



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 12 April 2012

8591/12

**Interinstitutional File:
2009/0165 (COD)**

LIMITE

**ASILE 61
CODEC 937**

NOTE

from: Presidency
to: Strategic Committee on Immigration, Frontiers and Asylum
on: 16 April 2012

No. prev. doc.: 7967/12 ASILE 52 CODEC 748
No. Cion prop.: 11207/11 ASILE 45 CODEC 980

Subject: Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status

On 13 February and 29 March 2012, SCIFA discussed articles 6, 25 and 31 of the Commission's amended proposal for a Directive on common procedures for granting and withdrawing international protection status (APD). The Presidency considers it useful for SCIFA to discuss articles 41 and 46 further as well with a view to a possible resolution. Article 41 is seen as key in the negotiations of the proposal and article 46, which regulates the right to an effective remedy, has also been much debated.

1. Article 41 – Specific rules following the rejection or inadmissibility of a subsequent application

The article lays down specific rules to be applied during first instance procedures for applicants who, having had one subsequent application finally rejected or considered inadmissible present further subsequent applications. Article 41 stipulates in particular that in those cases, Member States (MS) can remove such applicants from the territory during first instance procedures, provided that the principle of non-refoulement is complied with. Combined with other rules of the proposal (Articles 9 and 40), it means that the right to remain is guaranteed only during first instance procedures of one subsequent application.

Discussions in the AWP have shown that some MS find the text of the provision unclear and that many MS wish that the possibility to deny applicants the right to remain on their territory during first instance procedures shall apply to all subsequent applications. They consider this appropriate since all MS respect the principle of *non-refoulement*.

The Commission mainly argues that the article as it stands provides MS with an efficient tool for dealing with abusive multiple applications. In this respect the text is already more flexible than the similar provisions in the current APD while guaranteeing the existence of minimum safeguards for taking into account genuine *sur place* claims.

The Presidency is well aware that abusive subsequent applications may negatively affect the functioning of the asylum systems in the Member States. At the same time, the Presidency also agrees that genuine *sur place* motives need to be addressed appropriately. The Presidency believes that the text of Article 41 as it stands after the AWP meeting on 21 March 2012 represents a balanced compromise proposal.

Question

The Presidency invites delegations to answer the following question:

- **Do delegations agree with the compromise proposal suggested by the Presidency for Article 41 of the APD?**

2. Article 46 – The right to an effective remedy

The article, which corresponds to Article 39 of the existing APD, stipulates the right for the applicant to an effective remedy before a court or tribunal against first instance decisions. Subject to a number of exceptions, the article determines that the applicant has a general right to remain on the territory of the MS in question during the appeals procedures. In cases where right to remain is not automatically granted, it is stipulated that the applicant may present this issue separately before a court or tribunal for decision. The court or tribunal may also, acting *ex officio*, take up such issues. The right to remain is assured while the court or tribunal decides on the issue.

Discussions in the AWP have led to an increase in the number of exceptions to the general right to remain during appeals procedures. Some MS wish to add further exceptions than those originally suggested by the Commission. In particular the question has been raised as to whether negative first instance decisions made in border procedures in accordance with Article 43 should entail an automatic right to remain during appeals procedures or not.

The Commission sees the automatic right to remain during appeal procedures as a basic guarantee against *refoulement*. In its amended proposal, the Commission enlarged the scope of derogations from the automatic right to remain, in order to ensure efficiency of the procedure and to enhance the fight against abuse while taking international case law into consideration.

The Presidency believes that the wording of Article 46 as it stands after the AWP meeting on 21 March 2012 constitutes a viable compromise proposal. On the subject of including negative decisions made in border procedures in the exceptions to the general right to remain during appeals procedures the Presidency wishes to draw attention to the existing international case law on the subject.

Question

The Presidency invites delegations to answer the following question:

Do delegations agree with the compromise proposal suggested by the Presidency for Article 46 of the APD?

2009/0165 (COD)

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on common procedures for granting and withdrawing international protection status

(Recast)

Articles 41 and 46 of the Asylum Procedures Directive taken from the latest outcome of proceedings following meeting of the Asylum Working Party on 21 March 2012 (doc. 7967/12)

...

Article 41**Specific rules following the rejection or inadmissibility of a subsequent application**

Where after a final decision to consider a subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded, a person makes another application for international protection in the same Member State, Member States need not grant the right to remain in the territory during the first instance procedures, provided the determining authority is satisfied that a return decision will not lead to direct or indirect *refoulement* in violation of international and Union obligations of that Member State.

Member States may also:

(a) provide that the examination procedure be accelerated in accordance with Article 31(6)(f); in such case, Member States may also derogate from the time limits normally applicable in accelerated procedures, in accordance with national legislation and/or,

~~(b) [...] derogate from the time limits normally applicable to admissibility procedures provided for in Articles 33 and 34, in accordance with national legislation.~~

...

Article ~~46~~ ~~39~~

The right to an effective remedy

1. Member States shall ensure that applicants for ~~international protection~~ ~~asylum~~ have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for ~~international protection~~ , including a decision:

↓ new

(i) to consider an application unfounded in relation to refugee status and/or subsidiary protection status,

~~(ii)~~ to consider an application inadmissible pursuant to Article ~~33~~ ~~25~~ (2),

~~(iii)~~ taken at the border or in the transit zones of a Member State as described in Article ~~43(1)~~ ~~35(1)~~ ; ~~[...]~~

~~(iii) not to conduct an examination pursuant to Article 36;~~

~~(iv) not to conduct an examination pursuant to Article 39.~~

(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles ~~27 and 28~~ ~~19 and 20~~;

~~(c) a decision not to further examine the subsequent application pursuant to Articles ~~32 and 34~~;~~

~~(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);~~

(~~ce~~) a decision to withdraw \Rightarrow international protection \Leftarrow ~~refugee~~ status pursuant to Article ~~45~~ ~~38~~.

2. Member States shall ensure that persons recognised by the determining authority as eligible for subsidiary protection have the right to an effective remedy as referred to in paragraph 1 against a decision to consider an application unfounded in relation to refugee status.

\Rightarrow Without prejudice to paragraph 1(c) of this Article, where the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law, that Member State may consider an appeal against the decision referred to in subparagraph 1 of this paragraph inadmissible on the basis of insufficient interest on the part of the applicant in maintaining the proceedings. \ominus

\Rightarrow [...] \ominus

3. Member States shall ensure that the effective remedy referred to in paragraph 1 provides for a full examination of both facts and points of law, including an *ex nunc* examination of the international protection needs pursuant to Directive [...]/.../EU [the Qualification Directive], at least in appeal procedures before a court or tribunal of first instance.

4.2 Member States shall provide for \Rightarrow reasonable \Leftarrow time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.

The time limits shall not render impossible or excessively difficult the access of applicants to an effective remedy pursuant to paragraph 1.

Member States may also provide for an *ex officio* review of decisions taken pursuant to Article 43.

~~3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:~~

~~(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;~~

~~(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and~~

~~(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).~~

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision

☞ (a) ☞ to consider an application unfounded where any of the circumstances listed in Article 31(6) ☞ [...] ☞ apply or ☞ manifestly unfounded in accordance with Article 32(2); ☞

☞ (b) ☞ ☞ [...] ☞ to consider an application inadmissible pursuant to Article 33(2)(a) or (d) ☞ ; ☞

☞ (c) to reject reopening of the applicant's case that has been discontinued according to Article 28; ☞

~~⌚ (d) not to examine or not to examine fully the application pursuant to Article 39, ⌚~~

~~and where, in such cases, the right to remain in the Member State pending the outcome of the remedy is not foreseen under national legislation, a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion.~~

~~This paragraph shall not apply to procedures referred to in Article 43.~~

~~7. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraph 6.~~

~~⌚ [...] ⌚~~

~~9.4. Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.~~

~~5. Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC, the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.~~

~~10.6. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.~~