



EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

IN1/10/2004/ext/CN

ECRE Information Note

on the Council Directive 2004/83/EC of 29 April 2004

on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

1. Introduction

The *fourth* piece of legislation flowing from the asylum agenda of the Amsterdam Treaty has now been adopted. The Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted was published in the Official Journal of the European Union on 30 September 2004 and will come into force on the twentieth day following this date. The Directive will apply to all EU Member States except Denmark¹. According to the Directive, the 24 Member States bound by it shall have or bring into force domestic legislation necessary to comply with the Directive by 10 October 2006.

This paper outlines ECRE's views on the adopted Council Directive, and provides detailed analysis of some of its key provisions.

2. Background

The European Commission issued a proposal for a Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted in September 2001.²

¹ In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application – see paragraph 40 of the Preamble.

² COM (2001) 510 final.

On 22 October 2002, the European Parliament generally welcomed the Directive and approved the proposal but with amendments. The various recommendations were aimed principally at expanding the scope of the Directive to apply to all persons and not only third country nationals and stateless persons; the removal of a provision including ‘stable quasi-state authorities’ as agents of protection; establishing parity of treatment between refugees and beneficiaries of subsidiary protection, especially in terms of access to employment; and addressing the omission of provisions on a mechanism to track what happens to failed asylum applicants who are returned in order to monitor the quality of decision-making within the EU. However, the Parliament’s proposed amendments were not subsequently included in the Directive.

The negotiations of Member States in the Council of the European Union were lengthy and encountered several difficulties. There was particular controversy surrounding proposed provisions on exclusion and revocation of refugee status. While agreement was more easily reached concerning the rights to be granted to beneficiaries of refugee status, there were persistent divergences concerning the minimum level of rights to be granted to beneficiaries of subsidiary protection status. Eventually consensus on the text, by a majority of Member States, was reached by the Justice and Home Affairs Council in June 2003, although Germany retained reservations on the recognition of non-state actors of persecution, and the level of rights and benefits accorded to beneficiaries of subsidiary protection, especially in relation to access to the labour market. Despite repeated calls by the European Council for the adoption of the Directive within the five-year time frame established by the Amsterdam Treaty, the negotiations were effectively blocked from that time until political agreement was eventually found by the Justice and Home Affairs Council on 30 March 2004, when Germany agreed to remove its reservation on the recognition of non-state actors. At the same time other Member States agreed to amendments that further lowered the level of minimum rights for beneficiaries of subsidiary protection and allowed a wide margin of discretion to Member States in their recognition.

The Directive was formally adopted by the Council on 29 April 2004.

3. Overview of the Directive

The purpose of the Directive is to establish minimum standards for the qualification of third country nationals and stateless persons as refugees or beneficiaries of subsidiary protection within EU Member States, and also the minimum levels of rights and benefits attached to the protection granted. The Directive also sets out the benefits to be enjoyed by family members of the beneficiaries of refugee status or subsidiary protection status. The Directive only applies to persons who are third country nationals and stateless persons. Family members are defined in the Directive as the beneficiary’s spouse or unmarried partner in a stable relationship, and their unmarried and dependent minor children, in so far as they are present in the Member State where the application for international protection is made.

The Preamble to the Directive sets out some of the important principles underlying the instrument as a whole. Paragraph (8) of the Preamble emphasises the important fact that “*it is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions*”. Paragraph (12) asserts that the “*best interests of the child*” should be a primary consideration of Member States when implementing the Directive, and paragraph (20) states that Member States should have regard to child-specific forms of persecution when considering applications from minors. Paragraph

(14) reiterates the fundamental principle that “*the recognition of refugee status is a declaratory act*”. Paragraph (9) clarifies that the scope of the Directive does not extend to third country nationals or stateless persons who are allowed to remain in the territory of a Member State “*on a discretionary basis on compassionate or humanitarian grounds*”.

Chapter I outlines some general provisions concerning the Directive. Article 2 sets out definitions. Importantly, Article 3 of the Directive confirms the rights of Member States to “*introduce or retain more favourable standards*”. Chapter II contains articles regulating the assessment of applications for international protection. This section outlines the respective duties of applicants and Member States during the process of assessment of facts and circumstances (Article 4), guidance concerning applications submitted *sur place* (Article 5), what constitutes actors of persecution and protection (Articles 6 and 7), and when an internal protection alternative may be reasonably considered to be available (Article 8).

Chapters III and IV set out the qualifications for being a refugee. Articles 9 and 10 define what qualifies as acts of and reasons for persecution, while Articles 11, 12 and 14 outline the conditions under which a person may be excluded from refugee status, and when refugee status may cease or be revoked. Article 13 enshrines the obligation for Member States to grant asylum to refugees (although the Directive refers to the obligation to grant refugee status). Chapters V and VI set out the qualification for subsidiary protection. Article 15 outlines what constitutes ‘serious harm’, and Articles 16, 17 and 19 establish when a person may be excluded from subsidiary protection or when that status may cease or be revoked. Article 18 establishes the obligation on Member States to grant subsidiary protection status to persons who qualify for it under the terms of the Directive. This is the first time that an obligation to grant protection status to persons who do not qualify as refugees has been enshrined in an international instrument.

Chapter VII sets out the content of international protection. Article 21 outlines the conditions for protection from *refoulement* of individuals. In terms of the benefits attached to international protection, the Directive details the conditions under which persons with refugee status and subsidiary protection have rights to residence permits (Article 24), travel documents (Article 25), freedom of movement (Article 32), and access to employment (Article 26), education (Article 27), social welfare (Article 28), health care (Article 29), accommodation (Article 31), and integration facilities (Article 33). Article 23 sets out provisions for maintaining family unity.

Chapter VIII contains some provisions on administrative co-operation. Lastly, Chapter VIII sets out some final provisions, including a so-called ‘rendez-vous’ clause (Article 35), requiring the European Commission to report on the application of the Directive and propose any necessary amendments, with specific attention to Articles 15, 24 and 31, within 18 months of the Directive coming into force.

The adoption of this Directive represents another step towards the development of a Common European Asylum System, as called for at Tampere. ECRE generally welcomes this Directive as part of the incremental process of approximating asylum systems in working towards the establishment of a common, fairer, and more efficient system that is capable of delivering real protection to those fleeing persecution. In Member States with as yet less developed asylum systems, particularly some of the new Member States, the setting of minimum standards on which to build should be helpful.

ECRE particularly welcomes:

- The inclusion of provisions recognising persecution from non-state actors (Article 6);
- The express obligation for Member States to grant subsidiary forms of protection (Article 15);
- The recognition of child-specific and gender-specific forms of persecution (Article 9), and provisions aimed specifically at the needs of unaccompanied minors (Article 30);
- The principle that the assessment of applications should be carried out on an individual basis (Article 4).

However, ECRE has a number of outstanding concerns about other provisions in the Directive. Key concerns include the fact that:

- The definition of a "refugee" is limited to a "third country national" or "a stateless person" rather than any person (Article 2);
- The inclusion of non-State authorities in the definition of actors of protection (Article 7);
- The lack of key criteria for assessing whether an internal protection alternative is properly available, and the possible application of the internal protection alternative to deny refugee status "*notwithstanding technical obstacles to return to the country of origin*" (Article 8);
- The inclusion of a provision allowing national security grounds to be used to deny refugee status before an asylum claim has been determined, thus widening the exclusion clauses in the 1951 Geneva Convention, potentially in breach of Member States' obligations under the 1951 Geneva Convention (Article 14);
- In relation to the provisions concerning subsidiary protection, ECRE is disappointed at the number of derogations included in Chapter VII on the content of international protection, which differentiate between those with refugee status and those with subsidiary protection by allowing Member States to withhold rights, or grant significantly lower levels of rights, to beneficiaries of subsidiary protection. This is of particular concern in relation to benefits afforded to family members, the duration of residence permits, the provision of travel documents, entitlement to social welfare benefits, and access to health care, the employment market, and integration facilities. ECRE believes that any rights afforded to 1951 Geneva Convention refugees should also be granted to all persons afforded subsidiary protection, as both categories of protected persons have similar needs and circumstances.

ECRE observes with regret the fact that the protracted nature of negotiations has resulted in the lowering of some of the standards outlined in the original draft of the Directive proposed by the Commission, and the adoption of many provisions whose standards are in fact lower than the current practice of many Member States. In this context, ECRE would forcefully reiterate that these are minimum standards only, and would therefore urge Member States to maintain their higher standards (as explicitly provided for by Article 3) while raising any standards that fall short of the requirements outlined in this Directive.

4. Analysis of the key Articles of the Directive

Chapter I General Provisions

Article 2 Definitions

The substance of the “refugee” definition under Article 2 (c) of the Directive broadly reflects Article 1 A (2) of the 1951 Geneva Convention except for the unfortunate fact that it is limited to a “third country national” or a “stateless person”, and therefore does not include nationals of Member States of the European Union³. Article 2 (f) includes the same restriction for beneficiaries of subsidiary protection. ECRE had recommended that the terms “third country national” and “stateless person” be replaced by the term “any person” in order to properly reflect Article 1A of the 1951 Geneva Convention. Not only is this restriction discriminatory and therefore in breach of Article 3 of the 1951 Geneva Convention, but the potential repercussions may be greater as the EU enlarges. Given the export value of EU asylum policies, it also sets a very bad precedent for other regions of the world.

ECRE is concerned by the provision in Article 2 (j) (i) that unmarried partners will only be recognised as dependants where a Member State’s immigration laws treat unmarried couples in a comparable way to married ones. ECRE believes that unmarried couples in stable relationships should automatically fall under the definition of family for refugee protection purposes, as this more accurately reflects customary practice in many countries where legal marriage or civil registration may not necessarily be the norm.

ECRE is concerned about the requirement for minor children not to be married in order to qualify as family members (paragraph (j) (ii)). ECRE regrets the absence of a qualification concerning minor married children’s level of emotional and other dependency on the parents. ECRE also questions the use of the term “*insofar as the family already existed in the country of origin*” in paragraph (j) which would appear to exclude any children born in the host country pending determination of the asylum claim.

Article 3 More favourable provisions

ECRE welcomes this Article that confirms the right of Member States to introduce or retain more favourable standards for determining status and attendant rights. ECRE believes that it is important to emphasise that by definition these are only minimum standards, and would urge those Member States with higher standards to maintain or improve rather than lower them. Similarly, ECRE would encourage those Member States introducing legislation to provide for higher standards that fully comply with the requirements of international law, and include all necessary rights and safeguards for those in need of international protection.

Chapter II Assessment of applications for international protection

Article 4 Assessment of facts and circumstances

³ Paragraph 13 of the Preamble claims that “[t]his Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community”, which does confirm the right, albeit limited, of EU nationals to claim asylum within the EU. Under the Protocol it is agreed that “... Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.” It is agreed that asylum applications are only receivable where the European Council is engaged in action against the country of origin, where the country of origin has derogated from the European Convention on Human Rights, or with the exceptional consent of the destination country - though the European Council must be informed of such a decision, and the claim must in any event be treated as “manifestly unfounded”.

ECRE welcomes the recognition of the importance of individual statements in Article 4 (2), as called for in previous submissions, and the confirmation in 4 (4) that past episodes of persecution are to be interpreted as strongly indicative of future risk. Also welcome is the confirmation in Article 4 (1) of the duty on Member States to assess the relevant elements of the application in cooperation with the applicant that reflects a well-established legal principle⁴.

However, ECRE is concerned about the formulation of paragraph 5 (d) that allows Member States to treat the fact that an application has been submitted late as creating a strict requirement that all aspects of the applicant's statement are supported by documentary or other evidence, unless a satisfactory explanation has been provided for the late submission of the claim. ECRE does not see why the timing of an application should impact on the status determination procedure, and therefore this provision appears to be an unreasonable construction of Article 31 of the 1951 Geneva Convention that envisages late claims as potentially attracting immigration penalties only, rather than influencing whether or not the applicant qualifies for refugee status. Another condition, in paragraph 5 (b), is that the applicant has provided all "relevant elements"⁵ or provided a "satisfactory explanation" for their absence. Although ECRE welcomes the fact that this requirement also allows for exceptions, it must be stressed that there are many occasions where genuine refugees might not claim asylum immediately as well as many instances where refugees will have been forced to flee their country of origin without identity or travel documents, or having had time to collect other documentary evidence, assuming it was ever even available in the first place. Indeed, in practice the instances where an applicant can provide full documentation will usually be the exception rather than the rule. ECRE believes that Member States should take proper account of this fact when considering claims, and in the absence of evidence to substantiate some aspects of the applicant's account, the benefit of the doubt should be given, provided that all available information has been examined, and the applicant has been able to show that his fear of persecution is a reasonable one⁶.

Article 5 International protection needs arising *sur place*

ECRE welcomes the inclusion of a definition of international protection needs that may arise *sur place*. As recognised by the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, a well-founded fear of persecution may arise as a result of the actions of an individual after leaving their country, and this is properly reflected in paragraph (2). When considering this issue, ECRE would wish to remind Member States that a political conviction could be attributed to a person by the persecutor, notwithstanding a lack of real political conviction on his part. A well-founded fear of persecution can also sometimes arise simply where the persecutor in the country of origin knows or reasonably suspects that someone has claimed asylum abroad.

In relation to "subsequent" applications, Article 5 (3) permits refugee status to be denied "*if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin*", although it is explicitly confirmed that this is without prejudice to the 1951 Geneva Convention. In this regard, ECRE would wish to

⁴ See UNHCR Handbook, para. 196.

⁵ Under Article 4 (2) these elements "*consist of statements and all documentation at the applicant's disposal regarding his/her age, background, including that of relevant relatives, identity, nationality(ies), country(ies), and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection*".

⁶ See UNHCR Handbook, para. 203-204.

emphasise that the fundamental consideration must be whether activities may reasonably be expected to come to the notice of the authorities of the individual's country of origin, be treated by them as demonstrative of an adverse political or other protected opinion or characteristic, and give rise to a well-founded fear of being persecuted. ECRE would also like to note that a person could genuinely take up a political conviction whilst outside the country of origin.

Article 6 Actors of persecution or serious harm

ECRE fully supports the inclusion of non-state actors of persecution among the actors of harm outlined in paragraph (c) of Article 6. It considers that this interpretation is required in order for Member States to comply with the 1951 Geneva Convention and in particular Article 1 (A) (2), the purpose of which is to provide protection to those who do not have the protection of their state of nationality or habitual residence. With regard to the specific wording of Article 6 (c), ECRE had recommended that an additional point be added to explicitly account for cases of failed states where central government institutions have ceased or virtually ceased to exist.

Article 7 Actors of protection

ECRE is extremely concerned by the provision in Article 7 (1) (b) that protection can be provided by "*parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State*". ECRE has consistently expressed its opposition to this provision on the following grounds. State-like authorities are not and cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations. Their lack of accountability in international law makes it impossible for persons within their jurisdiction to hold them responsible at international level for ensuring that human rights standards are safeguarded.

Under Article 7 (2) ECRE had recommended a stronger reference to the need for the effectiveness of State protective measures to be taken into account when assessing the need for protection. The formulation of this article validates an effective denial of protection so long as the State takes reasonable steps to prevent the infliction of persecution or harm. However, ECRE takes the view that if such efforts by a State do not in fact reduce a risk of persecution below the well-founded fear threshold then there is no protection in reality.

Article 8 Internal protection

This Article allows Member States to refuse international protection if they judge that there is a part of the country of origin where the applicant would not be subject to persecution, and the applicant "can be reasonably expected to stay" in that part of the country of origin. Though ECRE welcomes the fact that Member States are required to consider the "personal circumstances of the applicant" in making this assessment, it is extremely concerned about the lack of reference to certain key criteria that should properly be considered when assessing whether internal protection may be available to an applicant and hence whether or not to grant international protection. ECRE considers that in assessing the reasonableness of the internal protection alternative, the following criteria should be applied:

- the protection must be afforded by a *de jure* not just *de facto* authority. This is necessary given that *de facto* authorities are under no international legal obligation and often not in a position to safeguard human rights;

- the claimant must be able to access the area of internal protection in safety and dignity and legally;
- conditions to meet the needs of particularly vulnerable groups must be available, e.g. adequate health care for claimants with medical needs or adequate care and reception for unaccompanied minors;
- conditions in the area of internal protection must ensure that the applicant is not forced back into the area where there is a risk of serious harm for a Convention reason, i.e. it must offer a durable protection alternative and provide effective protection from *refoulement* to the area where the person fears persecution;
- the absence of a risk of serious harm in the proposed site of internal protection must be objectively established, rather than being considered reasonably unlikely to occur.

ECRE is also concerned that this article does not include any limitation to the effect that an assessment of an internal protection alternative is normally not relevant in cases where persecution emanates from state actors⁷, and would urge Member States to apply such a limitation when considering claims.

Furthermore, ECRE is concerned that the wording in paragraph (1) “*as part of the assessment*” might prompt decision-makers to “short-cut” a proper determination of whether an applicant has a well-founded fear by proceeding too quickly to assert an internal protection alternative. ECRE regrets the loss of wording, contained in the original proposal from the Commission, which only allowed Member States to consider the availability of an internal protection alternative “*once they have established that the fear of being persecuted or of otherwise suffering serious and unjustified harm is well-founded*”⁸. This properly conveyed the principle that the availability of internal protection only becomes a factor for consideration after first having established a fear of being persecuted or otherwise subjected to serious harm. ECRE’s position is that the focus of enquiry must always be on whether a refugee claimant has a well-founded fear of being persecuted in his or her country of origin. This reflects the general principle that the concept of an internal protection alternative should not be too readily applied given the scope of difficulties likely to be faced by an individual in internally relocating in a country in which he or she has been persecuted or faces a risk of persecution.

Article 8 (3) allows Member States to assert the existence of an internal protection alternative “*notwithstanding technical obstacles to return*”. ECRE strongly opposes the inclusion of this provision, the effect of which is to deny protection to a person who has no accessible protection alternative in reality. ECRE does not consider this to be consistent with Article 1 of the 1951 Geneva Convention. There is no requirement in the 1951 Geneva Convention that the fear of persecution should extend to the whole territory of the country of origin. Article 1 (A) (2) of the 1951 Geneva Convention simply requires that an individual be outside his country of origin while in possession of a well founded fear of persecution, and “*unable or, owing to such fear, is unwilling to avail himself of the protection of that country*” (or in the case of a stateless person to “return” to the country of his former habitual residence). A person who cannot in reality be returned, must therefore logically be “unable” to “avail himself” of

⁷ This view is taken by UNHCR – see “UNHCR annotations for articles 1 to 19 of the draft Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”, December 2002.

⁸ COM (2001) 510 final.

any protection, even if such protection was found to exist. An assessment of whether internal protection exists necessarily involves an assessment of whether the proposed area is physically, safely and legally accessible by the applicant. If access is impossible in practice then an internal protection alternative does not exist⁹.

Chapter III Qualification for being a refugee

Article 9 Acts of persecution

Article 9 (1) defines the necessary components of acts of persecution. Paragraph (a) holds that the seriousness of the act can be measured by either a qualitative assessment (nature of the act(s)) or a quantitative assessment (repetition of the act(s)). Paragraph (b) is based on the concept that the cumulative effect of various measures which would not in isolation amount to persecution, either alone or in combination with other adverse factors, can give rise to a well-founded fear of persecution, that is, make life in the country of origin so insecure that the only solution for the individual is to leave that country.

ECRE broadly welcomes many of the provisions within Article 9 (2), and particularly the inclusion of acts of a gender-specific or child-specific nature. Also to be welcomed is the explicit recognition of acts of mental or sexual violence. Although 9 (2) (e) recognises that persecution or prosecution for evasion of military service may constitute an act of persecution, this is limited to scenarios where individuals would be required to commit war crimes or other serious crimes as part of their military service. ECRE considers it unfortunate that the original wording of the Commission proposal was not retained which allowed for the reasons for the refusal to perform military service to be based on specific individual circumstances relating to deeply held moral, religious, or political convictions. This interpretation of conscientious objection is consistent with the UNHCR Handbook and evolving human rights law¹⁰.

ECRE also regrets the loss of a provision in the original proposal from the Commission providing that “*it is immaterial whether the applicant comes from a country in which many or all persons face the risk of generalised oppression*”¹¹. ECRE would reiterate that persons fleeing from situations of war or internal armed conflict should never automatically be denied refugee status, as such generalised violence does not preclude the existence of a well-founded fear of persecution by an individual person or a group of people. While every individual or group must be able to show a risk of harm for a Convention reason, if everyone within a conflict situation is at risk for a Convention reason then they will all potentially qualify for asylum, irrespective of the size of the group at risk¹².

Article 10 The reasons for persecution

⁹ This view is taken by UNHCR – see “UNHCR annotations for articles 1 to 19 of the draft Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”, December 2002.

¹⁰ For example, in General Comment No.22 (48) on Article 18 ICPPR (right to freedom of thought, conscience and religion), the Human Rights Committee confirmed that a right to conscientious objection can be derived from Article 18.

¹¹ This is particularly so given the wording of paragraph 26 of the Preamble which states that “*Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm*”.

¹² See ECRE Position on the Interpretation of Article 1 of the Refugee Convention, September 2000.

This article outlines principles of interpretation concerning the reasons for persecution in a way that is on the whole to be welcomed, particularly in relation to the definitions of the concepts of race, religion, nationality, and political opinion.

However, ECRE believes that the concept of a social group should be interpreted in a broad and inclusive manner, and is therefore concerned about the formulation of paragraph 1 (d) which suggests that in order for a social group to be recognised it must be demonstrated that members of a group share an innate characteristic/common background that cannot be changed (*ejusdem generis*) and additionally that the group has a distinct identity because it is viewed as being different by the rest of society (social perception test). Such an interpretation could result in the denial of status to groups defined by an innate characteristic but which are not seen as set apart from society. However, in relation to this provision, the inclusion of the words “in particular” in the first line of paragraph 1 (d) arguably permit a less restrictive interpretation allowing for cases where only one of the two tests is satisfied, and ECRE supports this interpretation.

Paragraph 1 (d) further suggests that sexual orientation or gender would not alone create a presumption for the applicability of this Article whereas ECRE would instead take the view that each is always a group defined by a fundamental immutable characteristic and is in all cases the basis for a particular social group, although whether group membership would in itself give rise to a well founded fear of persecution is a separate question altogether.

Article 11 Cessation

This Article, which details the grounds on which a refugee or a stateless person shall cease to be a refugee broadly reflects Article 1C of the 1951 Geneva Convention. However, ECRE notes with regret that it does not include the “compelling reasons” exception to cessation set out in Articles 1 C (5) and (6) of the 1951 Geneva Convention. ECRE agrees with UNHCR that this “humanitarian principle”¹³ should prevent cessation being applied to refugees who are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of nationality.

ECRE also regrets the fact that, unlike the original draft proposed by the Commission, the final text does not explicitly confirm that the burden of proof rests with the Member State when establishing whether an individual is no longer in need of international protection, although Article 11 (2) does require Member States to consider whether the change in circumstances is of a “significant and non-temporary nature” to remove the risk of persecution.

Article 12 Exclusion

This provision sets out the grounds for exclusion from refugee status and is broadly based on Article 1F of the 1951 Geneva Convention. ECRE emphasises the importance of interpreting the exclusion clauses of the 1951 Geneva Convention restrictively and after extreme caution has been exercised given Article 1F's nature as a limitation on a human rights provision¹⁴. It is therefore of particular concern that there is no safeguard to the effect that the grounds for exclusion be based solely on the personal and knowing conduct of the person concerned, as was included in the original proposal from the Commission. This is especially relevant to the definition of the instigation or participation in the commission of acts introduced by Article

¹³ UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, which refers to this as a ‘general humanitarian principle’ in paragraph 136.

¹⁴ See ECRE's Position on Exclusion, March 2004.

14 (3). Such a definition must be narrowly defined and consistent with Article 25 of the 1998 Rome Statute of the International Criminal Court. Otherwise there is a risk that the lack of clarification of the terms ‘instigation’ and ‘participation’ could lead States to exclude persons who within the scope of international criminal law, are not individually responsible as they have not intentionally been involved in the commission of crimes.

ECRE would also like to highlight the importance of ensuring that no provision in Article 12 results in the automatic exclusion from refugee status of family members of persons subject to exclusion under this Article. Family members should have the right to apply for and be granted asylum on the basis of the merits of their individual application. ECRE regrets that this is not reflected in the Article.

Chapter IV Refugee status

Article 13 Granting of refugee status

This Article imposes an obligation on Member States to grant refugee status to persons who qualify under the terms of the Directive (under wording used in international law an individual is rather recognised as a refugee and it is asylum which is granted). ECRE welcomes this legally binding provision on Member States to grant asylum, which constitutes a development of the obligation already enshrined in Article 18 of the Charter of Fundamental Rights of the European Union.

Article 14 Revocation of, ending of or refusal to renew status

This Article outlines the grounds for the revocation of refugee status. ECRE is extremely concerned by this provision establishing grounds for the revocation of refugee status. ECRE is concerned by Article 14 (5) which results in the widening of the exclusion clauses in the 1951 Geneva Convention by including national security concerns as grounds not to recognise an individual as a refugee where such a decision has not yet been taken.

ECRE has repeatedly highlighted the importance of interpreting the exclusion clauses of the Geneva Convention restrictively and with caution¹⁵. ECRE would like to stress again that there is no provision for revocation as such in the 1951 Geneva Convention. Article 33 (2) of the 1951 Geneva Convention allows for an exception to the prohibition of *refoulement* of refugees for reasons of national security or where an individual poses a danger to the community following conviction for a particularly serious crime. Article 1F allows for the exclusion of persons having committed crimes against peace or humanity, those committing a serious non-political crime outside the country of refuge, and those guilty of acts contrary to the purposes of the United Nations. However, the 1951 Geneva Convention does not include a provision allowing for either the revocation or the exclusion of refugee status on national security grounds. ECRE is therefore concerned that in this regard the Directive is not in line with the 1951 Geneva Convention.

Chapter V Qualification for subsidiary protection

Article 15 Serious harm

The elements of serious harm listed as grounds for qualification for subsidiary protection in this article are welcomed by ECRE. However, it is disappointing other grounds such as ‘systematic or generalised violations of their rights’ as a cause of a threat to a person’s life

¹⁵ See *inter alia* ECRE’s Position on Exclusion, March 2004.

and ‘violation of a human right’, have not been included. The latter would have reflected the international obligations of Member States under the European Convention on Human Rights and other international human rights instruments to protect individuals against violations of fundamental rights.

ECRE believe that subsidiary protection should accrue to any individual entitled to a right of non-return under the European Convention on Human Rights (ECHR), international human rights law or international humanitarian law. The grounds for protection, including the relevant standard of proof, should be interpreted in the light of existing and evolving jurisprudence of international human rights law and in particular the European Court of Human Rights. This would reflect the international obligations of Member States under the ECHR to protect individuals against violations of fundamental rights that may take place outside their territory, other than the prohibition of torture or inhuman or degrading treatment or punishment under Article 3 ECHR. Potential obligations in this regard include the right to life (Article 2); the right to liberty and security (Article 5); the right to a fair trial (Article 6); the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); and the right to an effective remedy (Article 13).

The European Court of Human Rights has prohibited return where violations of such rights would occur in the country of origin, and has explicitly confirmed the general principle that Member States have obligations under the ECHR for acts that produce effects outside their territory¹⁶. In relation to this principle there have also been important recent developments at national level. For example in the United Kingdom, the House of Lords recently ruled in two linked cases that other human rights, apart from those protected under Article 3 ECHR, may present a bar to removing asylum seekers to their country of origin¹⁷. ECRE would wish to stress that this is an evolving area of law, and as such it is important that Member States maintain a flexible definition of the treatment that should engage a right to subsidiary protection.

ECRE would also emphasise that persecution for a Convention reason can and does occur in the situations described by Article 15. Therefore, and in compliance with Article 2 (e) of the Directive, a person who is outside his or her country of origin and cannot return owing to a well-founded fear of being subjected to serious and unjustified harm on the basis of the risk of harm as described in this article should only be granted subsidiary protection if it is not possible to demonstrate that the fear of persecution is for reason of race, nationality, religion, membership of a particular social group or political opinion. ECRE's view is that subsidiary protection should only be seen as a residual status for categories of people in need of protection who clearly fall outside a full and inclusive interpretation of the 1951 Geneva Convention, and not as a substitute for refugee protection for individuals who meet the definition under the 1951 Geneva Convention¹⁸.

Article 16 Cessation

¹⁶ In the case of *Lozidou* (judgement of 23 March 1995) the ECtHR confirmed that “*the concept of jurisdiction [under Article 1 of the European Convention on Human Rights] is not restricted to the national territory of the High Contracting Parties. According to the established caselaw, [...] the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory*” (para.62).

¹⁷ *Ullah* [2004] UKHL 26, and *Razgar* [2004] UKHL 27.

¹⁸ See ECRE's Position on Complementary Protection, 2000.

ECRE's observations in relation to this Article repeat those expressed in relation to Article 11 (above), namely the desirability of an additional provision explicitly confirming that the burden of proof in establishing that a person is no longer in need of international protection lies with the Member State that granted the subsidiary protection status.

Article 17 Exclusion

ECRE regrets the fact that this Article does not explicitly confirm the absolute prohibition on return where this would result in a breach of international human rights law. In this regard, ECRE considers unfortunate the omission of the safeguard, contained in the original proposal from the Commission¹⁹, which provided that "*the application of the exclusion shall not in any manner affect obligations that Member States have under international law*". ECRE similarly regrets the loss of safeguards from the original Commission draft concerning access to court proceedings to challenge exclusion, and the requirement that exclusion be based solely on the personal and knowing conduct of the person concerned.

Chapter VI Subsidiary protection status

Article 18 Granting of subsidiary protection status

ECRE warmly welcomes the express obligation for Member States to grant subsidiary forms of protection.

Article 19 Revocation of, ending of or refusal to renew subsidiary protection status

ECRE would wish to reiterate its comments in relation to Article 17 (above) regretting the absence of explicit reference to the absolute prohibition under international human rights law of returning an individual to face human rights violations, including torture, or inhuman or degrading treatment. ECRE regrets that despite the evolving state of international law in relation to non-refoulement, the Directive does not include specific wording such as that in Article 3 of the UN Convention Against Torture (to which all Member States are Parties) and Article 19 (2) of the Charter of fundamental Rights of the European Union, which explicitly establishes that "*no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*".

Chapter VII Content of international protection

Article 23 Maintaining family unity

ECRE welcomes the recognition in this Article of the need to maintain family unity, and the requirement for Member States to provide family members with the same access to benefits accorded to refugees and persons with subsidiary protection. ECRE is disappointed at the differentiation explicitly permitted by paragraph (2) in relation to the benefits family members of persons with subsidiary protection can access, compared with the main beneficiary of the status. Although the Preamble to the Directive requires benefits awarded to family members to "be fair in comparison" with the main beneficiary, Article 21 itself only requires Member States to guarantee an "adequate standard of living". ECRE considers this to be insufficient, and believes that family members of persons with a subsidiary form of protection should have access to the same benefits as the main beneficiary.

ECRE believes that persons granted subsidiary protection status should receive the same level

¹⁹ COM (2001) 510 final

of rights as refugees. Both categories of protected persons have similar needs and circumstances, and should be given the same chance of successful integration in the asylum country. ECRE would therefore urge Member States to adopt or maintain such an approach in transposing the Directive.

ECRE very much regrets the fact that the Directive contains no provision concerning the right to family reunion for those granted subsidiary protection, and this is of particular concern given that the Directive on the right to Family Reunification did not extend to beneficiaries of subsidiary protection²⁰.

ECRE is also concerned that the Directive leaves it to the discretion of Member States whether to accord the same rights to other "close relatives", particularly as paragraph (4) allows this only where the close relative was living with and dependant on the main beneficiary prior to leaving the country of origin. ECRE believes that the family unit should not be limited to the spouse or unmarried partner and their children. ECRE would urge Member States to grant the same status, or where relevant, the same rights, to the following family members of a refugee and of a person granted subsidiary protection, regardless of whether they lived together or not at the time of leaving the country of origin:

- a) dependent relatives in the ascending line of legally married partners;
- b) children who are de facto members of a household through adoption, fostering or other forms of care arrangements, although not descending from a marriage or a relationship pertaining to that household;
- c) all dependent relatives in the ascending or descending line of cohabitating partners;
- d) dependent siblings when humanitarian reasons are invoked; and
- e) relatives on whom the principal applicant is dependent due to health, age, disability or other reasons.

Dependence should be seen in both financial as well as psychological/cultural terms. Consideration must be given to differences in the definition of "family" and "family life" which, in some cultures, might include near relatives and members of a household with whom there might not be a blood relationship. Equally, consideration should be given to the fact that families may not only have been formed in the country of origin. This is particularly relevant in the case of unaccompanied minors, who may have become members of the household during flight.

Article 24 Residence permits

Paragraph 1 of this Article sets out the right of persons with refugee status to a residence permit for at least 3 years, but in relation to family members allows for a permit to be valid for less than 3 years. ECRE regrets the differentiation introduced between the duration of residence permits between persons with refugee status and their family members. It is also noted that Article 13 of the Directive on the right to family reunification²¹ requires that residence permits for family members must be valid for at least one year, although it is reiterated that in ECRE's view there should be no differentiation.

ECRE notes with concern the fact that the Preamble to the Directive allows that access to benefits (employment, social welfare, health care and integration facilities) to be conditional on the prior issue of a residence permit. A residence permit is essentially only an identity

²⁰ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

²¹ Ibid.

document establishing that an individual has been recognised as a refugee or as a beneficiary of subsidiary protection, and any attached rights should accrue from the decision to grant the status rather than be dependent on the issuing of a residence permit. This provision allows Member States to effectively prevent a person recognised as a refugee or in need of subsidiary protection from enjoying the rights associated with such status. This could be done either immediately after an initial decision or at the time of renewing a residence permit. Under Article 24 (2) Member States are expressly permitted to withhold the issuing of a residence permit for “*compelling reasons of national security or public order*”. ECRE is concerned that Member States might use this as an additional mechanism for effectively revoking or excluding a person from status, without there being any guaranteed procedural safeguards or appeal rights to enable an individual to challenge any such decision. This is particularly so given that the term “national security or public order” is not clearly defined, and could be applied unduly broadly by Member States.

It is noted that paragraph (28) of the Preamble cites membership of or support for an organisation that supports international terrorism as an example of what would be covered by the notion of “national security and public order”, but this itself could be problematic given that there is no universally agreed definition of what constitutes “international terrorism”, and that individuals might support certain aims or actions of a prescribed organisation, without supporting or condoning acts of violence or terrorism. ECRE believes that the issue of exclusion from refugee status should be addressed as part of the determination procedure, and in accordance with Article 1 (F) of the 1951 Geneva Convention. Likewise, it would be inappropriate for Member States to use this provision as an additional opportunity to seek to deny essential benefits to beneficiaries of subsidiary protection whose refoulement would be prohibited under the European Convention on Human Rights.

In addition to this principled concern, it is quite conceivable that many refugees could effectively be prevented from enjoying their rights as a result of administrative failings on the part of Member States leading to a significant delay in the issuing of a residence permit. Similar concerns might apply during the process of renewing a residence permit.

In relation to Article 24 (2), ECRE regrets the fact that the minimum duration of only one year is required for residence permits provided to persons with subsidiary protection. ECRE would urge Member States to grant longer durations as otherwise this will create high levels of insecurity among persons granted international protection for a non-Convention related reason. ECRE believes that beneficiaries of subsidiary protection should be given residence permits on the same basis as 1951 Geneva Convention refugees in view of the fact that both categories of protected persons have similar needs and circumstances, and that successful integration into the asylum country requires a status that enables persons to develop a sense of long-term perspective for the future. ECRE also observes that the administrative processing of multiple renewal applications adds unnecessary costs to the asylum system.

Article 25 Travel documents

ECRE regrets the fact that paragraph (2) of this Article restricts the requirement of a Member State to issue a travel document to beneficiaries of subsidiary protection to where “*serious humanitarian reasons arise that require their presence in another State*”. ECRE considers that beneficiaries of subsidiary protection should have the same right to freedom of movement as 1951 Geneva Convention refugees, and would therefore urge Member States to adopt such a policy. For example, a travel document might be necessary to facilitate regular contact with relatives resident in another Member State. This article is in any case inconsistent as well as

discriminatory as the restriction only applies to beneficiaries of subsidiary protection who are unable to obtain a passport from their own national authorities.

Article 26 Access to employment

ECRE welcomes the fact that this Article provides that beneficiaries of refugee status can take employment immediately after the granting of the status. However for persons with subsidiary protection Article 26 (3) states that “*the situation of the labour market in the Member States may be taken into account, including the possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law.*” ECRE is disappointed that equal access to the labour market for persons with subsidiary protection is not provided for and that no time limit has been specified for this possible derogation. ECRE would like to reiterate that employment restrictions upon status determination seriously hinder refugee integration in the long term as they risk pushing people into illegal work or encouraging dependency on social welfare. There are thus strong policy grounds for allowing full access to the employment market to both refugees and beneficiaries of subsidiary protection.

In relation to access to vocational training this has also been made subject to “*conditions to be decided by Member States*” for persons with subsidiary protection. ECRE believes that restrictions in relation to access to vocational training have a negative effect in delaying considerably the process of acquisition of the skills and knowledge by persons in need of international protection that are necessary to access the labour market and live independently. ECRE’s view is therefore that rights to employment and self-employment accruing to 1951 Geneva Convention refugees should be granted to all persons afforded subsidiary protection without any restrictions as well as the right to vocational training and employment-related educational opportunities.

Article 27 Access to education

ECRE warmly welcomes the provisions in paragraph 1 of this Article that provides for full access to the education system to all minors recognised as refugees or in need of subsidiary protection under the same conditions as nationals. ECRE also welcomes the absence of differentiation between adult beneficiaries of refugee status and subsidiary protection in paragraph (2) that confirms their right to access to the general education system under the same conditions as third country nationals. However, in order not to unduly inhibit effective integration, ECRE would encourage Member States as a matter of good policy to ensure that young adults (including those granted refugee status when they were aged under 18) are not denied access to higher education or a university place on account of their status alone.

Article 28 Social welfare

ECRE welcomes the general recognition contained in this Article that all beneficiaries of international protection should receive social assistance under the same conditions as nationals. Although it is regrettable that discretion is afforded to Member States to “*limit social assistance granted to beneficiaries of subsidiary protection to core benefits*” and to define what those core benefits should comprise, it is helpful that paragraph 34 of the Preamble to the Directive confirms that “*core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, insofar as they are granted to nationals according to the legislation of the Member State concerned*”.

Article 29 Health care

ECRE similarly welcomes the fact that beneficiaries of refugee status are entitled to the same access to health care under the same eligibility conditions as nationals, but again regrets the discretion afforded to Member States under paragraph (2) to limit health care granted to beneficiaries of subsidiary protection to “core benefits”.

Article 30 Unaccompanied minors

ECRE welcomes the provisions of this Article concerning the particular needs of unaccompanied minors although it had also called for a specific reference to the obligations under the UN Convention on the Rights of the Child within this article. ECRE would wish to emphasise the need for the representation of an unaccompanied minor to include powers of ‘legal guardianship’, and that the option of “*representation by an organisation which is responsible for the care and well-being of minors*” should only be considered as an addition rather than as an alternative to legal guardianship, in cases where such representation does not include legal guardianship. This is important given that the absence of legal guardianship can impede an individual or organisation from acting in the best interests of a child. Representation should also be as comprehensive as possible and always be provided until the child is at least eighteen years of age.

Article 31 Access to accommodation

This Article requires Member States to ensure that accommodation is provided to beneficiaries of both refugee status and subsidiary protection under the same conditions as third country nationals, but ECRE would urge Member States to provide accommodation under the same conditions as nationals.

Article 32 Freedom of movement within the Member State

ECRE is concerned about the discretion afforded to Member States to restrict the freedom of movement within their territories of beneficiaries of international protection. In particular it is noted that freedom of movement is an inherent right under Article 31 (2) of the 1951 Geneva Convention. ECRE would also wish to reiterate that freedom of movement is often essential to enable persons to access employment and therefore integrate fully into the receiving country.

Article 33 Access to integration facilities

The provision for access to integration programmes in this Article are to be welcomed but ECRE is disappointed to note that access to these programmes for beneficiaries of subsidiary protection has been left to the discretion of Member States. It considers that immediate access to integration services upon status determination is very important for promoting independence and facilitating the participation of all persons in need of protection in all aspects of the economic, social, cultural, civil and political life of the country of asylum. Access to integration programmes accruing to 1951 Geneva Convention refugees should therefore be granted to persons afforded subsidiary protection without any restrictions.

Naturalisation

ECRE regrets the absence of any provision in the Directive in relation to Article 34 of the 1951 Geneva Convention concerning the naturalisation of refugees.

Chapter IX Final Provisions

Article 37 Reports

ECRE welcomes the fact that this Article provides for a review by the Commission of the application of the Directive within 18 months, and hopes that the Commission will take the opportunity afforded at this time to consider the concerns raised in this paper. ECRE believes that the criteria for assessment must primarily be based on the importance of safeguarding human rights and ensuring the effective recognition of those in need of international protection.

ECRE, October 2004

For further information contact the European Council on Refugees and Exiles (ECRE) at:

ECRE EU Office

Rue Belliard, 205 - Box 14
B- 1040 Brussel
Tel: +32 (0) 2.514.59.39
Fax: +32 (0) 2.514.59.22
E-mail: eucre@ecre.be

ECRE Secretariat

103 Worship Street
London EC2A 2DF
Tel: +44 (0) 20 7377 7556
Fax :+44 (0) 20 7377 7586
E-mail: ecre@ecre.org

Web : <http://www.ecre.org>