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COMMISSION OF THE EUROPEAN COMMUNITIES

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ANNEX

2008/0244 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

laying down minimum standards for the reception of asylum seekers

(Recast)

{SEC(2008) 2944}

{SEC(2008) 2945}

Detailed Explanation of the Proposal

Article 2

(a) Since no reference is made in the text of the Directive to the Geneva Convention, the definition is deleted, in line with rules on legislative drafting. Same applies for current Article 2(e) and (f).

(b) The definition of 'application for asylum' refers only to applications for international protection relating to the status of refugees as defined under the Geneva Convention relating to the Status of Refugees of 28 July 1951. It is therefore necessary to amend it in line with the Council Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted¹ (hereafter – the Qualification Directive) in order to ensure that the Reception Conditions Directive also applies to applicants for subsidiary protection. This amendment is reflected in several provisions of the proposal, namely in Articles 2(c), 2(d), 3, 5, 6, 14, 17, 18 and 23.

(d) The definition of family members is extended in three regards: First and foremost, the condition for minors referred to in point (ii) to be dependent is deleted. In this respect, the amendment enlarges the scope of the application of the clause to minors who are not necessarily dependent of their parents from an economic point of view, but who depend more in an emotional way. Secondly, the new provisions foresee the possibility for the married minor children to be "family members" where it is in their best interests to reside with the applicant. This condition aims to respond in particular to situations of forced marriages or to cases where the minor is in practice separated from the spouse. Thirdly, it includes the minor unmarried siblings of the applicant, when the later is a minor and unmarried. The term "unmarried" is subjected to the same caveat that minor married applicants or their minor siblings can be considered as family members when it is in the best interests of one or more of them to reside together.

(e) For reasons of legal clarity and with a view to align the directive with the 1989 UN Convention of the Rights on the Child, the definition of a minor is inserted in this Article.

(h) The definition of unaccompanied minor is amended in line with the definition of a minor.

(j) The definition of material reception conditions is amended in order to rectify a disharmony between this provision and the current definition of this notion in Article 17 of the Directive.

Article 3

The proposal is extended to cover applicants of subsidiary protection. In this respect it is necessary to refer to the Qualification Directive ensuring that Member States are obliged to apply the directive also to this category of applicants.

For reasons of consistency with the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status² (hereafter – the Asylum Procedures Directive) several linguistic changes are introduced in the first paragraph of this provision and a reference to 'transit zones'³ is added also in line with the ECtHR case of *Ammur*.³

Article 5

¹ OJ L 304, 30.9.2004, p.12

² OJ L 326, 13.12.2005, p.13

³ *Ammur v France* application no. 19776/92, 25.6.1996

For reasons of clarity the phrase 'in a language that the applicants may reasonably be supposed to understand' is replaced to a 'in a language that the applicants are reasonably supposed to understand'.

Article 6

It is proposed to clarify that the document issued to the asylum applicant is sufficient to guarantee access to the rights and benefits conferred under the directive.

Article 7

For reasons of clarity, since the proposal introduces extensive amendments with regard to the issue of detention, it is proposed to address detention separately from the issue of residence and freedom of movement. In this respect, this paragraph is deleted and the issue of detention is addressed in new Articles 8, 9 10 and 11.

Article 8

Primarily, the Article refers to the general principle on detention laid down in the Asylum Procedures Directive, namely that a person shall not be detained for the sole reason that he/she is an applicant for international protection.

Secondly, the Article aims to ensure that, detention should normally be avoided and used only in exceptional cases.

In this respect the Article introduces a restrictive list of four grounds under which detention could be applied, based on the Recommendation of the Committee of Ministers of the Council of Europe "On measures of detention of asylum seekers". Under these specified grounds, detention could be lawful only if i) it is in line with the principle of necessity as stated in the Geneva Convention relating to the Status of Refugees of 28 July 1951 and developed by the case-law of the ECtHR and ii) other less coercive measures could not be applied in the specific case. Such less coercive measures shall be foreseen in national law.

The provision finally requires that detention should be justified in the light of the individual circumstances of the case. In this respect this evaluation should adequately take into account the vulnerability of the individual concerned.

Article 9

The Article provides for procedural rules and guarantees concerning the detention of asylum seekers.

First and foremost, it is ensured that detention shall be for the shortest period possible. In particular, concerning grounds under Article 8(2)(a), (b), and (c), the duration of detention shall not exceed the time needed for administrative authorities to fulfil the relevant procedural requirements. In any case, delays in the administrative procedure, if they cannot be attributed to the asylum seeker, should not justify the prolongation of detention.

Moreover, the Article states that the detention decision shall be ordered by judicial authorities or in urgent cases by administrative authorities in which case it shall be confirmed by a judicial authority within 72 hours. The detention order shall be in writing, specifying the grounds and its duration. The detained asylum seeker shall be immediately informed of the grounds of detention, its duration and of the possibilities to challenge the detention decision.

In case of unlawful detention, the asylum seeker shall be released immediately. In order to avoid arbitrary detentions it is important to provide for a regular review of detention by a judicial authority.

The new Article also states that detention shall not be unduly prolonged. Finally it is ensured that in cases of detention asylum seekers shall be granted access to legal assistance and/or representation that shall be free of charge where they could not afford the entailed costs. Relevant procedures on access to legal assistance shall be laid down in national law.

Article 10

Conditions of detention should be specified in the directive with a view to ensure humane treatment of detained asylum seekers as prescribed under international law. In particular this Article ensures that asylum seekers shall not be kept in prison accommodation but in specialised detention facilities. It further takes into account the vulnerable situation of asylum seekers and states that they shall be kept separately from other third country nationals, unless there is a need to retain family unity. Contact with legal representatives, family members, UNHCR and other relevant organisations and bodies should be guaranteed in order to ensure access to legal procedures and benefits and respect of family life. Finally it introduces an obligation to Member States to inform detained asylum seekers of the rules applied in the detention facilities.

Article 11

The detention of vulnerable persons and other persons with special needs should be as far as possible avoided taking into consideration their specific situation. In this respect this Article forbids the detention of all persons with special needs unless it is ensured, after an individual examination of their situation, that their already vulnerable situation is not aggravated as a result of detention. Where persons with special needs are detained, regular monitoring of the detention and adequate support should be provided.

Moreover, the detention of minors is forbidden unless it is in their best interests. In exceptional cases where the detention of a minor is legitimate, he/she shall be able to engage in leisure-activities appropriate to his/her age. Moreover, taking into consideration the specifically vulnerable situation of unaccompanied minors, this Article forbids their detention in all cases.

In view of respecting the right to family life, separate accommodation shall be provided to detained families. Additionally, female asylum seekers shall never be kept in detention with male asylum seekers unless it concerns family members and all individuals consent.

Article 14

Access of minors to national schools should be as immediate and unconditional as possible in view of safeguarding their fundamental right to education. The Commission's Green Paper of June 2008 on 'Migration & mobility: challenges and opportunities for EU education systems' adopted in June 2008 recognises the educational difficulties produced by segregated schools and underlines the need for preparatory classes that assist minors' access to the national educational system.

In this respect the provision allowing for the extension of the period of granting access to education from a maximum of 3 months to one year is deleted. Preparatory classes, such as language classes and other specific education, should be available where necessary in order to facilitate access and/or integration of minor in the national educational system respectively. Moreover, Member States shall guarantee that where access to education is not possible due to the specific situation of the minor, other educational arrangements shall be offered in accordance with national legislation and practices.

The reference under the current provision to the possibility to confine access to education to the state education system is deleted for reasons of legal clarity. There is under the current

Directive no legal argument suggesting that Member States are not allowed to establish such modalities in this respect.

For reasons of coherence, the definition of minors is deleted from this Article since a new definition is inserted in Article 2(e) of the proposal.

Article 15

This Article is amended with a view to ensure that employment is accessible within a maximum period of 6 months after lodging an application for international protection. In this respect, it is proposed to remove the link between access to employment and the various stages of the asylum procedure, contrary to the current provision that grants access to employment only if a decision of first instance has not been taken within one year from the registration of the asylum application.

Moreover, while Member States are free to impose certain conditions on access to the national labour market, within the scope of their competence, the amended Article expressly prohibits any kind of restrictions that in practice unduly restrict access to employment for asylum seekers.

Paragraph 4 is deleted for reasons of legal clarity.

Article 17

Paragraph 2 is amended for reasons of legal clarity.

In order to retain legal clarity, the first subparagraph of paragraph 5 is deleted since the definition of material reception conditions is already provided in Article 2.

With a view to define the principle of adequacy currently stipulated in this Article, it is proposed to insert a general benchmark with regard to the level of material reception conditions granted to asylum seekers. In this respect, when Member States provide material reception conditions to asylum seekers they shall ensure that the total value of support granted is equivalent to the amount of social assistance granted to nationals. Any differences in this respect regarding the level of treatment should be duly justified. This new provision substitutes the current second subparagraph of paragraph 5.

Article 18

This Article is amended with a view to ensure that housing in relation to accommodation centres and premises used for the purpose of housing, is appropriate with regard to the gender, age and the special needs of the asylum seeker. It further obliges Member States to take appropriate measures to prevent within those premises gender-based violence including sexual assault.

For reasons of clarity the term 'appropriate' in relation to minors is formulated as 'if it is in their best interests'.

With regard to the establishment in exceptional cases, of different modalities for material reception conditions than those prescribed in the Directive, Member States should ensure that these differences are reasonably justified. The application of the provision 'where material reception conditions are not available in a certain geographic area' is ambiguous and is therefore deleted in view of ensuring legal clarity. The amended Article 14(8) could sufficiently address Member States' concerns with regard to the practical difficulties they might face in providing certain material reception conditions in remote areas.

Article 19

It is proposed to include the term 'mental disorders' to ensure that certain serious mental conditions such as post-traumatic stress disorder are covered with respect to health care. The term 'other assistance' is further clarified in order to include appropriate mental health care.

Access to medical or other assistance for persons with special needs should be granted under the same conditions as nationals taking into consideration their particularly vulnerable situation. This amendment is also in line with current case-law concerning the treatment of persons with special needs, notably minors.

Article 20

This Article is amended with a view to ensure that reception conditions are only fully withdrawn if the asylum seeker has the necessary means to support himself/herself, namely where he/she has concealed financial resources and has therefore unduly benefited from material reception conditions. In all other circumstances already provided under the current directive, Member States shall only reduce, not fully withdraw, reception conditions.

In all cases of withdrawal or reduction of reception conditions asylum seekers shall have access to essential treatment of illness or mental disorder, and their subsistence shall be ensured. The current provision allowing Member States to refuse reception conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State is deleted, taking into consideration current case-law.⁴

For reasons of legal clarity, the Article now refers to 'material reception conditions' rather than 'reception conditions'.

For reasons of coherence, the provision referring to the case where Member States may request asylum seekers for a refund is deleted, since it is already inserted under the current Directive in Article 17(4).

Article 21

It is first and foremost proposed to ensure that vulnerable persons as prescribed under paragraph 1 of the current Article are always to be considered as persons with special needs.

Moreover the list of vulnerable persons is expanded to include victims of trafficking and persons with mental health problems. Although the list of vulnerable persons currently envisaged is not an exhaustive one, it is considered essential to ensure that these categories of asylum seekers are to be considered by all Member States as persons with special needs, in view of their particular vulnerable situation.

The specific situation of vulnerable persons should be taken into consideration with regard to the implementation of the provisions of the whole directive and not merely Chapter II. In this respect Member States should ensure *inter alia* that certain labour market conditions imposed on asylum seekers should not aggravate the already vulnerable situation of persons with special needs.

It is further proposed to impose an obligation to Member States to ensure the immediate identification of special needs as well as the monitoring of individual cases of persons with special needs where necessary, throughout the asylum procedure. This obligation is implicitly

⁴ *R(Q) v Secretary of State for the Home Department* [2004] QB 36, confirmed by the opinion of the Lords of Appeal for the judgement in the case *Regina v Secretary of State for the Home Department* [2005] UKHL 66

embedded in the current wording of the second paragraph of the current Article and is therefore further strengthened.

Article 22

The standards of treatment regarding minors should be aligned with the 1989 UN Convention of the Rights on the Child stipulating that Member States shall ensure a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Moreover, the Article enumerates some of the main factors Member States have to consider when assessing the best interests of the child, based in particular on "General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin" of the UN Committee on the Rights of the Child and Article 24(1) of the EU Charter on Fundamental Rights.

Furthermore the Article ensures that minors kept in accommodation centres have access to leisure activities appropriate to their age.

Article 23

The Article strengthens Member States obligation to trace the family of unaccompanied minors by requiring the establishment of national procedures in this respect. Member States should start tracing the family of the unaccompanied minor as soon as the application for international protection is lodged.

Finally, it is ensured that those working with unaccompanied minors have had but also continue to receive appropriate training.

Article 24

The phrase 'if necessary' is deleted. It is considered that victims of torture and violence are always in need of necessary treatment. Moreover, in view of legal clarity the meaning of 'necessary treatment' is further clarified.

It is further considered important to ensure that those working with victims of torture and violence have had and continue to receive appropriate training, as already foreseen under the Directive with regard to unaccompanied minors.

Article 25

It is considered essential to ensure the possibility to appeal a decision concerning the withdrawal or reduction of reception conditions in view of the serious implications such decision could have on asylum seekers especially regarding persons with special needs.

Moreover, the Article ensures access to legal assistance and/or representation in cases referred to therein. Legal assistance should be free if the asylum seeker cannot afford the entailed costs.

Finally, it is ensured that appeal or review before a judicial body will involve an examination of the case both in fact and in law, in line with Community law principles⁵.

Article 26

It is proposed to insert a new Article introducing an obligation for Member States to notify to the Commission a list of the competent national authorities with regard to the implementation of this Directive. This provision is widely used with regard to directives. It is specifically

⁵ Wilson v Ordre des avocats du barreau de Luxembourg, C-506/04 judgement of 19 September 2006

essential with regard to this Directive since reception conditions involve a wide range of national ministries.

Article 27

The current Article concerns the proper monitoring and control of the national reception system. Following the same line, two new measures are proposed: First and foremost it is proposed to introduce a requirement to 'put in place relevant mechanisms' in order to ensure appropriate guidance, monitoring and control of the level of the reception conditions at national level. In this respect, this new provision clarifies the obligation already envisaged under this Article.

Secondly, it is proposed to introduce a requirement for Member States to submit data with a view to allow the Commission to monitor the implementation of certain provisions of the Directive [Articles 15, 17 and Article 21]. While the Commission will prepare an overall evaluation report on the application of the new directive in accordance with Article 29, it is considered essential to regularly monitor these provisions, in view of the numerous deficiencies identified regarding their implementation during the first phase of the asylum legislation. The relevant information required is inserted in a form annexed to this directive. To avoid overburdening Member States with numerous reporting requirements the annexed form also merges the data and information currently required under current Article 22 titled 'Cooperation', concerning the number of persons covered by reception conditions and the particularities of the document to be provided to asylum seekers under Article 6 of the current Directive. In this respect Article 22 is deleted.

Article 29

This reporting mechanism shall be retained under the new directive.

Article 30

It is proposed to introduce an obligation for a correlation table. The Commission systematically proposes such table.