



Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status

(Council Document 14203/04, Asile 64, of 9 November 2004)

The Office of the United Nations High Commissioner for Refugees ('the Office' or 'UNHCR') has issued provisional comments on the proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status of November 2004 (the 'Asylum Procedures Directive')¹. This summary highlights UNHCR's main concerns.

UNHCR welcomes confirmation in the Directive of certain basic principles and guarantees which should apply in an asylum procedure. However, UNHCR notes that the possible exceptions and derogations which qualify these safeguards are so broad that, in practice, these minimum safeguards may not apply to a significant number of asylum-seekers in the EU.

Moreover, throughout the negotiations on the draft, UNHCR has repeatedly expressed serious concerns that a number of provisions in the Directive could lead to violations of international law. Many of these provisions remain in the proposal. If incorporated into national law without further safeguards, these provisions may create a serious danger of *refoulement*.

In view of the fact that the Directive defines common minimum standards for national asylum procedures, but permits Member States to retain or introduce higher standards in national law, UNHCR urges Member States to apply more favorable provisions where necessary to ensure compliance in practice with international refugee and human rights law.

- **Application of the 'safe third country' concept should be limited and should include an effective opportunity to rebut a presumption of safety (Articles 27 and 35A)**

UNHCR is seriously concerned that the Directive does not ensure that all applicants have **an effective opportunity to rebut the presumption** that a third country is safe in their particular cases. No applicant should be denied access to an asylum procedure altogether, including applicants arriving from **countries designated as 'safe third countries' by national parliaments**. Given the lack of procedural standards for appeals, and the fact that the Directive does not require appeals to have suspensive effect, there is a real danger of return to persecution or serious harm in contravention of the 1951 Convention and other international treaties. While the Directive provides for examination at least of whether applicants could face a risk of torture or inhuman, cruel or degrading treatment, under international law, individual **risks extending beyond this minimum should be examined**, including the fear of persecution on 1951 Convention grounds.

¹ UNHCR Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64) of 10 February 2005.

UNHCR is particularly concerned that **no safeguards apply to the specific safe third country procedure under Article 35A**. Access to the asylum procedure (and territory) may be denied altogether under this rule, including by border guards who may not necessarily be qualified to assess international protection needs. UNHCR reiterates the need for applicants to have a genuine opportunity to raise and have considered any reasons which could preclude their removal to another state under on ‘safe third country’ grounds, **before** removal takes place. There should also be an effective remedy which is exercisable **in practice** against a negative decision based on this ‘safe third country’ rule.

UNHCR would favour multilateral agreements which ensure access to effective protection over ‘safe third country’ procedures involving a unilateral decision to transfer responsibility to a third state to examine an asylum request. If Member States nevertheless wish to rely on the ‘safe third country’ notion, certain requirements should be met (see UNHCR’s comments on Article 27).

- **Acceleration of procedures should be limited to clearly well-founded or clearly abusive or manifestly unfounded cases (Article 23(4))**

All parties have an interest in efficient, as well as fair, asylum procedures. UNHCR is concerned, however, that Article 23(4) of the Directive permits **prioritisation or acceleration in a wide range of cases**, on grounds that are not necessarily related to the validity of the claims. UNHCR would encourage States to accelerate positive consideration of claims which are manifestly-well founded, and accepts prioritization of claims in the regular procedure, with all necessary safeguards. However, under the proposed Directive, the consequences of prioritization or acceleration are left largely to the Member States, and may lead to considerably reduced safeguards. Amongst others, the Directive permits States to dispense with personal interviews and other significant procedural requirements in such cases.

For instance, the Directive provides that claims may be accelerated simply because the applicant has failed to apply as early as possible or has not fulfilled formal requirements; has made inconsistent statements; or has failed to produce sufficient information about his or her identity. Many such claims will not fall within the definition of “clearly abusive” or “manifestly unfounded” claims, i.e. claims “which are so obviously without foundation as not to merit full examination at every level”, as set out in the UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983. Under the Conclusion, only such narrow categories of claims should be channeled into a procedure with a simplified review. Further, the broad categories in Article 23(4) (a) to (o) do not take account of the fact that applicants who do not qualify for refugee status may nevertheless need complementary protection. Such claims should not be considered manifestly unfounded or clearly abusive.

- **The same minimum procedural guarantees should apply for all asylum examinations (Chapter II, Article 24 and 35)**

UNHCR welcomes the recognition of minimum basic principles and guarantees such as the right to a personal interview; the right to receive information and to communicate with UNHCR; the right to legal assistance and representation; the right not to be detained solely for seeking asylum; and the right to an “effective legal remedy”. The Office is however concerned about the **exceptions** and possibilities to **derogate from these minimum standards** in a number of important cases.

UNHCR regrets, for example, the **extensive limits which Member States may place on personal interviews** (Article 10(2)(b), 10(2)(c) and 10(3)). Personal testimony is often decisive for determinations, and can be vital to clarify errors or apparent inconsistencies. Limiting interview rights will significantly undermine the fairness of procedures and accuracy of decisions.

In UNHCR's view, the right to legal assistance and representation is another essential safeguard, especially in complex asylum procedures. The Directive limits **free legal assistance and representation** to appeals against negative decisions. The right to legal assistance under Article 13(2) is, moreover, seriously eroded by the exceptions in Article 13(3) to (5). Quality legal assistance and representation is in the interest of States, as it can help to ensure that international protection needs are identified early. The efficiency of first instance procedures is thereby also improved. Exceptions to the provision of free legal aid should be made only where the applicant has adequate financial means.

Furthermore, Article 24 permits Member States to **derogate from basic procedural standards** for particular types of procedures. There is no reason why applicants for asylum at borders and in transit zones (Article 35), for example, should have fewer guarantees of due process of law than those who submit claims within the territory of a Member State. In UNHCR's view, States should afford the same minimal guarantees and safeguards as outlined *inter alia* in Chapter II of the Directive in all asylum procedures. As a minimum, vulnerable persons should be exempt from such special procedures.

UNHCR also regrets the exceptions to the principle that all asylum applications should be examined by **one competent authority**. The Office is concerned that decisions by other authorities may be of lesser quality, due to a lack of appropriate expertise and experience or access to relevant country information. In UNHCR's view, the risk of *refoulement* is thereby increased. UNHCR recommends that authorities other than the determining authority under Article 3A(1), such as border police, be competent only to register an asylum application and to send it to the determining authority for examination.

UNHCR is further disappointed that the draft Directive does not include **age- and gender-sensitive safeguards** and recommends that States establish such safeguards in their national legislation.

- **The right to an effective remedy should include suspensive effect (Articles 6 and 38)**

UNHCR regrets that the Directive only guarantees the right to remain during the first instance procedure (Article 6). Article 38(3)(a) allows Member States the discretion to decide whether a remedy has suspensive effect, and on whether and which exceptions will apply. In view of the relatively high number of decisions overturned on appeal, and given the potentially serious consequences of wrong decisions at first instance, the **suspensive effect of asylum appeals** is a **critical safeguard**. Applicants should be permitted to remain in the Member State until their appeals have been decided, if a legal remedy is to be effective. UNHCR urges States to ensure that their national laws provide for suspensive effect of appeals against negative decisions. Exceptions to automatic suspensive effect could be permitted only for clearly abusive or manifestly unfounded claims, although an application for leave to remain should be possible in such cases.

- **Applicants who left the country before a substantive examination was completed should have access to such an examination upon return (Articles 19, 20, 33)**

Asylum applicants may leave the country for a variety of reasons before a substantive examination on their asylum application has taken place. Articles 19 and 20 of the Directive give States the option to **reject applications of such asylum-seekers as unfounded**. If they return, a request for protection may be considered as a subsequent application under Article 33 of the Directive, and a substantive examination is required only if new elements or findings are presented. Access to the procedure may, moreover, be seriously curtailed in practice. This could mean that asylum applicants

returned under a Dublin II arrangement or the ‘safe third country’ concept may not receive a substantive examination of their claims.

In UNHCR’s view, every asylum application should be examined on substance, to avoid a risk of *refoulement*. Explicit or implicit withdrawal should lead to discontinuation of the procedure, not to rejection of the claim. Applicants should be granted the opportunity to resume or re-open the asylum procedure.

- **The ‘safe country of origin’ concept should be applied narrowly (Articles 30, 30A, 30B)**

The ‘safe country of origin’ notion may be used as a procedural tool for prioritized or accelerated treatment of claims in carefully circumscribed situations. However, it is critical that **each case be examined individually** on its merits, as stipulated in article 30. UNHCR is concerned in this regard that Article 30B places the **burden of proof entirely on the asylum-seeker**, who is made responsible to submit evidence that a country is not safe. Each applicant should be given an effective opportunity to rebut the presumption of safety, without bearing an increased burden of proof. The duty to ascertain relevant facts remains a joint responsibility of the applicant and the examiner.

UNHCR notes the criteria set out in Annex II², but considers that **clear benchmarks** are needed to define when a country could be included in the common EU list of ‘safe countries of origin’ proposed by the Directive. UNHCR regrets that the Directive permits the possibility to introduce or maintain **national lists of safe countries of origin**, which do not meet **the criteria for ‘safe’ countries outlined in Annex II**. The Office further notes that, in principle, **a country cannot be considered ‘safe’ if this applies only for part of its territory**.

UNHCR
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² Annex II is also referred to as ‘Annex C to Annex I’ in the Council Document 14203/04.