

COUNCIL DIRECTIVE 2004/81/EC

of 29 April 2004

on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point 3 of Article 63 thereof,

Having regard to the proposal from the Commission, ⁽¹⁾

Having regard to the opinion of the European Parliament, ⁽²⁾

Having regard to the opinion of the European Economic and Social Committee, ⁽³⁾

Having consulted the Committee of the Regions,

Whereas:

- (1) The framing of a common immigration policy, including the definition of the conditions of entry and residence for foreigners and measures to combat illegal immigration, is a constituent element of the European Union's objective of creating an area of freedom, security and justice.
- (2) At its special meeting in Tampere on 15 and 16 October 1999, the European Council expressed its determination to tackle illegal immigration at source, for example by targeting those who engage in trafficking of human beings and the economic exploitation of migrants. It called on the Member States to concentrate their efforts on detecting and dismantling criminal networks while protecting the rights of victims.
- (3) An indication of the growing concern about this phenomenon at international level was the adoption by the United Nations General Assembly of a Convention against Transnational Organised Crime, supplemented by a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and a Protocol Against the Smuggling of Migrants by Land, Sea and Air. These were signed by the Community and the 15 Member States in December 2000.
- (4) This Directive is without prejudice to the protection granted to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.
- (5) This Directive is without prejudice to other provisions on the protection of victims, witnesses or persons who

are particularly vulnerable. Nor does it detract from the prerogatives of the Member States as regards the right of residence granted on humanitarian or other grounds.

- (6) This Directive respects fundamental rights and complies with the principles recognised for example by the Charter of Fundamental Rights of the European Union.
- (7) Member States should give effect to the provision of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.
- (8) At European level, Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence ⁽⁴⁾ and Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings ⁽⁵⁾ were adopted to strengthen the prevention and the fight against the above offences.
- (9) This Directive introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities while including certain conditions to safeguard against abuse.
- (10) To this end, it is necessary to lay down the criteria for issuing a residence permit, the conditions of stay and the grounds for non-renewal and withdrawal. The right to stay under this Directive is subject to conditions and is of provisional nature.
- (11) The third country nationals concerned should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. This should help put them in a position to reach a well-informed decision as to whether or not to cooperate with the competent authorities, which may be the police, prosecution and judicial authorities (in view of the risks this may entail), so that they cooperate freely and hence more effectively.

⁽¹⁾ OJ C 126 E, 28.5.2002, p. 393.

⁽²⁾ Opinion delivered on 5 December 2002 (not yet published in the Official Journal).

⁽³⁾ OJ C 221, 17.9.2002, p. 80.

⁽⁴⁾ OJ L 328, 5.12.2002, p. 17.

⁽⁵⁾ OJ L 203, 1.8.2002, p. 1.

- (12) Given their vulnerability, the third-country nationals concerned should be granted the assistance provided by this Directive. This assistance should allow them to recover and escape the influence of the perpetrators of the offences. The medical treatment to be provided to the third-country nationals covered by this Directive also includes, where appropriate, psychotherapeutical care.
- (13) A decision on the issue of a residence permit for at least six months or its renewal has to be taken by the competent authorities, who should consider if the relevant conditions are fulfilled.
- (14) This Directive should apply without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating the offences concerned.
- (15) Member States should consider authorising the stay on other grounds, according to their national legislation, for third-country nationals who may fall within the scope of this Directive, but who do not, or no longer, fulfil the conditions set by it, for the members of his/her family or for persons treated as members of his/her family.
- (16) To enable the third-country nationals concerned to gain their independence and not return to the criminal network, the holders of the residence permit should be authorised, under the conditions set by this Directive, to have access to the labour market and pursue vocational training and education. In authorising access of the holders of the residence permit to vocational training and education, Member States should consider in particular the likely duration of stay.
- (17) The participation of the third-country nationals concerned to programmes and schemes, already existing or to be introduced, should contribute to their recovery of a normal social life.
- (18) If the third-country nationals concerned submit an application for another kind of residence permit, Member States take a decision on the basis of ordinary national aliens' law. When examining such an application, Member States should consider the fact that the third-country nationals concerned have been granted the residence permit issued under this Directive.
- (19) Member States should provide the Commission, with respect to the implementation of this Directive, with the information which has been identified in the framework of the activities developed with regard to the collection and treatment of statistical data concerning matters falling within the area of Justice and Home Affairs.
- (20) Since the objective of introducing a residence permit for the third-country nationals concerned who cooperate in the fight against trafficking in human beings cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at the Community level, the Community may

adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

- (21) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on the European Union and to the Treaty establishing the European Community and without prejudice to Article 4 of the said Protocol, these Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (22) In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on the European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration.

Article 2

Definitions

For the purposes of this Directive:

- (a) 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;
- (b) 'action to facilitate illegal immigration' covers cases such as those referred to in Articles 1 and 2 of Directive 2002/90/EC;
- (c) 'trafficking in human beings' covers cases such as those referred to in Articles 1, 2 and 3 of Framework Decision 2002/629/JHA;
- (d) 'measure to enforce an expulsion order' means any measure taken by a Member State to enforce the decision of the competent authorities ordering the expulsion of a third-country national;

(e) 'residence permit' means any authorisation issued by a Member State, allowing a third-country national who fulfils the conditions set by this Directive to stay legally on its territory.

Article 6

Reflection period

(f) 'unaccompanied minors' means third-country nationals below the age of eighteen, who arrive on the territory of the Member State unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member State.

Article 3

Scope

1. Member States shall apply this Directive to the third-country nationals who are, or have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member States.

2. Member States may apply this Directive to the third-country nationals who have been the subject of an action to facilitate illegal immigration.

3. This Directive shall apply to the third-country nationals concerned having reached the age of majority set out by the law of the Member State concerned.

By way of derogation, Member States may decide to apply this Directive to minors under the conditions laid down in their national law.

Article 4

More favourable provisions

This Directive shall not prevent Member States from adopting or maintaining more favourable provisions for the persons covered by this Directive.

CHAPTER II

PROCEDURE FOR ISSUING THE RESIDENCE PERMIT

Article 5

Information given to the third-country nationals concerned

When the competent authorities of the Member States take the view that a third-country national may fall into the scope of this Directive, they shall inform the person concerned of the possibilities offered under this Directive.

Member States may decide that such information may also be provided by a non-governmental organisation or an association specifically appointed by the Member State concerned.

1. Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.

The duration and starting point of the period referred to in the first subparagraph shall be determined according to national law.

2. During the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned shall have access to the treatment referred to in Article 7 and it shall not be possible to enforce any expulsion order against them.

3. The reflection period shall not create any entitlement to residence under this Directive.

4. The Member State may at any time terminate the reflection period if the competent authorities have established that the person concerned has actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences referred to in Article 2(b) and (c) or for reasons relating to public policy and to the protection of national security.

Article 7

Treatment granted before the issue of the residence permit

1. Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance.

2. Member States shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive, in accordance with national law.

3. Member States shall provide the third-country nationals concerned, where appropriate, with translation and interpreting services.

4. Member States may provide the third-country nationals concerned with free legal aid, if established and under the conditions set by national law.

*Article 8***Issue and renewal of the residence permit**

1. After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:

- (a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and
- (b) whether he/she has shown a clear intention to cooperate and
- (c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).

2. For the issue of the residence permit and without prejudice to the reasons relating to public policy and to the protection of national security, the fulfilment of the conditions referred to in paragraph 1 shall be required.

3. Without prejudice to the provisions on withdrawal referred to in Article 14, the residence permit shall be valid for at least six months. It shall be renewed if the conditions set out in paragraph 2 of this Article continue to be satisfied.

CHAPTER III

TREATMENT OF HOLDERS OF THE RESIDENCE PERMIT*Article 9***Treatment granted after the issue of the residence permit**

1. Member States shall ensure that holders of a residence permit who do not have sufficient resources are granted at least the same treatment provided for in Article 7.

2. Member States shall provide necessary medical or other assistance to the third-country nationals concerned, who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence and, if Member States have recourse to the option provided for in Article 3(3), minors.

*Article 10***Minors**

If Member States have recourse to the option provided for in Article 3(3), the following provisions shall apply:

- (a) Member States shall take due account of the best interests of the child when applying this Directive. They shall ensure that the procedure is appropriate to the age and maturity

of the child. In particular, if they consider that it is in the best interest of the child, they may extend the reflection period.

- (b) Member States shall ensure that minors have access to the educational system under the same conditions as nationals. Member States may stipulate that such access must be limited to the public education system.
- (c) In the case of third-country nationals who are unaccompanied minors, Member States shall take the necessary steps to establish their identity, nationality and the fact that they are unaccompanied. They shall make every effort to locate their families as quickly as possible and take the necessary steps immediately to ensure legal representation, including representation in criminal proceedings, if necessary, in accordance with national law.

*Article 11***Work, vocational training and education**

1. Member States shall define the rules under which holders of the residence permit shall be authorised to have access to the labour market, to vocational training and education.

Such access shall be limited to the duration of the residence permit.

2. The conditions and the procedures for authorising access to the labour market, to vocational training and education shall be determined, under the national legislation, by the competent authorities.

*Article 12***Programmes or schemes for the third-country nationals concerned**

1. The third-country nationals concerned shall be granted access to existing programmes or schemes, provided by the Member States or by non-governmental organisations or associations which have specific agreements with the Member States, aimed at their recovery of a normal social life, including, where appropriate, courses designed to improve their professional skills, or preparation of their assisted return to their country of origin.

Member States may provide specific programmes or schemes for the third-country nationals concerned.

2. Where a Member State decides to introduce and implement the programmes or schemes referred to in paragraph 1, it may make the issue of the residence permit or its renewal conditional upon the participation in the said programmes or schemes.

CHAPTER IV

NON-RENEWAL AND WITHDRAWAL*Article 13***Non-renewal**

1. The residence permit issued on the basis of this Directive shall not be renewed if the conditions of Article 8(2) cease to be satisfied or if a decision adopted by the competent authorities has terminated the relevant proceedings.

2. When the residence permit issued on the basis of this Directive expires ordinary aliens' law shall apply.

*Article 14***Withdrawal**

The residence permit may be withdrawn at any time if the conditions for the issue are no longer satisfied. In particular, the residence permit may be withdrawn in the following cases:

- (a) if the holder has actively, voluntarily and in his/her own initiative renewed contacts with those suspected of committing the offences referred to in Article 2(b) and (c); or
- (b) if the competent authority believes that the victim's cooperation is fraudulent or that his/her complaint is fraudulent or wrongful; or
- (c) for reasons relating to public policy and to the protection of national security; or
- (d) when the victim ceases to cooperate; or
- (e) when the competent authorities decide to discontinue the proceedings.

CHAPTER V

FINAL PROVISIONS*Article 15***Safeguard clause**

This Directive shall apply without prejudice to specific national rules concerning the protection of victims and witnesses.

*Article 16***Report**

1. No later than 6 August 2008, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and propose any amendments that are necessary. The Member States shall send the Commission any information relevant to the preparation of this report.

2. After presenting the report referred to in paragraph 1, the Commission shall report to the European Parliament and the Council at least every three years on the application of this Directive in the Member States.

*Article 17***Transposal**

The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 6 August 2006. They shall immediately inform the Commission accordingly.

When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

*Article 18***Entry into force**

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

*Article 19***Addressees**

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 29 April 2004.

For the Council

The President

M. McDOWELL