy of that arrangement led in May 2000 to an 'Additional Protocol', which gave permission for pre-boarding immigration controls at Eurostar stations in Britain (Waterloo, St Pancras and Ashford) and France (Gare du Nord, Calais-Frethun and Lille-Europe).²² The Additional Protocol also reflected Britain's specific concerns in including provision for asylum which was absent in the original Sangatte Protocol. Under Article 4 of the Additional Protocol, a request for asylum or other form of international protection falls to be examined by the state of departure where it is made either at immigration control or otherwise before the shutting of the train doors.²³

¹⁷ The Sangatte Protocol was published as *Cm* 2366 (1993), and came into force on 2 August 1993. It was given effect in Britain by the Channel Tunnel (International Arrangements) Order 1993, SI 1993 No. 1813.

¹⁸ Article 10 of the Sangatte Protocol.

¹⁹ *Ibid.*, Article 18.

²⁰ See the remarks of Lord Bassam, *HL Debs* vol 623, cols 1124-1125, 16 March 2001.

²¹ Article 7 of the Sangatte Protocol and Article 4 of the 1993 'Tripartite Agreement' between Belgium, Britain and France concerning Rail Traffic between Belgium and Britain (*Cm* 3954). The Tripartite Agreement was given effect in Britain by the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994 No. 1405, and came into force on 1 December 1997.

²² The Additional Protocol was published as *Cm* 5015 (2000), and came into force on 25 May 2001. It was given effect in Britain by the Channel Tunnel (International Arrangements) (Amendment No. 3) Order 2001, SI 2001 No. 1544.

²³ Article 4 of the Additional Protocol.

Further developments as regards juxtaposed controls followed the coming to office of Nicolas Sarkozy as Interior Minister in May 2002 and the subsequent consensus between the two governments that they would actively discourage irregular entry to Britain.²⁴ In July that year, at the same time as agreeing that the Sangatte centre would be closed, the governments announced their intention that British immigration controls should be put in place in Calais.²⁵ In August 2002, British immigration officials began to operate in Calais seaport in conjunction with French officials, and in September 2002 the French authorities began using British equipment at Calais to check for persons hidden in lorries.²⁶

The next stage in co-operation is likely to be the introduction of juxtaposed immigration controls with respect to travel by sea between the two states. Legislative authority for this development has been provided in Britain by section 141 of the Nationality Immigration and Asylum Act 2002, under which the Secretary of State is empowered to “make provision for the purpose of giving effect to an international agreement which concerns immigration control at an EEA port.”²⁷ An agreement on frontier controls at sea ports was then signed with France at Le Touquet on 4 February 2003.²⁸ It provides for the creation of control zones in commercial ports from which there is sea travel between the two states. As in the Sangatte Protocol, within these control zones, officials of the state of destination will be permitted to enforce their immigration laws, including by arrest, detention and the bringing of persons to their own territory.²⁹ Where entry is refused or not proceeded with, the state of departure will have an obligation to accept back the persons in question.³⁰ The Le Touquet Treaty then follows the Additional Protocol in providing that the state of departure is responsible for applications for asylum or other forms of international protection which are made at immigration control or otherwise prior to departure.³¹ While the initial intention is that British immigration controls should be allowed at Calais and Dunkerque, and French controls at Dover,³² the Treaty itself can be applied to any sea route between the two states.³³

²⁴ For a general discussion, see Phuong, *supra*, n 6, pp. 162-165.

²⁵ ‘Closure Timetable set for Sangatte Centre,’ IND press release, 12 July 2002.

²⁶ ‘UK Borders Extended – Sangatte to Close on 30 December,’ IND press release, 2 December 2002. British equipment has also been deployed in the Belgian ports of Ostend and Zeebrugge: ‘New Detection Technology to Prevent Illegal Immigration,’ IND press release, 6 October 2003.

²⁷ Self-evidently, this provision also authorises juxtaposed controls at sea ports with Belgium. A more likely step is the introduction of British immigration control on Eurostar departures from Brussels, as was anticipated in ‘UK/French Co-operation Key to Combatting Terrorism and Illegal Immigration – Home Secretary,’ IND press release, 4 February 2003.

²⁸ Treaty between United Kingdom and France concerning the Implementation of Frontier Controls at the Sea Ports of Both Countries on the Channel and North Sea, *Cm.* 5832 (2003). The Treaty is to be given effect in Britain by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003 No. 2818. The Order will come into force with the Treaty itself.

²⁹ Articles 3 and 5 of the Le Touquet Treaty.

³⁰ *Ibid.*, Article 7.

³¹ *Ibid.*, Article 9.

³² See the ‘joint communiqué’ issued after the Franco-British summit in London on 24 November 2003.

³³ This follows from the definition of ‘sea ports’ in Article 2(h) of the Le Touquet Treaty. Schedule 1 of the 2003

2. External borders

These developments in border control towards continental European states show that the open-border Schengen regime has had significant effects upon British policy. It is for that reason not surprising to discover that Britain has also participated in elements of the Schengen external border regime so as to reduce the likelihood of asylum applicants or irregular entrants who arrive in Britain by an overland route. Its participation can be seen in at least four policy areas, which are summarised here: carriers' obligations, documentation, readmission agreements and external border control.

Carriers' obligations

Article 26 of the Schengen Implementing Convention 1990 places three obligations upon participating states with respect to carriers. The first concerns the taking of responsibility by carriers: when a non-EU national is refused entry to the territory of one of the participating states, the carrier is to be obliged to take charge of them. This includes the obligation to return the person, if so requested by the authorities, to the state from which they travelled, the state which issued their travel document, or another state in which they are "certain to be admitted". The second obligation concerns documentation: carriers are to be obliged to take "all the necessary measures" to ensure that a non-EU national possesses the travel documents required for entry "into the territories of the Contracting Parties." The third and related obligation concerns carriers' sanctions: the participating states are obliged to impose penalties on carriers which bring non-EU nationals who do not possess the necessary travel documents. All three obligations apply to arrivals by air and sea. In the case of arrivals by land, the obligation to take responsibility applies in all cases, while the obligations as regards documentation and carriers' sanctions apply only to the transport of groups overland by coach.

After the Treaty of Amsterdam, Article 26 of the Schengen Implementing Convention was classified as part of EC law.³⁴ That step was followed by the 'supplementing' of Article 26 by Council Directive 2001/51, with effect from 11

Order also authorizes British controls in Boulogne, although there are not at present ferry services from Britain to that port.

³⁴ Article 26 was allocated to Article 63(3) EC by Council Decision 1999/436 of 20 May 1999 determining the legal basis for the Schengen acquis, OJ 1999 L 176/17.

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February 2003.³⁵ The directive added to the content of carriers' responsibility, by obliging them to take charge of third country nationals in transit when they are not allowed to reach their intended destination. It also specified that, where a carrier cannot themselves effect a return, they should be obliged "to find means of onward transportation immediately" or to "assume responsibility for the costs of the stay and return of the third-country national in question". The second change made by the 2001 directive was to specify the penalties for a carrier's failure to ensure the correct documentation. In general, it is provided that the penalties should be "dissuasive, effective and proportionate." The directive then sets out three options: (i) a maximum penalty of at least €5000 per person carried, (ii) a minimum penalty of at least €3000 per person carried, and (iii) a maximum penalty for each infringement of not less than €500,000 irrespective of the number carried. Finally, Article 5 of the directive explicitly allows for other penalties and sanctions for carriers, whether arising under Article 26 or otherwise.

Article 26 of the Schengen Implementing Convention applies to Britain by virtue of the 2000 decision on Britain's participation in the Schengen *acquis*.³⁶ Britain is also covered by Directive 2001/51, both because it is obliged to participate in measures which 'build on' those parts of the Schengen *acquis* applicable to it, and because it anyway opted in to the discussions.³⁷ Britain's participation in these measures has not however necessitated changes in the provision for carriers' obligations in British law. Carriers' responsibility is governed by the power in the Immigration Act 1971 for an immigration officer to give directions to the owners, agents or captain of the ship or aircraft for the removal of a person refused entry.³⁸ Much as in the directive, the carrier may be required to remove the person to a specified destination, which may be any of a state of nationality, a state or territory which has issued a travel document, the state or territory of embarkation, or a state or territory to which "there is reason to believe" the person is likely to be admitted. Provision for carriers' checks and penalties is made by the system of carriers' liability introduced by the Immigration (Carriers' Liability) Act 1987, and now in the Immigration Act 1999.³⁹ A carrier is liable to a charge of £2000 where a passenger who arrives by air or sea⁴⁰ requires leave to enter Britain but fails to produce a valid identity document and, where applicable, a

³⁵ OJ 2001 L 187/ 45.

³⁶ OJ 2000 L 131/43. The Decision took effect on 2 June 2000.

³⁷ See Article 8(2) of Decision 2000/365, which states that Britain "shall be deemed irrevocably to have notified ... that it wishes to take part in all proposals and initiatives which build upon the Schengen *acquis* referred to ...". For the opt in decision, see Council doc 12751/00 (27 October 2000).

³⁸ Immigration Act 1971, Schedule 2, paragraph 8.

³⁹ Section 40 of the Immigration Act 1999, as substituted by Schedule 8 of the Nationality, Immigration and Asylum Act 2002.

⁴⁰ Carriers sanctions previously applied to arrivals by train from the continent under the Channel Tunnel (Carriers' Liability) Order 1998, SI 1998 No 1015, but that Order is no longer in force. The power in section 40(7) IA 1999 (as amended) to extend carriers' sanctions to arrivals by train has not so far been used.

visa. This level of penalty is consistent with Directive 2001/51, since a penalty of €3000 equates to £1881 per person.⁴¹

Further developments as regards carriers' obligations can be anticipated from a proposal now under discussion that carriers should be obliged to provide data to immigration authorities concerning the passengers they bring to the EU.⁴² Britain has opted in to the discussions on the Council of Ministers. It has also sought to strengthen the proposal, so as to require passenger data at the time of check-in rather than boarding, and to require data of all carriers, rather than of airlines alone.⁴³ This too is an aspect of carriers' obligations which is already provided for in British law. An immigration officer is permitted to require certain passenger information from carriers, including each passenger's name, nationality and the number of their travel document.⁴⁴

The compatibility with pre-existing British law of Article 26 of the Schengen Implementing Convention, Directive 2001/51 and possible legislation on passenger data should not mask the peculiarity of Britain's being subject to these obligations. The rationale for carriers' obligations within the Schengen system is the provision of a guarantee among states which have abolished internal border controls as to the regime applicable at their common border. It is for that reason for example that in Article 26 carriers' responsibility applies only at the "external border" and that carriers' sanctions apply only to those who are brought from "third states". That means that the duty on Britain to maintain carriers' obligations does *not* apply to arrivals from the EU, Iceland and Norway. But the policy conundrum remains: since internal border controls remain between Britain and the full Schengen states - indeed, have been increased in strictness in recent years - why is Britain bound to impose obligations on carriers from outside the EU?

Documentation

The common policy on document formats is a second aspect of measures taken at the European level with respect to external control in which Britain has participated. Under Regulation 1683/95, all EU member states are bound by

⁴¹ The sterling value of the amounts in Directive 2001/ 51 is given by the rate of exchange set out in the Official Journal of 10 August 2001, which was €1 = £0.6269. The sum of €3000 therefore corresponds for these purposes to £1881.

⁴² The initial proposal is at OJ 2003 C 82/23.

⁴³ On both points, see the information provided by Home Office minister, Caroline Flint, reported in House of Commons European Scrutiny Committee, Thirty-Seventh Report 2002-03, part 7. For the opt in, see Council doc 10952/03, 27 June 2003.

⁴⁴ Immigration Act 1971, s 27B, inserted by Immigration and Asylum Act 1999, s 18. Further detail is in the Immigration (Passenger Information) Order 2000, SI 2000 No. 912.

technical specifications for a uniform visa format.⁴⁵ Separately, a Joint Action of 16 December 1996 (adopted under Title VI of the EU Treaty) provided for technical specifications concerning residence permits.⁴⁶ Early in 2002, the regulation on visa formats was amended, and an EC measure on the format residence permits was introduced, each of which for the first time provided for the inclusion of a photograph.⁴⁷ The technical specifications governing the inclusion of photographs were then laid down by the Commission on 3 June 2002 in relation to visas and on 13 August 2002 in relation to residence permits.⁴⁸ While member states currently have five years from those dates to comply with the technical specifications, the Commission proposed in September 2003 that the period for compliance should be reduced to three years. At the same time, it proposed that there should be a new requirement for the inclusion of biometric data (high-resolution facial images and digital fingerprints) in visas and residence permits.⁴⁹ There is every likelihood that these two changes will soon go ahead.⁵⁰

Britain is covered by all four of the measures on visa and residence formats which have been adopted to date, having opted in to the 2002 amendments. The Government's view is that participation in the uniform formats is advantageous, since they "enhance the security of documents used for third country nationals entering the UK, without affecting the Government's ability to control third country nationals."⁵¹ There is also every likelihood that Britain will participate in legislation deriving from the 2003 proposals.⁵² In particular, it fits in with recent developments in British policy. Although applicants for British visas or entry clearance are not ordinarily required to provide biometric data, section 126 of the Nationality Immigration and Asylum Act 2002 empowers the Secretary to State to require them to provide "specified information" about their "external physical characteristics." Relying on that power, in July 2003, a trial of compulsory fingerprinting of visa applicants began in Sri Lanka, and the Government indicated in August 2003 its desire to extend the principle to other states.⁵³

⁴⁵ Council Regulation 1683/95 laying down a uniform format for visas, OJ 1995 L 164/1.

⁴⁶ Joint Action 97/11/JHA, OJ 1997 L 7/1.

⁴⁷ Council Regulation 334/2002 amending Regulation 1683/95, OJ 2002 L 53/7 and Council Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ 2002 L 157/1.

⁴⁸ The specification decisions have not been published. Reference to them can be found in COM (2003) 558, p. 2.

⁴⁹ Each of these proposals is in COM (2003) 558.

⁵⁰ For the support of the Justice and Home Affairs Council, see the press release issued after its meeting of 27 and 28 November 2003, pp. 16-17.

⁵¹ See the summary of a letter of 11 December 2001 from Home Office minister, Angela Eagle in House of Commons European Scrutiny Committee, Twelfth Report 2001-02, para 14.3.

⁵² See the summary of the opinion of Home Office Minister, Caroline Flint in House of Commons European Scrutiny Committee, Thirty-Fifth Report 2002-03 (October 2003), para 7.3.

⁵³ Immigration (Provision of Physical Data) Regulations 2003, SI 2003 No. 1875 and 'Biometric Technology to Tackle Immigration Abuse', Home Office press release, 28 August 2003.

Readmission agreements

Agreements relating to readmission are a third element of the EU's external borders regime which is applicable to Britain.⁵⁴ In part, EU policy on readmission involves the inclusion of readmission clauses in general association and co-operation agreements with other states. As part of a policy begun in 1999, the EU routinely requires three obligations in such agreements: an obligation on participating states to take back *their own* nationals who are found to be irregularly in the territory of the other party; an obligation to "conclude upon request" an agreement concerning the detail of readmission, including the readmission of nationals of *other* states; and, an obligation on the non-EU party to conclude bilateral agreements on readmission with individual member States.⁵⁵ The states that are bound by such clauses which are currently in force include Armenia, Azerbaijan, Georgia, Uzbekistan and the 76 African, Caribbean and Pacific (ACP) states covered by the 2000 Cotonou Agreement.⁵⁶ In no case to date however has a detailed agreement on readmission with the EU as a whole been concluded with the states subject to readmission clauses.

In addition, EU policy on readmission is expressed in specific agreements on the subject. To date, readmission agreements have been concluded with four states or other entities. Agreements have been fully ratified with the Hong Kong Special Administrative Region (28 November 2002) and the Macao Special Administrative Region (13 October 2003).⁵⁷ A third readmission agreement, with Sri Lanka, having been negotiated by the Commission, obtained Council approval on 25 November 2003.⁵⁸ The fourth agreement was concluded by the Commission with Albania in November 2003, but at the time of writing had neither been published nor approved by the Council.⁵⁹ Further agreements are also possible, given that the Commission has negotiating mandates with respect to at least seven other states.⁶⁰

⁵⁴ For an overview of EU readmission agreements, see S. Peers, 'Readmission Agreements and EC External Migration Law', *Statewatch Analysis* 17 (2003), available from <http://www.statewatch.org>.

⁵⁵ The 'model readmission clauses' were the subject of an unpublished Council decision on 2 December 1999. For the text, see Council doc 13409/99 (25 November 1999).

⁵⁶ Article 72 of the Partnership and Co-operation Agreement with Armenia (OJ 2000 L 239/3), Article 75 of that with Azerbaijan (OJ 2000 L 246/3), Article 75 of that with Georgia (OJ 2000 L 205/3) and Article 72 of that with Uzbekistan (OJ 2000 L 229/3). Each of those agreements came into force on 1 July 1999. The ACP states are covered by Article 13 of the Cotonou Agreement (OJ 2000 L 317/3), which came into force on 1 April 2003.

⁵⁷ The text of the EC-Hong Kong SAR agreement can be found in Council doc 9190/02 (8 November 2002). The text of the EC-Macao SAR agreement can be found in Council doc 8211/03 (7 April 2003).

⁵⁸ The text of the EC-Sri Lanka agreement on readmission can be found in Council doc 7831/03 (26 March 2003). For the approval of the agreement, see press release of Council meeting of 25 November 2003 (Council doc 14492/1/03).

⁵⁹ 'Albania: Deal Reached to Return Immigrants', *Euobserver.com*, 7 November 2003.

⁶⁰ Commission negotiations are ongoing with Algeria, China, Morocco, Pakistan, Russia, Turkey, Ukraine: see the press release of the Justice and Home Affairs Council, 6 November 2003, p 6.

The three readmission agreements which have been published place the participating states under an obligation to readmit certain persons who are on the territory of the other party without permission. In the first place, the participating states must readmit their own nationals – or, for Hong Kong and Macao, their own permanent residents.⁶¹ Secondly, in the case of the Hong Kong and Macao agreements, but not that for Sri Lanka, there is an obligation to readmit former nationals or – for Hong Kong and Macao – permanent residents. Thirdly, in all three agreements the participating states are obliged to readmit persons from *other* jurisdictions in two situations.⁶² One situation is where the person in question has unlawfully entered the territory of the requesting party – or in the case of the EU, any participating member state – having “come directly” from the territory of the requested party. The second situation is where the person in question entered the territory of the requesting party lawfully, but at that time also had a valid visa or residence permit issued by the requested party. In this latter situation, there is however an exception for persons who only had an airside transit visa in the requested state, or who had been issued a visa or residence authorisation in the requesting state for a longer period than that issued in the requested state. A requirement of readmission is also excluded in the Hong Kong and Macao agreements – though not that for Sri Lanka – where the person in question did not require a visa to enter the requesting state.

Britain is covered automatically by the readmission clauses, and has opted in to each of the three readmission agreements which have so far been approved by the Council. The practical consequence is likely to be a greater ability to secure the return of persons who have either been unsuccessful in an asylum claim in Britain, or who are found to have entered or remained in Britain irregularly. It may be added that, in the specific case of Sri Lanka, the coming into force of the readmission agreement fits with its controversial designation in July 2003 as a state whose residents will not usually have an in-country right of appeal against the rejection of an asylum claim.⁶³

External border control

A final question to consider is British participation in operational measures aimed at the prevention of irregular migration at the external EU/Schengen border. The recent past has seen a high degree of *ad hoc* co-operation among EU and

⁶¹ Articles 2 and 4 of each of the agreements.

⁶² Articles 3 and 5 of each of the agreements.

⁶³ Asylum (Designated States) Order 2003, SI 2003 No. 1919. For criticism of the step, see ‘Refugee Council report shows Sri Lanka still unsafe for returning refugees,’ Refugee Council press release, 18 September 2003.

Schengen member states as regards external border control, this having been encouraged in particular by the Seville European Council in June 2002.⁶⁴ Within that co-operation, Britain has indeed played a leading role.⁶⁵ British activities aimed at external border control have included ‘Impact I and II’ which involved IND officials’ co-operation with counterparts in Bosnia Herzegovina, Serbia and Montenegro on the disruption of organised illegal migration.⁶⁶ Britain also participated in ‘Operation Ulysses’ in 2003. This was a joint sea and air operation of five states (the others were France, Italy, Portugal and Spain) in the western Mediterranean and off the Canary Islands, which aimed at preventing irregular migration from the African continent. It proved controversial due to claims that the patrols led to the deaths of 21 migrants attempting to reach the Canary Islands in June 2003.⁶⁷ Other proposals in the area are that Britain take the lead in ‘Project Deniz’ aimed at reducing the smuggling of migrants by sea to Turkey, and in a ‘Centre of Excellence’ at Dover on the use of detection technology against clandestine entry.

Given that background, it is unsurprising that Britain has agreed to participate in discussions on a proposed Regulation establishing an immigration liaison officers network.⁶⁸ According to the draft Regulation, these would be officials posted to work with the authorities of third countries. While their remit would extend to “the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration,” it is evident from the text of the Regulation that it is the first of those roles which is to be paramount. The Regulation also provides for co-operation among the member states in third countries – including the establishment of networks among their liaison officers in third countries, agreement that some member states’ liaison officers will look after the interests of other states, and the possibility that certain tasks will be “shared”.

Conclusion

The material in this article suggests that there is a growing degree of interdependence between British and European policies on border control. The removal of controls among Schengen states, by increasing the possibility of arrival in the channel area, led to an intensification of British border controls there. At the

⁶⁴ Presidency Conclusions of European Council, 21 and 22 June 2002 (Council doc 134653/02), pp 9-10.

⁶⁵ See in particular the Council ‘Report on the Implementation of Programmes, ad hoc centres, pilot projects and joint operations’, Council doc 10058/1/03 (11 June 2003).

⁶⁶ Details are taken from ‘Senior police meet to discuss next steps in attack on organised immigration crime’, ACPO press release, 13 November 2003.

⁶⁷ See L. Fekete, ‘Canary Island tragedy: Did the RAF put border security before human safety?’, *IRR News* October 2003.

⁶⁸ The proposal is in OJ 2003 C 140/12. For confirmation of British participation, see House of Commons European Scrutiny Committee, Thirty-Sixth Report 2002-03, para 18.7.

same time, Britain's concern to exclude irregular migrants and asylum applicants has led it to extensive and increasing participation in the external border regime for the EU/ Schengen area. Britain has sought to take a leading role in this area – much as in the field of asylum policy – as it projects its concerns to the European level.

The increasing severity of the British approach to internal and external border controls is open to humanitarian objections, such as that it frustrates asylum applications and that it increases the risk of the death or injury of those who seek to evade the controls. Within the European Union, a further question concerns the viability of the British strategy of seeking to strengthen both internal and external controls at once. Will Britain continue to be able to exert leverage over European-level choices as long as it retains entrenched immigration controls *vis-à-vis* European states? Neighbouring states may not continue to accept the severity of British controls, where these simply lead to the displacement to them of responsibility for asylum applications and other migrants. Other member states may also object to the potential of severe immigration controls at internal borders to disrupt trade with Britain. It cannot be ruled out that in the long run Britain may have to choose between influence over external border control at the European level, and the retention of strict immigration controls at internal borders.

Bernard Ryan, Senior Lecturer, Law School, University of Kent