Meijers Committee
Standing committee of experts on
international immigration, refugee
and criminal law

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To Mr. Ivan BIZJAK
Director General
Directorate-General H - Justice and home affairs
COUNCIL OF THE European Union
B-1048 BRUSSELS

Reference CM1004
Regarding Note of the Meijers Committee (Standing Committee of experts on international immigration, refugees and criminal law) on the proposals for recasting the Qualification Directive (COM(2009) 551) and the Procedures Directive (COM(2009) 554)
Date 8 February 2010

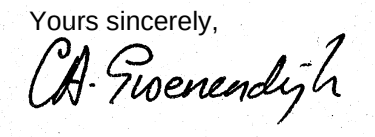
Dear Mr. BIZJAK,

Please find attached a note of the Meijers Committee (Standing Committee of experts on international immigration, refugees and criminal law) on the amended proposal on the proposals for recasting the Qualification Directive (COM(2009) 551) and the Procedures Directive (COM(2009) 554)

In the attached note the Meijers Committee comments on some of the provisions of both directives and suggests amendments and improvements.

Should any questions arise, the Standing Committee is gladly prepared to provide you with further information.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman

Note of the Meijers Committee (Standing Committee of experts on international immigration, refugees and criminal law) on the proposals for recasting the Qualification Directive (COM(2009) 551) and the Procedures Directive (COM(2009) 554)

Introduction

The Meijers Committee in general welcomes most of the proposed amendments in the Qualification Directive and the Procedures Directive. Nevertheless, in this note the Meijers Committee comments some of the provisions of both directives and does suggestions for amendments and improvements.

Summarized our comments read as follows.

As the Qualification Directive concerns:

- In Article 4 (assessments of facts and circumstances) the Meijers Committee suggests to replace in paragraph 1 the wording "as soon as possible" by the phrase "within a reasonable time";
- Article 5(3) on protection needs "sur place" permits refugee status to be denied "if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin". The Meijers Committee suggests to incorporate more explicitly the fundamental consideration that it should always be assessed whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim;
- With respect to paragraph 2 of Article 7 (actors of protection), the Meijers Committee deems it opportune to reconsider whether a more elaborated description should be laid down with respect to the necessary 'protection' available. The current formulation of this article still allows an effective denial of protection so long as the State takes "reasonable steps" to prevent the infliction of persecution or harm. The Meijers Committee would suggest a higher standard;
- Article 10 (particular social group) still requires in paragraph 1(d) a cumulative application. We would like to suggest to change "and" in this paragraph in "or";
- In Articles 11 and 16 (cessation) the Meijers Committee welcomes the paragraph stipulating that 'compelling reasons arising out of previous persecution or serious harm' preclude the cessation of protection but it considers it opportune to set out more clearly the circumstances giving rise to the exception;
- In Articles 14(1) and 19(1) on revocation of status the Meijers Committee suggests to substitute the term 'shall' for 'may'. A paragraph could further be added which would clarify that in decisions concerning the revocation or ending of the residence right of protection beneficiaries, other factors than the eligibility criteria laid down in the Directive should be taken into account, including the family, social and economic ties in the Member State;
- The Meijers Committee is not in favour of amending Article 15(c). But there may be a need to complement Article 15 in order to widen its overall scope. Before further EU legislation is proposed, it is necessary that the Commission as originally foreseen provides an overview of the different national subsidiary forms of protection. The Meijers Committee regrets that the Stockholm programme is silent on the issue.

As the Procedures Directive concerns:

- While the proposal does not define what an accelerated procedure exactly is, the Meijers Committee recommends to include a definition of 'accelerated procedures' in Article 27 (6). Furthermore it may be feasible to include, next to the maximum time-limit of six months a minimum time-limit for the asylum procedure or specific phases of the asylum procedure in the directive;
- The Meijers Committee welcomes the improvements in the safe country concepts of Articles 32, 33 and 34. Nevertheless, the new Article 38 (the European safe third countries concept) meets severe criticism. The Meijers Committee strongly recommends to bring Article 38 in line with Article 32 or to delete – as originally foreseen – the concept of European safe third countries altogether;

- Article 35 (subsequent asylum applications) leaves Member States discretion to decide not to examine a subsequent application further, because, according to the Member State, the new facts and circumstances could and therefore should have been submitted by the applicant during the previous asylum procedure. The Meijers Committee is concerned that Article 35 (6) may be used by Member States to exclude subsequent applications, in which evidence obtained from the country of origin or late statements of victims of serious violence are submitted, from further examination The Meijers Committee therefore recommends requiring Member States to assess in each subsequent asylum procedure whether the new facts or circumstances should lead to the conclusion that the person concerned qualifies as a refugee or a person eligible for subsidiary protection or falls within the scope of protection of the prohibition of refoulement. Furthermore, it would be useful to define the term 'new facts and circumstances' in the directive.

Qualification Directive

General observations

The Meijers Committee agrees with most of the proposed amendments, especially those ensuring that eligibility criteria are in line with international standards, the creation of a uniform status of protection for refugees and subsidiary protection beneficiaries and approximation of the level of protection and rights attributed to both categories. The Committee supports the insertion of the new article 28 providing for equal treatment with nationals regarding the recognition of foreign diploma's, certificates etc.

However, there are certain articles which the Commission left unchanged, despite the need for amendments in order to raise the protection standards in accordance with international norms and to stimulate further harmonization.

Article 4 Assessment of facts and circumstances

The duty of Member States to assess the relevant elements of the application in cooperation with the applicant is a well-established legal principle, and laid down in UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (para 196). The fact that this legal principle is confirmed in this Directive remains of the utmost importance. However, the Meijers Committee notes that according to the impact assessments with respect to the transposition of the Directive, national legislation, practice and jurisprudence in several Member States indicate that the actual application and interpretation of article 4 differs widely. This may be attributed to the somewhat diffuse wording of the article, or the wide margin of appreciation left to the Member States in interpreting 'duty of the Member States' and 'cooperation with the applicant'.[1] With respect to the obligation imposed on the asylum seeker in Article 4(1) to provide all evidence 'as soon as possible': most states, including the Netherlands uphold a very restrictive approach towards this obligation of the asylum seeker. Lack of evidence or late submissions are often held against the (credibility of) asylum seeker, not providing the benefit of the doubt. As the UNHCR stated, there may be limits to what the asylum seeker is able to submit. Due consideration should be given to the circumstances of the case, as persons in need of international protection have fled due hardship, often arrive without documents, are traumatised and anxious. They need time to prepare and substantiate their asylum claim. The Meijers Committee therefore suggest to insert instead of the wording 'as soon as possible' the phrase 'within a reasonable time'. This wording does more right to the system of evidentiary assessment of protection needs. Furthermore this phrase will be more consistent with the Procedures Directive, where reference to 'reasonable time limits' has been inserted in for example article 27(6).

Article 4(5) deals with the requirements for the application of the 'benefit of doubt' principle.[2] The formulation of Article 4(5)(d) allows Member States to introduce or maintain the strict requirement that

1 See ELENA, The Impact of the EU Qualification Directive on International Protection, October 2008, p. 10-11; UNHCR, Asylum in the European Union. A Study of the Implementation of the Qualification Directive, November 2007.

2 See also UNHCR Handbook paras. 203-204.

all aspects of the applicant's statement are supported by documentary or other evidence in case of late submission of the claim, unless a satisfactory explanation has been provided for the late submission of the claim. Although the Meijers Committee agrees that the asylum claim itself should be filed as soon as reasonably possible, the Committee would like to point out that a late submission of the claim alone should not lead to an increase of the requirements of proof on the asylum seeker**.**

Article 5 International protection needs arising sur place
The Meijers Committee notes that this article is not subject to amendment. However, the Committee would like to see a clarification of article 5(3). Article 5 (3) permits refugee status to be denied "if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin".

Paragraph 3 is limited to the recognition as a refugee and leaves the absolute protection against serious harm according to Article 3 ECHR untouched. However, the text of this provision may be at odds with the 1951 Refugee Convention, as it does not, explicitly nor implicitly, state that its protection cannot be provided to persons whose claims for asylum are the result of actions abroad. Although this may follow from the current wording of the paragraph ('without prejudice to the 1951 Geneva Convention'), the Meijers Committee would like to suggest the possibility to incorporate more explicitly the fundamental consideration that it should always be assessed whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim.
The Meijers Committee would furthermore like to emphasize that it is very well possible that a person could create in 'good faith' circumstances giving rise to a well-founded fear of being persecuted. The Committee recognizes that here may also be instances of persons 'manufacturing' asylum motives while being outside their country of origin. However this raises issues of evidence and assessment of facts and credibility, which are covered by article 4.

Article 7 Actors of protection
Under international law, non-state entities and international organisations do not have the attributes of a State. They are not parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations.
The newly inserted phrase in article 7(1)(b) 'and which are willing and able to enforce the rule of law' is thus welcomed by the Meijers Committee. In any case, Member States should not use the concept of non-state actors of protection to deny refugee status, if the assumption of protection cannot in fact be challenged or assailed. It is therefore of the utmost importance to clearly set out the criteria and standards of protection to be provided for by these actors.

Thus, with respect to paragraph 2, the Meijers Committee deems it opportune to reconsider whether a more elaborated description should be laid down with respect to the necessary 'protection' available. The current formulation of this article still allows an effective denial of protection so long as the State takes 'reasonable steps to prevent the infliction of persecution or harm'. The Meijers Committee would suggest a higher standard with respect to the actual effectiveness, accessibility and adequacy of protection: if such efforts by a State do not in fact reduce a risk of persecution below the well-founded fear threshold then there is in fact no real protection.

Article 10 Reasons for protection: particular social group
The Meijers Committee is content with the new reference to the role of gender aspects in defining 'particular social group' ground for persecution in article 10(1)(d).
The Directive however still requires a cumulative application of the two approaches as to what constitutes a social group (protected characteristics or innate approach and social perception approach), while an alternative application would be more in line with the Refugee Convention[3] and will avoid any protection gaps in case the two approaches do not converge. Although the phrase 'in particular' in article 10(1)(d) seems to provide some flexibility to Member States in granting protection, the Committee would like to suggest to change 'and' in para 1(d), first indent, to 'or'.

3 See also UNHCR, Guidelines on International Protection: 'Membership of a Particular Social Group', 7 May 2002, i.a. para 12.

Articles 11 and 16 (Cessation) (general humanitarian principle)
The Meijers Committee welcomes the insertion in the cessation clauses of a paragraph stipulating that 'compelling reasons arising out of previous persecution or serious harm' preclude the cessation of protection. Although the corresponding provision of the Refugee Convention only applies to so-called statutory refugees (refugees under special arrangements before the entry into force of the Refugee Convention), many States apply this exception as a general humanitarian principle applicable to all refugees. The Meijers Committee does note however, that the provision is rather vague and susceptible to different interpretation and implementation. In its Guidelines on International Protection UNHCR has interpreted this exception as intended to cover cases where refugees or their family members have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin.[4] Examples mentioned are ex-camp or prison detainees, survivors or witnesses of violence against family members, as well as severely traumatised persons. Some States consider the prospect of social exclusion in the country of origin an important element giving rise to compelling reasons, while other States have developed special arrangements for traumatized persons. The Meijers Committee considers it opportune to set out more clearly in the Directive the circumstances giving rise to the exception. This could be done, for example, by inserting an indicative list of circumstances as mentioned in the above mentioned UNHCR Guidelines (in analogy with Articles 9 (2) of the Directive listing acts of persecution)

Article 14 and 19 (Revocation of status and implications for right of residence)
The Meijers Committee observes that the proposal does not contain a prospect for beneficiaries of protection of obtaining durable integration and residence in a Member State. Article 34 of the Refugee Convention obliges States to facilitate as far as possible the assimilation and naturalization of refugees. This corresponds with the practice in many Member States of granting refugees the opportunity of applying, after a period of legal residence, for permanent residence or naturalization. As it stands, EU asylum and immigration law fails to adequately regulate a possible long-term residence right of refugees. International protection beneficiaries are still excluded from the scope of the Long-Term Residence Directive (2003/109/EC) and the current proposal for recasting the Qualification Directive maintains the obligation on Member States to revoke or end refugee or subsidiary protection status and the concomitant residence right provided for in the Directive when the person has ceased to be eligible for protection. This includes the situation where the circumstances leading to the grant of protection have ceased to exist. The imperative nature of the revocation clauses ('Member States shall revoke or end' the status) contrasts with the system of the Refugee Convention, under which cessation *de jure* ends entitlements under the Convention, but without touching upon the issue of the residence right. The Netherlands, for example, has implemented the obligation of revocation or ending the status by stating in imperative terms that the residence permit must be revoked or ended. Such implementation may come in conflict with the goal of facilitating the integration of third-country nationals who have resided legally for a period of time, irrespective of the initial grounds on which residence was granted. This goal has been repeatedly formulated by the European Council (see amongst others the Tampere Conclusions). UNHCR's Executive Committee, in Conclusion No. 69, has also recommended that States consider a (possibly alternative) residence status for long-settled refugees whose refugee status is being withdrawn and "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links".
Accordingly, the Meijers Committee suggests to substitute the term 'shall' for 'may' in Articles 14(1) and 19(1). A paragraph could further be added which would clarify that in decisions concerning the revocation or ending of the residence right of protection beneficiaries, other factors than the eligibility criteria laid down in the Directive should be taken into account, including the family, social and economic ties in the Member State.

4 Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees, para. 20.

Article 15 Serious harm

The Meijers Committee notes that this article is not subject to amendment, although several stakeholders stressed the need for clarification of Article 15(c). An amendment of Article 15(c) is not considered necessary in view of the interpretative guidance provided by the ECJ in its Elgafaji judgment of 17 February 2009, C-465/07. The Meijers Committee is not in favor for amending Article 15(c) and prefers to wait for further guidance of the ECJ in interpreting the scope of this new ground for subsidiary protection. Nevertheless, there may be a need to complement Article 15 in order to widen its overall scope. Most Member States have developed national subsidiary forms of protection with regard to persons from countries of conflict. In conflict situations chances of violation of fundamental human rights for individual citizens are generally high. Because of the often volatile and dangerous situation, individualized risks are harder to substantiate and to assess. Therefore, there is still a need for a wider ground for protection in conflict situations, to reflect the EU and its Member States' humanitarian traditions not to expel persons to a situation of (internal) conflict. A less individualized ground for protection for persons fleeing situations of large scale violations of human rights, could by nature involve larger numbers of persons. However, such situations are exceptional and State practice shows that in these situations Member States often do operate general protection schemes or at least some sort of expulsion stop. Until now, such national schemes have often been under pressure, because responses of other neighboring Member States may be very different. Hence, there could be a need for further EU legislation both on granting and withdrawal of status(es) in situations where dictatorial regimes or factions randomly commit large scale, gross violations of human rights against the population or parts of the population. Before further EU legislation is proposed, it is necessary that the Commission as originally foreseen provides an overview of the different national subsidiary forms of protection. The Meijers Committee regrets that the Stockholm programme is silent on the issue.

Procedures Directive

General observations

The Meijers Committee welcomes the proposal for a new directive on minimum standards on procedures for granting and withdrawing international protection. The proposal incorporates important procedural safeguards, which reflect the requirements following from the existing case law of the Court of Justice regarding general principles of Community law, Article 47 European Union Charter of Fundamental Rights and the European Court of Human Rights case law under Article 13 ECHR. The proposal addresses the main shortcomings of Directive 2005/85/EC. The proposal is furthermore less complex and better structured than the existing directive. Finally the directive provides for minimum standards on the most crucial aspects of asylum procedures and contains much less possibilities for derogation than Directive 2005/85/EC. As a result an important step is made towards the establishment of a single procedure comprising common guarantees.

The Meijers Committee particularly welcomes the reduction of exceptions to procedural safeguards such as the right to a personal interview and access to information in the applicants' file, the introduction of a right to free legal aid in the first instance procedure, the obligation to attach suspensive effect to the remedy against a negative asylum decision, the introduction of special guarantees for asylum applicants with special needs and the recognition of the relevance of medico-legal reports for asylum cases. However, also some concerns remain, in particular regarding the wide discretion for Member States to use accelerated procedures and to refuse subsequent asylum applications after a preliminary examination. These concerns will be addressed below.

Article 27 The use of accelerated procedures

In several Member States accelerated or short track procedures are used, in which an asylum applicant is refused within a fixed period of time (hours or days). Supervising human rights bodies have criticised such procedures, because they do not allow asylum-seekers the opportunity to adequately substantiate their claims and may place them at hazard of being expelled to a country where they may be at risk.[5]

5 See Human Rights Committee's concluding observations and recommendations regarding the Netherlands of 28 August 2009, CCPR/C/NLD/CO/4. See also the Committee against Torture's concluding observations and recommendations regarding

Article 27 (6) of the proposal allows Member States to accelerate an examination procedure only in a limited number of cases, in particular manifestly unfounded or fraudulent cases and asylum seekers originating from countries designated as safe countries of origin. Member States must lay down reasonable time limits for the adoption of a decision in an accelerated procedure. Furthermore the applications of victims of serious forms of psychological, physical or sexual violence and unaccompanied minors may not be examined in an accelerated procedure. These are important improvements in comparison to Article 23 of Directive 2005/85/EC, which allowed for acceleration of the procedure in all asylum cases.
The proposal does however not define what an accelerated procedure exactly is. The question arises whether the proposal allows Member States to introduce a very short standard procedure for all asylum cases, with a possibility of extension in complex cases. The Netherlands is for example planning to introduce a general asylum procedure of eight days. The procedure may be extended to six months in complex cases. Furthermore the requirement of 'reasonable' time-limits leaves Member States wide discretion to organise their accelerated procedure.
The Meijers Committee recommends to include a definition of 'accelerated procedures' in the meaning of Article 27 (6) of the proposal in the directive. Furthermore it may be feasible to include, next to the maximum time-limit of six months a minimum time-limit for the asylum procedure or specific phases of the asylum procedure in the directive.

Articles 32, 33, 34 and 38 The Safe Country Concepts
The Meijers Committee welcomes the amendments which incorporate both forms of international protection provided for in the Qualification Directive in the safe third country notion. This also implies that a person may not be expelled to a third country where he risks to become a victim of serious harm, as defined in the Qualification Directive. The fact that Article 18 of the Charter on the right to asylum is essentially incorporated into the requirements of a safe third country according to Article 32 is welcomed too. The amendments clarify that national rules need to assure that the applicant may challenge the safety of the country and the reasonableness for requesting national protection in that safe third country.
The Meijers Committee appreciates in particular the deletion in Article 33 of the stand still clause which allowed Member States to apply the notion of safe countries of origin to part of a territory. We consider the fact that it is explicitly stated that an applicant may challenge the presumption of safety of a safe country of origin in relation with both the refugee definition and the grounds of subsidiary protection as an important improvement too.
Nevertheless, the new Article 38 (the European safe third countries concept) meets severe criticism. Due to the stand-still clause the present provision (Article 36) applies only to Germany and lost its meaning since the neighbouring States became Member States of the EU. The deletion of the stand-still clause in the proposed Article 38 does revive the European safe third countries concept. Member States on the eastern border of the EU may apply this concept to applicants for international protection from Ukraine, Moldova, Belarus and the Russian Federation with as a consequence "no, or no full examination of the asylum application". In this respect the European safe third countries concept is at odds with the safe third countries concept of Article 32 according to which national rules in line with article 18 of the Charter need to assure that the applicant may challenge the safety of the country and the reasonableness for requesting national protection in that safe third country. The Meijers Committee strongly recommends to bring Article 38 in line with Article 32 or to delete – as originally foreseen – the concept of European safe third countries altogether.

Article 35 Subsequent asylum applications
Article 35 of the proposal provides for a preliminary examination of subsequent asylum applications, in which it is assessed whether after the final asylum decision or the withdrawal of the previous asylum application 'new elements or findings' relating to the examination of a person's protection needs in the meaning of the Qualification Directive have arisen or have been presented by the applicant. According to Article 35 (6) Member States may decide to further examine the application only if the applicant concerned was through no fault of his/her own incapable of asserting these new findings and circumstances in the previous procedure, in particular by exercising his right to an effective remedy pursuant to Article 41 of the proposal. The proposal thus leaves Member States discretion to decide

Latvia of 23 November CAT/C/LVA/CO/2, and France of 3 April 2006, CAT/C/FRA/CO/3.

not to examine a subsequent application further, because, according to the Member State, the new facts and circumstances could and therefore should have been submitted by the applicant during the previous asylum procedure.
The Meijers Committee is concerned that the refusal to examine a subsequent application, in which important new information is submitted, may lead to a violation of the prohibition of refoulement. Furthermore it should be noted that although the proposal does address part of the root causes of subsequent procedures, asylum applicants may still have problems to obtain evidence from their country of origin[6] or to talk about their past experiences of persecution or torture[7]. This is particularly the case when the application is examined in a speedy (accelerated) asylum procedure. The Meijers Committee is concerned that Article 35 (6) of the proposal may be used by Member States to exclude subsequent applications, in which evidence obtained from the country of origin or late statements of victims of serious violence are submitted, from further examination.
The Meijers Committee therefore recommends requiring Member States to assess in each subsequent asylum procedure whether the new facts or circumstances should lead to the conclusion that the person concerned qualifies as a refugee or a person eligible for subsidiary protection or falls within the scope of protection of the prohibition of refoulement. Furthermore it would be useful to define the term 'new facts and circumstances' in the directive.

Utrecht 4 February 2010

6 See ECtHR 19 February 1998, nr. 25894/94 (Bahaddar v. The Netherlands)

7 See for example CAT 22 January 2007, nr. 262/2005 (V.L. v. Switzerland), para 8.8.