

Standards for the reception of applicants for international protection. Recast

2008/0244(COD) - 10/06/2013 - Commission communication on Council's position

In its communication on the Council's position on the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, the Commission indicates that it fully supports the text resulting from the compromise arising from negotiations between the two co-legislators. The text brings added value to the current standards of treatment and an increased level of harmonisation on reception conditions for asylum seekers. It also introduces rules on detention and access to free legal assistance, issues which the current asylum instruments do not address.

Analysis of the main differences between the common position and the Commission's 2011 modified proposal:

- **Definition of family members** – Article 2(c): the Commission's proposal extended the definition of family members as far as minors were concerned (both married and unmarried minors). The common position does not endorse this definition, but the more restrictive one as agreed in the "Qualification Directive" amended proposal, while including safeguards in other provisions which ensure the rights of minors, whether married or unmarried, in relation to their accommodation rights. The objectives of the Commission proposal are thus fully met.

- **Identification of the special reception needs of vulnerable persons**, Article 22, Recital 14: although the wording has been substantially amended in negotiations, the obligation to assess the individual needs of all applicants with a view to identifying who is a vulnerable person and thus may need special reception guarantees is retained.

- **Material reception conditions** - Article 17(5), Recital 20: the common position retains the obligation included in the Commission proposal for Member States to apply a national point of reference when calculating the required level of material assistance for asylum applicants.

- **Health care** - Article 19: the common position retains the objective of the Commission's proposal in this respect, since it ensures better standards on healthcare for all applicants, including vulnerable persons.

- **Reduction or withdrawal of material reception conditions**: Article 20, Recital 21: **the common position is more restrictive than the Commission proposal on this issue**; it re-introduces the ground included in the current Directive which allows the reduction/withdrawal of support when the asylum application was unjustifiably made too late. However, it only allows the reduction of support and not its full withdrawal, and provides that, in all cases, applicants must be ensured "dignified standards of living".

- **Access to the labour market** - Article 15, Recital 19: **the common position is more restrictive than the Commission's proposal concerning the maximum period of time after which access to employment shall be granted** (9 months instead of 6, as proposed by the Commission, and only if a first instance decision is not issued within that period). It also re-introduces the possibility to apply the labour market test, which was deleted by the Commission proposal.

Detention: the Commission notes that, with the exception of a few general principles, the Directive in force does not include rules on detention. Therefore, the common position, which to a great extent retains the Commission proposal's objectives, achieves a high added value compared to current standards:

grounds for detention - Article 8(3): the common position adds one more ground for detention to the 4 proposed by the Commission, i.e. frustrating the return procedure;

guarantees for detention – Article 9: the common position retains, to a large extent, the guarantees proposed by the Commission, namely on access to free legal assistance, information on grounds for detention and possibilities to appeal. However, it does not foresee for an **automatic judicial review** of the detention order if it is issued by the administrative authorities;

Detention of persons with special reception needs - Article 11: Article 11(1) of the Commission amended proposal which prohibits Member States to detain vulnerable persons unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention has been deleted in the common position. Article 11(1) needs to be seen together with Article 22, which obliges Member States to assess without delay the situation of all applicants arriving on the territory with a view to identifying their special needs, including in terms of health and psychological status. Moreover, **Article 11 no longer refers to the obligation to ensure that detention is not applied unless it is established that it is in line with the best interests of the child principle.** However, Article 23 of the Directive states that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of the law concerning minors, as also stipulated in the UN Convention on the Rights of the Child. In this respect, the Directive retains the obligation to ensure that the principle of the best interests of the child is respected in all cases including detention;

conditions for detention - Article 10: the common position does not retain the obligation to always ensure the separation of asylum applicants from other third country nationals while in detention, as proposed by the Commission, but only "as far as possible". Moreover, the common position allows Member States to exceptionally resort to **prison accommodation** if they are "obliged to" whereas the Commission proposal only allowed the use of prison facilities when places in special facilities are exhausted;

Appeals (free legal assistance and representation) - Article 26: the **common position reached is more restrictive** than the Commission proposal on two points. First it includes a second ground for accessing free legal assistance informed from the charter of Fundamental Rights, namely when "it is necessary to ensure effective access to justice". Secondly, it introduces the "merit test" (informed by case-law of the ECtHR) which allows judges to **refuse access to free legal assistance if they consider that the appeal will have no chance of success.** In all cases, the court will first need to assess the level of difficulty of the legal procedures and the person's ability to follow them and the level of severity of the sanctions involved with a view to deciding whether free legal assistance is necessary. Although in the case of applicants it would be difficult to prove that such assistance is not needed (unaware of the language, national legal proceeding etc.), there could be cases where access to legal assistance may be considered by the court to be disproportionate (i.e. minor reduction of pocket money which does not affect his fundamental rights).