

Standing committee
of experts on
international immigration,
refugee and criminal law

Secretariat
P.O. Box 201, 3500 AE Utrecht/The Netherlands
telephone 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl
http://www.commissie-meijers.nl

To The European Parliament
Att. The members of the Committee on Civil Liberties, Justice and Home Affairs

Reference CM05-05
Regarding Article 230 TEC action directed against the recently adopted Directive on Minimum standards on procedures in Member States for granting and withdrawing refugee status

Date 9 December 2005

Dear Sir/Madam,

The Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') kindly requests your attention as regards a possible action by the European Parliament under Article 230 TEC against the recently adopted Directive on Minimum standards on procedures in Member States for granting and withdrawing refugee status (the 'Procedures Directive' or 'PD').

The Standing Committee notes that the United Nations High Commissioner for Refugees (*UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* of 10 February 2005, available at www.unhcr.ch) as well as a number of non-governmental organizations (e.g. ECRE in *CO1/03/2005/ext/CN* of March 2005, available at www.ecre.org) have severely criticised a number of provisions of the Directive, and expressed doubts as to whether its provisions ensure that asylum procedures in the European Union are in conformity with the Refugee Convention and the European Convention on Human Rights. The Standing Committee itself expressed such concerns in a previous letter to the European Council (CM0407 of 18 March 2004, attached). According to the first sentence of Article 63(1) TEC, the Directive must be "*in accordance with the 1951 Geneva Convention on the status of refugees [...] and relevant treaties*". Doubts as to the compatibility of the Directive with the Refugee Convention and the European Convention hence amount to doubts as to the legality of the instrument. The Standing Committee observes that the Directive therefore raises questions of law which in the final instance can only be decided by the European Court of Justice. Under Article 230 TEC, the European Parliament is competent to bring those questions before the Court.

The Standing Committee notes furthermore that the Council did not accept any of the amendments proposed by the EP in its Opinion of 27 September 2005. The JHA Counsellors examined the opinion of 13 October 2005 and, apparently decided that no changes in the modified proposal for the Directive, as agreed by the Council almost eighteen months ago in April 2004, were necessary (doc. 14579/05).

Below, we first discuss the main legal questions as to the compatibility of the Directive with the above-mentioned treaties. We then offer some observations as to the advisability of an application under Article 230 TEC by the European Parliament.

• Standing committee of experts on international immigration, refugee and criminal law

• Comité permanent d'experts en droit international de l'immigration, des réfugiés et du droit pénal

• Ständiger Ausschuss von Experten im internationalen Ausländer-, Flüchtlings- und Strafrecht

Main questions

(1) The Directive is based on Article 63(1)(d) TEC, which renders the Council competent to adopt “*minimum standards*”. It follows from the case-law of the European Court of Justice on similar provisions concerning competence – such as Article 137(2) TEC, which refers to “*minimum requirements*” – that such standards leave the member states the competence to adopt or maintain domestic law, subject to certain requirements. Domestic rules which deviate from a Community measure are permitted, provided they are more favourable for the beneficiaries of the measure, do not endanger the unity of Community action, and comply with primary Community law (IP v Borsana Srl, Case C-2/97, ECR I-5755). The Standing Committee observes that Advocate-General Kokott proposed a similar reading of the second last clause of Article 63 TEC in her Opinion in the Parliament’s challenge to the Family Reunification Directive (Parliament v Council, Case C-540/03, para. 42).

Article 4 of the Directive states that “*Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive*”. The latter half of this provision can be read as a prohibition on member states adopting or maintaining measures which are more favourable for applicants for asylum, but incompatible with Directive provisions. The Standing Committee questions whether “*minimum standards*” as meant by Article 63(1)(d) TEC can prohibit domestic measures in this way. If domestic measures deviate from the Directive in order to implement international law, they are more favourable for applicants, and do not endanger the unity of Community action in so far as it is aimed at ensuring accordance with international law.

This issue is relevant in particular to the safe third country of origin arrangement laid down in Articles 30 and 30B PD. According to Article 30(1) PD, the Council “*shall*” adopt a list of safe countries of origin. According to Article 30B(2) PD, “*Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 30.*” The Standing Committee observes that, pursuant to Article 30B(1) PD, the member states must allow every applicant who comes from a safe country of origin the opportunity to rebut the presumption of safety. Further, member states can, pursuant to Article 30(5) PD, request the removal of a country from the Council’s list and suspend application pending a decision on removal. Nevertheless, these provisions impose an obligation to turn down certain applications for asylum. The Standing Committee doubts that this obligation is a “*minimum standard*” in the sense of that term in Article 63(1)(d) TEC. If indeed this obligation is not a minimum standard, the provision is in excess of the competence bestowed upon the Community organs in Article 63(1)(d) TEC.

(2) As with all measures based on Article 63(1) TEC, the Procedures Directive must respect the Refugee Convention and other relevant treaties.

We recognise that this stipulation is open to various interpretations. One interpretation is that provisions of a Directive which either require or permit a course of conduct which does not respect international law are inconsistent with Article 63 TEC. For example, Article 35A PD allows member states to expel persons who apply for asylum to bordering third countries without any previous examination of the application, if the applicant enters illegally (or tries to do so), and provided the third country fulfils a number of requirements. According to the European Court of Human Rights, however, “*a rigorous scrutiny must necessarily be conducted of an individual’s claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 [ECHR]*” (judgment of 11.7.2000, Jabari, par. 39). The Committee observes that where the Procedures Directive allows member states to expel applicants without any such prior examination, it does not secure compliance with Article 3 ECHR. The question arises whether Article 35A PD is therefore compatible with the requirement set out in the first sentence of Article 63(1). The same argument

could be made with respect to certain other provisions in the Procedures Directive: in particular, Article 5(3) which allows member states not to hear adult applicants on the substance of their claim, and Article 6(2) which infringes the right for the applicant to remain on the territory of a member state until a first decision on their application. (On these issues, see further the attached letter of the Standing Committee to the European Council.)

Alternatively, it could be argued that the first clause of Article 63(1) only prohibits Community standards which require member state conduct at variance with international law. If this is correct, the Directive's provisions cannot be in breach of Article 63 first clause if they set "*minimum standards*", as minimum standards permit member states to adopt or maintain domestic provisions which are more favourable to applicants than those in the Directive. In that view, Article 35A PD would not be in breach of Article 63(1) as the provision only allows member states to expel applicants without previously examining their claim – it does not require member states to do so. This appears to be the position of the Legal Service of the Council as expressed in the letter SJ-623/05/D (2005)44222 of 23 September 2005 concerning some provisions of the directive on procedures. But even if this reading of Article 63 is correct, which the Standing Committee doubts, the conformity of Article 30 and 30B PD with the requirement of respect for international law would still raise questions. For this arrangement could imply discriminatory treatment of applications, as prohibited by Article 3 Refugee Convention, Article 26 CCPR and Article 14 ECHR: nationals from allegedly safe countries of origin face a standard of proof which seems to differ from the standard applicable to nationals of other countries. Moreover, this higher standard of proof could imply a standard beyond the "*well-founded fear*" or "*real risk*" of ill-treatment required by Article 1 Refugee Convention and Article 3 ECHR respectively, and its application may therefore lead to refoulement.

(3) The Standing Committee observes that the lists of safe countries of origin for the purposes of Articles 30 and 30B PD, and of safe third countries for the purposes of Article 35A PD, are to be adopted by the Council upon proposal by the Commission only after the consultation of the European Parliament, rather than by co-decision. Pursuant to Article 67(5) TEC, measures on inter alia procedures for the granting of asylum are to be adopted according to the co-decision procedure of Article 251 TEC "*provided that the Council has previously adopted, in accordance with [Article 67(1)], Community legislation defining the common rules and basic principles governing these issues*". The Standing Committee considers that Articles 30 and 30B PD (taken together with its Annex B, which sets out standards for the designation of safe third countries of origin), as well as Article 35A PD, do indeed state "*common rules and basic principles*". We take the view that denying the European Parliament the power of co-decision on the adoption of those lists is in breach of Article 67(5) TEC.

The relevance of a legality procedure

The Standing Committee recognises that the European Parliament's competence to start an annulment procedure against legislative instruments is a discretionary one, whose exercise involves questions of non-legal nature. We are furthermore aware that annulment actions raise intricate admissibility questions, as is made clear in the Opinion of Advocate-General Kokott in Case 540/03 (see paras. 35-50). We are also aware that questions similar to those raised here are currently before the European Court of Justice in the application by the European Parliament for partial annulment of Directive 2003/96/EC (the Family Reunification Directive; C-540/03). The Standing Committee observes that the Court has held that partial annulment of Community acts is possible (e.g. France v. EP and Council, case C-244/03). A leading handbook on EU procedural law identifies two restrictions in this regard:

"An act cannot be annulled in part if the contested part of the act cannot be severed from its other provisions. Partial annulment is also impossible where it would result in the content of the remaining part ceasing to have its original effect." (Lenaerts and Arts, Procedural Law of the European Union, London 1999).

Nevertheless, the Standing Committee would like to bring to your attention a number of factors which argue in favour of starting an annulment procedure. To begin with, the legal basis of the Procedures Directive, Article 63(1)(d) TEC differs in important respects from Article 63(3)(a), the legal basis of the Family Reunification Directive. In particular, in the latter provisions the terms “*minimum standards*” and “*accordance with the [Refugee Convention] and other relevant treaties*” are absent. Although the Family Reunification Directive may be subject to similar requirements, the exact meaning of those terms raises important legal questions which deserve to be decided upon by the Court. We further point out that the questions raised under (1) and (2) above are also relevant to Directives 2003/9/ EC and 2004/83/ EC (on reception of asylum seekers and on qualification for protection), which define “*minimum standards*” pursuant to Article 63(1)(b) and (c) TEC. Finally, we observe that, pursuant to Article 68 TEC, only courts whose decisions are not open to appeal have the competence to refer preliminary questions to the European Court of Justice. As a consequence, it may take a relatively long time before the issues addressed above are brought before the European Court of Justice by way of reference by a national court.

Yours sincerely,

On behalf of the Standing Committee,



Prof.dr. C.A. Groenendijk
Chairman

Encl.: Letter of the Standing Committee to the European Council concerning the *amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (COM)2002) 326 final (CM0407 of 18 March 2004)

To Att. The Presidency of the Council of the European Union
Mr. Michael McDowell, T. D., Minister for Justice, Equality and Law Reform,
Department of Justice, Equality and Law Reform
72-76 St. Stephen's Green, Dublin 2
Ireland

Reference CM0407
Regarding *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM)2002) 326 final*

Date 18 March 2004

Dear Sir,

The Standing committee of experts on international immigration, refugee and criminal law (hereafter: the Standing Committee) is deeply concerned about the discussions in the EU Council of Ministers on the Directive on asylum procedures (*Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM)2002) 326 final*). We base our concerns on recent Council documents, notably 'Asile 66' (December 4, 2003, Council Document 15198/03) and 'Asile 65' (November 26, 2003, Council Document 15153/1/03), and 'Asile 1', January 29, 2004 (Council document 5697/04).

The Standing Committee fears that the text of the Directive will insufficiently guarantee an efficient and fair examination of each asylum application, or an effective remedy in all cases against a rejection of the asylum claim by the determining state. Thus the standards of the Directive may well fall below international law standards, especially the standards required by the European Court of Human Rights.

Considering the importance of this Directive for the European asylum system, the Standing Committee deems a revision on some essential aspects of the Draft text of the Directive necessary. This revision should prevent potential and already foreseeable conflicts between Community Law and the European Convention on Human Rights, as well as costly and time-consuming legal procedures before national and international fora. Given the current content of the proposed texts it cannot be excluded that similar objections can be raised against the final text of the Directive on asylum procedures as against the Directive on family reunification. We refer to the European Parliament's decision to start a legal proceeding against the Council before the European Court of Justice, because of the incompatibility of parts of this Directive with basic principles of humanitarian and Community law.

The Standing Committee therefore urgently recommends the EU Council to:

- delete provisions which allow states not to hear adult applicants on the substance of their claim. We refer in particular to the provisions on dependent asylum seekers (Art. 5 (3))
- delete provisions which infringe on the right for the applicant to remain on the territory of a member state until a first decision on his application. We refer in particular to Art. 6 (2).
- delete provisions which deny the applicant the possibility to rebut the presumption of safety of a 'safe third country'. We refer to Art. 28 and Art. 28 A;
- delete provisions which infringe on the right for the applicant to remain on the territory pending a judicial appeal procedure, at least until a judicial ruling that the applicant is allowed to remain. We refer to Art. 38 and Art. 39 (2).

In the attached memorandum, we will discuss the proposed provisions in further detail, which in our view fall short of international standards.

Yours sincerely,

Prof. mr. C.A. Groenendijk
Chair Standing Committee

1 Standards for the examination of an asylum request

The obligations of non-refoulement require an efficient individual examination of each asylum request. The European Court of Human Rights (ECtHR) reiterated on several occasions that the guarantees laid down in the European Convention on Human Rights (ECHR), including the obligation not to refoule ex Art. 3 ECHR, aimed at guaranteeing rights that both are effective in practice as well as in law (compare ECtHR, February 5, 2002, *Conka vs. Belgium*). More specifically regarding the asylum procedure, the ECtHR considered in *Jabari vs Turkey*, that a 'meaningful assessment' was necessary, or in other words: 'a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3' (ECtHR 11 July 2000, par. 39-40). The current draft texts seriously fall short of the above mentioned standards which the ECtHR requires.

This is first of all the case for the exception of Art. 28 A of the Draft Directive on 'neighbouring safe third countries', where Member States may provide for procedures which do not imply an examination of the asylum claim (see also our comments under 2. for 'safe third country exceptions').

Secondly, according to Art. 5 (3) of the Draft texts the Member States may allow for legislation under which an asylum seeker is able to lodge an application on behalf of his dependants. Under this specific procedure, the Member States may decide not to further examine the individual asylum requests of these dependants. However, it cannot be excluded that essential facts concerning the asylum request of the dependants will not be sufficiently taken into consideration. The Standing Committee refers in particular to the situation in which a husband, who is considered the main applicant, is not aware of the fact that his wife was a victim of sexual violence.

The text of the draft Directive does require some guarantees in these situations, however these are in our view insufficient. The requirement for example that the dependants have to consent to an application being made on their behalf, and that, failing this consent, they shall have an opportunity to lodge an independent application (Art. 5 (3)), as well as the requirement that the 'Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted (Art. 5 (3) last sentence) is an insufficient guarantee that the determining authority will become familiar with all relevant facts. For various reasons a woman may not be able to tell her personal account in the presence of her husband. It is therefore particularly problematic that the draft text does not provide for an explicit requirement stating that each adult dependant has to be given a personal hearing (compare Art. 10 (1), second sentence: *the Member States may also give the opportunity of a personal interview to each adult among the dependants referred to in Article 5 (3)*).

The Standing Committee recommends that the possibility to lodge an application on behalf of dependants, as proposed in Art. 5 (3) will be deleted.

2 Standards regarding the application of the safe third country exception and the safe country of first asylum exception

As mentioned above under 1), international law requires an individual assessment of asylum applications. However, such an individual assessment would not necessarily have to be conducted under the international obligations of 'non refoulement', if another EU state or non-EU state may be considered a safe third country, respectively a safe country of asylum. These exceptions implicate a shift of the burden of proof, which means that there is a presumption of the safety of the third country, unless there are indications of the contrary.

According to Art. 28 (1) of the draft texts, a third non EU-state may be considered safe when 1) it fulfils the requirements of Annex II, the asylum seeker has had or would have had the opportunity to ask for protection in that country, and he would be re-admitted or admitted to that country.

The proposed text is insufficient in at least two respects:

- a) The Standing Committee notes that the sentence '*... a country may for a particular applicant for asylum, notwithstanding any list, be considered a safe third country, if there are no grounds for considering that the country is not a safe third country in his/her particular circumstances*' as originally proposed by the Commission (COM(2002)326 def., Art. 28 (1) and under (c)), has been deleted in 'Asile 65', and has been added in 'Asile 66'. If this sentence were to be omitted, according to the remaining text the presumption that the safe third country is safe under the requirements as set out in Annex II becomes absolute, and is no longer rebuttable. This is incompatible with the obligations not to refoule. As the ECtHR considered in its judgment T.I. vs UK (7 March 2000) "*the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the [expelling state] to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention*". The ECtHR then examined itself, in lieu of the expelling state, whether the third country was safe for this particular applicant.

The Standing Committee considers it necessary that the sentence '*... a country may for a particular applicant for asylum, notwithstanding any list, be considered a safe third country, if there are no grounds for considering that the country is not a safe third country in his/her particular circumstances*', or an equivalent safeguard, is maintained in the text of the Directive.

- b) According to article 28 (1) first sentence and under (a) of the Draft text an asylum request may be considered inadmissible if the asylum seeker '*has had*' the opportunity to avail himself/herself of the protection of the '*safe third country*'. Thus the draft text allows for a deportation to a third country where the current situation does not guarantee that the applicant, in effect, can avail himself of the protection of that country. This means that the Draft text allows for a deportation prohibited under international law, as this goes directly against the obligations not to refoule. The Standing Committee therefore urgently recommends to delete the words '*has had*' in Article 28 (1).

With regard to Art. 28 A the Standing Committee notes that according to this Article '*Member States may provide for procedures, which do not imply an examination as described in chapter II, in cases where a competent authority has established on the basis of facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country having a common border with a Member State.*' As noted earlier, the European Court of Human Rights ruled that a presumption of safety of a third country should be rebuttable. Omitting any examination of an asylum claim, could well mean that the asylum seeker does not have an effective opportunity to rebut this presumed safety of the third country. The Standing Committee therefore recommends the deletion of this Article.

3 Requirements regarding appeal procedures

In principle an applicant for asylum should not be expelled without having had the opportunity to appeal the rejection of his request before an independent (judicial) instance on the grounds that this rejection and a subsequent expulsion would be incompatible with international law. This follows directly from the obligation of '*non refoulement*', and more specifically from the obligation under Article 13 ECHR, which requires an effective remedy against violations of ECHR obligations. The Draft text fall short of these international standards, as it allows for deportations even before a

judicial instance can examine the claim. This is particularly the case for the 'derogations' of Art. 39 (2), or for derogations from Art. 38, as currently discussed in the Council negotiations.

Derogations from Article 38

Art. 38 prescribes an effective remedy against asylum decisions. The Standing Committee notes that the exclusion from the scope for certain categories, as discussed in Council document Asile 1, Council Document 5697/04, would have considerable consequences. The categories which are under discussion are inadmissible decisions on the basis of the Dublin II Regulation or the safe third Country concept, and decisions not to further examine subsequent applications on the basis of Article 33 and 34 of the Draft Directive. Such an amendment to Article 38 would deny asylum seekers the right to appeal these decisions. The Standing Committee is of the opinion that this explicitly follows from the ECtHR's judgement *T.I. vs. UK* (March 7, 2000) that neither safe third country decisions nor Dublin decisions are excluded from the scope of Art. 13 ECHR. There is also no evidence that such a generic exclusion for the application of 13 ECHR would exist for '*subsequent applications*' as referred to in Article 33 and 34 of the proposal. Irrespective of the substance of Article 33 and 34 the Standing Committee considers it a general principle that the question whether there is a repeat request, should be subject to judicial scrutiny. Clearly the question whether certain facts or circumstances should have been asserted earlier, is open to interpretation and should be subject to judicial review. If there would be no access to a judicial recourse, the competent authorities' decision that no new facts were raised would be immune for any legal challenge. This is contrary to Article 13 ECHR.

With regard to Community law, the Standing Committee notes that according to the case law of the European Court of Justice individuals must be able to invoke the rights which Community law confers to them before a national court (e.g. C-222/84, *Johnston*). Under the harmonisation of asylum legislation currently undertaken, Community law will confer such rights to third country nationals, for example claims to residence permits and guarantees regarding the application of the safe third country. The requirement of judicial control regarding these rights is a general principle of law, which underlies the constitutional traditions common to the Member States (*Johnston*). This principle is laid down in the EU Charter on Fundamental Rights and in the Draft text of the EU Constitution, Article II-47.

Finally the Standing Committee notes that according to Art. 39 of the Dublin II Regulation, inadmissibility decisions based on this Regulation may be subject to an appeal or a review. The proposed derogation to Art. 38 of the Directive on asylum procedures would thus be contrary to the Dublin Regulation. The Standing Committee is of the opinion that this should be avoided.

Article 39

Article 39 (1) of the draft text stipulates that when an applicant lodges an appeal or requests a review according to Article 38, the Member States shall allow the applicant to remain in the territory of the Member State pending the outcome. However, Art. 39 (2) allows for a potentially large number of derogations from this rule '*provided that the applicant still has the right to request a court or tribunal of the member state concerned to decide that he or she be allowed to remain.*' The latter means that in case of a derogation from Art. 39 (1) (a), Art. 39 (1) (b) still applies. This Article stipulates that the Member States shall ensure that a court or tribunal has the competence to rule upon the request of the applicant lodging an appeal or requesting a review whether or not he/she may remain in the member state pending its outcome. The Draft text, however, does not explicitly stipulate that an expulsion may not take place before a decision by a court has been obtained.

If this were to be the reading of Art. 39, this provision is incompatible with the principle of '*non refoulement*' and with Art. 13 ECHR, as interpreted by the ECtHR. The latter provision requires that in case of an '*arguable claim*' that one of the rights laid down in the ECHR is violated or risks being violated, each person has a right to an '*effective remedy*' before a "*national authority*", which is

either a judicial or quasi-judicial instance. A remedy can only then be considered effective, when, among other requirements, the national authority has the competence to suspend the expulsion:

“The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (...). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (...)” (Conka vs. Belgium, par 79).

The possibility of an expulsion pending a request for a decision to obtain suspensive effect is therefore contrary to Art. 13 ECHR.

In light of the above it should be noted that Art. 13 ECHR is not applicable to applicants who do not have *'an arguable claim'*, but the standards which apply in this respect, are considerably more stringent compared to the derogations provided for in Art. 39 (2). According to established case law of the ECtHR, only when a claim is *'manifestly unfounded'*, there is no *'arguable claim'*, i.e. when there is not even a *prima facie* case against the state in question (*ECtHR January 24, 1990 Powell and Rayner par. 33*). Moreover, in cases of an alleged claim of a violation of Art. 3 ECHR, Art. 13 ECHR would apply even to manifestly unfounded claims. This was the case in *T.I. vs UK*, where the claim of a violation of Art. 3 ECHR was considered *'manifestly unfounded'*, but the claim of a violation of 13 ECHR was nevertheless examined.

Where Art. 13 ECHR thus requires a criterion of substance, i.e. there are no grounds to *prima facie* consider that an expulsion will be contrary to Art. 3 ECHR, Art. 39 (2) allows for an expulsion before a judicial or quasi-judicial instance is able to examine the case, irrespective of the question whether the claim is, in effect, manifestly unfounded. The Standing Committee recommends the deletion of Art. 39 (2).