Common procedures for granting and withdrawing international protection. Recast

2009/0165(COD) - 06/04/2011 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 314 votes to 306 with 48 abstentions a legislative resolution on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast).

Parliament?s position adopted in first reading under the ordinary legislative procedure amends the Commission?s proposal as follows:

Definitions: Parliament clarifies the concept of ?applicant with special needs? (due to age, gender, sexual orientation, gender identity, disability, physical or mental illnesses, etc.). However, unlike the committee responsible, the plenary did not propose a new definition for ?family members?.

The determining authority: Parliament sought to secure a more consistent application of the concept of ?determining authority? and ?competent authority? in line with the principle of a single determining authority. Members consider the expression 'deal with requests for international protection' is extremely vague. It has therefore amended the proposal so that throughout the text it is specified that authorities other than the determining authority are competent only to register applications and forward them to the determining authority for examination (the determining authority being that in front of which any decision on international protection is taken).

Strengthening procedural guarantees: on the whole, Parliament sought to strengthen the minimal procedural guarantees for asylum seekers, notably in regard to the case law of the Court of Justice of the EU and the European Court of Human Rights, in particular in respect of the right to be informed, the right to be heard and the right to free legal assistance, and ensure their consistent application in the text. Among the measures proposed are a certain number of provisions designed to guarantee the non-refoulement of asylum seekers. Parliament stresses that the Member States must fully respect the principle of non-refoulement and the right to asylum which includes access to an asylum procedure for anyone wishing to claim asylum and who is within their jurisdiction including those under the effective control of a Union body or a body of a Member State.

Parliament strengthens the procedural guarantees as follows:

- permitting the applicant to remain on the territory of a Member State during consideration of the application: during the period when his application for international protection is being examined, the applicant should in principle have the right to remain on the territory of the Member State while waiting for the final decision of the determining authority and, in the event of a negative decision, the time to lodge an appeal;
- personal examination by competent and qualified staff: interviews on the admissibility of an application for international protection and on the substance of an application for international protection shall always be conducted by the personnel of the determining authority. Given the potentially serious consequences of an inadmissibility decision, the personal interview on the admissibility of an application must be conducted by a member of staff of the determining authority, who must have the necessary training to apply complex concepts such as safe third country and first country of asylum. The personnel examining applications should have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, child, gender, religious or sexual orientation issues. Member States shall ensure that the member of staff of the determining authority who conducts the interview on the admissibility of the application does not wear a uniform;
- talking into account sexual orientation:personal interviews should be organised in a way which makes its possible for both female and male applicants to speak about their past experiences in cases involving gender based persecution to an interviewer of the same sex if so requested, who has specific training on the issue of interviews regarding gender-based persecution;
- personal interviews with minors: Member States should determine in their national law in which cases a minor may be offered the possibility of a personal interview, taking due account of the child?s best interests and special needs;
- medical examination: Member States may use medical examinations to determine the age of unaccompanied minors where they have doubts concerning his/her age. If those doubts persist after the medical examination, any decision shall always be for the benefit of the unaccompanied minor. Any medical examination shall be performed in full respect of the individual's dignity, selecting the most reliable and the least invasive exams and carried out by qualified and impartial medical experts. Moreover, the decision to reject an application for international protection from an unaccompanied minor who refused to undergo this medical examination shall not be based on that refusal;
- respect for applicants? dignity:the competent authorities may search the applicant and the items he/she carries with him/her, provided the search is carried out by a person of the same sex who is sensitive to the applicant's age and culture and fully respects the principle of human dignity and physical and mental integrity;
- information to applicant in a language he/she understands: applicants shall be informed in a language which they understand or may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure;
- qualifications of interpreters: in the light of the shortcomings observed recently in the competence of interpreters, it is vital for a code of conduct for interpreters to be drawn up at national level. This will ensure that applicants have a genuine and proper opportunity to justify their application for protection and ensure better understanding and cooperation between interpreters and the staff conducting the interviews;
- involvement of a legal representative if the applicant cannot lodge his/her own application: where applicants are unable to lodge their application in person (e.g. if they are ill), Member States shall ensure that a legal representative is able to lodge the application on their behalf;
- submission of an application for minors by a legal representative:Member States shall ensure that a minor has the right to make an application for international protection either on his/her own or through his/her legal representative or the latter?s authorised representative. This guarantee should also apply if the minor is married;
- clear reasons for rejection of application: Member States shall also ensure that, where an application is rejected or granted with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are clearly stated in the decision and information on how to challenge a negative decision is given in writing at the time of issuing the decision and signed upon receipt by the recipient;

- burden of proof:in the event of failure to adopt a decision, the burden of proof for challenging the granting of protection to an applicant shall be on the determining authority;
- challenge of the application of the concept of first country of asylum: the applicant shall be allowed to challenge the application of the concept of first country of asylum on the grounds that the first country of asylum in question is not safe in his or her particular case.
- setting of time-limits for the submission of a challenge: in view of the wide variety of time limits laid down by the Member States and the need to achieve a common asylum system, Parliament calls for the introduction of a minimum common time limit to provide applicants with access to an effective remedy in law and in practice. The Member States shall set a minimum time limit of 45 working days (30 days under the accelerated procedure) during which applicants may exercise their right to an effective remedy.

Detention: Parliament stresses that the detention of minors shall be strictly prohibited in all circumstances. Furthermore, the arrangements for holding applicants at Member States? frontiers or transit zones should therefore satisfy the requirements laid down in this area in the Commission proposal on reception conditions.

Advice and legal representation of applicants: several new provisions have been introduced in order to strengthen the provisions regarding the legal s-assistance of applicants:

- the applicant and his/her legal adviser should have access to country of origin information and the procedure to access it;
- legal assistance can be delivered by a qualified non-governmental body or by qualified professionals.

It should be noted that unlike the committee responsible, the plenary rejected the idea of free legal representation of applicants for international protection.

Provisions for the vulnerability of certain applicants: in Parliament?s view, the definition of a ?vulnerable applicant? should cover minors, unaccompanied minors, pregnant women, persons who have been subjected to torture, rape or other serious acts of violence, such as violence based on gender and harmful traditional practices, or disabled persons. These persons benefit from free legal assistance in all the procedures covered by the Directive.

Provisions regarding children?s best interests: a number of specific guarantees have been provided for in relation to minors (in particular unaccompanied minors). Besides the procedural guarantees described above, provisions have also been added to ensure that the situation of a minor is not linked to his marital status (in fact, in some countries the marriageable age may be very low, but this has no bearing on the degree of maturity or independence of the minor concerned).

Withdrawal of an application: in a series of new amendments adopted in plenary, Parliament proposed to strengthen the provisions facilitating the withdrawal of an application. Parliament believes that when there is a reasonable cause to consider that an applicant for asylum has implicitly withdrawn, or abandoned his/her application for asylum without reasonable cause, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status if he/she in addition to the above- mentioned reasons: i) has refused to cooperate, or ii) has absconded illegally, or iii) in all likelihood has no right to international protection, or iv) originates from or has transited via a safe third country. In the event of the reopening of the case (if the applicant reports again to the competent authority after a decision to discontinue the examination), this request for a case to be reopened may only be made once.

Accelerated examination procedure: in a series of new amendments, the plenary specifies that the accelerated procedure may be applied if it appears that:

- the applicant clearly does not qualify as a refugee or for refugee status in a Member State;
- the applicant has made clearly inconsistent, contradictory, improbable, insufficient or false representations which make his/her claim plainly unconvincing in relation to his/her having been the object of persecution;
- the applicant has submitted a subsequent application which clearly does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin;
- the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so;
- the applicant has failed without good reason to comply with his/her obligations to cooperate in the examination of the facts of his/her case and the establishment of his/her identity;
- the applicant entered the territory of the Member State unlawfully or extended his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry;
- the applicant may for serious reasons be considered a danger to the national security of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law.

Revision of the concept of safe country of origin, safe third country and safe European third country: these concepts were revised or deleted:

- safe European third countries: according to Parliament, the concept of 'safe European third countries' is unacceptable as it stands. This concept is not accompanied by any minimum guarantees or principles since both territorial access and access to the asylum procedure may be refused. It therefore deletes the provisions that would allow Member States to provide that no, or no full, examination of the applications coming from these countries (considered as conforming with particularly high standards in the area of human rights and the protection of refugees);
- designation by a Member State of safe third countries of origin:Member States having the possibility to maintain or adopt legislative measures enabling to designate safe third countries of origin at national level for the purposes of the examination of applications for international protection is deleted by Parliament because the objective is to establish a single European system in relation to asylum. This is why the definition of safe third country has to be uniform in all Member States. However the plenary maintains (in contrast to the committee responsible) the Commission?s proposal with regard to the concept of the ?safe country of origin? in which a country may be considered as ?safe? for a given applicant following the individual examination of his/her request;
- it revised the definition of ?safe third countries? and called for this definition to be uniform in all Member States. As a result, Parliament proposes a new definition of this concept whereby, in principle, an applicant for international protection coming from a safe third country would have nothing to fear neither for his/her life nor his/her freedom if sent back. These countries would have to offer a certain number of guarantees (non-refoulement, the possibility to request refugee status or another complementary form of protection,?). The list of safe countries may only be agreed or amended by the European Parliament and the Council acting in accordance with the ordinary legislative procedure.

Financial assistance for Member States with a disproportionate burden: in Parliament?s view, it is necessary that in Member States that accept a disproportionately large number of asylum applications in relation to the size of their population, financial support and administrative/technical support is mobilised immediately under the European Refugee Fund and the European Asylum Support Office respectively in order to enable them to comply with this Directive.

Report: Parliament wants the Commission to report to the European Parliament and the Council on the application and the financial cost of this Directive in the Member States. This report will need to be presented every 2 years (instead of 5 years in the Commission?s proposal).

Entry into force: lastly, Parliament wants the proposed Directive to enter into force within 2 years of its adoption (and not in 3 years).