

**Irish Presidency of the European Union  
Informal meeting of the Justice and Home Affairs Ministers  
Dublin, Ireland – 22/23 January 2004**

**Orientation discussion on the amended proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status**

**Application of safe third country concept and designation of neighbouring safe third countries**

**Introduction**

The Irish Presidency refers to the ongoing discussions at Council on an amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. The present text of the Directive is to be found in ASILE 66 (15198/03) of 4 December 2003 with text proposals from a number of Member States contained in document ASILE 66 ADD 1 also of 4 December 2003.

This Directive when adopted will form a key part of a common EU Asylum System as envisaged by the 1999 Tampere European Council and the Amsterdam Treaty. At its meeting on 27/28 November 2003, the Justice and Home Affairs Council took note of the state of play on the draft Directive and instructed the Permanent Representatives Committee to further continue work on the Directive with a view to reaching an agreement under the Irish Presidency.

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 in Tampere.

It is a priority of the Irish Presidency to seek to resolve outstanding issues on the draft Directive by 1 May 2004 in keeping with the requirements of Tampere and the Amsterdam Treaty.

Intensive discussions on the draft Directive took place under the Italian Presidency within the formal structures of the Council but a number of key issues with political implications remain to be finalised, namely:

- a) scope of the Directive - whether it should also apply to subsidiary protection;
- b) legal assistance for applicants - the extent to which Member States should be obliged to provide legal assistance;
- c) application of the safe country of origin principle, in particular the creation of a common EU list of safe countries of origin and the criteria for designation of countries as safe;
- d) appeals;
- e) application of the safe third country concept.

Having regard to the political and legal priorities identified earlier, it is the view of the Presidency that a pragmatic approach by all Member States is required to ensure that work is completed as soon as possible as requested by the European Council. In this context, the Presidency intends to progress discussion on these key issues by means of informal meetings as appropriate at expert level with a view to bringing compromise proposals to SCIFA and COREPER as soon as possible.

On the basis of this approach, the Presidency has identified important issues in relation to the application of the safe third country concept which, at this time, it believes would benefit from an orientation debate of Ministers. This in turn will assist the Presidency in bringing forward compromise proposals within the formal Council framework.

The issues in question relate in particular to:

- I. The application of the safe third country concept (Article 28 of the draft Directive) and
- II. The designation of neighbouring safe third countries (Article 28A of the draft Directive).

### **Orientation debate issues**

#### **I. Application of the safe third country concept - Article 28 of the draft Directive**

Article 28 of the draft Directive allows Member States to apply the safe third country concept to an individual asylum applicant where, *inter alia*, the applicant *has the opportunity* to avail himself/herself of protection in a safe third country. The Article further provides that, where that third country does not readmit the applicant in question, the Member State concerned shall ensure that the application is examined in conformity with the basic principles and guarantees set out in Chapter II of the draft Directive.

A number of key issues with political implications remain to be resolved in relation to Article 28. They include:

- a) whether the application of the safe third country concept to an individual applicant should be dependent on that applicant having a past connection with the third country concerned (i.e. having travelled through or spent time in that country) and

b) whether the applicant should have the possibility to request recognition and be granted protection as a refugee in the safe third country.

The answers to these questions are of political importance since they determine the scope of application of the safe third country concept and could affect a potentially large group of individual applicants. In addition, the position of the EU on this matter may have a bearing on the relations of the EU with third countries and on the international protection regime as such.

The position of the United Nations High Commissioner for Refugees on this matter (which was shared with Ministers in advance of the Justice and Home Affairs Council on 27/28 November 2003)<sup>1</sup> is, *inter alia*, that, "outside the context of multilateral agreements (such as Dublin II)<sup>2</sup> that regulate the allocation of responsibilities for refugee protection between countries with similar asylum systems, a transfer of such responsibility can be envisaged under certain circumstances: where a **meaningful link** or connection exists which would make it reasonable for an applicant to seek asylum in that third State; and where that State is safe, in other words, capable and willing to determine needs for international protection and to provide **effective protection**."

**Having regard to the foregoing, Ministers are invited to address the following questions:**

**1. Other than a requirement for the safe third country to allow the applicant to enter its territory, should the Directive provide that no connection whatsoever between the applicant and the safe third country concerned is required. If Ministers consider that a connection between the applicant and the safe third country is required, should the Directive provide Member States with some options as to what constitutes such a connection?**

<sup>1</sup> By letter dated 20 November 2003, High Commissioner Lubbers outlined UNHCR concerns to the President of the Council

<sup>2</sup> Council Regulation 343/2003 of 18 February 2003 established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. OJ No. L50 of 25 February 2003

**2. Should the Directive provide that for a Member State to be able to apply the safe third country concept, it must be satisfied that the applicant can at least access a procedure in the safe third country which could lead to recognition as a refugee under the Geneva Convention relating to the Status of Refugees and its 1967 Protocol?**

## **II. Neighbouring safe third countries - Article 28A of the draft Directive**

Article 28A of the draft Directive permits a Member State to derogate from the framework of the basic principles and guarantees set out in Chapter II of the Directive when dealing with an applicant who is seeking to enter or has illegally entered into its territory from a safe third country. The effect of this derogation is that the applicant will be refused access to the asylum procedure in the Member State concerned. If the provisions of Article 28A are not implemented by all Member States, it will create secondary movements of applicants in the Union. In the present text of the draft Directive (Asile 66) the provisions of the Article are only applicable where the third country has been designated as safe by “an act of parliament or with the consent of parliament by national legislation” on the basis that it fulfils specified criteria including ratification and observance of the 1951 Geneva Convention relating to the Status of Refugees and its related 1967 Protocol and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).

A number of key issues with political implications remain to be resolved in relation to Article 28A. They include:

- a) whether to define the safe third countries under this Article merely in terms of the ratification and observance of the standards of the ECHR; and
- b) the level of decision making as regards the designation of neighbouring safe third countries - at EU or at Member State level.

The answers to these questions are of political importance since they determine the scope of a provision which serves to deny access to an asylum procedure in a Member State altogether. It also has implications for the extent to which the Directive could prevent secondary movements of applicants among Member States as a result of divergent national approaches. In this context, the relationship of the provision to the Dublin II Regulation has been mentioned.

The inclusion of ratification of the ECHR as a criterion for designation sets a clear geographical limitation on its application. Ratification of the ECHR is limited to members of the Council of Europe. Forty five<sup>3</sup> countries (including the fifteen Member States of the European Union and the ten Accession States) are members of the Council of Europe and 44 have ratified the ECHR. Thus, after enlargement on 1 May 2004, the only countries which could be considered for potential designation for the purposes of this exceptional provision are the other nineteen members of the Council of Europe which have ratified the ECHR<sup>4</sup>. It would not be possible therefore for Member States to apply this exceptional provision to applicants entering the territory of Member States via third countries outside this group of States.

A number of Member States consider that the application of Article 28A should be further limited to third countries which have been designated as safe by a decision of the Council under a mechanism to be provided in the Directive, namely, by the creation of a common EU list. This view is motivated by the concern that this is an exceptional provision, providing for an opportunity to deny all access to an asylum procedure under the draft Directive and that it should therefore only be allowed after the Council has decided that the third countries can be considered as safe third countries for the purposes of this Article.

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<sup>3</sup> As at 22 December 2003

<sup>4</sup> Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Georgia, Iceland, Liechtenstein, Moldova, Norway, Romania, Russia, San Marino, Switzerland, former Yugoslav Republic of Macedonia, Turkey, Ukraine. Serbia-Montenegro has signed but not yet ratified the Convention.

The proposal in Article 28A for the establishment of a common EU list is to be distinguished from the question of the establishment of a minimum common EU list of safe third countries which was considered at the Justice and Home Affairs Council on 2/3 October 2003. A consensus did not emerge at Council in respect of the latter list. The present suggested common EU list would be a much more restricted list than that previously considered by the Council as the eligibility for consideration would be limited to those countries which have, in the first instance, ratified the ECHR and observe its provisions.

**Having regard to the above, Ministers are invited to address the following questions:**

**3. Should the geographical application of Article 28A of the draft Directive be restricted to those countries which have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observe its provisions?**

**4. Should the Directive include a mechanism for the creation of a common EU list of safe third countries with the inclusion of a country on this list being a requirement for the application of Article 28A?**

**9 January 2004**