Asylum: granting and withdrawing refugee status, minimum standards on procedures, Common European Asylum System

2000/0238(CNS) - 01/12/2005 - Final act

PURPOSE: to set the minimum standards for granting and withdrawing refugee status in the EU.

LEGISLATIVE ACT: Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

CONTEXT: in 1999 the EU Heads of State at the Tampere European Council agreed to gradually abolish national asylum procedures and replace them with a "Common European Asylum System" to be fully compatible with and based on the full application of the 1951 Geneva Convention. In so doing, the EU is committing itself to the principle of *non-refoulement*, which guarantees that nobody will be sent back to persecution. In order to realise a new European system a two step approach has been agreed upon. As a first step the Community creates *minimum, common standards* for asylum procedures *in the Member States* . As a second step the Community creates *Community rules* and a *Community common asylum procedure*. The deadline for this final stage in 2010.

The minimum standards laid down in this Directive for granting or withdrawing refugee status is the realisation of the first step towards the completion of a Common European Asylum System.

CONTENT: the main objective of this Directive is: to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status. In approximating the rules for granting and withdrawing refugee status the Community is hoping to limit the secondary movement of asylum seekers between the Member States. Further, in adopting this Directive the Community is simplifying procedures considerably by abolishing twenty disparate asylum procedures and establishing one minimum set of standards. Member States will retain the right to introduce or maintain more favourable provisions for third country nationals or stateless persons seeking international protection. Decisions will based on facts and must be made as soon as possible. Member States will not be allowed to keep those seeking asylum in detention for the sole reason that they are an asylum seeker. In cases where applicants are detained they must have recourse to a speedy judicial review.

Both the United Kingdom and Ireland have notified their wish to take part in the adoption and application of the Directive. Denmark, on the other hand, has decided not to adopt the Directive.

Scope

The Directive will apply to all asylum applications made in the territory of an EU Member State including their border or transit zones. It will not apply to diplomatic requests nor will it apply to territorial asylum requests submitted to Member States' representations. In cases where a Member State wishes to introduce a procedure in which asylum applications are examined on the basis of either the Geneva Convention or other kinds of international protection (as defined by Directive 2004/83/EC see CNS/2001/0207) then they must apply the provisions of this Directive. On the other hand, this Directive will NOT apply to provisions spelt out in Regulation 343/2003/EC *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.* (For a summary of this Regulation see CNS/2001/0182).

Guarantees

Applications for asylum can be made in person and/or at a designated place. They may also be made on behalf of dependants. The Directive establishes the following rights, requirements and guarantees:

- **The right of an asylum seeker to remain in the Member State** pending examination of the application. This right does not, however, constitute a right to a "residence permit".

- **Requirements for examining applications**: Decisions on an application must be taken individually, objectively and impartially. Applications can not be rejected on the ground that they have not been made as soon as possible.

- **Requirements for a decision**: Decisions must be given in writing though Member States are not obliged to state the reasons for rejecting an application. In cases where a decision has not been taken within six months the authorities should update an applicant on progress.

- **Guarantees**: Asylum seekers must be kept informed on progress in a language which they can understand. For this they may receive the services of an interpreter. Similarly they will be allowed to communicate with the UNHCR and they have the right to be told of the final decision in a language they understand.

- **Personal interviews**: Asylum applicants will be asked for a personal interview. This interview may be omitted in cases where a positive decision has already been taken or where the applicant is unfit/unable to be interviewed. Whether or not to interview minors is at the discretion of the Member States. The interview will normally take place without the presence of family members and will be conducted in strictest confidentiality. A report will be prepared by the authorities on the basis of such personal interviews to which an applicant will have access.

- **The right to legal representation and assistance**: Applicants may hire legal representation, at their own costs, on *matters relating to their application*. In the event of *a negative decision* they may have access to free legal assistance. The Member States retain the right to grant free legal assistance only for procedures before a court or tribunal; to those who lack sufficient resources and if an appeals procedure looks likely to succeed. Member States will be allowed to offer applicants legal advisers who have been specifically designated under national law to assist asylum applicants. The Member States must provide all necessary and relevant information on an asylum applicant to their legal adviser unless they have grounds to believe that such information would jeopardise national security or a person's security.

- **Guarantees to unaccompanied minors**: Persons who are younger than 18 years of age will be guaranteed representation as soon as possible. They will be informed of progress and the obligations they are under. In cases where a personal interview may be necessary the person conducting the interview must have knowledge of the needs of minors. Member States may (but can not force) minors to undertake a medical examinations to determine their age. In cases where this is necessary the minor will be informed, in a language which they can understand, of the procedure involved – and of the possible consequences of refusing a medical examination. The Directive specifically states that: the decision to reject an application for asylum can not be based solely on a minor's decision to refuse the medical examination.

- **Procedures in case of implicit withdrawal or abandonment of an application**: Member States can assume that an application is being withdrawn (and can therefore be rejected) when, for example, an applicant fails to provide essential information; they have failed to appear for their

personal interview or when they have absconded. The file, under certain conditions may be re-opened. A Member State may not, however, regardless of withdrawal, remove a person in contradiction to the principle of non-refoulement.

- **The role of the UNHCR**: The UNHCR will be allowed to have access to: asylum seekers as well as information on individual applications.

- **The collection of information on individual cases**: Member States will not be allowed to disclose information on: individual applications for asylum; the fact that an application has been made; obtain information for the alleged persecutors which could implicate the asylum seeker and which could put themselves or their dependants in jeopardy.

Obligations

Asylum applicants also have certain obligations. For example they must:

- report to the authorities or appear before them in person without delay or at a specified time;

- hand over documents in their possession necessary for their application process;

- inform the authorities of their residence and or address. They must inform the authorities if there is a change of address;

- allow the authorities to search them plus any items they may have on them;

- have their photograph taken; and

- allow an oral record of statements.

Procedures at first instance

The Directive covers three basic types of procedures: regular, accelerated and specific. In cases of a "regular procedure" the provisions outlined above (or Chapter 2 of the Directive) must apply. In certain cases, however, an accelerated procedure or "examination procedure" may apply, which can be summarised as follows:

- **Examination procedure**: The Directive allows national authorities to accelerate examinations in cases, for example, where an applicant has special needs or where an application looks well founded.

  In cases where an applicant clearly does not qualify as a refugee (as defined by Directive 2004/83 /EC) or because they already come from a "safe third country" or from a "safe country of origin" (see below) the procedures can also be accelerated. Other reasons for accelerating or prioritising a procedure include cases where an applicant has, *inter alia*,: provided false information; made inconsistent and contradictory statements; submitted a subsequent application, submitted an application merely to delay or frustrate the enforcement of an earlier or imminent decision on their removal; failed to comply with their obligations; entered a territory unlawfully or prolonged their stay unlawfully; poses a danger to national security or public order; refused to have their fingerprints taken; or submitted an application after their parents application has been rejected.

- **Specific procedures**: derogations to the "regular" procedure may apply in cases when a person makes a "subsequent" application in the same Member State. Specific procedures will also apply at border crossings or transit zones. These procedures must, it is stressed, be in conformity with the basic principles and guarantees specified under the regular procedure.

- **Inadmissible applications and unfounded applications:** Applications will be considered inadmissible in cases where: another Member State has granted refugee status; if a country (which is not a Member State) is considered a first country of asylum; if an applicant comes from a country considered a safe third country; if they have been granted leave to stay in a Member State based on Directive 2004/83/EC; if they have lodged an identical application following a final decision; or if a dependant of the applicant lodges an application where there are no facts relating to the dependant's situation which justify a separate application. An application will be considered unfounded: if an authority has established that the applicant does not qualify for refugee status as defined by Directive 2004/83/EC.

First country asylum, safe third country, European safe third countryand safe countries of origin

In view of the fact that the accelerated or examination procedure can be applied to persons coming from a "safe country of origin" and given that certain applications will be deemed inadmissible in cases where an applicant has a connection to a "safe third country", the Directive clarifies these two points. It should be noted that there is a distinct difference between a "safe third country" and a "safe country of origin" as described below. The Directive also spells out the concept of first country asylum.

- **First country asylum:** A "first country of asylum" refers to a country where an applicant has been recognised as a refugee and which can still offer the applicant adequate protection – including protection from non-refoulement. This country may not necessarily be an EU Member State.

  Safe third country: The authorities will NOT be obliged to examine a file or application in substance when a connection to a "safe third country" can be established. This refers to any asylum seeker who could have sought (but chose not to seek) protection in a safe third country before seeking protection in the EU. The Directive provides that the EU Member States may apply a "safe third country" concept on condition that they are satisfied that a person being returned to a safe third country will be treated in accordance with certain principles. Those principles being: respect for a persons life and liberty; respect for their race, religion, nationality, membership of a particular group or political opinion; non-refoulement in accordance with the Geneva Convention; non-violation of the right to freedom from torture and cruel inhumane or degrading treatments; and the possibility of requesting refugee status in accordance with the Geneva Convention.

  Applying the concept of "safe third country" will be subject to national rules and regulations. In implementing a decision based on this concept the authorities must keep an applicant abreast of developments. In cases where a third country will not permit re-entry onto its territory, the Member States must then revert back to the regular procedure. The Member States will be obliged to report, periodically, to the Commission of the countries to which this concept is applied.

  In order to avoid secondary movements of applicants, common principles for the consideration or designation by Member States of third countries as "safe" will be established.

  European safe third country: Similarly, the authorities will NOT be obliged to examine a file or application for protection, or not carry out a full examination of a file, if a connection with a "European safe third country" can be established, where human rights standards are considered

high. Again this concept applies to those seeking refuge in one particular country but who have a connection with a third state.

For example, an applicant may have transited a "safe" European (though not EU) state, not stopped to request asylum and continued on to another country where they then sought asylum. This may apply, for example, to a Georgian seeking asylum in the EU, who entered Greece illegally, where they sought protection, having transited through Bulgaria. Bulgaria may then be considered a European "safe" third country - until that is Bulgaria becomes a member of the EU. The Directive also goes on to stipulate that, in this context, a safe third country can only be considered as such if it has: ratified the Geneva Convention; it has a prescribed asylum procedure and it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A list of European safe third countries will be compiled at a later stage by the Council based on a proposal from the Commission and having consulted the European Parliament. Voting will be based on qualified majority.

- **Safe third country of origin**: The definition of a "safe third country of origin" can be found in Annex II to the Directive. It is a concept which seeks to limit persons seeking asylum for economic, as opposed to, political reasons. Thus, a safe third country of origin, under the terms of this Directive, applies to those countries that apply the rule of law within a democratic system and general political circumstances; where there is no persecution (as defined by Directive 2004/83 /EC), no torture or inhuman and degrading treatment or threat of indiscriminate violence in situations of armed conflict. It can also apply to "parts of a country".

  Currently the only recognised "safe third countries of origin", under the terms of this Directive, are Bulgaria and Romania. The Council, at a later stage, will adopt a minimum common list of "third countries of origin". The Council, based on a Commission proposal and following consultation with the European Parliament, will adopt the list by qualified majority. Specific provisions have also been put in place on how a country can be removed or put onto the list including, for example, consultation with the UNHCR on a countries' status. The Directive also allows the Member States to retain or introduce legislation that allows for the designation of third countries of origin and which do not appear on the minimum common list. Member States are not, however, allowed to remove countries on the agreed minimum common list.

  In cases where it has been safely established that a person comes from a "third country of origin" the authorities may consider a person's application unfounded.

Withdrawing refugee status

Procedures have also been established for "withdrawing" refugee status. This process can only begin once the authorities have obtained new information or findings which indicate that there are reason to reconsider the validity of a person's refugee status. The information containing new elements must not stem from potential persecutors. If such a situation arises the authorities must inform an individual that their status is being reconsidered. Any decision to withdraw refugee status must be given in writing. Reasons in fact and in law must be stated if a decision has been taken to withdraw a person's refugee status and information on how to challenge the decision must be given in writing.

Appeals procedures

The Directive specifies that applicants have the right to an effective remedy before a court or tribunal. An asylum seeker, whose application has been rejected, may seek judicial review under the following circumstances:

- if an application has been rejected on the basis that it is inadmissible;

- if an application has been rejected at the border or in a transit zone of a Member State;

- if it has been decided not to conduct an examination because the person seeking asylum has entered illegally from a safe third country;

- if the authorities refuse to re-open a file after it has been discontinued;

- if an application is rejected due to a subsequent application;

- if an application is refused following the application of specific procedures at border crossings;

- if a decision has been taken to withdraw refugee status.

General and final provisions

In the final provisions, the Directive stipulates that public authorities are free to challenge any administrative or judicial decision set out in national legislation. The authorities responsible for implementing the Directive are bound by strict confidentiality clauses and lastly, the Commission will report on the application of the Directive by 1 December 2009.

DATE OF TRANSPOSITION: 1 December 2007. Concerning an asylum seeker's right to legal representation (article 15) the deadline for complying with the Directive has been set at 1 December 2008.

TRANSITION: The Member States must ensure that their laws and regulation, necessary for the implementation of this Directive, are brought into force before 1 December 2007. Procedures for the withdrawal of refugee status must start after 1 December 2007.

ENTRY INTO FORCE: 2 January 2006.