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NOTE

from : Presidency

to : Permanent Representatives Committee / Council

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No. Cion prop. : 10279/02 ASILE 33 + REV 1 (de, en, fr) - COM(2002) 326 final/2

Subject : Amended proposal for a Council Directive on minimum standards on procedures
in Member States for granting and withdrawing refugee status
- Orientation debate on appeals (Chapter V - Articles 38, 39 and 40)

I. INTRODUCTION

1. The European Council on 12 December 2003 welcomed the significant progress achieved in the negotiations for the adoption of the draft Directive. While taking note of the persisting political obstacles that have been delaying the conclusion of these negotiations, it reaffirmed the importance of developing a common European policy on asylum and invited the Justice and Home Affairs Council to complete its work as soon as possible to ensure that the first phase of the establishment of a European asylum system is fully implemented within the deadline set out in Article 63 TEC.

2. It is a priority of the Presidency to seek to resolve outstanding issues on the draft Directive by 1 May 2004 in keeping with the requirements of the Treaty.
3. At its meeting on 4 February 2004, at the request of the Chair, the Strategic Committee on Immigration, Frontiers and Asylum considered a number of strategic questions relating to one of the key issues which remain to be finalised in the draft Directive, namely Appeals - Chapter V- with a view to providing guidance to the Presidency in bringing forward compromise proposals.

II SCIFA DISCUSSIONS

4. SCIFA considered the following issues:
 - Whether the Directive should provide for derogations from the right to an effective remedy for certain types of decisions (inadmissible decisions on the basis of Dublin II and the safe third country concept and decisions not to examine subsequent applications further) under the Directive;
 - Whether certain types of decisions (Dublin II and Article 28A decisions and decisions not to examine subsequent applications further) should be exempted from the requirement under the Directive that an applicant have the right to request a court or tribunal to decide that he/she be allowed to remain pending the outcome of an appeal or review;
 - Whether the Directive should prescribe the circumstances in which Member States may remove an applicant even though a court or tribunal has not taken a decision on the request.
5. In so far as *Dublin II* cases are concerned, the Chair concluded that there was substantial support for the suggestion that the Directive should follow the approach adopted in Article 19(2) of the Dublin II Regulation itself. That Article leaves the issue of whether a right of appeal or review should attach to a decision to transfer an applicant from one Member State to another to the discretion of individual Member States. Such an approach would ensure that no further issues concerning Dublin II cases (e.g. the question of exempting Dublin II decisions from the requirement under the Directive that an applicant have the right to request a court or tribunal to decide whether he/she can remain) will arise in the Appeals Chapter.

III ISSUES FOR COUNCIL

6. COREPER is invited to submit the following issues, which remain to be resolved, to Council:
- A. Whether the Directive should provide for derogations from the right to an effective remedy for inadmissible decisions on the basis of the safe third country concept (Articles 27 and 28) and decisions not to examine subsequent applications further (Articles 33 and 34) under the Directive;
 - B. Whether Article 28A and subsequent application cases should be exempted from the requirement that an applicant have the right to request a court or tribunal to decide that he/she be allowed to remain pending the outcome of an appeal or review;
 - C. Whether the Directive should prescribe the circumstances in which a Member State may remove an applicant even though a court or tribunal has not taken a decision on the request.

Issue A

Whether the Directive should provide for derogations from the right to an effective remedy for inadmissible decisions on the basis of the safe third country concept (Articles 27 and 28) and decisions not to examine subsequent applications further (Articles 33 and 34) under the Directive.

7. Article 38(1) lists “*a decision taken on their application for asylum made in the territory of the Member State, including at its border or in its transit zones..*” (Article 38(1)(a)) as one of the decisions under the Directive against which Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal. This is understood to include inadmissible decisions in accordance with Article 25. Under Article 25, Member States are *obliged* to consider an application as inadmissible where the Dublin II Regulation applies. In 6 other cases, including safe third country cases dealt with in accordance with Articles 27 and 28, Member States *may* consider an application inadmissible.
8. Article 38(1) lists “*a decision not to further examine the subsequent application on the basis of Articles 33 and 34*” (Article 38(1)(d)) as one of the decisions under the Directive against which Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal.

Outcome of SCIFA discussions

9. The Chair concluded that a majority considered that the Directive should *not* provide for derogations from the principle of the right to an effective remedy for inadmissible decisions on the basis of the safe third country concept and decisions not to examine subsequent applications further on the basis of Articles 33 and 34 of the draft Directive.

The Presidency invites the Council to confirm that:

There should be no derogations from the right to an effective remedy for inadmissible decisions on the basis of the safe third country concept and a decision not to examine a subsequent application further.

Issue B

Whether Article 28A and subsequent application cases should be exempted from the requirement that an applicant has the right to request a court or tribunal to decide that he/she be allowed to remain pending the outcome of an appeal or review.

11. Article 28A allows Member States to derogate from the basic principles and guarantees in Chapter II of the draft Directive in cases where an applicant has entered or is seeking to enter illegally from a third country meeting strict criteria.
12. Some Member States consider that there are similarities between Dublin II cases and Article 28A cases and that the issue of whether a right of request to a court or tribunal should attach to the latter type of cases should be left to Member States as it is in the Dublin II Regulation.
13. It should be noted however, that unlike the Dublin II Regulation, Article 28A does not require prior acceptability from the third country, does not incorporate readmission obligations, does not provide a dispute settlement mechanism and does not impose any obligation on the third country to examine the application. In summary, while Dublin II is an international agreement laying down rules on responsibility sharing, Article 28A as it appears in the draft Directive is a unilateral mechanism.

14. In relation to subsequent application cases, one Member State considers that the practical consequence of granting an applicant the right of request in such circumstances is to give the applicant the means to prolong his/her stay in the Member State concerned *ad infinitum* i.e. by repeatedly submitting the same asylum application.
15. A potential implication of not requiring Member States to provide a right of request in these cases could be to undermine the effectiveness of the right to an effective remedy provided in Article 38(1).

Outcome of SCIFA discussions

16. The Chair concluded that a clear majority of Member States consider that Article 28A cases and decisions not to examine subsequent applications further should *not* be exempted from the requirement that an applicant must have the right to request a court or tribunal to decide that he/she be allowed to remain pending the outcome of an appeal or review.

The Presidency invites Council to confirm that the Directive should:

Provide no exemptions to the right of an applicant to request a court or tribunal to decide that he or she be allowed to remain in the territory of the Member State concerned pending the outcome of an appeal or review.

Issue C

Whether the Directive should prescribe the circumstances in which a Member State may remove an applicant even though a court or tribunal has not taken a decision on the request.

17. Some Member States are of the view that the Directive should explicitly state the circumstances in which a Member State may remove an applicant before a court or tribunal has made a decision on any such request.

18. The Presidency recalls in this regard that former Article 39(5) found in 12734/03 ASILE 51 contained the principle of non-removal pending a decision from a court or tribunal on a request together with a list of derogations. This was deleted at working group level because no consensus could be reached on the contents of the list and furthermore because expulsion issues were considered to be outside the scope of the Directive.

Outcome of SCIFA

19. The Chair concluded that, following previous discussions on this matter at working group level, and the suggestion of the Council Legal Service offered at the meeting of SCIFA, the Directive should remain silent on this issue thereby leaving the matter to the discretion of individual Member States.

The Presidency invites the Council to confirm that the Directive should:

Remain silent on the issue of the circumstances in which a Member State may remove the applicant before a court or tribunal has made a decision on any such request.