

Common procedures for granting and withdrawing international protection. Recast

2009/0165(COD) - 07/06/2013 - Council position

The Council adopted its position in first reading on the Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast).

The position on first reading is based on a compromise agreement between Parliament and Council, with the aim of concluding an agreement at this point in the procedure.

The compromise amends Directive 2005/85/CE on the following major points:

A. Training: with a view to improving the quality of the asylum procedure, the Council position establishes training requirements for the personnel of the authorities responsible in Member States for an appropriate examination of applications for international protection. The personnel of the determining authority need to be properly trained. To that end, Member States must provide for training that includes the same elements as those listed in the Regulation establishing the European Asylum Support Office, **except those relating to reception conditions**. Moreover, persons interviewing applicants must have acquired general knowledge of problems that could adversely affect the applicants' ability to be interviewed, such as **indications of possible torture**.

The same training requirements apply to personnel working for another authority that is assigned to conduct interviews where a large number of third country nationals or stateless persons simultaneously request international protection. Lastly, personnel of authorities likely to receive requests for international protection, **such as border guards and personnel of immigration authorities or detention facilities** must also receive the necessary level of training as appropriate to their tasks and responsibilities.

B. Access to the procedure: the Council position sets standards aimed at ensuring easy and timely access to the asylum procedure while taking into account the specificities of national systems. In order to ensure that applicants effectively comply with their obligations and benefit from their rights, applications should be registered as soon as possible and within specific time limits: where the application is made by the determining authority, the time limit is 3 working days after the application is made. Where such determination is made by other competent authorities, such as border guards, the time limit is 6 working days. A longer time limit of 10 working days is allowed in situations of large and simultaneous influx of applicants.

Also important for effective access to the procedure is Member States' obligation to provide third-country nationals or stateless persons detained in detention facilities or present at border crossings with **information on the possibility of making a request for international protection** where there are indications that such persons may wish to do so. Moreover, Member States must provide interpretation arrangements in detention facilities and border areas to the extent necessary to facilitate access to the procedure concerning international protection

C. Examination procedure: the Council's position provides that a procedure for examining an application for international protection needs to be concluded within 6 months after the application was lodged. Where there are complex issues, a large number of applicants or a delay due to the lack of cooperation on the part of the applicant, Member States may extend this time limit by a period not exceeding a further 9 months. An additional extension of a maximum of 3 months is allowed in exceptional and duly justified cases, where it is necessary to ensure an adequate and complete examination.

The text contains further derogations from these time limits where there is an uncertain situation in the country of origin. In any case, Member States are required to conclude the procedure within a maximum time limit of **21 months from the lodging of the application**.

In line with the aim of establishing more harmonised asylum procedures, accelerated examination procedures and border procedures can be conducted only under specific grounds, which aim to include in those procedures only applications that are likely to be unfounded, or that raise serious national security or public order concerns.

D. Information in case of derogations: where a Member State, as a consequence of a large number of persons applying simultaneously, derogates from the time limits for registration of the application and for conclusion of the examination of the application, or allows other authorities than the determining authority to conduct asylum interviews, it must inform the Commission. This information must be provided at least once a year and as soon as the reasons for applying these exceptional measures have ceased to exist.

E. Report and recording of interview: the Council's position provides for an extensive set of rules concerning the reporting on and recording of asylum interviews. It provides that Member States are required to prepare a thorough and factual report containing all substantial elements or a transcript. In addition, they may provide for an audio or audiovisual recording. Member States must also ensure that the applicant is fully informed of the content of the report or of the substantial elements of the transcript.

F. Legal information and legal assistance and representation: the Council's position provides that Member States must ensure that applicants, on request and under certain conditions, are provided with **legal and procedural information free of charge in procedures at first instance**. This must include, at least, the provision of information on the procedure in the light of the applicant's particular circumstances. Furthermore, in the event of a negative decision in first instance, Member States must, on request, provide applicants with information in order to clarify the **reasons of such decision** and explain how it can be challenged. Furthermore, Member States may provide that this legal and procedural information may be provided by non-governmental organisations, or professionals from government authorities or specialised services of the State.

In addition, Member States must ensure that, under certain conditions and in full conformity with the other asylum instruments, free legal assistance and representation is granted on request in appeals procedures. This must include, at least, the preparation of the required procedural documents and representation in the hearing before the court or tribunal of first instance on behalf of the applicant.

G. Applicants in need of special procedural guarantees: the Council's position aims at allowing applicants in need of special procedural guarantees to benefit from the rights and comply with the obligations of the Directive throughout the duration of the asylum procedure. Where applicants have been identified as needing special procedural guarantees, they must be provided with adequate support. Moreover, where such support cannot be provided within the framework of accelerated or border procedures, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States are not allowed to apply such procedures, or must cease to apply them.

H. Minors: the Council's position provides specific guarantees to minors and unaccompanied minors while avoiding potential abuse of the system. It clarifies the conditions that apply to minors who wish to make an application **on their own behalf**. Furthermore, it specifies that interviews with minors must be conducted in a **child appropriate manner**.

As regards unaccompanied minors, the Council position establishes a set of guarantees in relation to the representative of the minor. Member States are also required to provide unaccompanied minors, free of

charge, with legal and procedural information for procedures for the withdrawal of international protection. In this way, unaccompanied minors and their representatives receive a form of legal support in all procedures of the Directive (first instance, appeal and withdrawal).

Where a Member State, in the course of the asylum procedure, identifies a person as an unaccompanied minor, it may use certain procedures for processing the application for international protection if the applicant comes from a **safe country of origin**.

There are specific provisions for border procedures where, for example, the unaccompanied minor applicant has misled the authorities by presenting false documents or in bad faith, has destroyed an identity or travel document to avoid a negative decision.

Because border procedures always involve some form of detention, it is specified that unaccompanied minors may be detained only in exceptional circumstances, which must be evaluated with due regard to the best interest of the child.

Member States may declare the application of an unaccompanied minor inadmissible if the unaccompanied minor comes from a **safe third country**, which is not a Member State, only provided this is in the minor's best interest. They may also decide not to provide free legal assistance and representation to an unaccompanied minor applicant if the appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

I. Gender sensitive asylum procedures: the Council's position takes into account the notion that asylum procedures must be gender sensitive. In that light, Member States must, wherever possible, ensure that the interviewer and the interpreter are of the same sex as the applicant, if the applicant concerned so requests.

Moreover, without prejudice to any search carried out for security reasons, a search of the applicant's person in the application of the directive must be carried out by a person of the same sex in full respect of the principles of human dignity and of physical and mental integrity.

J. Subsequent applications: the Council's position clarifies the procedural rules regarding subsequent applications. Contrary to a variety of procedural arrangements for those applications possible under Directive 2005/85/EC, the Council position provides that a subsequent application is considered inadmissible when in a preliminary examination no new elements or findings arise or are presented by the applicant which significantly add to the likelihood of him being in need of international protection.

Applicants that make **subsequent applications with the sole intention of delaying removal from the territory of the Member State** put an undue strain on national asylum systems. Therefore, effective rules on subsequent applications are needed. However, Member States remain at all times bound by the principle of non refoulement which means that a person must not be sent back to a country where he could be at risk.

K. Implicit withdrawal/abandonment of an application: the Council's position lays down that, under certain conditions, Member States may assume that an applicant has implicitly withdrawn or abandoned his application for international protection. Member States may make such an assumption in two cases in particular: (i) when it is ascertained that the applicant has failed to respond to requests to provide information essential to his application or has not appeared for a personal interview, unless the applicant demonstrates within a reasonable time that his failure was due to circumstances beyond his control; (ii) when the applicant has absconded or left without authorisation the place where he lived or was held. Against that background, the Council position provides for a set of rules with regard to the reopening of an implicitly withdrawn or abandoned application. Where the person reports again to the authorities within a period of 9 months, Member States are **not allowed to treat the re-opened application or the new application as a subsequent application**.

L. Effective remedy: the Council position's establishes a set of rules on the right to remain on the territory pending an appeal which aims to fully guarantee the right to an effective remedy while acknowledging the need for effective and efficient asylum systems capable of preventing abuse. **As a rule, Member States must allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired** or, when this right has been exercised within the time limit, pending the outcome of the remedy.

However, in a limited number of cases, a Member State may provide that such automatic suspensive effect does not apply. In such cases, Member States must provide that a court or tribunal has the power to rule whether or not the applicant may remain on the territory, either upon request of the applicant or acting on its own motion.

M. In border procedures, non-automatic suspensive effect can be applied only provided that: (i) the applicant has the necessary interpretation, legal assistance **and at least one week to prepare the request** and submit to the court or tribunal the arguments in favour of granting him/her the right to remain on the territory pending the outcome of the remedy and (ii) in the framework of the examination of the request to remain in the territory, the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

When non-automatic suspensive effect is applied, the applicant is allowed to remain on the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory. Furthermore, in all cases, the principle of non refoulement applies.

N. Safe third countries: the Council's position allows Member States to apply the safe country of origin, safe third country and European safe third country concepts, while recognising the need for **possible further harmonisation in the future**. To that end, Member States should take into account the guidelines and the operating manuals developed by the European Asylum Support Office and the United Nations High Commissioner for Refugees and conduct regular reviews of the situation in those third countries. Furthermore, the Council's position underlines the importance of exchanging information from relevant sources and having regular reviews of the application of the safe third country concepts with Member States and with the involvement of the Parliament.

The Council's position clarifies the conditions for the application of those concepts as it provides that Member States must allow applicants to challenge the application of the European safe third country concept on the grounds that **the country is not safe in their particular circumstances**.

O. Other important issues: other important issues in the Council position at first reading on which the Council and the European Parliament reached a compromise concern:

- **extradition:** a Member State may make an exception to the right of an applicant for international protection to remain on the territory until a first instance decision on his application is made, where the Member State surrenders or extradites a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals;
- **determining authority and other competent authorities:** Member States may provide that an authority other than the determining authority is responsible for the purposes of processing cases pursuant to the Dublin Regulation or of granting or refusing permission to enter in the framework of a border procedure, subject to the conditions set out in that framework and on the basis of the reasoned opinion of the determining authority;

- **medical examination:** the Council position includes rules concerning medical examinations so as to ensure that signs that might result from past persecution or serious harm are included in the assessment of the request for international protection. These rules include provisions indicating the conditions under which the medical examination is to be paid out of public funds or when such examinations are at the cost of the applicant;
- national security considerations: in appeals where there are national security considerations, Member States must ensure that access to confidential information or sources is available to the courts and tribunals and establish in national law procedures guaranteeing respect of the applicant's rights of defence.