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THE EUROPEAN UNION**

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LIMITE

ASILE 15

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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

I

Following the first reading of the above proposal by the Asylum Working Party, several delegations submitted alternative texts relating to different provisions of the draft Directive.

Delegations will find in section II below these drafting suggestions.

(Unofficial translation)

Article 2 j)

For the purposes of this Directive:

- j) “Detention” means the confinement of an applicant for asylum by a Member State within a restricted area, where his freedom of movement is substantially curtailed. *This does not include cases where the applicant's residence is restricted to the transit areas of airports and at border crossing points.*

Article 5, para. 3

- 3) Member States shall ensure that each adult person *having legal capacity* has the right to make a separate application for asylum on his own behalf.
However, Member States may determine, by law
- (a) the cases in which a minor cannot make an application on his own behalf and in which his application is to be made by another person on his behalf;
 - (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 15(1).
 - (c) *the cases in which the filing of an application for asylum is deemed to constitute also the filing of an application for asylum for any minor and unmarried child of the applicant.*

New Article 9a

Obligations of the applicant for asylum

- 1) Member States may provide that**
 - a) applicants for asylum are required to report to specific authorities or institutions or appear there in person, either without delay or at a specified time.**
 - b) applicants for asylum have to submit, or hand over, their passports or surrogate passports and any other documents in their possession to the competent authorities, and**
 - c) applicants for asylum are required to ensure that notices from authorities and courts can reach them at any time. Member States may provide that the applicant shall have to accept any notification and informal communications at the most recent address which he indicated in his asylum application or of which he informed the agency in question**

- 2) Member States may further provide that**
 - a) the asylum authorities may search the applicant and the items he/she carries with him/her, if there are indications suggesting that he/she is not complying with the obligation under paragraph 1 b) to hand over said documents,**
 - b) that an applicant's identity and origin are secured by including photographs and that his oral statements are recorded provided the applicant has previously been informed thereof,**
 - c) Article 33 shall apply accordingly to any application for asylum filed at a later date by any applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or to appear before the asylum authority at the specified time.**

Article 10

4. The fact that no personal interview has taken place on a ground referred to in paragraph 2 and that no comments were received pursuant to paragraph 3, shall not prevent the determining authority from taking a decision on an application for asylum. The absence of a personal interview on the grounds referred to in paragraph 2 *a – c)* or 3 shall not in itself adversely affect the decision of the determining authority.

Article 12

1. Member States shall ensure that a transcript *containing at least the essential information produced by the applicant* is made of every personal interview.

Article 13

1. Member States shall allow applicants for asylum the opportunity to consult in an effective manner a legal adviser or other counsellor *admitted under national law* on matters relating to their asylum applications at all stages of the procedure, including following a negative decision.
2. In the event of a negative decision by a determining authority, Member States shall ensure that legal assistance, on request, be granted free of charge, subject to the provisions of this paragraph.

Member States may

- (a) choose to only make available legal assistance free of charge to those *applicants* who lack sufficient resources [...].
- (b) *refuse to make available legal assistance free of charge if the application is unlikely to succeed,*
- (c) *demand to be reimbursed wholly or partially for any benefits granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken due to false information supplied by the applicant.*
- (d) former (b)

Article 14

1. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum is informed in due time of the time and place of the applicant's personal interview as provided for in Articles 10, 11 and 12 and is allowed to attend it. ***Member States may decide not to inform the legal advisor or other counsellor if the applicant is obliged to live in a reception centre and if the personal interview takes place at the day at which the application is made.***

Member States shall provide rules on the presence of legal advisers or other counsellors at all other interviews in the procedure, without prejudice to this Article or to Article 15(1)(b).

Article 15

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 10 and 12, Member States shall ensure that all unaccompanied minors ***who, under national law, are unable to represent themselves*** enjoy the following guarantees:
2. ***Whenever possible*** Member States shall ensure that

Article 18

In order to implement the procedures according to the Council Regulation .../...[establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national] Member States may hold the applicant in detention to prevent him from absconding or effecting an unauthorised stay, ***[...]*** until the moment the applicant is transferred to the other Member State. Detention for this reason shall not exceed one month.

Article 20

1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn / / his application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided the information to do so is available, to reject the application on some other ground in accordance with this Directive.

Member States may assume that the applicant has implicitly withdrawn / / his application for asylum when it is ascertained that:

- (a) He/she has not within a reasonable time complied with reporting duties or other obligations to communicate, has failed to respond to requests for information essential to his/her application under the terms of Article 16 or has not appeared for a personal interview as provided for in Articles 10, 11 and 12;
 - (b) He/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time *or has not reacted within an adequate period to a notice requesting him/her to pursue the procedure.*
2. Member States / / *may provide* that the applicant who reports once again to the competent authority after a decision to discontinue as referred to in paragraph 1 is taken, is entitled to request that his/her case be re-opened. *Articles 33 and 34 shall remain unaffected.*

Member States shall ensure that this person will not be removed contrary to the principle of non-refoulement. Member States may allow the determining authority to take up the examination at the stage in which the application was discontinued.

Article 29

to be amended by a paragraph 2 which will replace – with the modifications as indicated - Article 32; Article 32 will be deleted

2. *„Member States may also reject an unfounded application for asylum as manifestly unfounded if...*

- a) *„the applicant has without good reason, misled the authorities with respect to his identity and/or nationality, by presenting false information or by withholding relevant information that could have had a negative impact on the decision **or if he/she has filed another application for asylum stating other personal data.***
- b) *the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, and there are serious reasons for considering that he/she has, in bad faith, destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality **or if main aspects of the information are not substantiated or contradictory.***
- c), d), e) unchanged
- f) *the applicant failed to comply with obligations referred to in Article 7 of the **Qualification Directive** and 20(1) of this Directive **or if he/she has severely failed to comply with his/her obligation to co-operate pursuant to Art. 9a para. 1 a) and b), unless he/she is not responsible for the violation of his obligation to co-operate or he/she was, for important reasons, not in a position to comply.***
- g) *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 **or filed an application for asylum** as soon as possible given the circumstances of his/her entry;*
- h) *the applicant is a danger to the security of the Member State or constitutes a danger to the community of that Member State, having been convicted by a final judgement of a particularly serious crime **or if he/she has enforceably been expelled for serious reasons of public security and order under national law.***

Article 36

„Where Member States do not provide that in the cases of Art. 13 of the Qualification Directive ... the recognition as a person entitled to asylum lapses by law, Member States shall ensure that an examination may be started to withdraw [...] the refugee status of a particular person when information comes to light indicating that there are reasons to reconsider the validity of his refugee status

Article 37

2. Member States may derogate from Articles 9 to 12 when it is technically impossible for the competent authority to comply with the provisions of those Articles.

Member States may also provide that, instead of conducting a personal interview pursuant to Article 10, the foreigner concerned may be requested to provide a written statement.

(Unofficial translation)

Article 1

Spain proposes to add: “in order to grant or withdraw the Refugee Status to third country national applicants.”

Comment: if this sentence is not in the text, the asylum protocole should be included for the granting process (consideration of manifestly unfounded, etc.).

Article 2

- b) to include “stateless” and to add third country nationals.
- c) applicant or asylum applicant is the person who has made an application for asylum and is, as such, protected against expulsion or devolution.
- d) deleted

alternative

- c) as it is (ending in “resolution”).
- d) a final decision is the resolution which withdraws the protection against expulsion (or which allows for execution of devolution or expulsion).

Article 5

3. delete starting at “however... a) and b)”.

replace with:

Member States will establish the procedure for the asylum applications of unaccompanied minors and handicapped according to their national law.

4. delete: it doesn't add anything and what it may want to say is covered by paragraph 3.
5. At this sentence at the end: Member States should try (...) start as soon as possible after the interested party has expressed his/her intention to apply for asylum.
6. The paragraph structure is suppressed and replaced by the following composition:

“Member States will ensure that all authorities whom the applicant may reasonably address to express his/her desire to apply for asylum, specially at the borders, have the capability to formalize the applications or, otherwise, inform the applicant about the manner and place in which the application can be submitted.”

Article 6

Replace the title with: right to not be sent back to the origin country until the application has been examined.

- 1 and 2 adequate them to the “non refoulement” principle.

Article 7

B replace “including” with “such as”. In these moments, UNHCR is not making its own reports, but combining other reports.

Article 9

1. b) leave the first sentence until “... whenever reasonable”. Delete from “Member States...” to “In this case and in other cases”.
 - d) delete “If a legal adviser...” up to the end; the expression “in an appropriate manner” covers it all.
2. Delete the first part to make sense with what was said in 5.4.

Article 10

1. Every asylum applicant should be given the opportunity to provide with as much information as is considered necessary for his asylum application.
2. For that purpose, Member States can establish that interested parties make their applications by means of a personal interview with competent officers, who will assist them in filling up their applications and, particularly, in presenting allegations.

In the case that an application has not been made in the manner provided for in the last paragraph, interested parties should have the opportunity to have a personal interview with a competent officers before the determining authority makes a decision.

3. In any case, the possibility should be established that the interested parties pose written allegations as often as they deem it necessary before the determining authority makes a decision, the Member States being able to establish up to what moment, before the decision is taken, shall the applicant’s allegations be accepted.

4. In the cases described in the second paragraph of point 2, the personal interview can be omitted when, on the basis of an individual evaluation:
 - a) the determining authority is able to take a positive decision based on the available evidence,
 - b) the competent authority considers that the applicant is unfit or unable to be interviewed due to circumstances beyond his control,
 - c) the competent authority cannot provide an interpreter in accordance with point b) of Article 11 (2) within a reasonable time,
 - d) the determining authority cannot carry out the interview as the applicant, without valid reasons, has ignored the invitations to appear,
 - e) Member States determine it for minors under a certain age.

5. In the cases described in b), c), d) and e) of paragraph 4, the applicant should have the possibility, before a decision is taken by the determining authority, to make comments instead of having a personal interview, if needed by means of a legal adviser or any other counselor or, if he is a minor, through a representative.

If the applicant cannot have an audience because the competent authority does not provide with a translator in a reasonable time in accordance with letter b), point 2, Article 11, the Member States, before the determining authority makes a decision, will provide with the assistance of a legal adviser or any other counselor free of charges or, in the case of an unaccompanied minor, of a representative, so that, instead of a personal interview, allegations can be made in behalf of the applicant.

6. The fact that no personal interview has taken place on the grounds referred to in paragraph 4 and that no comments were received pursuant to paragraph 5, shall not prevent the determining authority from taking a decision on an application for asylum.

The absence of a personal interview on the grounds referred to in the letters b), c) and e) of paragraph 4 shall not adversely affect the decision of the determining authority.

The absence of a personal interview on the grounds referred to in letter d) of paragraph 4 shall not in itself determine an adverse decision on an application for asylum, though it may be taken into account when evaluating the need for the protection requested.

Article 11

General amendment: All mentions made to “personal interview” should be followed, according to what has been proposed for Article 10, by the sentence “and applications are made by means of a personal interview and the assistance of the competent authority”.

2. a) Delete from “surrounding the application” to the end of the paragraph.

Article 12

1. Member States shall ensure, through any means admitted in their national law, that the comments made by an applicant during a personal interview or during the presentation of an application through a personal interview with the assistance of the competent authority are documented.
2. Member States shall ensure that the applicants have timely access to their comments annotated during the personal interview or during the presentation of an application through a personal interview with the assistance of the competent authority and can request the applicant’s approval on their contents.

In such cases, Member States shall ensure that immediately after having access to the documents referred, the applicant has the opportunity to request that his/her observations about possible mistakes in the transcription of his comments are registered.

The refusal of an applicant to approve the contents of his/her comments as annotated during a personal interview or when presenting an application by means of a personal interview and assistance of the competent authority will not prevent the determining authority from taking a decision on his/her application.

Article 13 (new wording)

1. Member States will facilitate the applicants access to legal advisers specialized in asylum procedures.
2. Member States will provide the asylum applicants with legal assistance throughout the appeal process.

Member States will, in accordance with their national law, establish in which cases this legal assistance will be free of charge.

Article 14 (new wording)

1. Member States will allow the legal advisers or representatives formally appointed by the applicants to have access to the information contained in the applicant's file, at least in the same conditions provided by the national law for the access of legal advisers or representatives of interested parties in proceedings being processed by the public administrations of the Member States.
2. Member States will ensure that legal advisers or representatives formally appointed by the applicants have access to closed areas for the purpose of visiting the applicants. This possibility may only be limited for objective reasons legally established and complying with necessity and proportionality criteria.
3. Member States will provide rules on the presence of legal advisers or other counselors at any interview or appearance of the asylum applicant.

Article 15

2. a) When interviewing an unaccompanied minor on his/her application for asylum, in accordance with what established in Articles 10, 11 and 12, the interview must be previously prepared together with the minor's representative.

2. b) The decision on the application of an unaccompanied minor must take into consideration the reports of the minor's representative.
3. a) Before examining the application, the minors shall be informed, in a language which they may reasonably be supposed to understand, about the characteristics of the medical examination he/she will undergo.
 - b) If the unaccompanied minor refuses to undergo the medical examination without a valid reason, there being reasonable doubts about his/her age minority, the asylum proceeding will be continued as if he/she were an adult.

Article 16

This whole Article should be deleted as the actual Article 7 of the "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" established in sufficient depth the manner in which evidences and indications are evaluated.

If the decision is to maintain it, its wording should be consistent with that of the mentioned Article 7.

In any case, the subjective element which the Geneva Convention considers in its definition of refugee does not translate into the expression "benefit of the doubt", which does not exist in any of the State Member's national laws. The adequate legal interpretation is that full evidence is not required in the asylum proceeding, enough indication is suffice.

Article 17

1. In the first paragraph, delete the word "only".

Add "or when the applicant doesn't have a valid title to enter the country" to the end of the second paragraph.

Article 18

1. The deadlines must be adjusted to match those established in the “Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national”.

Article 20

1. When the applicant adequately justifies the reasons for implicit withdrawal of his/her application for asylum in accordance with point 1, the Member States shall ensure that they have the right to request its reopening.

The other two paragraphs can remain.

Article 21

2. If there were no UNHCR delegation in a State Member, point 1 shall be applied to the organization that, after a bilateral agreement, acts in representation of UNCHR.

Article 22

2. Start with the sentence : ”In case of persecution by state agents, Member States shall...”.

Section II

Article 25 (Completely new) Cases of inappropriate applications

1. Member States may reject a specific application for asylum as inappropriate if:
 - a) another Member State, or Norway or Iceland, has acknowledged responsibility for examining the application, according to the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third-country stateless person in one of the Member States;
 - b) in accordance with Article 26, a country, different from the States to which paragraph a) is applicable, is considered first country of asylum for the applicant;
 - c) in accordance with Articles 27 and 28, a country, different from the States to which paragraph a) is applicable, is considered a safe third country for the applicant;
 - d) the applicant is *prima facie* excluded from the refugee status by virtue of Council Directive .../... (requirements and refugee status) (former 29-c);
 - e) the applicant poses a threat for the national security or, having being indicted by definite sentence because of a particularly serious crime, constitutes a threat for the community of this Member State.

(Current d) and e) are deleted since Article 1.F of the Geneva Convention is applied in these cases)

2. Also, Member States may reject a specific application for asylum as inappropriate if:
 - a) the applicant in submitting his application and presenting the facts, has only raised issues that are obviously not relevant to the Geneva Convention ;(29 a)
 - b) the applicant is from a safe country of origin within the meaning of Articles 29 and 30 of this Directive; (29 b)
 - c) the applicant, without a good reason, misled the authorities with respect to his/her identity and/or nationality, particularly if there are founded reasons to consider that he/she has in bad faith concealed or destroyed an identity or travel document necessary to establish his/her identity or nationality; (32 a and b)
 - d) the applicant has made deliberately false or misleading representations of a substantial nature in relation to the evidence produced in support of his/her application for asylum; (32.c)
 - e) the applicant has submitted a subsequent application raising no relevant new facts with respect to his/her particular circumstances or the situation of this country of origin; (32.d)
 - f) the applicant has failed without reasonable cause to make his application earlier and submits it during an expulsion procedure or once it has finished; (32.e)
 - g) the applicant has failed to comply with the obligations referred to in Articles 16 and 20(1) of this Directive; (32.f)
 - h) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without a good cause, has not presented himself/herself to the authorities as soon as possible; (32.g)
 - i) the application is manifestly inconsistent, contradictory or unlikely. The concurrence in the particular case of one or several of the circumstances listed in the present point can be taken into consideration when evaluating the credibility of an application. (Resolution of London about manifestly unfounded applications)

3. The application can only be rejected as inappropriate by the determining authority in accordance with point 2 of the present Article when it has been established that the applicant does not have valid reasons to fear persecution, according to the Council Directive .../... (requirements and refugee status). (32 last paragraph)

Article 27

Application of the safe country concept

1. The Member States may consider a third country is a safe third country for the purpose of examining applications for asylum after an evaluation that will take into account the following elements:
 - a) that the applicant for asylum does not suffer threats against his life or freedom in this third country;
 - b) that the applicant for asylum is not exposed to torture or inhumane treatment in this third country;
 - c) that the applicant for asylum will have effective protection in this country against the persecuting country in accordance with the Geneva Convention.

2. In accordance with the criteria established in the previous point, a third country may only be considered a safe country for an applicant for asylum if:
 - a) the applicant has either a connection or close links with the country or has had an opportunity to avail himself/herself of the protection of the authorities of that country;
 - b) there are grounds for considering that this particular applicant will be admitted or readmitted to this country and;
 - c) there are no grounds for considering that the country is not a safe third country in his/her particular circumstances.

Article 28

Designation of countries as safe third countries

1. The Council may designate third countries as safe third countries in application of the principles established in Article 27 (1) and by means of the procedure described in the Annex.
2. Member States which, at the date of entry into force of this Directive, have in force laws or regulations which designating countries as safe third countries in accordance with the criteria established in Article 27 (1) and wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive.

Article 29

Application of the safe country origin concept

1. Member States may consider a third country to be a safe country origin for the purpose of examining applications for asylum after evaluating the following elements:
 - a) whether it has democratic structures which guarantee the democratic processes, free elections of representatives, political pluralism, freedoms of thought, conscience, religion, and expression, and rights of peaceful assembly and association;
 - b) whether it is governed by the rule of law and has an effective appeal system against violation of rights and freedom;
2. In accordance with the criteria established in the previous point, a third country may only be considered as a safe country of origin for a particular applicant for asylum if he has the nationality of that country or, if he is a stateless person, it is his country of former habitual residence, and if there are no grounds for considering the country not to be a safe country of origin in his particular circumstances.

Article 30

Designation of countries as safe countries of origin

1. The Council may designate third countries as safe countries of origin for the purpose of examining applications for asylum in application of the principles established in the Article 29 (1) and by means of the procedure described in the Annex.
2. Member States which, at the date of entry into force of this Directive, have in force laws or regulations which designating countries as safe countries of origin in accordance with the criteria established in Article 29 (1) and wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive.

Articles 32 and 34 (delete)

Article 31

Cases of subsequent applications

1. Member States may adopt or retain a specific procedure entailing a preliminary examination 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;
 - b) after a final decision has been reached on his/her previous application.
2. A subsequent application for asylum shall first be subject to a preliminary examination as to whether, after the withdrawal of the previous application or after the final decision on this application has been reached,
 - a) the circumstances that determined the rejection of the application or motivated its withdrawal;
 - b) new evidence or indication exist that support the applicant's allegations, which he/she could not present before for reasons beyond his/her control;
 - c) there are other reasons in accordance with the national law which justify continuing with the examination of the subsequent application.

3. a) The preliminary examination referred to in the point 2 will have as only purpose to establish whether or not one of the cases listed in it exists and cannot include an evaluation of the relevance for the decision which is finally taken regarding the subsequent application of the new circumstances alleged, the new evidence or indication or the reasons alleged according to the national law.
 - b) If it is established in the preliminary examination that there is one of the cases listed in the previous paragraph and that the applicant was not able, for reasons beyond his/her control, of establishing these reasons in the previous procedure, particularly by means of presenting an appeal at a court, the application will be examined in accordance with Chapter II.
4. **(New paragraph, which adds Article 34, with modifications)**

Points 1 and 2 and letters b) and c) of paragraph 3 are maintained

New letter a) of paragraph 3): “The decision regarding the preliminary examination may be the responsibility of authorities different from the determining authority responsible for the decision on the previous application.

The rest of the Articles should be renumbered

ANNEX

The annex would describe the procedures for elaboration by the Council of the unique lists of safe third countries and safe countries of origin.

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 adoption of this Directive, specific procedures in order to decide at the border on the entry to their territory of ~~applicant for asylum~~ **foreign nationals** who have arrived and made an application for asylum. ~~, In so far as those laws or regulations are compatible with Articles 5, 6, 8(2), 13(1), 14(1), 14(2), 15, 17, 21 and 22.~~
These laws and regulations shall lay down in particular that the persons concerned:
- **can be confined within a designated restricted area;**
 - **are free to leave that designated area at any time for a destination outside the territory of the Member State concerned;**
 - **must be immediately informed of their rights and obligations;**
 - **have access, if necessary, to the services of an interpreter;**
 - **can consult a legal adviser or counsellor;**
 - **are interviewed in relation to their application for asylum by agents with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law;**
 - **have the right to appeal before a court of law against the decisions confining or holding them within the designated area and against the decision refusing them the right of entry into the territory;**
 - **have a legal representative appointed in the case of unaccompanied minors.**
2. This procedure may also be applicable to applicants for asylum arriving in airport ~~and~~ port **and railway** transit zones.

3. Member States shall ensure that the laws or regulations lay down rules for those specific procedures as regards the examination of applications and the decision on the applications, the access to legal assistance and representation, the procedure, duration and conditions of ~~detention~~ **confinement within a designated restricted area** as well as the time limits that apply.
4. Member States shall ensure that a decision to refuse entry to the territory of a Member State for a reason arising from the application for asylum is taken within ~~two~~ **three** weeks, subject to an extension of that time limit ~~for no more than two weeks agreed upon by a competent judicial body~~ in a procedure prescribed by **national** law.
5. Non-compliance with the time limits provided for in ~~this~~ **the preceding** paragraph shall result in the applicant for asylum being granted entry to the territory of the Member State in order for his application to be processed in accordance with the other provisions of this Directive. Member States shall ensure that applicants for asylum who are refused entry in accordance with this procedure enjoy the guarantees referred to in Chapter IV.
6. (deleted)

This document sets out Irish proposals on points of substantial concern to Ireland in the context of the above Directive. It does not address Irish concerns about the appeals chapter in respect of which a substantive reservation has been entered on the basis that the precedent cases being relied upon to support the position in the text do not, in fact, support the approach being taken.

There are other areas of the text in respect of which we have expressed concerns during the course of the first reading and we will address those areas in future meetings of the Working Group.

Article 2 - Definitions

Determining Authority - Irish proposal

The Irish delegation submits a proposed definition for inclusion in the draft Procedures Directive which addresses our concerns about the definition of "determining authority".

"Determining authority" means any quasi-judicial or administrative body in a Member State which is responsible for the examination of an application for asylum at first instance and is competent to make a determination as to whether the applicant concerned comes within the definition of a "refugee"

Commentary

There are two elements of this definition:

1. it has responsibility for the examination of asylum applications at first instance
2. it is competent to make a determination as to whether the applicant comes within the definition of a refugee [this is flexible enough to support the concept of a body which makes the actual decision on the application or a body, such as exists in Ireland, which makes a recommendation to the authority competent to make a decision (the Minister) on an application]

"Determination" means a decision or a recommendation of the Determining Authority which follows the examination of an application for asylum at first instance and which can be the subject of an appeal under the provisions of Chapter IV of this Directive

Commentary

There are two elements to this definition:

1. it can be either a decision (as envisaged in the current text of the Directive) or a recommendation (which is the situation in Ireland) of the Determining Authority. [A recommendation of the Determining Authority in Ireland that an applicant is a refugee cannot be overturned by the Minister and the person concerned **must** be granted refugee status. The only exception to this rule applies where an applicant is a danger to the security or public policy of the State. However, the Minister also has power to grant refugee status in cases where a negative recommendation has been made in respect of an application.]
2. this decision or recommendation can be the subject of an appeal to the second instance body [In Ireland, the Minister will not make a decision on an application until the appeal process has been finalised. If the appeal body decides that a negative recommendation of the Determining Authority is incorrect and that the applicant in fact comes within the definition of a refugee, it can overturn the recommendation. Where such a recommendation is overturned, the Minister **must** grant refugee status. The only exception to this rule applies where an applicant is a danger to the security or public policy of the State. However, the Minister also has power to grant refugee status in cases where a negative recommendation has been made in respect of an application]

If the notion of "determination" instead of "decision" is accepted, the definition of "final decision" will have to be amended by the substitution of "determination" for "decision"

Article 13 - Right to legal assistance and representation

2. *In the event of a negative decision by a determining authority, Member States shall ensure that legal assistance, on request, be granted ~~free of charge~~, subject to the provisions of this paragraph.*

Member States may

(a) choose to only make available legal assistance free of charge to those who lack sufficient resources and insofar as such assistance is necessary to ensure their effective access to justice.

(b) restrict legal assistance given free of charge to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum.

Commentary

It is inconsistent to impose a mandatory obligation to provide legal assistance free of charge and subsequently to provide for optional exceptions to that obligation. The intention behind this paragraph seems to be that an applicant shall be provided with legal assistance upon request insofar as such assistance is necessary to ensure their effective access to justice in all cases and that such assistance shall be free of charge where the applicant lacks sufficient resources. This intention is adequately provided for in subparagraphs (a) and (b) - there is no need to provide that legal assistance should be granted “free of charge” in the opening paragraph.

Article 19 - Procedure in case of withdrawal of the application

1. *When an applicant for asylum explicitly withdraws his application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided the information to do so is available, to reject the application ~~on~~ some other ground in accordance with this Directive.*

2. *Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority shall enter a notice in the file.*

Article 20 - Procedure in case of implicit withdrawal or abandonment of the application

1. *When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided the information to do so is available, to reject the application ~~on some other ground in accordance with this Directive.~~*

Member States may assume that the applicant has implicitly withdrawn or abandoned his application for asylum when it is ascertained that:

- a) *He/she has not within a reasonable time complied with reporting duties or other obligations to communicate, has failed to respond to requests for information essential to his/her application under the terms of Article 16 or has not appeared for an personal interview as provided for in Articles 10, 11 and 12;*
 - b) *He/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time.*
2. *Member States shall ensure that the applicant who reports once again to the competent authority after a decision to discontinue as referred to in paragraph 1 is taken, is entitled to request that his/her case be reopened.*

Member States shall ensure that this person will not be removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage in which the application was discontinued.

Commentary

Irish position - we fully support the idea that Member States should be able to reject an application that has been withdrawn. However, we consider that it should be open to Member States to reject an application for asylum solely on the basis that it has been withdrawn and not “*on some other ground in accordance with this Directive*” [Note: it is unclear as to what other ground in the Directive a rejection can be based]. By explicitly withdrawing an application, or where an application is implicitly deemed to be withdrawn, the applicant is effectively absents himself or herself from the asylum process and it is reasonable for the Member State to conclude that the applicant no longer wants to be considered as a refugee. In these circumstances, it is also reasonable for the Member State concerned to issue a notice saying that the application is refused and that the applicant is not a refugee. Member States should be able to make a final determination in these cases on the basis that the applicant has withdrawn. If the applicant subsequently presents to the authorities and wants to continue the claim, it can be considered in accordance with the procedures in Article 33 dealing with subsequent applications.

Article 25 - inadmissible applications

We generally agree to the text of the article but would submit that some additional grounds for deeming cases to be inadmissible could also be included here as follows:

- the applicant refuses to provide fingerprints for the purposes of his application,
- a subsequent application is made by a dependent who had, in accordance with Article 5(4), consented to be part of an application made on his or her behalf,
- a subsequent application, made in accordance with the provisions of Article 33(1), which does not meet the criteria in Article 33(2).

Articles 29 and 32 - manifestly unfounded applications and other cases in the accelerated procedure

Articles 29 and 32

An alternative approach is to merge the articles and to amend the chapeau to read that *"Member States may process an application for asylum under the accelerated procedure, and may reject the application as unfounded or manifestly unfounded, where the determining authority has established that*

- *the applicant in submitting his application and presenting the facts, has only raised issues that are obviously not relevant to the Geneva Convention;*
- *the applicant is from a safe country of origin within the meaning of Articles 30 and 31 of this Directive;*
- *the applicant is prima facie excluded from 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]*
- *the applicant has without good reason, misled the authorities with respect to his identity and/or nationality, by presenting false information or by withholding relevant information that could have had a negative impact on the decision;*
- *the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, and there are serious reasons for considering that he/she has, in bad faith, destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality;*
- ~~*the applicant has made deliberately false or misleading representations of a substantial nature in relation to the evidence produced in support of his/her application for asylum*~~ **the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is abusive**
- *the applicant has submitted a subsequent application raising no relevant new facts with respect to his/her particular circumstances or to the situation in his country of origin;*
- *the applicant has failed without reasonable cause to make his application earlier, having had ample opportunity to do so, and 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;*

- *the applicant failed to comply with obligations referred to in Articles 16 and 20(1) of this Directive;*
- *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 as soon as possible given the circumstances of his/her entry;*
- **the applicant had lodged a prior application for asylum in another country (whether or not that application had been granted or rejected), or**
- *the applicant is a danger to the security of the Member State or constitutes a danger to the community of that Member State, having been convicted by a final judgement of a particularly serious crime.*

*The application can only be rejected if the determining authority has established that the applicant has no well-founded fear of being persecuted 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].*

Commentary

In dealing with manifestly unfounded applications, Ireland is influenced in particular by the 1992 London Resolution on manifestly unfounded applications for asylum which sets out subjective and objective grounds on which applications can be deemed to be manifestly unfounded. We are aware that other Member States are also influenced by this resolution and have developed their asylum determination systems in to take account of its provisions.

At the last meeting of the Working Group, a number of Member States called for Articles 29 and 32 to be merged. Ireland supports this approach. The grounds currently listed in Article 32 are grounds for finding an application to be "unfounded" and suitable for processing in an accelerated procedure according to Article 23. In view of the fact that the provisions governing **both** articles are the same, i.e. the application must be processed within three months and an appeal can have non suspensive effect, it would appear that there is a valid argument for merging the articles. Many of the grounds listed in Article 32 are also grounds for deeming an application to be manifestly unfounded (subject of course to a merits examination of the application).

The key points in the above suggestion is that it would be for the determining authority to "establish" (i.e. a merits examination would be necessary as provided for in the second paragraph of Article 32)

- that the applicant is not refugee and that the application falls within one of the grounds
- and that the option to deem the case "unfounded" rather than "manifestly unfounded" would be available to the determining authority.

Article 33 - Cases of subsequent applications

1. *Member States may adopt or retain a specific procedure entailing a preliminary examination 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;*
 - b) *after a final decision has been reached on his/her previous application.*
2. *A subsequent application for asylum shall first be subject to a preliminary examination as to whether, after the withdrawal of the previous application or after the final decision on this application has been reached,*
 - ~~*(a) the personal circumstances of the applicant or his/her legal situation has changed or*~~
 - ~~*(b) there is new information indicating that a decision more favourable to the applicant could be taken or could have been taken or*~~
 - ~~*(c) the decision on a former application for asylum was taken on an incorrect or false basis*~~
or
 - (a) the basis for the subsequent application is sufficiently different from the original application as to have a realistic prospect of a more favourable decision***
 - (d) there are other reasons under national law to further examine that subsequent application.*

If one of the reasons described under subparagraphs (a), ~~(b)~~, ~~(c)~~ and (d) applies and the applicant concerned was, through no fault of his/her own, incapable of asserting those reasons set forth in this paragraph in the previous procedure, in particular by filing an appeal before a court, the application will be further examined in conformity with Chapter II.

Commentary

There is a need to have finalisation of cases and the text as it stands is somewhat vague. We must remember that, under this article, we are giving consideration to applications which have been rejected or withdrawn and there must be a reasonably high threshold before the applications are allowed back into the process. Accordingly, we consider that subparagraphs (a) and (b) of paragraph 2 could be merged and the criteria amended to read as above. We also consider that paragraph (c) should be deleted as the question of whether an application was decided upon an incorrect or false basis would be a matter for the reviewing body in the first instance and the courts in later instances.

Article 34 (Cases of subsequent applications) - 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.*
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 applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.

3. *Member States shall ensure that*
- ~~(a) the determining authority which has taken the decision on the previous application is responsible for the preliminary examination;~~
 - ~~(b) 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 challenging it;~~
 - (c) *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.*

Commentary

Ireland considers that Articles 3(a) and (b) should be deleted. The guarantees provided by Article 9 (paragraph 3(1) above) and the final sentence of paragraph 2 are adequate to ensure that the applicant is given a fair hearing in respect of the subsequent application.

Article 37 (Withdrawal or annulment) - Procedural rules

1. ~~Where in a Member State a determining authority reconsiders a refugee's qualification, the annulment or withdrawal of a refugee status shall be examined under the regular procedure in accordance with the provisions of this Directive.~~

~~— Where in a Member State a court or another body reconsiders a refugee's qualification, the annulment or withdrawal of a refugee status shall be examined under the same conditions as the review of decisions taken under the regular procedure.~~

2. ~~Member States may derogate from Articles 9 to 12 when it is technically impossible for the competent authority to comply with the provisions of those Articles.~~

- 1. Member States shall ensure that, where the competent authority is reconsidering a refugee's qualification for refugee status, 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 same; and**
 - (b) to be given the opportunity to submit reasons in writing as to why his or her refugee status should not be withdrawn or annulled.**

- 2. Member States shall ensure that the person concerned has the right to an appeal or review before a judicial or quasi-judicial body of a decision taken in accordance with this Article.**

- 3. Member States may derogate from Article 37(1) and (2) where it is technically impossible for the competent authority to comply with these provisions.**

Commentary

Ireland considers that it should not necessarily be a matter for the first instance determining body to consider whether a refugee's status should be withdrawn or annulled. The important consideration is that there should be a procedure laid down in national law which provides adequate safeguards for the refugee. Ireland considers that the above text provides such safeguards, including the opportunity to appeal a decision to withdraw or annul status.

Article 25 (Cases of inadmissible applications)

Add as category in which Member States may reject a particular application for asylum as inadmissible:

- f) the asylum seeker is allowed to remain on the territory of the Member State concerned on some other ground which protects him against refoulement.**

Explanation:

If an asylum seeker has a permit to stay or as long as a procedure is going on and the asylum seeker is allowed to remain on the territory pending its outcome, he is protected against refoulement. When the permit to stay is not extended or is withdrawn, he has interest in making an application for asylum. At that moment he can make this application. The objective of this provision is to prevent (several) procedures (pending at the same time).

Article 32 (Other cases under the accelerated procedure)

Member States may process an application for asylum under the accelerated procedure, **inter alia**, where

Explanation:

Article 32 contains a restrictive list of circumstances which justify a rejection of an application for asylum under the accelerated procedure, if the case is unfounded. This restrictive list obstructs the possibility of processing within the accelerated procedure cases which could be dealt with in such a procedure. The objective of the proposal is to enlarge the possibilities for a quick procedure in unfounded asylum cases in general. This is all the more necessary in the light of the (rather long) time-limit of three months for the accelerated procedure and the fact that the listed circumstances come close to the notion of manifestly unfounded.

According to the current legislation in the Netherlands a request for asylum can be dealt with in the accelerated procedure if the request for asylum can be rejected without time-consuming investigation within 48 processing hours. In this case the request for asylum is rejected within 48 processing hours after a personal interview. This accelerated procedure contains fundamental guarantees, such as appeal before a court of law, legal assistance and the services of an interpreter. It is of the utmost importance to the Netherlands that the Directive doesn't preclude certain categories of unfounded applications from the accelerated procedure.
