

**Comments from the European Council on Refugees and Exiles
on the
Proposal for a Council Regulation amending Directive 2003/109/EC to extend its
scope to beneficiaries of international protection**

(Brussels, 6.6.2007, COM(2007)298 final, 2001/0182(CNS))

1. Introduction

The European Council on Refugees and Exiles (ECRE) is a network of 64 non-governmental refugee-assisting organisations in 28 European countries. ECRE welcomes this opportunity to comment on the Proposal for a Council Regulation amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection.

2. Background

The Commission presented the proposal for a Long Term Residents Directive (hereafter: LTR Directive) on 13 March 2001¹. This proposal was based on the special meeting of the European Council in Tampere in 1999, in which the Council had acknowledged the need to ensure fair treatment of third-country nationals who reside legally on the territory of the Member States. It declared that a more vigorous integration policy should aim at granting this group rights and obligations comparable to those of EU citizens². Furthermore, the Council acknowledged that the legal status of third-country nationals should be approximated to that of Member States' nationals, and decided to pay special attention to the situation of third-country nationals settled on a long-term basis³.

The proposal for the LTR Directive did include refugees but not third country nationals who are authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States⁴ (the term 'subsidiary protection' was only later defined in EU legislation in the Qualification Directive that was adopted in 2004⁵). During the JHA Council meeting on 6 May 2003 it was decided that refugees would be removed from the scope of the proposed LTR Directive and that a separate instrument would be proposed by

¹ COM(2001) 127, 13.3.2001

² Presidency Conclusions, point 18

³ Presidency Conclusions, point 21

⁴ COM(2001) 127, article 3.2b

⁵ Council Directive 2004/83/EC of 29 April 2004

the Commission with regard to a long-term residence status for refugees as well as for beneficiaries of subsidiary protection. In a Joint Statement of 8 May 2003 the Council and the Commission called for the extension of the scope of the Directive to cover beneficiaries of international protection (the term beneficiaries of international protection includes refugees as well as beneficiaries of subsidiary protection), taking into account the study on the transfer of protection status⁶.

The LTR Directive was adopted on 25 November 2003⁷. The Directive grants a LTR permit to those who have resided within a Member State's territory legally and continuously for five years⁸, have stable and regular resources for themselves and for dependent family members⁹ and sickness insurance. Member States may additionally require third-country nationals who apply for a LTR to comply with integration conditions¹⁰. This LTR permit is a permanent status that gives the holder a right to equal treatment with nationals as regards the areas mentioned in the Directive¹¹, including among others, access to employment, education, social security and social assistance. Furthermore, the permit gives the holder the right to reside in a Member State other than the one that has granted the protection to exercise an economic activity in an employed or self-employed capacity, the pursuit of studies or vocational training or other purposes¹².

ECRE consistently advocated against the exclusion of refugees and beneficiaries of subsidiary protection from this important legal instrument. Denying refugees and beneficiaries of subsidiary protection who have already lived for at least five years in one Member State access to this more stable status has in ECRE's view resulted in denying them the enjoyment of certain social and economic rights, including the opportunity to make use of freedom of movement within the European Union, on equal terms as other third country nationals.

3. Overview of the Proposal

On 6 June 2007 the Commission published its long-awaited Proposal to amend the LTR Directive (hereafter: the Proposal) to extend its scope to beneficiaries of international protection¹³, aiming to offer beneficiaries of international protection legal certainty about their residence in a Member State and rights which are comparable to those of EU nationals after 5 years of legal residence, thus closing the gap left open by the LTR Directive. The term 'beneficiaries of international protection' covers both refugees and beneficiaries of subsidiary protection. In the Proposal the Commission had extended the scope of the LTR Directive by deleting the exceptions concerning beneficiaries of international protection in the LTR Directive. The proposal does not contain a community

⁶ The Final Report was published on 25 June 2004: *Study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, by Nina M. Lassen, Joanne van Selm and Jeroen Doomernik (Institute for Migration and Ethnic Studies).

⁷ Council Directive 2003/109/EC of 25 November 2003, concerning the status of third-country nationals who are long-term residents.

⁸ Ibid, Article 4

⁹ Ibid, Article 5 (1)(a)

¹⁰ Ibid, Article 5 (1)(b)

¹¹ Ibid, Article 11

¹² Ibid, Article 14 (2). The term 'other purposes' is not defined in the LTR Directive.

¹³ Proposal for a Council Directive amending Directive 2003/109 to extend its scope to beneficiaries of international protection, COM(2007) 298.

mechanism on transfer of responsibility for protection status: the issue is thus outside the scope of the Directive and therefore the Proposal contains safeguards against refoulement.

In general, ECRE welcomes the Proposal, and particularly:

- The inclusion of beneficiaries of international protection in the scope of the Directive;
- The fact that the calculation of the five-year period for beneficiaries of international protection starts on the date of the application for international protection and the duration of the procedure is thus taken into account;
- The obligation of the Member State granting a LTR permit to a third-country national who is a beneficiary of international protection to include a remark referring to the protection status in the LTR permit.

However, ECRE has concerns about other provisions in the Proposal, particularly:

- The Directive does not apply to third-country nationals who are authorised to stay in a Member State on the basis of ‘temporary protection’, but temporary protection is not defined (no reference is made to the Directive on Temporary Protection¹⁴);
- If a period of temporary protection is followed by international protection, the period of temporary protection is not taken into account in the calculation of the five year period;
- Beneficiaries of international protection have to comply with the same material conditions as other third-country nationals in order to obtain a LTR permit, particularly the condition of stable and regular resources, although they do not have equal opportunities to other third-country nationals to achieve this.
- Beneficiaries of international protection have to comply with the same integration conditions as other third-country nationals although due to their special circumstances they might not be able to meet these requirements;
- The safeguards against refoulement are weak. For example if a Member State wants to expel a third-country whose LTR permit contains the remark that the holder was granted international protection, it shall ‘consult’ the Member State mentioned in the remark.

4. Analysis of key articles

Scope

(Article 3)

ECRE believes it is of major importance that beneficiaries of subsidiary protection are included in the scope of the LTR Directive as well as those granted refugee status. The concept of subsidiary protection has been recognized and harmonized in the Qualification Directive and is thus part of the EU-acquis. There is no logical reason to grant third-country nationals who have obtained a subsidiary form of protection fewer or lesser rights than Convention refugees¹⁵, because their needs may be equally compelling and lasting as those of Convention refugees.

¹⁴ Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced third-country nationals and on measures promoting a balance of efforts between Member States in receiving such third-country nationals and bearing the consequences thereof.

¹⁵ *The Way Forward: Europe's Role in the Global Refugee Protection System 'Towards Fair and Efficient Asylum Systems in Europe'*, ECRE, September 2005, section 4.7, and other recent policy positions relating to the Qualifications Directive

Duration of residence

(Article 4, amended by article 1.3 of the Proposal)

Article 4 sets the time limit for obtaining a long-term residence permit as five years. ECRE welcomes that for beneficiaries of international protection the proposal states that the period between the application date and the granting of the permit will be taken into account. However, ECRE recommends that a temporary protection status should also be taken into account if the person is subsequently granted refugee or subsidiary protection status, and that temporary protection should be defined with explicit reference to the Temporary Protection Directive¹⁶. This should apply whether the person applied before, during or after the operation of the temporary protection regime.

Recommendation:

If a period of temporary protection is followed by international protection then the period of temporary protection should also be taken into account in the calculation of the period referred to in paragraph 1.

Conditions for acquiring long-term resident status: economic means

(Article 5.1)

In this article that is not amended by the proposal the conditions are laid down for obtaining a LTR permit. The third-country national who wants to apply for a LTR permit after the period of five years, starting on the date of application, has to fulfil the condition of having stable and regular resources that are sufficient to maintain him or herself and the members of his or her family without recourse to the social system of the Member State concerned. ECRE recommends that beneficiaries of international protection be exempted from this requirement.

Firstly, practices in Member States vary widely as to whether or not asylum seekers are allowed to work during their asylum procedure¹⁷. A 2005 ECRE study reported the significant obstacles that asylum seekers faced in trying to exert their right to work in several Member States, which in many cases were linked to ‘conditions’ set down in national legislation.¹⁸ Severe restrictions to the economic sectors (e.g. in Austria) and to the amount of time that asylum seekers can work (e.g. in Slovenia), administrative obstacles (e.g. in Austria, the Czech Republic, Hungary and the UK), and the remoteness of accommodation centres make almost impossible for asylum seekers to access employment¹⁹. ECRE believes that it is unfair to require from refugees and beneficiaries of subsidiary protection stable and regular resources after five years, given that during the period of their asylum procedure they have had limited opportunities to achieve this, varying from one Member State to another.

Secondly, refugees and beneficiaries of subsidiary protection are a more vulnerable group than other third country nationals. Refugees have been forced to migrate and unlike other

¹⁶ See footnote 14, reference to Council Directive 2001/55/EC.

¹⁷ More specifically, practices in Member States vary with regard to the period after which they are allowed to work, whether or not they have to apply for a work permit first, how long it takes in practice to obtain a work permit and the areas where they are allowed to work.

¹⁸ ECRE, The EC Directive on the Reception of Asylum Seekers: Are Asylum Seekers in Europe Receiving Material Support and Access to Employment in Accordance with European Legislation?; November 2005.

¹⁹ Ibid, page 15.

third country nationals have had very little chance to choose where to reside in Europe. They often have not had the chance to choose the Member State where they were most likely to integrate best. Furthermore, many refugees and beneficiaries of international protection are likely to still experience daily the physical and psychological effects of their flight. Unlike other third country nationals it could take beneficiaries of international protection longer to fulfil the requirement of stable and regular resources. ECRE recommends therefore that refugees and beneficiaries of subsidiary protection be excluded from this condition.

Recommendation:

Beneficiaries of international protection should be exempted from fulfilling the material conditions mentioned in 1(a) of this article given their limited access to the labour market while their claims are being determined, and in view of their particular circumstances compared to other third-country nationals

Conditions for acquiring long-term resident status: integration conditions

(Article 5.2)

Member States may require third-country nationals to comply with integration conditions in accordance with national law on the basis of article 5.2 of the Long Term Residence Directive, which would also apply to beneficiaries of international protection under the proposal. ECRE believes that this would neglect the vulnerability of refugees and beneficiaries of subsidiary protection who are often traumatized. This condition should not be an unreasonable high barrier to obtain a LTR permit and therefore ECRE urges Member States to incorporate exceptions in the relevant national legislation and/or policies for refugees and beneficiaries of subsidiary protection so as to examine on an individual basis if the refugee or beneficiary of subsidiary protection concerned can be expected to meet this requirement.

Recommendation:

Member States should create exemptions from the integration requirement for vulnerable refugees and beneficiaries of subsidiary protection to be assessed on an individual basis.

Transfer of Protection Status

(Article 12 as amended by Article 1 (6) of the Proposal)

ECRE is disappointed at the failure to include a community mechanism on the transfer of protection status in the Proposal. Transfer of protection status²⁰ would have secured a third-country national with an international protection status and a LTR permit the same level of protection in the Member State that has granted the international protection status as in a second Member State where he or she has chosen to reside. The absence of a community mechanism on the transfer of protection status makes clear that a true Common European Asylum System is not yet in sight although the 2010 deadline approaches quickly.

²⁰ Transfer of protection status is foreseen in The European Agreement on Transfer of Responsibility for Refugees (CETS No. 107, entered into force 1/12/1980), but only 11 EU Member States have ratified this Agreement.

Since transfer of protection is outside the scope there are safeguards in the proposal: the Member State that has granted the refugee status or the status of subsidiary protection to a third-country national will stay responsible for protection against refoulement, also if the third-country national concerned has moved to another Member State with a LTR permit. If a 'second' Member State wants to expel a holder of a LTR permit, be it one issued by the first Member State or one issued by the second Member State, the second Member State is obliged to 'consult' the first Member State on whether or not the third-country national concerned is still a beneficiary of international protection. 'Contact points', appointed by Member States on the basis of Article 25 of the LTR Directive, amended by article 1.8 of the Proposal, will be responsible for receiving and transmitting the requested information. If the third-country national is still in need of international protection, it will be possible only to expel him or her to the Member State that originally granted the protection. In the case that the third-country national is not in need of international protection anymore, the second Member State can expel him or her to countries other than the Member State that originally granted the protection status.

ECRE is concerned with the formulation of the safeguards in the proposal intended to substitute for not including a mechanism for transfer of protection status. Firstly, it is not specified in the proposal what 'consult' exactly means. Furthermore, the proposal does not mention a deadline for the consulted Member State to answer nor does the proposal specify how the consulted Member State should answer and if the third-country national concerned is informed as well. Moreover, it is not specified in the proposal whether the consulted Member State can answer plainly with a 'yes' or a 'no' or if reasons must be given. Also, it is unclear from the proposal if and which judicial safeguards the third-country national concerned has against withdrawal of the protection status and expulsion. ECRE is concerned that the safeguards against refoulement in the proposal as described above are not in accordance with Member States' obligations under international refugee and human rights law, particularly article 33 of the 1951 Refugee Convention and article 3 of the European Convention of Human Rights

Recommendation:

The consultation procedure should be standardised in writing and clearly define Member States' responsibility to verify whether an individual still benefits from international protection. It should also specify time limits and ensure individuals have access to proper judicial safeguards.

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