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NOTE

from : General Secretariat of the Council

to : Asylum Working Party

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

Delegations will find below alternative texts submitted by several delegations relating to different provisions of the draft Directive.

(Unofficial translation)

Art. 33.1.b)

"after a decision on his/her previous application has been taken, **provided that there is no more appeal possibiltiy on the merits.**"

ARTICLE 35

1. 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:

- a) in order to decide, at the border or in transit zones, on the applications for asylum made at such locations **after it has been established that the conditions for entry the territory are not met by the applicant concerned.**
- b) Where no such procedure is available, 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.

ARTICLE 38

- 1. (...)
- (e) a decision for the withdrawal of the refugee status pursuant to Article 37, **except when that decision was taken by a court.**

(Unofficial translation)

Article 38

The right to an effective remedy before a court or tribunal

1. Member States shall ensure that applicants for asylum have the right to an effective remedy 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;
 - (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;
 - (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;
 - (d) a decision refusing entry within the framework of the procedures provided for under Article 35 (1) (b);
 - (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.
3. Member states may under national law provide that the effective remedy referred to in paragraph 1 is guaranteed through the combined effect of two or more successive remedies before a court or tribunal.

(Unofficial translation)

Article 39 paragraph 3

Add as categories in which Member States may derogate from Article 39 paragraph 1 by virtue of national legislation:

- e) where the review has not been requested or the appeal has not been lodged within the time limits provided for in national law;
- f) where the applicant for asylum has been or is detained with a view to deportation in accordance with Article 5 ECHR;
- g) where the application for asylum is considered to be unfounded pursuant to Article 29(1) and has been rejected within four weeks in a procedure in conformity with Chapter II.

(Unofficial translation)**Note to Presidency from Irish delegation concerning Irish reservation on Chapter V - "Appeals Procedures"**

Ireland is fully supportive of the principle of "*a right to an effective remedy*" as set out in Article 38. We are also supportive of the approach being followed with regard to suspensive effect. Our difficulty with this Chapter centres around the use of the word "*appeal*" in Articles 39 and 41.

Essentially Ireland is suggesting that the word "challenge" should replace references to "appeal" in Articles 34, 38, 39 and 41 as indicated in the amended text submitted. This would take on board both appeals as they are commonly understood and judicial reviews which apply in certain circumstances in our common law system.

This difficulty has also arisen in the context of other EU asylum and immigration measures e.g. the Reception Standards Directive and more recently the Free Movement Directive where it has been resolved successfully by the inclusion of "*review*" as an alternative to "*appeal*". Adding the word "review" in this instance is not an available solution as "*review*" already appears in Article 39 in the context of a review before an administrative body.

Background

In our asylum system all decisions on the merits of an asylum application may be appealed to a Tribunal and also challenged by way of judicial review before the High Court. Other decisions which do not concern the substance of the claim e.g. decisions on subsequent applications may only be challenged by way of judicial review.

Judicial review (which allows for an examination on both facts and points of law) fulfills the requirements of an effective remedy as required under Articles 38 and defined in the Council Legal Service opinion (JUR 168/ASILE 21). Our concern is therefore more a matter of drafting than of substance. There are already two precedents in the text of this Directive where the word appeal alone is not used - Article 34(3)(a) refers to "seeking an appeal or review"¹ and Article 37(2) uses "challenge".

Drafting suggestions for Chapter V and Article 34**Chapter V**

We propose the following changes to the text (our changes are in bold and italics). The changes essentially replace the word "appeal" with "challenge" which we consider is wide enough to encompass both appeals and our judicial review system.

¹"Review" was inserted here at Ireland's request to cover our judicial review arrangements however in view of context in which "review" is used in Article 39 i.e. in connection with a review before an administrative body a change to Article 34 is proposed. See under Drafting suggestions

CHAPTER V

Appeals procedures

Effective remedy before a court or tribunal

Article 38

The right to an effective remedy before a court or tribunal

1. Member States shall ensure that applicants for asylum have the right to an effective remedy 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);
 - (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;
 - (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;
 - (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.

Article 39

Suspensive effect of ~~review and appeal~~ proceedings

1. Member States shall allow applicants for asylum lodging ~~an appeal~~ *a challenge to a decision* before a court or tribunal, in accordance with Article 38, 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 *lodging a challenge* ~~appeal~~ before a court of law to remain in the territory of the Member State concerned pending its outcome.

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.
3. Member States may also derogate from paragraph 1 by virtue of national legislation in the following cases:
 - (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; or
 - (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.

The request may be based upon

~~(a) an appeal~~ *a challenge to* ~~against~~ a decision pursuant to this Directive; or

~~(b) an appeal~~ *a challenge to* ~~against~~ an order to remove the applicant concerned following a decision pursuant to this Directive.

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:

(a) where it has been decided that an application for asylum is inadmissible;

(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 been submitted with respect to the particular circumstances of the applicant or his/her country of origin after this rejection;

(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;

(e) where the applicant for asylum is from a safe country of origin within the meaning of Articles 30 and 31.

Article 40

(deleted)

Article 41

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~~ *notification of a challenge* and, where applicable, for requesting a review; [...]
 - (b) all other necessary rules for lodging ~~an appeal~~ *a challenge* 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~~ *challenge* 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.

Article 34

In addition given the context in which "review" is already being used in Article 39 a change is necessary to Article 34(3)(a). The change proposed below draws on Article 37(2).

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).
1. 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;
 - (a) require submission of the new information by the applicant concerned within a time limit after which it has been obtained by him or her;
 - (a) 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. 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~~ *challenging* the decision;
- (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.

(Unofficial translation)

**CHAPTER V
Appeals procedures**

Article 38

The right to an effective remedy before a court or tribunal

1. Member States shall ensure that applicants for asylum have the right to an effective remedy 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);
 - (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;
 - (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;
 - (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 may derogate from paragraph 1 by virtue of national legislation where the application for asylum is considered to be inadmissible.

Article 39

Suspensive effect of review and appeal proceedings

1. Member States shall allow applicants for asylum lodging an appeal before a court or tribunal, in accordance with Article 38, 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.

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.
3. Member States may also derogate from paragraph 1 by virtue of national legislation in the following cases:

[...]

- (a) where the application is considered to be unfounded pursuant to Article 29(1) and any of the cases listed in Article 23(4) apply; or
 - (b) where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33; or
 - (c) 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.

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.
- (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:

[...]

- (a) 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 been submitted with respect to the particular circumstances of the applicant or his/her country of origin after this rejection;
- (b) 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;
- (d) where the applicant for asylum is from a safe country of origin within the meaning of Articles 30 and 31.

Article 40

(deleted)

Article 41

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.