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NOTE

from : Swedish, Dutch and Finnish delegations

Subject : Subsidiary protection

Delegations will find enclosed a note sent by Minister Klingvall on behalf of the Swedish, Dutch and Finnish delegations to Minister Duquesne and Commissioner Vitorino concerning the above-mentioned subject.

Note on Subsidiary Forms of Protection
by Sweden, the Netherlands and Finland

Introduction

One of the questions to be addressed in combination with the proposal of the Commission for a Council Directive on minimum standards on asylum procedures is whether the instrument should also cover subsidiary protection.

For the purpose of this note subsidiary protection should at least include international obligations which derive from relevant human rights treaty bodies such as the ECHR and CAT. This would not preclude a broader European concept of subsidiary protection being developed in the future.

The Commission has decided not to enlarge the scope of the directive on minimum standards on asylum procedures to subsidiary forms of protection. This decision is consistent with the general approach towards other proposals presented so far by the Commission under article 63 of the Treaty of the European Community (TEC).

We consider that subsidiary forms of protection must be included in the proposals under article 63 TEC for the following reasons.

1. Efficient and swift procedures

All Member States aim for efficient and swift procedures. The inclusion of subsidiary protection into a single procedure is a well tried way of creating efficient and swift procedures that does not undermine the Geneva Convention. A majority of Member States have adopted a single procedure and many of those that are preparing amendments to their asylum legislation are moving this direction.

In a system based on a single procedure an asylum officer deciding merits of an asylum claim, first determines if the asylum seeker falls within the scope of the Geneva Convention. If it does not then consideration is given to other forms of international protection which may be granted. If a single procedure is not followed an asylum seeker may have the consideration of his claim duplicated as the new application has then to be determined in a separate procedure. By having different procedures the total time for trying applications will be much longer. It is clearly in the interest of Member States as it will make procedures and policies more cost effective, simple and clear.

Another reason for the inclusion of subsidiary forms of protection is the humanitarian factor: no one should have to wait longer than necessary for his claim to be determined. If the procedures run for a long time people integrate into the host country, this is particularly so for children. This can cause considerable difficulties in then removing unsuccessful applicants once all procedures have been exhausted. We consider that inclusion of subsidiary protection in the different proposals based on article 63 TEC is a logical consequence of the movement towards a single procedure.

2. Subsidiary protection in numbers

Subsidiary protection has increased in importance over the past few years. Member States currently offer subsidiary protection more frequently than protection under the Geneva Convention. A recent preliminary study undertaken under the authority of the Commission endorses this picture. To be precise: at present only four Member States grant refugee status more frequently than a status based on some form of subsidiary protection.

A recent comparative analysis by the UNHCR of asylum statistics and indicators in 38 mostly industrialised countries points in the same direction. According to the UNHCR there were 32 386 grants of refugee status in 1999 in the European Union compared to 32 445 grants of subsidiary protection. In 2000 there were 35 702 grants of refugee status compared to 45 711 grants of subsidiary protection. If the directives and regulations under article 63 TEC were not to apply to subsidiary protection, the practical value of the future legal instruments would be unnecessarily limited.

3. Common asylum procedure

To include subsidiary protection in the instruments based on article 63 TEC is entirely consistent with the common asylum procedure and a uniform status indicated by the European Council at Tampere. In its Communication of last November the Commission concluded that such common asylum procedure and uniform status should be applied to all international protection needs and not only those covered by the Geneva Convention, a conclusion we endorse. The Commission considered that this option is not only in line with the conclusions of Tampere, but it is also in agreement with the objective of efficiency and balance. From this perspective it would be clearly beneficial to include subsidiary protection already at this stage in the various instruments based on article 63 TEC.

The Commission seeks to justify this on the grounds that not enough is known about the various forms of subsidiary protection in the European Union, and that national policies on subsidiary protection differ widely, which would make it difficult to find a common denominator. These arguments are not conclusive and should at least be open to discussion. Recent years have seen a large number of notes, studies and reports produced on subsidiary protection. These show that an increasing number of Member States have installed forms of protection based on international obligations not prejudiced by the Geneva Convention. They also show that Article 3 ECHR and the jurisprudence of the Court in Strasbourg have an increasing influence on national legislation of the Member States. In this regard it seems logical to add such international obligations to the scope of the proposals based on article 63 TEC.

4. Legal basis

An additional argument used by the Commission to exclude subsidiary protection from the scope of the proposals under article 63.1 TEC is the presumed lack of a legal basis. This argument seems to be open to discussion. In fact, we consider that it is more a question of political will than a legal question. To begin with the opening words of article 63.1 TEC states that the different measures on asylum should not only be in accordance with the Geneva Convention but also with *other relevant treaties*. This implies that it is appropriate for measures under 63.1 TEC to also relate to Member State's obligations to offer other forms of international protection, otherwise these words become superfluous.

ECHR is such a relevant treaty, and in particular Article 3. All Member States have ratified ECHR and it is explicitly mentioned in Article 6. 2. of TEU. There are also other international treaties that are of relevance, in particular CAT, the Geneva Conventions I-IV from 1949 and the two Protocols from 1977. Consequently it is justified to conclude that there is a legal basis in Article 63.1 to include subsidiary protection into the application of the instruments adopted on the basis of the Article.

This position is further strengthened by consideration of Article 63.2 TEC. This explicitly mentions persons who otherwise need international protection. This has already been accepted in the Vienna Action Plan as a suitable legal base for the Directive on Subsidiary protection identified as a measure to be taken by May 2004. Furthermore the conclusions of the Tampere Council confirmed the need for measures on subsidiary protection in short term, thereby implicitly accepting that there was an appropriate legal base. It therefore seems both pragmatic and logical for the measures so far proposed to have a scope which also includes subsidiary protection.

5. Conclusion

In this paper we have attempted to demonstrate that there are many good reasons for including subsidiary protection in the different proposals based on article 63 TEC. We consider that it would be a missed opportunity if instruments such as the directive for reception conditions, the directive concerning minimum standards for asylum procedures and the regulation which will replace the Dublin Convention, would only apply to those who fall under the Geneva Convention. The inclusion of subsidiary protection will in our view lead to more efficient, speedy, cost effective and fair procedures and policies. We suggest, therefore, that the Council will confirm the need to include subsidiary protection in the scope of these instruments.