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on directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Jean Lambert

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)

Background to the legislation

Context

The background to the revised Directive is set out in the Commission's proposal. In this working document, your Rapporteur offers an assessment of the amendments proposed in light of the shortcomings identified by the Commission during its monitoring activities on the transposition and implementation of the directive, as well as by studies conducted by the UNHCR, ECRE and other major NGOs. This document is by no means exhaustive - its aim is to inform, advise and steer the debate towards Parliament's first reading position.

Current directive

The Directive on 'minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (2004/83/EC), hereafter referred to as the Directive, has been in force since 2004. The legislation aims to establish common standards between Member States for the harmonisation of criteria for the identification of those in need of international protection and the rights and benefits to be granted to them.

The Directive deals with the **conditions** which need to be fulfilled for an individual to qualify for refugee status or subsidiary protection status. This includes defining who can be classed as an 'Actor of persecution or serious harm' (Article 6) or an 'Actor of Protection' (Article 7); the conditions under which 'internal protection' can be considered as an alternative to the granting of international protection (Article 8); what constitutes persecution under the 1951 Geneva Convention and related Protocols (Articles 9, 10); what constitutes serious harm (Article 15); and the reasons and conditions for the exclusion from or cessation of status (Articles 11,12,16,17). It also details the **content** of the international protection granted (Chapter VII) in terms of access to information, maintaining family unity, residence permits, travel documents, and access to employment, education, social welfare, health care, accommodation and integration facilities. Special provisions for unaccompanied minors are detailed.

Why a revision?

The current Directive has increased harmonisation between member States on some points of law, but there are still wide divergences of interpretation in some areas. Evaluations have shown that decision-makers have difficulties in reaching robust decisions quickly: the possibility to interpret concepts in different ways results in intensive recourse to appeals and in high rates of successful appeals against negative decisions. Statistical data suggests that the Directive has not had any effect on reducing secondary movements. The Commission's impact assessment¹ the minimum standards of the Directive are vague and ambiguous,

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:1374:FIN:EN:PDF>

containing gaps and allowing for derogation possibilities. This in turn has led to dramatic differences in the implementation of the Directive and thus on recognition rates for asylum seekers from the same countries among the Member States. Shortcomings of the current Directive have been reflected in recent rulings of the European Court of Human Rights, e.g:

Judgment of 11 January 2007, Salah Sheekh v. the Netherlands¹ which relates to Article 8 of the Directive, on Internal protection *and* **Judgments of 15 February 2006 in cases Niedzwiecki v Germany² and Okpisz v Germany³** which relates to the alignment of the two protection status.

The European Parliament is clearly of the view that the divergence in practice between Member States must be addressed. A revision of the Directive is necessary to clarify certain parts of the text and will in turn lead to improved implementation and a decrease in divergence between Member State practices: we also need to. Ensure that it is fully in line with international refugee and human rights law to which all Member States are party. Article 37 of the current Directive provides for a revision. Practical cooperation and the sharing of best practice between Member States, which will be facilitated with the upcoming establishment of the European Asylum Support Office, are not enough to improve the implementation of the Directive.

Scope of the revision

The re-cast proposal⁴ attempts to address a number of shortcomings in the current legislation. A number of the criticisms were raised during Parliament's consultation in 2002⁵. The issues highlighted by Parliament particularly concerned the concept of 'Actors of protection' 'Internal protection' and the scope of the Directive which is restricted to third country nationals and stateless persons, excluding EU nationals. Other issues highlighted at the time included actors of persecution; women and sexual orientation as constituting a particular social group and the definition of family. Other areas of criticism also include the 'sur-place' analysis requiring an assessment of whether the asylum seeker has created the situation giving rise to persecution or serious harm by his or her own decision, as still remains in Article 5 paragraph 3, as this reflects a restriction of an asylum seekers rights to freedom of expression, freedom of religion and freedom of association.

In its revision, the Commission has opted not to re-open some of the wider issues which have been highlighted as problematic. While this is certainly of regret to some, including your Rapporteur, it is clear that Member States are not willing to address some of the wider deficiencies of the Directive at this time. The Commission has opted for a recast involving the partial amendment of the text in some key areas. **Your Rapporteur recommends that the Committee generally follows this approach at this point in the development of the Common European Asylum System**, but nevertheless invites Council to consider the

¹ ECtHR, Salah Sheekh v the Netherlands, Application no. 1948/04, 11 January 2007, para 141.

² ECtHR Niedzwiecki v Germany 58453/00, 25 October 2005

³ ECtHR Okpisz v. Germany, 59140/00, 25 October 2005

⁴ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast) COM(2009) 551

⁵ See final report T-5-0494/2002 of 22/10/2002.

remaining issues mentioned above. There are also a few questions about the place of children in terms of continuity of treatment within the whole protection process. Your Rapporteur would invite Commission and Council to consider these.

The following provides a non exhaustive overview of the Commission's proposed amendments and your Rapporteur's preliminary assessment of the changes.

Replacement of 'refugee status' and 'subsidiary protection status' with 'beneficiaries of international protection' (Article 1, 2b,2j) and others) – this is in line with the Hague programme which calls for the creation of a uniform status of protection, and has been reaffirmed in the Stockholm Programme¹. As a reflection of this proposal we see an alignment of rights as outlined in the next point. A number of member States already do this.

Your Rapporteur welcomes the Commission's approach. Subsidiary protection is often assumed to fulfil a short-term need but this has not proved to be the case. Status qualification should depend on the individual circumstances, not on a perception of the possible length of stay. It was always intended that the two status definitions would meet different protection needs and cannot be substituted one for another.

Alignment of rights of beneficiaries of subsidiary protection to those of refugees (Articles 22 -27, 29, 30, 33) This is expected to simplify and streamline procedures and reduce administrative costs as well as ensure full respect of the principle of non discrimination and bring the text into line with case law of the ECtHR.² The amendments also respond to the Hague programme, as reaffirmed in the Stockholm Programme, which calls for the creation of a uniform status of protection. The amendments remove differences between the two status' allowed under the current directive in relation to the duration of the residence permit; access to employment and employment-related education activities; access to social welfare, healthcare and to integration facilities and access to benefits for family members.

Your Rapporteur strongly supports the Commission's amendments. As some Member States have already found, the alignment of rights can lead to a simplification of administration and a better understanding and delivery of the system as a result. Such alignment can assist integration, reduce social exclusion and help move those who have the capacity from state benefits to employment. Substantive differences in treatment between those of different status can act as an incentive for applicants to move to another Member State and lodge another claim which in turn increases the pressure on the Dublin system. Given that Council wishes to reduce the differences in approach between Member States and reduce the number of additional claims, it makes sense to reduce such differences by aligning the rights pertaining to the two statuses in line with the Commission proposal. This issue of possible additional costs are covered in the Summary of the Impact Assessment and Commission Staff Working Document³. The European Refugee Fund is available to co-fund certain measures.

¹ Stockholm Programme pg 69

² Judgments of 15 February 2006 in cases Niedzwiecki v Germany and Okpisz v Germany

³ See pg 5 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:1374:FIN:EN:PDF>

Actors of protection (Article 7) - a clarification of the concept in order to ensure full compatibility with the Geneva Convention, enhanced quality and efficiency of decision making and interpretive consistency and coherence.

Your Rapporteur welcomes the proposed changes but considers that the article could be improved by restricting the role of 'actors of protection' only to state authorities. The current article effectively imposes the duties of a state on a body that cannot be held legally accountable and whose ability in practice to enforce the rule of law and therefore offer protection is limited. UNHCR's study on the implementation of the Qualification Directive¹ found that although some Member State authorities are prepared to consider international organisations as actors of protection, generally, international organisations were eventually found unable to provide such protection: the notion is thus problematic.

Additional amendments could also be considered to this article to make reference to a State's willingness and ability to enforce the rule of law.

Acts of persecution (Article 9)

Your Rapporteur fully supports the Commission's amendment to Article 9.3 as it makes clear that status should be granted not only where an act of persecution has occurred, but also where there is an absence of, or failure to provide protection. The amendment is necessary to address protection gaps arising in particular from non-state actors and is particularly relevant to gender based claims.

Internal protection (Article 8) - specifies the criteria for assessing the accessibility and effectiveness of protection that should be available to the applicant within another area of their country of origin or residence, and ensures compatibility of the concept with Article 3 of the ECHR, as interpreted in a recent court judgment of the ECtHR²

Your Rapporteur considers the amendments proposed by the Commission as essential to improve the clarity of the text and its compatibility with the recent judgement of the ECtHR. Your Rapporteur would also recommend keeping the current Directive's wording in relation to the reasonableness test, which will ensure that those concerned would be able to lead a relatively normal life in the part of the country of origin in question. This would bring the text into line with UNHCR guidelines on "Internal Flight or Relocation Alternative", elements of which a number of Member States already take into consideration.³ This further clarification and application of the reasonableness test would contribute to the further harmonisation of Member State practice which currently varies considerably in this area. For example, prior to the entry into force of the Directive many Chechen asylum seekers were denied refugee status on the grounds that they could live elsewhere in the Russian Federation, although it was acknowledged that they might not attain a basic level of subsistence. Your Rapporteur considers that it may also be useful to consider how the internal protection alternative should apply in the case of children.

¹ Asylum in the European Union 'A study of the implementation of the Qualification Directive' November 2007, pg 48

² Judgment of 11 January 2007, Salah Sheekh v. the Netherlands, Para 141

³ ELENA survey, 'The application of the concept of Internal Protection Alternative' updated 2000, pg 17-18

Including gender in the definition of member of a 'particular social group' (Article 10 and recital 29) – the Commission's amendment results in a requirement to give due consideration to gender for the purposes of defining a particular social group. This ensures a more inclusive interpretation of the concept "particular social group" in line with the standards of the Geneva Convention, and will enhance access to protection, in particularly for women.

Your Rapporteur welcomes this revision but would invite the Committee to consider whether the amendment fully reflects the gender dimension or, indeed, the issue of gender identity. Furthermore, as the text currently stands, a 'particular social group' is defined by its members sharing an innate characteristic or common background that cannot be changed, or a characteristic or belief that is so fundamental to their identity or conscience that a person should not be forced to renounce it, and being socially perceived as such. In order to avoid any protection gaps your Rapporteur considers that the text should require only one of these requirements to be met, thus changing 'and' to 'or'. Your Rapporteur trusts that the Council will consider this minor textual amendment.

Definition of 'family members' (Article 2j) – The Commission proposes to broaden the definition to include married minors, where it is in their best interests to reside in the same country as the beneficiary; the father, mother or another responsible adult relative responsible for the beneficiary when he/she is a minor and unmarried or married and it is in the minors best interest; and the minor unmarried siblings of the beneficiary when the latter is a minor and unmarried or married and it is in one or more of their best interests that they reside in the same country.

The proposed amendments bring the text into line with the right to family unity as outlined in the relevant UNHCR handbook. However, your Rapporteur also considers that this right should be afforded to families which have been formed since flight from the country of origin, as those which have been formed during flight or upon arrival in the asylum state also need to be taken into consideration. Your Rapporteur supports the position asserted by Parliament¹ in its response to the Commission's Communication 'Towards an EU strategy on the rights of the child', that the best interests of the child must be paramount in any decision concerning them.

Cessation (Articles 11 and 16) - addition of a clause concerning compelling reasons not to conclude cessation of status - this amendment brings the text fully into line with the Geneva Convention and general humanitarian principles.

It is not clear from the limited changes proposed how children will be protected within the current formulation. The Committee is invited to consider this question further.

Vulnerable persons (Article 20.3)

Your Rapporteur welcomes the Commission's amendments to article 20.3 which explicitly mentions victims of trafficking and persons with mental health problems in the non exhaustive list of vulnerable persons member states should take into account in the

¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0012&language=EN>

implementation of Chapter VII.

Unaccompanied minors (Article 31) - obliges member State's to establish procedures for tracing members of an unaccompanied minor's family as soon as possible after the granting of international protection, whilst protecting the unaccompanied minors best interests, and improves the training requirements of those working with unaccompanied children.

The above is to be welcomed. However, initiating family and guardianship tracing programmes at the point of application, as proposed in the Commission's re-cast of the Reception Conditions Directive¹ would be desirable and would ensure consistency between the two Directives.

Best interests of the child

In Recital 17 the Commission has included a reference to the United Nations Convention on the Rights of the Child which is to be welcomed. *However, Members may wish to consider whether an expansion of this Recital to include the principles involved would contribute to a more uniform implementation of the Directive*

Improving integration possibilities Articles 26, 28, 32, 34 - through the recognition of qualifications, improved access to employment related education opportunities, integration programmes and through a request for member States to implement measures to improve access to accommodation for beneficiaries of international protection.

Your Rapporteur fully supports these amendments and would recommend that the Committee supports the Commission's proposals.

Conclusion

Your Rapporteur recommends that the Commission proposals be accepted in principle

Generally, your Rapporteur welcomes the Commission's amendments and considers them essential in order to move towards a full and inclusive interpretation of the relevant international Conventions and agreements. The amendments proposed are also in line with the objectives set out by the Hague and Stockholm Programmes agreed by Council, regarding the establishment of a uniform protection status and further progress with regard to the integration of third country nationals. The alignment of rights is key to achieving this. The text's increased legal clarity will assist the harmonisation of practices between member states and thus a reduction in secondary movements and Dublin cases. Increased clarity will also lead to a reduction in the number of appeals, both of which will reduce administrative and financial burden on member states.

¹ Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast) Article 23.3