



Statewatch Analysis

Extending EU long-term resident status to refugees and persons with subsidiary protection status

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Introduction

The European Parliament (EP) and the Council have recently agreed on a Directive to extend long-term resident status to refugees and persons with subsidiary protection. This Directive is a modest but significant step towards fair treatment of persons needing international protection, and an indication that the Treaty of Lisbon has had a significant impact on the development of EU immigration and asylum law.

Background

The EU's current Directive on long-term residents was originally adopted in 2003. Member States had to apply it by January 2006, although it does not apply to the UK, Ireland and Denmark. The purpose of the Directive is first of all to ensure that legally resident citizens of non-EU countries can obtain a long-term residence status in a Member State after five years' legal residence in that Member State. This status confers a right to equal treatment in that Member State (subject to some exceptions) and a degree of protection against expulsion. Secondly, the Directive allows long-term residents to move to another Member State, subject to some limitations.

The Commission's original proposal for the long-term residents' Directive in 2001 had envisaged that it would apply to recognized refugees. Similarly, the original proposal for the 'qualification Directive' (the Directive which defines the conditions for obtaining recognition of refugee status or 'subsidiary protection' status - ie the status of persons who need to be protected from removal to their state of origin but who do not qualify for refugee status) had suggested that the long-term residents' Directive would apply to people with subsidiary protection status.

Both these suggestions were rejected by the JHA Council (made up of Member States' interior ministers), which at the time had to vote unanimously, after consultation of the European Parliament, to adopt

legislation on immigration or asylum matters (the final qualification Directive - Directive 2004/83 - was adopted in 2004).

In order to include these two groups of third-country nationals within the scope of the long-term residents' Directive, the Commission submitted a proposal to amend the long-term residents' Directive in June 2007. Most of the interior ministers in the JHA Council could agree to this proposal but a small number, and eventually only one Member State, objected. The proposal was therefore shelved for 18 months, from the end of 2008 until mid-2010, when the Belgian Presidency of the EU Council revived the proposal.

The significant development in the meantime was obviously the entry into force of the Treaty of Lisbon on 1 December 2009, which provides that legislation on legal immigration must be adopted by a qualified majority vote in Council and gives joint legislative power to the EP - this is known as the 'ordinary legislative procedure' (formerly co-decision). With national vetoes now abolished, the Council quickly agreed to support the text which had been blocked in 2008, and then had to negotiate a deal with the EP which both institutions could accept.

This is the first time that a Directive on legal immigration has been agreed by QMV and under the ordinary legislative procedure, although in October 2010 a Regulation on social security for third-country nationals was adopted by means of this procedure. Discussions on the latter proposal had also been deadlocked prior to the entry into force of the Treaty of Lisbon. Discussions on a proposed Directive which would establish a 'single permit' for all third-country national workers are ongoing between the EP and the Council, and discussions have recently begun on proposals from July 2010 for Directives on seasonal workers and intra-corporate transferees.

This legislation has been agreed at 'first reading' in the ordinary legislative procedure, ie following wholly informal contacts between the EP and the Council which in practice were not at all transparent (see the link below to the Statewatch critique of first-reading deals). The EP rescinded the vote on this Directive which it had already held in April 2008 in order to facilitate this. A large majority of EU legislation subject to the ordinary legislative procedure is agreed at first reading, including JHA legislation, although the recent Regulation on social security for third-country nationals was agreed at second reading.

The new Directive is likely to be adopted officially early in 2011, assuming that the Council and the EP back the deal which has been negotiated. Member States will have two years to apply it. The UK, Ireland and Denmark will again not be covered by the new Directive.

Content of the new Directive

The new Directive consists of a series of amendments to the existing long-term residents' Directive. The amendments are marked on the consolidated

text of the long-term residents' Directive, as it will apply after the new Directive is adopted, which is attached to this analysis.

In summary, these amendments do the following:

- a) they (obviously) remove the exclusion of refugees and persons with subsidiary protection from the scope of the existing long-term residents' Directive; these two categories of people now included within the scope of the Directive are defined by reference to the qualification Directive (amendments to Articles 2 and 3(2));
- b) they make clear that the revised long-term residents' Directive is without prejudice to higher standards set in treaties relating to refugees (amendment to Article 3(3));
- c) they set out a special rule for obtaining long-term residence status for these two new categories of people - namely, only *half* of the time spent waiting for a decision on their application for refugee or subsidiary protection status (and then spent waiting to get obtaining a residence permit afterward) will count toward the five year period of legal residence necessary to obtain long-term resident status, unless they have waited more than 18 months for a decision and residence permit, in which case the whole time period will count (new Article 4(1a));
- d) they set out special rules relating to indicating the status of the person concerned in their residence permit (amendments to Article 8), including cases where the refugee or subsidiary protection status has been transferred to a second Member State where the long-term resident has moved to (new Article 19a);
- e) they *require* Member States to refuse long-term residence status in the event that refugee or subsidiary protection status had to be revoked under certain circumstances set out in the qualification Directive (new Article 4(1b)); they also *permit* (but do not require) Member States to withdraw long-term residence status in the same circumstances (amendment to Article 9);
- f) they make clear that some of the permitted restrictions on equal treatment of long-term residents do not apply to refugees and persons with subsidiary protection, to the extent that the qualification Directive sets higher standards on these points (amendment to Article 11); and
- g) they provide that if the criteria to expel a long-term resident are met, and the person concerned still has refugee or subsidiary protection status in another Member State, that person should normally be expelled to the Member State which granted that status, except where the expelling Member State can validly apply the provisions in the qualification Directive that permit the 'refoulement' of a refugee to an unsafe country due to the danger to the community or security which that refugee presents - but this possibility is limited by the other international obligations of Member States (ie there is an absolute ban in the ECHR on sending people to a State where there is a real risk of torture or inhuman or degrading treatment) (amendment to Article 12); this also applies where the long-term

resident has moved to another Member State (amendment to Article 21).

It should be noted that it is open to Member States, if they wish, to count *more* than half of the application period toward the qualification for long-term residence status (the new Directive says that 'at least' half this time should be counted). Also, it should be noted that there are some cases in which the qualification Directive requires or permits Member States to revoke refugee or subsidiary protection status, but which are *not* referred to in the amendments to the long-term residence Directive (in particular, the cessation of protection status due to a change in circumstances in the country of origin). It must follow that these are *not* grounds for withdrawing or refusing long-term residence status.

Also, it should be noted that the remaining conditions and procedures in the long-term residence Directive for obtaining long-term residence status, and for moving to other Member States, will apply fully to refugees and persons with subsidiary protection, because the other provisions of the Directive have not been amended. The Commission is due to present a report on the existing long-term residents' Directive soon (January 2011 – see Article 24 of the existing Directive).

Although the new Directive refers to the transfer of refugee or subsidiary protection status between Member States, it does *not* provide for this to take place as such (as distinct from the transfer of *long-term residence status*, which is regulated by the long-term residents' Directive). Any such transfer of protection status takes place on the basis of national law and/or a Council of Europe Convention on this issue, which 11 Member States have ratified (although two of those States, the UK and Denmark, will not be applying the new Directive; also the Convention only applies to the transfer of refugee status, not subsidiary protection status). So it is possible that a refugee or person with subsidiary protection who moves to another Member State as a will lose his or her protection status that was granted in a first Member State, without obtaining protection status in the second Member State. (The EU's qualification Directive is silent on these issues). There is obviously a need for the EU to examine whether EU legislation is needed to ensure that the protection status is transferred – otherwise the Treaty provision providing for '*a uniform status of asylum...valid throughout the Union*' (Article 78 TFEU - emphasis added) is not being respected (see also the Commission study on this issue, linked to this analysis).

Given the extent of cross-references in this new Directive to the qualification Directive, it should finally be noted that the Commission proposed the recast of the latter Directive in 2009. Discussions on this proposal are at an advanced stage in the Council, and are likely to start soon between the Council and the EP. The final revised qualification Directive, if agreed, could amend some relevant provisions such as the standards on benefits, especially for persons with subsidiary protection.

Negotiations within and between the Council and the EP

As compared to the Commission's original proposal, the agreed text of the new Directive is different as follows:

- a) it still excludes from the scope of the long-term residents' Directive people who have a form of protection under national law (ie other than international protection as defined by the qualification Directive);
- b) it provides expressly that the Directive is without prejudice to refugee-related treaties;
- c) it provides for a less favourable rule regarding obtaining long-term resident status - the Commission had proposed that *all* the time waiting for a decision on refugee or subsidiary protection status and a subsequent residence permit should count toward qualification as a long-term resident;
- d) it provides for an obligation to refuse long-term residence status where certain grounds for revocation of refugee or subsidiary protection status exist, and an option to withdraw long-term residence status in the same circumstances - the Commission had not proposed any rule on this issue;
- e) it contains more obligatory rules on consultation between Member States when a long-term residence permit is issued, as well as rules on this point as regards transferred refugee status; and
- f) it includes a new provision addressing the documentation of persons with refugee or subsidiary protection status whose status has been transferred.

Comparing the agreed text of the Directive to the text mostly agreed by the Council in 2008, and then accepted as the Council's initial negotiating position after the entry into force of the Treaty of Lisbon, the Council's preference differed as follows:

- a) the Council text provided for 'at least' half of the waiting period between the application for status and the issue of a residence permit to count toward obtaining long-term residence status - with no qualification that all the time should count if the waiting period was longer than 18 months; and
- b) the Council text also provided that *all* of the waiting period should be ignored if international protection was granted only because of events which took place after the application was lodged.

It follows that the impact of EP's new powers as co-legislator has been limited in this case to the single issue of the calculation of the waiting period for qualification as a long-term resident, ie whether to disregard up to half or even (in some cases) all of the time spent waiting for a decision on an application for international protection and then spent waiting to receive a residence permit after a positive decision. The EP and the Council reached a compromise on this issue.

However, the EP gave up pressing for some of the amendments which it sought in its original vote in 2008 - the softening (for refugees and persons with subsidiary protection) of the conditions concerning integration and the income requirements which Member States can apply before obtaining long-term resident status.

The impact in practice of the concession on the waiting period which the EP obtained from the Council can only be assessed in part, due to the limitations on the information available on how long it takes to process applications for refugee or subsidiary protection status and then issue residence permits. According to the Commission's impact assessment concerning the recast of the asylum procedures directive (see Annex 23), in one Member State (Belgium) the waiting period for a final decision on an application was 101 weeks (ie about 2 years), while in another Member State (Germany) about 10% of applications took over 18 months to decide. But the other Member States all reported waiting periods of much less than 18 months. However, data was only reported for half of the Member States, and this information only concerns applications for refugee status, not subsidiary protection. Moreover, it is not known whether the applicants who had such long waits for a final decision predominantly received positive or negative final decisions as compared to other applicants. Finally, there is no data available on the question of how much extra time it takes to receive a residence permit after a final positive decision (the qualification Directive states that a permit must be issued 'as soon as possible').

Although the information available is limited, it indicates that the concession which the EP received will assist a relatively small number of persons who receive international protection, while the majority of beneficiaries of international protection will face a wait of up to an extra 9 months before they can obtain long-term residence status, as a result of the Council's change to the Commission's proposal on this point. It is possible, on the other hand, that not all Member States will take advantage of the possibility to insist on a longer wait for long-term residence status.

Conclusion

The background to the adoption of this Directive shows that without the abolition by the Treaty of Lisbon of the unanimity requirement relating to immigration legislation, this Directive might never have been adopted at all.

Furthermore, without the extension (in the same Treaty) of joint legislative powers over immigration legislation to the EP, a proportion of people obtaining refugee or subsidiary protection status would have had a longer wait before obtaining that status. All the same, considering the information available on the practical relevance of this concession, its impact will likely be limited.

Since the exclusion of refugees and persons with subsidiary protection status from long-term residence status could never be plausibly justified, this new Directive can only be welcomed. It is unfortunate that it took so long to

achieve, and that a greater relaxation of the rules applicable to qualification for long-term resident status was not agreed for refugees and persons with subsidiary protection.

Documents

Agreed text of new Directive:

<http://www.statewatch.org/news/2010/dec/eu-council-international-protection-16097-10.pdf>

Original Commission proposal for new Directive

<http://www.statewatch.org/news/2010/dec/eu-com-2007-298-ltr-extension.pdf>

Council negotiating position (Council doc. 16476/08)

<http://www.statewatch.org/news/2010/dec/eu-council-ltr-16476-08.pdf>

EP - draft Moraes report, 30 Aug. 2010:

<http://www.statewatch.org/news/2010/dec/ep-ltr-moraes-aug-2010.pdf>

EP - adopted Roure report, April 2008:

<http://www.statewatch.org/news/2010/dec/ep-ltr-roure-april-2008.pdf>

Directive 2003/109 – existing long-term residents' Directive:

<http://www.statewatch.org/news/2010/dec/eu-council-ltr-directive-consolidated.pdf>

Consolidated text - long-term residents' Directive as amended by new Directive:

<http://www.statewatch.org/news/2010/dec/eu-council-ltr-directive-consolidated.pdf>

Qualification Directive - Directive 2004/83:

<http://www.statewatch.org/news/2010/dec/eu-directive-2004-83-refugees.pdf>

Proposed recast of qualification Directive (COM (2009) 551):

<http://www.statewatch.org/news/2010/dec/eu-com-551-2009-qualification.pdf>

Impact assessment on recast of procedures Directive (SEC (2009) 1376), part II:

<http://www.statewatch.org/news/2010/dec/eu-com-ia-sec-1376-2009-asylum-procedures.pdf>

Statewatch critique of first-reading deals:

<http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf>

Council of Europe Convention on transfer of responsibility for refugee status:
<http://conventions.coe.int/Treaty/en/Treaties/Html/107.htm>

Commission study of 2004 on the transfer of protection status:
http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/transfer_protection_status_rev_160904.pdf

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