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NOTE

from : the Presidency
to : Asylum Working Party
on : 7 and 8 October 2003

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No. Cion prop. : 10279/02 ASILE 33 + REV 1 (de, en, fr) - COM(2002) 326 final/2

Subject : Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

I

Delegations will find attached :

- Articles 23 to 29 and 31 to 47 and Annexes I and II as they result from the work of the Asylum Working Party meeting on 16 and 17 September 2003, including some drafting changes suggested by the Presidency (changes to 12281/03 ASILE 48 are in bold);
- Articles 30, 30A and 30B as well as Annex III as they result from the JHA Council meeting on 2 October 2003.

Delegations comments are set out in the footnotes.

II

Amended proposal for a

COUNCIL DIRECTIVE

On minimum standards on procedures in Member States for granting and withdrawing refugee status

CHAPTER III

Procedures at first instance¹

Section I

Article 23

Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

¹ The following Recital will be added to the Preamble :
"It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum is left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of **any** application, taking into account the standards in this Directive."
E : refer to "applications, in particular applications presumed to be inadmissible or unfounded".

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, when no decision can be taken within six months,

- (a) the applicant concerned shall either be informed of the delay or
 - (b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time frame.¹
3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II.
 4. Moreover, Member States may **lay down** that an examination procedure **in accordance with the basic principles and guarantees of Chapter II** be prioritised or accelerated if:²
 - (a) the applicant in submitting his/her application and presenting the fact, has only raised issues that are not relevant or of minimal relevance³ to the examination of whether he/she qualifies as a refugee by virtue of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*]; or

¹ **UK** : it should be clarified that this provision only applies to applications made after the Directive enters into force.

² **D** : scrutiny reservation linked to the final drafting of Article 29(2).
FIN/S : this list is too long and detailed, it would be better to have a general provision.

A : scrutiny reservation.

³ **D** : scrutiny reservation.

- (b) the applicant clearly does not qualify as a refugee¹ under Council Directive .../... *[Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection]*; or
- (c) the application for asylum is considered to be unfounded because the applicant is from a safe country of origin within the meaning of Articles 30 and 31 of this Directive, or
- (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision or
- (e) the applicant has filed another application for asylum stating other personal data; or
- (f) the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, or, it is likely that, in bad faith, **he/she** has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or
- (g) the applicant has made inconsistent, contradictory, unlikely or insufficient representations in relation to his/her having being the object of persecution under Council Directive .../... *[Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as a persons who otherwise need international protection]*; or
- (h) the applicant has submitted a subsequent application raising no relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or
- (i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or

¹ **D** : add "or for status to a refugee in a Member State".

- (j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or
- (k) the applicant failed to comply with obligations referred to in Articles 7(1)(2) of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*], in Article 20(1) of this Directive, or has severely failed to comply with his/her obligation under Article 9A(2)(a) and (b) of this Directive, unless he/she is not responsible for the violation of the obligations; or
- (l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible given the circumstances of his/her entry; or
- (m) the applicant is a danger to the security of the Member State or constitutes a danger to the community of that Member State, or¹ has been convicted by a final judgement of a particularly serious crime or the applicant has enforceable been expelled for serious reasons of public security and public order under national law; or
- (n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or
- (o) (deleted)²

¹ **D** : reservation. Delete "or", read instead "having been convicted".

² **UK** : reservation on the deletion of this sub-paragraph which read :
"the applicant, without good reason, fails either to go a reception centre or to appear before or to report to the competent authorities at a specified time."

- (p) the application was made by an unmarried minor pursuant to Article 5(4)(c) after the application of the parents or parent which takes care of the child has been rejected by a final decision.**

Article 23 A
Specific procedures

Member States may moreover provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:

- (a) a preliminary examination for the purpose of processing cases considered within the framework of the provisions set out in Section IV;
- (b) procedures for the purpose of processing cases considered within the framework set out in Section V.¹

Article 24
Time limits for an accelerated procedure

(deleted)

¹ **F** : add the following sub-paragraph :
"(c) procedures for the purpose of processing cases, within the framework of the provisions of Section III."

Section II

Article 25

Cases of inadmissible applications

1. Where an application is considered inadmissible under this Article, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*].
2. A Member State shall consider an application for asylum as inadmissible [...]¹, if another State is responsible for examining the application according to the rules establishing criteria and mechanisms for determining which State is responsible for considering an application for asylum, unless that Member State examines an application for asylum even if such examination is not its responsibility under such criteria.
3. In addition, Member States may consider an application for asylum as inadmissible [...] ² if:
 - (a) another Member State has granted refugee status;
 - (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;
 - (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Articles 27 and 28;

¹ E : reinsert the words "and may reject it".

² E : reinsert the words "and may reject it".

- (d) the applicant is allowed to remain in the Member State concerned on some other ground and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*];¹
- (e) the applicant has lodged a subsequent application after a final decision and he/she does not submit new elements **or findings**, having occurred after the final decision, establishing a well-founded fear of persecution by virtue of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*];
- (f) a dependant of the applicant lodges an application, after he/she has in accordance with Article 5 (3), consented to have his/her case be part of an application made on his/her behalf and there are no facts relating to the dependant's situation justifying a separate application.²

¹ NL : add "or if the applicant is allowed to remain in the Member State concerned on some other grounds and which protect him/her against refoulement".

² FIN : scrutiny reservation. Rules concerning dependants should be further detailed.

Article 26

Application of the concept of first country of asylum

A country can be considered to be a first country of asylum for an applicant for asylum if

- (a) he/she has been recognised by that country or by UNHCR in that country as a refugee, or
- (b) he/she enjoys equivalent protection in that country,¹

provided that he/she can still avail himself/herself of that protection² [...] ³

¹ **D** : read "he/she obviously enjoys sufficient protection in that country".

² **D** : read "provided that he/she will be re-admitted in this country and he/she can reasonably be expected to stay in that country".

³ **E** : delete the words "and he/she can reasonably be expected to stay in that country".

FIN : enter a reference to Annex II including rights mentioned by the Geneva Convention, particularly protection against refoulement to the country of origin.

S : an individual examination of the application for asylum must be ensured in all cases.

Article 27

National designation of countries as safe third countries¹

1. Member States may consider that a third country is a safe third country for the purpose of examining applications for asylum only in accordance with the **criteria** set out in Annex II.
2. Member States may retain or introduce legislation that allows for the designation by law or regulation of countries as safe third countries. Such laws or regulations shall be compatible with Article 28.²
3. Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating countries as safe third countries and which wish to retain these laws or regulations, shall notify them to the Commission within six months of the entry into force of this Directive and shall notify as soon as possible any subsequent relevant amendments.

Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating countries as safe third countries after the entry into force of this Directive, as well as any subsequent relevant amendments.

¹ **F** : refer to "safe third countries of transit" in order to better distinguish them from "third safe countries of origin".

E/I : a list of safe third countries would have no real effect in the absence of readmission agreements with third countries involved.

² **A/D/I/L** : designation of safe third countries should be done in a common basis, through the establishment of criteria, leading to a single list. Otherwise, there would be a risk of secondary movements between Member States. A mechanism allowing updating of the list should be established.

B : the objective should be to establish a common list of safe third countries in the medium term.

IRL/NL/UK : concerning safe third countries, a flexible mechanism should be established.

F/FIN/P/S : supported the Presidency draft. They were opposed to the establishment of any common list of safe third countries. They could only accept national lists in the Member States wishing to do so.

FIN/NL/S : wanted to preserve the possibility of having an individual assessment in all cases.

D/P : reservations concerning the establishment of a Contact Committee by the Commission on the basis of the Legislative financial statement to the proposal (point 5.2). Such a Committee should be envisaged in the Directive itself following comitology rules.

Article 28

Application of the safe third country concept

1. A country that is a safe third country in accordance with the **criteria** set out in Annex II can only be considered as a safe third country for a particular applicant for asylum if,¹
 - (a) the applicant has had² an opportunity to avail himself/herself of the protection of the authorities of that country; and³
 - (b) this particular applicant will be⁴ re-admitted to this country.

2. When implementing a decision based on this Article in which Member States have not examined whether the applicant qualifies as a refugee, Member States shall :
 - (a) inform the applicant accordingly; and
 - (b) provide him/her with a document in the language of the third country informing the authorities of that country that the application has not been examined in substance.

¹ **FIN/S/Cion** : reservations. An individual examination of the applications must be ensured. They were opposed to the deletion of the words "notwithstanding any list there are no grounds for considering that the country is not a safe third country, in the circumstances relating to that applicant."

UK : add cases where the applicant would be admitted to a part of a country when that part of the country complies with the principles set out in Annex II.

D/FIN/S : opposed to this UK suggestion.

² **A/IRL/NL/UK** : reinsert the words "or would have".

³ **D** : add "this is assumed to be the case if the applicant has travelled through that country".
A/IRL/NL/UK : add "or".

Cion, supported by **FIN/S**, opposed to such an adding. They suggested instead the following text :

"(a) the applicant has had an opportunity to avail himself/herself of the protection of the authorities of that country *or has close ties with that country; and*".

⁴ **A/IRL/NL/UK** : reinsert the words "admitted or".

Section III

Article 29¹

Cases of unfounded applications

1. Without prejudice to Articles 19 and 20, Member States may only reject an application for asylum as unfounded² if the determining authority has established that the applicant does not qualify for refugee status pursuant to Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*].³
2. **In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications in which any of the circumstances listed in Article 23(4) (a) and (c) to (p) apply, Member States may also consider an application as unfounded and may apply rules under Article 39(3).**⁴

¹ **UK** : this Article could be deleted and its content to be covered by Article 39.
IRL: scrutiny reservation due to ongoing changes in its national legislation.
Cion : recalled that a short time-limit or at least a target, should be introduced in Article 23.

² **NL** : refer solely to rejection of applicants for asylum. See footnote under Article 25.

³ **B/E/L** : scrutiny reservations.
B : the structure set up by the Council Conclusions of 6 and 7 December 2001 should be respected (see 15107/1/01 ASILE 59 REV 1).
FIN : the distinction between unfounded and manifestly unfounded applications should be reintroduced in order to differentiate cases to be treated under regular or under accelerated procedures.

⁴ **NL/S** : scrutiny reservations.

Article 30
Safe countries of origin

1. A third country can be designated as a safe country of origin for the purpose of examining applications for asylum only in accordance with Annex III.

2. A third country that is designated as a safe country of origin in accordance with the criteria set out in Annex III can, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if
 - (a) he/she has the nationality of that country or,
 - (b) he/she was formerly habitually resident in that country;

and the applicant has not submitted any grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee in accordance with Council Directive .../ ...*[Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection]*.

3. Without prejudice to Article 30B, Member States shall, in accordance with paragraph 2, consider the application for asylum as unfounded where the third country is designated by the Council as safe pursuant to Article 30A.

Article 30A

Minimum common list of third countries as safe countries of origin

1. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries that shall be regarded by Member States as safe countries of origin in accordance with Annex III. When making its proposal, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations.
2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex III. The Commission shall examine any request made by the Council or by a Member State that it submit a proposal to amend the minimum common list.
3. Where the Council requests the Commission to submit a proposal for removing a third country from the minimum common list, the obligation of Member States pursuant to Article 30(3) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.
4. Where a Member State requests the Commission to submit a proposal to the Council for removing a third country from the minimum common list, that Member State shall notify the Council in writing of the request made to the Commission. The obligation of this Member State pursuant to Article 30(3) shall be suspended with regard to the third country as of the day following the notification of the request to the Council.
5. The European Parliament shall be informed of the suspensions under paragraphs 3 and 4.

6. The suspensions under paragraphs 3 and 4 shall end after [three] months, unless the Commission makes a proposal, before the end of this period, to withdraw the third country from the minimum common list. The suspensions shall end in any case where the Council rejects, a proposal by the Commission to withdraw the third country from the list.

7. Upon request by the Council, the Commission shall report to the Council and the European Parliament on whether the situation of a country on the minimum common list is still in conformity with Annex III. When presenting its report to the Council and the European Parliament, the Commission may make such recommendations or proposals as it deems appropriate.

Article 30B

National designation of third countries as safe countries of origin

1. Without prejudice to Article 30A, Member States may retain or introduce legislation that allows for the national designation of third countries other than those appearing on the minimum common list as safe countries of origin for the purpose of examining applications for asylum.
2. Member States shall assess whether a third country can be designated by them as a safe country of origin in accordance with Annex III on the basis of a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.
3. Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating third countries as safe countries of origin and which wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive and shall notify as soon as possible any subsequent relevant amendments.
4. Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating third countries as safe countries of origin after the entry into force of this Directive, as well as any subsequent relevant amendments.¹

¹ **UK** : add the following paragraph :
"Member States may also designate part of a country as safe or designate a country as safe for a specified group of persons in that country where the conditions of Annex III are applicable to that part or group."

Article 31

(deleted)

Section IV

Article 32

(deleted)

Article 33

Cases of subsequent applications¹

1. Member States may apply a specific procedure as referred to in paragraph 2, where a person makes a subsequent application for asylum:
 - (a) after his/her previous application has been withdrawn by virtue of Articles 19 or 20;²
 - (b) after a decision has been taken on his/her previous application. Member States may decide to apply this procedure only after a final³ decision has been taken.
2. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the final decision [**referred to in paragraph 1(b)**] on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*] have arisen **or have been presented by the applicant**.

¹ **S** : reservation linked to its reservation to Article 38(1)(c).

² **FIN** : reservation. Other reasons for having withdrawn the application should be considered.

³ **B** : instead of referring to "final decision", refer to "decision on the substance or relating to the refugee status".

E : delete the word "final".

3. If, **following the preliminary examination referred to in paragraph 1**, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*], the application shall be further examined in conformity with Chapter II.
4. Member States may, **in accordance with national legislation**, further examine a **subsequent application where there are other reasons which significantly add to the likelihood** of the applicant qualifying as a refugee by virtue of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*].
5. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 2, 3 and 4 in the previous procedure, in particular by filing an appeal before a court or tribunal.
6. This procedure may also be applicable in the case of a dependant who lodges an application, after he/she has in accordance with Article 5 (3), consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination referred to in paragraph 2 will consist of examining whether there are facts relating to the dependant's situation justifying a separate application.

Article 33A

(deleted)¹

Article 34

Procedural rules

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 33 enjoy the guarantees listed in Article 9 (1).
2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 33. Those rules may inter alia:
 - (a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
 - (b) require submission of the new information by the applicant concerned within a time limit after which it has been obtained by him or her;
 - (c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render the access of applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.

¹ **D** : reservation on the deletion of this Article which read "Member States may retain or adopt the procedure provided for in Article 33 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or to appear before the competent authorities at a specified time".

3. Member States shall ensure that

- (a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons and of the possibilities of seeking an appeal or review of the decision;¹
- (b) if one of the situations referred to in Article 33 (2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

¹ **UK** : scrutiny reservation linked to the final drafting of Chapter V.

Section V

Article 35

Cases of border procedures¹

- 1. Member States may provide for procedures in order to decide, at the border or in transit zones, on the applications made at such locations after it has been established that the conditions for entry to the territory are not met by the applicant concerned. The examination shall be in accordance with the basic principles and guarantees of Chapter II.**
- 2. However, subject to the provisions of this Article, Member States may maintain, in accordance with laws or regulations in force at the time of the adoption of this Directive, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations.**

¹ **B** : scrutiny reservation. Wanted to be sure that there is a possibility for the Member States for restraining the freedom of movements of those applicants who do not have the necessary documents establishing their identity. Some of the cases of the former version of Article 17 should be taken on board (see 9646/03 ASILE 31 ADD 1).

E : scrutiny reservation. Supported B. Wanted also to be sure that those not having the necessary documents for entry the country may be kept in detention.

FIN : scrutiny reservation. In its country a specific border procedure does not exist. Its definitive position will depend on the relationship of this provision with Article 39.

UK : parliamentary scrutiny reservation concerning this Article. In its country asylum seekers at the border are temporarily admitted in the territory. It is not clear whether such situations are covered by this provision.

A : reservation linked to the obligation to give all these guarantees to a person who is not yet in the territory of the Member State.

3. These procedures shall ensure in particular that the persons concerned:
- shall be allowed to remain **at the border or transit zones of** the Member State, **without prejudice to** Article 6; and
 - must be immediately informed of their rights and obligations, as described in Article 9 (1) (a); and
 - have access, if necessary, to the services of an interpreter, as described in Article 9 (1) (b); and
 - are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 10¹ to 12; and
 - can consult a legal adviser or counsellor admitted as such under national law, as described in Article 13 (1); and
 - have a representative appointed in the case of unaccompanied minors, as described in Article 15 (1), **unless Article 15(2) applies.**

Moreover, in case permission to enter is refused by a competent authority, the decision fo the competent authority shall state the reasons in fact and in law why he/she is not granted refugee status by virtue of Council Directive .../... [Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection].

¹ F : delete reference to Article 10. The interview referred to in this indent is not the same interview mentioned in Article 10.

4. Member States shall ensure that a decision in the framework of the procedures provided for in this Article is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.
5. In event that **an unforeseen arrival** of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, makes it practically impossible to apply there the provisions of paragraphs 2 and 3, the specific procedure set out in this Article may be applied also where and for as long as these third country nationals or stateless persons are accommodated [**normally**] at locations in [...] ¹ proximity to the border or transit zone.
6. Member States shall notify the Council and the Commission of the maintenance of the procedures referred to in this Article.

¹ **FIN/S/Cion** : scrutiny reservations.

Article 35A¹

1. Member States may also² provide that a person requesting asylum with a border authority cannot be allowed to enter the territory if:
 - (a) he enters from a safe third State in the sense of Article 27;
 - (b) it is obvious that the person was safe from persecution in another third country³; or

¹ Text proposed by **D**.

A/UK : support D text.

B/E/FIN/IRL/I/NL/P/S/Cion : cannot support this text since :

- it does not give any guarantees (including legal certainty) to those seeking asylum at the border (FIN/NL/P/S);
- cases of inadmissible or unfounded applications should also imply the prohibition of entry into the territory (E). Read "within the framework of a previous procedure for entry into the territory different from the asylum procedure".

B/IRL : the stand-still provided for in Article 35 could also be applicable here. B suggested to insert a draft along the lines of the Protocol on asylum for nationals of Member States of the European Union annexed to the Treaty, instead of making reference to Article 27. Such a draft could make reference to the fact that when the applicant enters from a third country with such a level of protection of fundamental rights and freedoms that it shall be regarded as constituting a safe country. (This new provision would replace sub-paragraphs (a) and (b)).

P : recalled that the Council, in its conclusions on asylum procedures of 6 and 7 December 2001, stated that the question of whether the Directive should apply to applications for asylum made at the border of a Member State remained open. It wondered whether a possible solution could consist on avoiding in this Directive any mention to applications at the border. Since the present Directive will only set up minimum standards, this question could be dealt with in a future exercise of full harmonisation.

F : positive scrutiny reservation concerning paragraphs 2, 3 and 4.

² **IRL** : delete the word "also" in order to avoid giving the impression that a link exist with the provisions of Article 35.

³ **E/IRL/FIN/NL** : this sub-paragraph does not give any objective criteria.

B : this sub-paragraph contradicts the provisions of Article 34.

- (c) he poses a threat to the general public¹, because he has non-appealably been punished with imprisonment of at least three years in the Member State on account of a particularly serious criminal offence and where his leaving the Member State did not take place more than three years ago.²
2. The person requesting asylum can be removed if the border authority finds in the vicinity of the border immediately before or after in illegal entry and if the conditions pursuant to paragraph 1 apply.
 3. In cases of an illegal entry of a person requesting asylum from a safe third State according to paragraph 1 (a), the person may be removed to such a safe State by the competent national authorities also from inside the country.
 4. Member States may provide that no asylum procedure according to Chapter II of this Directive takes place in cases of paragraphs 1 to 3 of this Article. Articles 17 and 22 of this Directive apply accordingly.
 5. When the removal of the applicant cannot be effected, Member States shall in any case apply the provisions of this Directive.

¹ **F** : delete the rest of this sub-paragraph. Reference to public order should suffice.

² **I** : this sub-paragraph seems to refer to cases of unfounded applications under Article 29 and does not have its place here.

CHAPTER IV

Procedures for the withdrawal of refugee status

Article 36

Withdrawal of refugee status

Member States shall ensure that an examination may be started to withdraw the refugee status of a particular person when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.¹

Article 37

Procedural rules

1. Member States shall ensure that, where the competent authority is considering to **withdraw** the refugee status of a third country national or stateless person in accordance with Article 14B of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*], the person concerned shall enjoy the following guarantees:
 - (a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and
 - (b) to be given the opportunity to submit, in **a written statement or in²** a personal interview in accordance with Article 9 (1) (b) and Articles 10 to 12, reasons as to why his/her refugee status should not be revoked, end or not be renewed.

¹ **D** : scrutiny reservation. An administrative instance cannot withdraw a refugee status which has been previously granted by a court ruling. (D will submit a new draft for the next meeting).

² **FIN/NL** : scrutiny reservation. A personal interview should always be possible.

In addition, Member States shall ensure that within the framework of such a procedure:¹

- (c) the competent authority is able to obtain precise and up to date information from various sources, such as information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of the persons concerned; and
- (d) where information is collected on the individual case for the purpose of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee, whose status is under reconsideration, nor jeopardize the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

Member States may derogate from Articles 9 (1) (b) and Articles 10 to 12 when it is technically impossible for the competent authority to comply with the provisions of those Articles.

[...]

2. Member States shall ensure that the decision of the competent authority to **withdraw** the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision² shall be given in writing.

¹ E/F : reservations concerning sub-paragraph (c) which they considered should be more flexible.

In order to solve the problem raised by E and F,

- IRL suggested a wording similar to Article 7(3)(a) of the Qualification Directive :
"Member States shall take into account all relevant facts as they relate to the country of origin at the time of taking a decision on the application."
- UK suggested to add "where coupled with a decision to remove".

² UK : reservation concerning the possibility of challenging the decision on withdrawal.

3. Once the competent authority has taken the decision to **withdraw** the refugee status, Articles 13, paragraph 2, 14, paragraph 1 and 21 are equally applicable.

4. By derogation to paragraphs 1, 2 and 3, Member States may decide that the refugee status lapses by law in case of cessation in accordance with Article 13(1), sub-paragraphs (a), (b), (c) and (d) of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*] or if the refugee has unequivocally renounced his/her recognition as a **refugee**.

CHAPTER V
Appeals procedures¹

Article 38

The right to an effective remedy before a court or tribunal²

1. Member States shall ensure that applicants for asylum have the right to an effective remedy³ before a court or tribunal against the following :
 - (a) a decision taken on their application for asylum made in the territory, including at the border or in the transit zones **as described in Article 35(1)**; ⁴
 - (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

¹ **D/I/P/S** : scrutiny reservations on the entire Chapter.
A/EL/IRL/UK : reservations on the entire Chapter.
A : add the following recital:
"When implementing Article 38 of this Directive it may be considered that the possibility of an appeal under national law to a tribunal within the limits of Article 6 of the Human Rights Convention provides for an "effective remedy...before a court of law" if national law foresees possibility of further complaints against all the tribunal's decision's to a court of law (Administrative High Court) which as suchy has the right to obtain prliminary rulings within the meaning of Articles 68 and 234 TEC".

² **A/B/EL/IRL/P/UK** : recalled that Council conclusions (15107/1/01 ASILE 59 REV 1) established that the term "judicial body" should cover the concept of "quasi-judicial" in certain Member States. They considered a reference to effective remedy before a national authority would be sufficient.
Cion : recalled existing caselaw of the Court of Justice of the European Communities concerning this issue.
The Council Legal Service opinion regarding this question is set out in 8124/03 JUR 168 ASILE 21.

The Chair asked those delegations which maintain reservations on this Article to submit new drafting for the next meeting.

³ **E/F/FIN** : linguistic reservation.

⁴ **S** : reservation. Add the possibility of not having appeals when security threats appear.

- (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;¹
 - (d) a decision refusing entry within the framework of the procedures provided for under Article 35 (2);
 - (e) a decision for the withdrawal of the refugee status pursuant to Article 37.
2. Member States shall ensure that the effective remedy referred to in paragraph 1 includes the possibility of an examination on both facts and points of law.²

¹ **S** : reservation. An important number of appeals could be involved.

² **B** : the above-mentioned Council conclusions should be faithfully quoted here. A Directive on minimum standards should not oblige Member States to modify their administrative structures.

Article 39

Suspensive effect of review and appeal proceedings¹

1. Member States shall allow applicants for asylum lodging an appeal before a court or tribunal, in accordance with Article 38², to remain in the Member State concerned pending its outcome.

Member States shall also allow applicants for asylum requesting a review by an administrative body prior to appeal before a court of law to remain in the territory of the Member State concerned pending its outcome.³

2. Member States may maintain national laws in force on the date of the adoption of this Directive, which derogate from the principle of paragraph 1.⁴
3. Member States may also derogate from paragraph 1 by virtue of national legislation in the following cases:⁵
 - (a) where the application for asylum is considered to be inadmissible; or
 - (b) where the application is considered to be unfounded pursuant to Article 29(1) and any of the cases listed in Article 23(4) apply; or⁶

¹ **B/FIN** : scrutiny reservations concerning the entire Article.

E : reservation. Avoid establishing the suspensive effect as the general rule for appeals.

The Chair asked **E** to submit a text for the next meeting.

² **E** : delete the words "in accordance with Article 38".

³ **F** : avoid establishing an obligatory suspensive effect for appeals before an administrative body.

⁴ **FIN/L/S/Cion** : reservations. This provision would sanction important differences between procedures in the Member States.

NL : scrutiny reservation.

The Chair asked **NL** to submit a text for the next meeting

⁵ **D** : scrutiny reservation.

⁶ **S** : scrutiny reservation.

- (c) where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33; or
 - (d) where entry is refused within the framework of the procedures provided for under Article 35.
4. When an applicant for asylum is not allowed to remain in the Member State concerned according to paragraphs 2 and 3, Member States shall ensure that a court or tribunal has the competence to rule upon request of the applicant whether or not he/she may remain in the Member State concerned.¹

The request may be based upon

- (a) an appeal against a decision pursuant to this Directive; or
- (b) an appeal against an order to remove the applicant concerned following a decision pursuant to this Directive.²

¹ **F** : scrutiny reservation.

² **D** : scrutiny reservation.

IRL : scrutiny reservation. Concerning IRL position on this Article, see 12276/03 ASILE 47.

UK : add a new sub-paragraph which could be drafted on the following lines:

"(c) a challenge to a decision that the applicant has no right to lodge an appeal against a decision pursuant to this Directive and remain in the Member State pending the outcome of that appeal".

5. No expulsion shall take place until the court or tribunal has ruled in the case referred to in paragraph 4. Member States may provide for an exception in the following cases:¹
- (a) where it has been decided that an application for asylum is inadmissible;²
 - (b) where a court or tribunal has already rejected a request from the concerned applicant for asylum to remain in the Member State concerned and it has been decided that, since that rejection, no new relevant facts have been³ submitted with respect to the particular circumstances of the applicant or his/her country of origin after this rejection;⁴
 - (c) where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33;
 - (d) where it has been decided that grounds of national security or public policy preclude the applicant for asylum from remaining at the border, airport or port transit zones or in the Member State concerned;⁵
 - (e) where the applicant for asylum is from a safe country of origin within the meaning of Articles 30 and 31.⁶

Article 40

(deleted)

¹ **FIN/NL** : this provision goes too far and is difficult to accept. NL : delete it.

D : scrutiny reservation.

² **NL** : refer only to Article 25(2) (a), (e) and (f).

³ **NL** : add "timely".

⁴ **D** : delete this sub-paragraph, which risks to create confusion.

⁵ The Council Legal Service contribution regarding this question is set out in 12505/03 JUR 361 ASILE 49.

FIN : this sub-paragraph is superfluous and could be deleted.

⁶ **NL** : add the following subparagraph:

"(f) where the request referred to in paragraph 4 has not been made within the period given to the applicant for asylum to leave the country".

Article 41¹

Time limits and scope of the examination in review or appeal

1. Member States shall [...] provide for:
 - (a) [...] time limits for giving notice of appeal and, where applicable, for requesting a review; [...]
 - (b) all other necessary rules for lodging an appeal and, where applicable, for requesting a review;

[...]
 - (c) rules whereby, if the court or tribunal overturns a decision, it must either remit the case to the determining authority for a new decision or must itself take a decision on the merits of the application.
2. Member States **may** lay down the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her review or appeal together with the rules on the procedure to be followed in these cases. **Member States shall lay down such conditions in law.**
3. Member States may lay down time limits for the court or tribunal to examine the decision of the determining authority.

¹ **D** : add the following provision :

"Article 41A

The procedural law of the Member States are unaffected by Articles 38 to 41."

CHAPTER VI
General and final provisions

Article 42
Non-discrimination

(deleted)¹

Article 43
Penalties

(deleted)

Article 43A
Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.²

¹ The following Recital will be added to the Preamble:
"With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination."

² (Former paragraph 5 of Article 7).

Article 44

Report

No later than two years after the date specified in Article 45, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 45

Transposal

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after the date of its adoption] They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Member States shall communicate to the Commission the text of the provisions of national law, which they adopt in the field covered by this Directive.

Article 46

Entry into force

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

Article 47
Addressees

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

Done at Brussels,

For the Council
The President

DEFINITION OF "DETERMINING AUTHORITY"

When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17 (1) of the Refugee Act 1996 (as amended) continues to apply, consider that:

- “*determining authority*” provided for in Article 2 (e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and
- “*decisions at first instance*” provided for in Article 2 (e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Ireland will notify the European Commission of any amendments to the provisions of section 17 (1) of the Refugee Act 1996 (as amended).

CRITERIA WITH RESPECT TO THE DESIGNATION OF SAFE THIRD COUNTRIES

I. Requirements for designation

In considering whether a country is a safe third country, regard shall be had to whether it

- (a) observes the standards laid down in international law for the protection of refugees and
- (b) observes basic standards laid down in international human rights law relevant to the prohibition of the removal of refugees and persons seeking asylum.

A. The standards laid down in international law for the protection of refugees

A safe third country is any country that has ratified the Geneva Convention and observes the provisions of that Convention with respect to the rights of persons who are recognised and admitted as refugees.

Notwithstanding the above, a country that has not ratified the Geneva Convention may still be considered a safe third country if

- (a) it observes in practice the standards laid down in the Geneva Convention with respect to the rights of persons in need of international protection within the meaning of this Convention; or
- (b) it complies in another manner with the need for international protection of these persons, either through cooperation with UNHCR or other organisations which may be working on behalf of the UNHCR or by other means deemed to be adequate for that purpose by the UNHCR.

B. The basic standards laid down in international human rights law

A safe third country is any country that has ratified the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as ‘European Convention’) or the 1966 International Covenant on Civil and Political Rights (hereafter referred to as ‘International Covenant’) or the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as ‘Convention against Torture’), observes the standards laid down therein with respect to the right to life, freedom from torture and cruel, inhuman or degrading treatment, and provides effective remedies against foreign nationals or stateless persons from being removed in breach of Article 3 of the European Convention or Article 7 of the International Covenant or Article 3 of the Convention against Torture.

II. Criteria for designation

Every general assessment of the observance of these standards for the purpose of designating a country as a safe third country in general or with respect to certain foreign nationals or stateless persons in particular must be based on a range of sources of information, which may include reports from diplomatic missions, international and non-governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

[...]

Where Member States solely assess in an individual decision the safety of a third country with respect to a particular applicant, such a decision need not be motivated on the basis of a general assessment as provided above.

DESIGNATION OF SAFE COUNTRIES OF ORIGIN¹

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently neither persecution as defined in Article 11 of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*] nor serious harm as defined in Article 15 of the said Council Directive.

In making this assessment, account shall be taken inter alia of the extent to which protection is provided against persecution or mistreatment through :

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms.

¹ **S** : parliamentary scrutiny reservation.
UK : scrutiny reservation.