THE DIRECTIVE ON MINIMUM STANDARDS ON PROCEDURES IN MEMBER STATES FOR GRANTING AND WITHDRAWING REFUGEE STATUS

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This Council Directive 2005/85/EC of 1st December 2005 is the result of long and difficult negotiations during five years. The Commission presented its first proposal on September 20, 2000. In the Council, many countries found it too detailed and invoked the principle of subsidiarity. In December 2001, the Council asked the Commission to present a new proposal and adopted general orientations on the content of the future Directive. Two weeks later, at the Laeken European Council meeting the Commission accepted to present a revised proposal. It did do in July 2002. The negotiations began in January 2003. The European Council meeting of Sevilla set, as an objective, the adoption of the text before the end of 2003. Another two years were necessary, both for technical and political reasons. As to the former the procedural rules and structures that applied in the then 15 Member States were very different. As to the latter the political support for an approximation of procedures relating to the granting of refugee status was somewhat lacking.

Hence the following features of the Directive:

- A rather long delay for its implementation (December 1st, 2007).
- The agreement reached is indeed a minima one, as shown by
    - the number of optional clauses ("may")
    - the number of derogations and exceptions to the principles proclaimed.
    - the limited content of certain provisions (see, for example, on detention, Art. 18).
    - the absence of provisions on the time-limit to decide on an application.
    - the many references to national legislation.

- The complicated content of the provisions on such notions as those of first country of asylum, safe country of origin and European safe country of origin.

This report is divided into several parts.

I - Scope.

II - Basic principles and guarantees.

III- Safe countries.

IV- Withdrawal of refugee status.

I

SCOPE

The Directive relates to all applications for refugee status. However, when Member States use a procedure in which asylum applications are examined as applications on the basis of the Geneva Convention and as applications for other forms of international protection, e.g. subsidiary protection, the Directive applies.

II

BASIC PRINCIPLES AND GUARANTEES

These principles and guarantees concern the following domains.

1- Access to the procedure.

2- Right to remain in the Member State during the examination of the application.

3- Examination of the application.

4- Applicants' guarantees.

5- Personal interview.

6- Right to legal assistance and representation.

7- Unaccompanied minors.

8- The decision.

9- Appeal.

1- Access to the procedure (Art. 6).

This article contains a provisions on applications made on behalf of dependants and on applications for minors.

2- Right to remain in the Member State during the examination of the application.

This applies only to the procedures at first instance. The following exceptions are mentioned

- when the person is to be extradited.
- when the person is to be surrendered to an international criminal or court.

  One remark is in order here: in cases of extradition toward third countries it will be the duty of the competent authorities to respect Art. 3 ECHR and the relevant provisions of the UN Convention against torture
- when a subsequent application is not examined, in accordance with Art. 32 and 34 (see infra).

3- Examination of the application (Art. 8 and 23).

It must be individual, objective and impartial, after obtaining precise and up to date information on the general situation prevailing in the country of origin of the applicant and making it available to the personnel in charge of the examination.

The notions of objectivity and of impartiality deserve a brief comment. They represent the common basic obligation of any judge or adjudicator. In refugee law cases, their relevancy is increased by the following fact: in to-day's Europe, the issues of asylum and of immigration are more and more frequently associated not only in legal instruments (e.g. the ECT) but also in public opinion and political debates. Although the two issues cannot be totally separated, one must insist on a necessary distinction between refugee law, based on protection against

persecution, and immigration law, which is about movements of aliens and their legal status inside a given country. In the present context challenges to judicial independence may be a reality (e.g. adverse comments by a minister on a judicial decision). In such situations, independence and impartiality are more essential than ever.

As to the examination of applications, the key notions are those of consistency and of reliability. This topic is discussed in my Report on the Qualifications Directive.

No time-limit is fixed. Art. 23 uses the expression "as soon as possible". Two important exceptions must be mentioned:

a) Priority or accelerated examination may be created in the following cases:

- Two relate to situations in which the application is likely to be well founded, or to applicants with special needs.
- In all the other 15 cases, listed in Art.23-4 (a to o), Member States may decide that the examination procedure will be prioritised or accelerated "in accordance with the basic principles and guarantees mentioned in Chapter II". Among the categories: the applicant is from a safe country of origin or there is a safe third country (Art. 23-4 c); the applicant has failed, without reasonable cause, to make his application earlier, having had an opportunity to do so (id, at i); the applicant entered the territory of the Member State unlawfully or prolonged his stay unlawfully and, without good reason, has either not presented himself to the authorities and/or filed application for asylum as soon as possible, given the circumstances of his entry (id, at l).

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b) Certain categories of applications may be held inadmissible under Art. 25. Seven cases are listed in Art. 25-2.The main ones relate to the existence of a first country of asylum or a safe third country (Art. 25-2 b and c).

4 - Guarantees for applicants (Art. 10).

- To be informed in a language "which they can reasonably be supposed to understand" of the procedure and of their rights and obligations during it.
- To receive the services of an interpreter, paid on public funds for submitting their case (e.g. during the interview).
- To be given notice in reasonable time of the decision.

5 – The personal interview (Art . 12-14).

Such an interview is a key element of the procedure. Hence, in the Directive, the many provisions relating to it.

The principle is that before a decision is taken the applicant shall be given the opportunity of a personal interview (Art.12-2, para 1). A number of exceptions are allowed under Art. 12-2.One of them is when the determining authority thinks the application is unfounded, with reference to situations mentioned in Art. 23-4 a,c,g,h and j.

Conditions of the interview:

The principle is that it takes place without the presence of the family members. Confidentiality must be ensured. An interpreter must be present. The report of the interview must be in writing. The applicant must have access to it. The exact time of this access is not determined. It may take place after the decision.

6 - The right to legal assistance and representation (Art. 15-16).

This right may be restricted by Member States in the situations mentioned on Art. 15-3.

The legal adviser of the applicant must have access to places where he is detained. This right may be limited by domestic authorities (Art. 16-2).

7- Unaccompanied minors (Art. 17)

They must be assisted or represented with respect to the examination of the application and be fully informed on the meaning and possible consequences of the personal interview and how to prepare themselves for it. Member States may use medical examinations to determine the age of unaccompanied minors, with the minor's or his representative's consent. Art. 17-6 replicates Art.3-1 of the 1989 UN Convention on the rights of the child : "The best interests of the child shall be a primary consideration for Member States when implementing this Article".

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8 – The decision (Art. 9)

It must be in writing and, in cases of refusal, contain the reasons in fact and in law, as well as information on how to challenge it.

9 - Appeal (Art. 39).

Applicants have a right to an "effective remedy" all negative decisions before a court or a tribunal. States shall provide for time-limits and shall provide for rules on whether the remedy allows the applicant to remain in the country pending its outcome, and on grounds for challenging a decision declaring an application inadmissible if there is a third safe country. They may set time-limits for courts.

III

SAFE COUNTRIES

This is a new notion in international refugee law. The Directive mentions three categories.

1- First country of asylum.

2- Safe country of origin.

3- European safe country of origin.

1- First country of asylum (Art. 26-27).

This notion applies when the applicant has already be recognised there as a refugee and can still avail himself of its protection of when he otherwise enjoys sufficient protection there, including non refoulement, and if he can be readmitted to that country.

The Member States *may* apply this concept – i.e. declare an application inadmissible under Art. 25 - when the criteria mentioned in Art. 27 are satisfied. They concern the respect of basic human rights, non refoulement and the possibility to request refugee status. Domestic legislation will provide for the remaining, including the connection between the applicant and that country and the methodology to be used.

2 - Safe country of origin (Art. 29- 31).

The criteria are listed in Art. 31 and in Annex II.

Under Art. 31-3 Member States shall lay down in national legislation rules and modalities for the application of the safe country of origin concept. Under Art. 23,3-c-i Member States *may* use a priority procedure or an accelerated one when the application is considered as unfounded because the applicant is from a safe country of origin. One remark may be in order here: where there is no objection in principle to having a priority procedure in

cases of manifestly unfounded applications, one must be extremely cautious in defining the latter category. Besides the temptation to save tome and human resources may lead to hasty and mistaken decisions and must therefore be resisted.

The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a common list of such countries. The Council has not been able, so far, to do that, due to lack of agreement between Member States. The consequence is that each of them has its own list .In France OFPRA, the autonomous Agency in charge of refugee status determination, has listed 17 countries as safe countries of origin:

- 6 European ones: Albania, Bosnia-Herzegovina, Croatia, Georgia, Macedonia and Ukraine ;
- 9 African ones:Bénin, Cap Verde, Ghana, Mali, Madagascar, Mauritius, Niger, Sénégal and Tanzania
- 2 Asian ones: India and Mongolia.

Under Art. 30 Member States may also introduce or retain legislation allowing safe countries of origin or safe third countries *other* than those mentioned in the common list.

3 - <u>European safe country of origin (Art. 36).</u>

Member States may provide that no decision, or no full examination of the application shall take place when a competent authority has established that the applicant has entered illegally into its territory from a safe country which, inter alia, has ratified the ECHR and observes its provisions, including the standards relating to effective remedies and has been designated by the Council as such.

IV

WITHDRAWAL OF REFUGEE STATUS

The substantive law is contained in the Qualification Directive. Art. 38 provides for a number of procedural guarantees. The person concerned must be informed in advance in writing that the competent authority is reconsidering his qualification as a refugee, be given the opportunity to submit, in a personal interview or in a written statement reasons against it. It does without saying that such an information must contain the grounds on which the competent authority envisages to reconsider the granting of refugee status. The decision must be in writing and contain the reasons in law and in fact.

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