

Opinion of the Economic and Social Committee on 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'

(COM(2001) 510 final — 2001/0207 (CNS))

(2002/C 221/11)

On 15 November 2001 the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 13 May 2002. The rapporteur was Ms Le Nouail Marlière.

At its 391st plenary session held on 29 and 30 May 2002 (meeting of 29 May), the Economic and Social Committee adopted the following opinion by 105 votes to 2, with 1 abstention.

1. Introduction

1.1. This Commission proposal, which aims to establish a Common European Asylum System, is one of a series of draft directives currently being examined by the Committee. It seeks to implement Article 63 of the Treaty, the Vienna Action Plan, Conclusion 14 of the Tampere European Council and relevant references in the Scoreboard presented to the Council and the Parliament in November 2001.

1.2. This draft directive seeks to be a fundamental tool in making national asylum systems more effective and a Common European Asylum System more credible. Refugee status is governed by the 1951 Geneva Convention, as amended by the 1967 New York Protocol and by the Dublin Convention, which entered into force on 19 August 1997 and which determines the European signatory state that is responsible for examining an asylum application.

1.3. The Commission has already presented a series of proposals on the harmonisation of asylum policy, on which the ESC has issued opinions: in September 2000, a draft directive on procedures for granting and withdrawing refugee status; in April 2001 a draft directive on minimum standards on the reception of applicants for asylum; and in July 2001 a draft regulation determining the Member State responsible for examining an asylum application.

1.4. The purpose of this proposal is to establish a common definition of refugees for third country nationals and stateless persons, as well as common standards concerning their rights within the European Union.

1.4.1. This definition includes non-state organisations or agents within the definition of the perpetrators of persecution of whom the refugees are victims, in cases where the State does not provide effective protection. By adopting this approach the Commission is proposing to follow the practice in the vast majority of EU Member States whereby if the persecution is well-founded, the source of the persecution is deemed irrelevant.

1.4.2. However the proposal states that if another part of the territory of the asylum seeker's state of origin can be considered safe, then he or she can be sent back there.

1.4.3. The proposal also addresses the specific problem of women and children. It includes special rules for assessing their claims and obliges Member States to provide specific medical or other assistance to victims of torture, rape or other serious psychological, physical or sexual violence.

1.5. It should be noted that the Commission has decided to issue a single document containing minimum standards for granting and withdrawing refugee status and subsidiary protection status.

1.6. The proposal does not address the procedural aspects of granting and withdrawing refugee status or subsidiary protection status.

1.7. The proposal reflects the fact that the cornerstone of the system must be the full and inclusive application of the Geneva Convention, ensuring that no-one is sent back to further persecution, i.e. maintaining the principle of non-refoulement. This is to be complemented by measures offering subsidiary protection to persons not covered by the Convention who are nonetheless in need of international protection.

1.8. The Commission claims that its proposal aims to harmonise the application of the right of asylum in the fifteen Member States, thereby seeking to discourage the practice of 'asylum shopping', whereby asylum seekers seek out the most generous systems.

1.9. The proposal seeks to:

- set out minimum standards on the qualification and status of applicants for international protection as refugees or beneficiaries of subsidiary protection status;
- ensure that a minimum level of protection is available in all Member States for those genuinely in need of international protection, and reduce disparities between Member States' legislation and practice in these areas as the first step towards full harmonisation;
- limit secondary movements of applicants for international protection influenced solely by the diversity of the applicable rules on recognising refugee status and granting subsidiary protection status;
- guarantee a high level of protection for those who need it, preventing certain asylum applications which undermine the credibility of the system and recognising the fact that it is sometimes difficult to distinguish between economic migrants and applicants for asylum.

1.10. The proposal has seven chapters which cover the broad aspects of the proposal, the general nature of international protection, qualification as a refugee, eligibility for subsidiary protection, Member States' minimum obligations towards persons to whom they grant international protection, and rules to ensure the complete implementation of the Directive.

2. General provisions

2.1. *The definition of minimum standards*

2.1.1. Every claim for protection, whether it is based on one of the five reasons set out in the Geneva Convention, or is complementary or subsidiary, is a fundamental universal right. Standards may be 'minimal' on condition that they recognise, respect and protect the fundamental and universal human rights enshrined in the international texts on human rights.

2.1.2. Whilst endorsing the Commission's focus on harmonisation and integration, the Committee underscores the need to safeguard those Member State practices most favourable to claimants.

2.2. *Recognition of status*

2.2.1. Every applicant is entitled to claim refugee status, but may or may not be granted protected status by the Member State.

2.2.2. The Committee welcomes the progress made towards adopting common standards with a view to recognising the status of refugee or of complementary protection.

2.2.3. However it regrets that the Commission continues to refer to the granting of status, rather than, in line with Article 1 of the Geneva Convention, the straightforward recognition of a status existing as a result of the circumstances of the applicant, independent of recognition by the Member State ⁽¹⁾.

2.2.4. The Committee notes that a draft regulation aiming to improve the Dublin Convention and its application is currently being prepared ⁽²⁾.

2.2.5. While stressing that the adoption of common standards for recognising refugee status or granting subsidiary protection marks a step forward in realising the objectives of the Tampere European Council, the Committee points out that the procedure for determining which Member State is responsible for examining the application has implications for the assessment of the claim.

2.2.6. The Committee underlines that adopting minimum standards for the recognition of refugee status should also make it less crucial to ascertain which Member State is responsible for examining the applications since applicants, when they choose to which Member State to apply, would use criteria other than potential differences in the way applications are processed.

2.2.7. As it has set out in a previous opinion ⁽³⁾, the Committee considers that it will thus be possible to take greater heed of the applicant's choice of country to apply to, taking account of the cultural and social factors which determine this choice and which are crucial for faster integration.

⁽¹⁾ Council Resolution of 20.6.1995 on minimum guarantees for asylum procedures. OJ C 274, 19.9.1996 p. 13- 17.

⁽²⁾ See Committee Opinion adopted on 20th March 2002 on the Proposal for a 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 (rapporteur: Mr Sharma).

⁽³⁾ OJ C 260, 17.9.2001, point 2.3.4.3 (rapporteur: Mr Mengozzi).

2.3. *The assessment procedure*

2.3.1. A distinction should be made between a request for international protection, an asylum claim and a request for subsidiary protection.

2.3.2. The draft directive does not address the issue of temporary protection based on a collective assessment of needs, as a decision was taken on this by the Council on 20 July 2001. This decision is of limited duration and applies to large groups⁽¹⁾.

2.3.3. The Committee agrees with the Commission in specifying that any application for international protection is presumed to be a claim for asylum, unless the third country national or stateless person explicitly requests another kind of protection [Article 2(g)].

2.3.4. However, the definition of application for subsidiary protection as a request 'which cannot be understood to be on the grounds that the applicant is a refugee within the meaning of Article 1(A) of the Geneva Convention, or follows rejection of such a request, ...' [Article 2(i)] presumes that the request for international protection has either been requested and then examined as a request for asylum, or presumed and then examined as such. It should be specified or added that the request itself is subsidiary, whereas the protection is complementary to non-recognised refugee status within the meaning of Article 1(A) of the Geneva Convention.

2.3.5. As pointed out by the Commission, a priority rule exists, according to which it is always the status of refugee which must be examined first during the assessment of a claim, and whereby subsidiary protection cannot be a means of weakening the protection conferred by refugee status. In addition, under the Geneva Convention refugee status confers extraterritorial rights and benefits which may take supremacy.

2.4. *Family members (Article 6)*

2.4.1. The Committee agrees that family members accompanying the applicant are entitled to claim the same status of international protection as the applicant.

2.4.2. A distinction needs to be made here between the right to claim asylum and the later stage of examining this request which would result in the recognition or non-recognition of refugee status and the benefits of international protection.

2.4.3. Indeed, although the claims are made on an individual basis and are always entitled to an in-depth and individual assessment, implementation of the standards on subsidiary protection must not contradict the provisions on the reunification of the applicant's family. This is crucial with a view to re-establishing a normal and dignified life as soon as possible.

⁽¹⁾ See ESC Opinion in OJ C 155, 29.5.2001 (Rapporteur: Mrs Cassina).

2.5. *Women*

2.5.1. Although not explicitly covered by the 1951 Geneva Convention, the specific forms of gender prosecution — female genital mutilation, forced marriages, stoning to death for presumed adultery, and the systematic rape of women and young girls as a strategy of war, to name just a few — should be acknowledged as strong reasons for submitting an application for asylum and as legitimate grounds for granting asylum in Member States.

2.5.2. To this end, the proposal for a Directive should include guidelines which incorporate a gender dimension in applications for asylum so as better to secure equal recognition between men and women seeking asylum; on past experience, fewer women than men have been granted asylum on the grounds of political opinion. When challenging prevailing social standards, women cannot always count on protection from the state in which they live.

2.5.3. The gender dimension must also be recognised in the processing of applications for asylum: qualified, trained female interviewers and interpreters; confidentiality in the interviewing process; non-confrontational interviews with open questions allowing women to talk about their experiences of persecution in confidence; measures ensuring the physical safety and privacy of women asylum seekers in reception or detention centres; access to specific services responding to women's health needs; and access to legal aid and representation, including the right to contact and be contacted by women's NGOs and/or NGOs which deal with asylum.

2.5.3.1. To facilitate these contacts, women should receive lists of NGOs that could help them with their application process. It would also be useful if the NGOs in question could be informed when there are women at reception centres.

2.5.3.2. There is no advantage in obtaining refugee status if protection is inadequate. This is well illustrated by the case of women who are driven into prostitution. Women must be guaranteed access to decent work and be free to join a trade union.

2.5.4. Lasting solutions must be pursued such as the adoption of measures encouraging the development of women asylum seekers' skills and qualifications during the asylum process, which will facilitate their independence and subsequent integration in the host country if their claim is successful, or their re-integration in their country of origin if their asylum claim is rejected, without prejudice to other possible measures geared to their living conditions and aimed at fully restoring to them, as soon as possible, a normal and dignified life.

3. Special provisions

3.1. *The consequences of cessation of refugee status (Article 13)*

3.1.1. The Committee wishes to draw the Commission's attention to the fact that when a residence permit is revoked but the state of origin has not yet returned the applicant's travel documents nor restored his nationality, the person no longer has protection nor valid residence documents.

3.1.2. The Committee proposes that the Commission provide for the withdrawal of refugee status (cessation) to be assessed in accordance with the same criteria as those upon which the status of recognition was based.

3.2. *Exclusion from refugee status (Article 14)*

3.2.1. The Committee does not support point 1(a). An applicant who currently benefits from protection or assistance from organs or agencies of the United Nations, other than the High Commissioner for Refugees, would in this instance be under the protection of an organ or agency which was not a signatory of the 1951 Convention and which might not be in a position to guarantee fully the rights ensuing from the recognition of his refugee status.

3.3. *The grounds of subsidiary protection (Article 15)*

3.3.1. The Committee stresses that other reasons which are not specified here may also exist. It also warns against the risk of including in the grounds for subsidiary protection other grounds which usually come under Article 1.A.2) of the Geneva Convention⁽¹⁾.

(1) For the purposes of the present Convention, the term 'refugee', shall apply to any person who: [...] (2) 'As a result of events occurring before 1.1.1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national. See also the 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees'.

3.4. *Cessation of subsidiary protection status (Article 16)*

3.4.1. Subsidiary protection, which is complementary to the protection granted to recognised refugees under Article 1(A) of the 1951 Convention, should be improved. Subsidiary protection should therefore draw on useful and relevant humanitarian references with regard to the treatment of people seeking protection. The cessation of status should therefore not be expeditious, but should instead be based on an assessment of the criteria upon which the protection was granted.

3.4.2. The Committee also suggests using the same terms for Article 16 as for Article 13(2): The Member State that has granted subsidiary protection status to an individual bears the burden of proof in establishing that that individual is no longer in need of international protection.

3.5. *Residence permits (Article 21)*

3.5.1. Refugees granted subsidiary protection are to be granted a residence permit valid for one year (instead of five for refugees under the Geneva Convention). This principle is inconsistent with an interpretation of the Geneva Convention which allows a large number of cases to be examined individually. Complementary protection should only be relied on in cases where the grounds for the request for international protection do not, after an individual assessment, fall within the scope of the Geneva Convention. There is no reason for this form of protection to be of shorter duration.

3.5.2. Moreover, as indicated in paragraphs 2.3.5 and 3.3.1 above, subsidiary protection must not diminish the status of refugee, as established in the 1951 Convention.

3.6. *Travel documents (Article 23)*

3.6.1. With regard to the restrictions to the freedom of movement, it should be noted that the 'compelling reasons' referred to apply on the same grounds and without discrimination to both third-country refugees and stateless persons as well as nationals.

3.7. *Access to employment (Article 24)*

3.7.1. As explained in the point concerning Article 21, the fact that protection is subsidiary does not imply that it is less extensive. Equal employment rights for refugees and Member State nationals must also be granted to persons with subsidiary protection as soon as they have been recognised as having this status. The Committee supports efforts to combat illegal or clandestine work and underlines that people granted asylum but not the right to work are vulnerable to social exclusion, vagrancy or social alienation.

3.7.1.1. In the case of women, the fact that they do not have the right to work once protection is granted increases the risk of them being drawn into forced prostitution rings.

3.7.1.2. In relation to employment, as in the case of integration facilities (see point 3.9), the Committee points out that refugee reception and social support facilities (solidarity funds, charitable association activities, reception in schools, housing) are ultimately supported directly at grassroots level by local authorities (municipalities and regions).

3.8. *Freedom of movement (Article 30)*

3.8.1. Refugees whose status is recognised by one Member State, or refugees enjoying subsidiary protection, should also be granted freedom of movement in the other Member States.

3.8.2. The Committee points out that once international protection has been granted and the status recognised, the refugee or person enjoying subsidiary protection surrenders his or her passport to the host country for the duration of the protection and asylum. Since he is under the responsibility of the Member State granting him protection, he should be entitled to move freely within Member States, under the same conditions as their nationals ⁽¹⁾.

3.9. *Access to integration facilities (Article 31)*

3.9.1. The same comments apply as those made on Articles 21 and 24 (residence permit and access to employment). The Committee wonders why beneficiaries of subsidiary protection must, once this status has been granted, wait for a year before benefiting from integration facilities geared to their needs, in particular with regard to employment, education, health and social well-being. Their linguistic and cultural needs could be added to this list. (The need to find a normal, dignified life as soon as possible.)

3.10. *Voluntary return (Article 32)*

3.10.1. Though the Committee supports access to voluntary return programmes, it stresses the close link between the drawing up of short-term reintegration programmes in the countries of origin and sustainable development. Such development is the best way of ensuring the peace, security and stability of populations. People whose claim has been dismissed

or who have been recognised as refugees but choose at some point voluntarily to return to their countries have specific needs; more attention should be given to such needs of returning refugees when drawing up the EU's sustainable development and cooperation policies.

3.11. *Staff and resources (Article 34)*

3.11.1. The Committee welcomes the fact that the staff of the 'authorities' and 'other organisations' implementing this directive must have received the necessary basic training prior to taking up their posts, and would prefer to add continuous or specialist training needs at all stages of claim assessment process. This would be particularly relevant, for example, with regard to the reception given to women who are victims of rape or sexual violence, unaccompanied minors, or the prevention of 'recruitment' of easy prey victims of drug or sex-industry trafficking.

4. **Final provisions**

4.1. *Race*

4.1.1. The Committee supports the principle of non-discrimination in the final provisions of the draft directive and recommends that the Commission take into account the European Union's position at the World Conference against Racism, Xenophobia and Intolerance and that of foreign minister Louis Michel speaking for the Belgian Presidency to the European Parliament, according to whom: 'It has now been proven that theories seeking to confirm the existence of different human races are scientifically incorrect. The European Union hoped that the language employed would reflect this finding. It considers that the use of wording suggesting the existence of different races should be avoided. Its aim is not to deny the diversity of the human race but rather to appreciate its unity, and thereby to combat contemporary forms of racism, which regularly rely on claims of this sort. However as a result of strong opposition from some states, it has not been possible to make much progress in this direction. The European Union has felt it important to express its position of principle on this point in a final statement which will be reflected in the Conference report' (Translator's note: unofficial translation). ⁽²⁾.

4.1.2. Many refugees or asylum seekers have fled because of discrimination based on nationality or ethnicity, sometimes finding themselves hounded from state to state because of the same discrimination that is the very reason for their request for protection.

⁽¹⁾ See the ESC Opinion on the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (CES 1321/2001) Rapporteur: Mr Pariza Castaños.

⁽²⁾ Speech given by Louis Michel to the EP on 2nd October 2001: record of proceedings of the Durban Conference

4.1.3. The Committee reiterates — as it has already stated in its opinion on the Communication on Towards a common asylum procedure ⁽¹⁾ — the Council's common position of 4 March 1996 ⁽²⁾, which recognises nationality in the broad sense of the term, namely independent of citizenship but including the sense of a family link.

4.1.4. The Committee urges the Commission, when proposing texts, to promote the positions adopted by the European Union within the international community.

5. Conclusions

5.1. The Committee supports the Commission's initiative and welcomes in particular:

- the equality of treatment with Member State nationals granted to refugees and beneficiaries of subsidiary protection with regard to employment, access to education, 'social welfare', health and psychological care, without prejudice to more generous measures in appropriate cases;
- the concept of subsidiary protection as a form of extended protection for people whose grounds for requesting

⁽¹⁾ See the ESC Opinion in OJ C 260, 17.9.2001 (rapporteur: Mr Mengozzi).

⁽²⁾ OJ L 63, 13.3.1996, pp. 2-7.

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asylum do not fall within the scope of the Geneva Convention but who are nonetheless in need of international protection in accordance with the principle of non-refoulement;

- broadening the scope of protection to include victims of persecution by non-state organisations or agents.

5.2. However, the Committee considers that some aspects of the proposal should be revised in order to match both the standards required in relation to the principles of international protection and the objectives set at the Tampere Council meeting.

5.3. After the tragic events of 11 September an increasing zeal for the need of security tends to undermine a climate of tolerance, acceptance, humanitarian sensitivity, prevailing in the behaviour of European refugee-immigration services, as well as the spirit and the letter of European legislation. The EESC considers that in a period of globalisation, protection of refugees and asylum-seekers and/or international protection are a humanitarian asset and must be based on an equal balance between territorial security and the safety of peoples. The Committee is convinced that in the medium to long term a strategy for invigorating civility between European citizens and refugees and asylum seekers is one of the most effective investments that will enable the European Union to remain the place of freedom, justice and prosperity for the desperates of the world, for those who cannot find hope, justice and freedom in their countries.

The President
of the Economic and Social Committee
Göke FRERICHS