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to : Strategic Committee on Immigration, Frontiers and Asylum  
on : 25 September 2002

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Subject : 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

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**Introduction**

On 31 October 2001 the Commission proposed a Council Directive on minimum standards on the qualification and status of third country nationals and stateless persons as refugees and as persons otherwise in need of international protection (protection qualification Directive).

The Directive defines who should be recognised as a refugee or as a person eligible for subsidiary protection.

With regard to refugees the directive is based on the refugee definition of the 1951 Convention relating to the Status of Refugees. Consensus appears to have been reached on the following wording:

**Article 2(c)**

*“Refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, and a stateless person, who, being outside the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 14 does not apply.*

In the case of subsidiary protection there is no common legal definition to base the directive on. According to the Commission the definition of subsidiary protection in the proposed directive is inspired by the protection systems of Member States and is clarifying and codifying existing international and Community obligations and practices.

At the Informal Ministers Meeting in Copenhagen on 13-14 September 2002 ministers agreed that the proposed directive is a priority and should be adopted as soon as possible.

There was furthermore consensus among ministers that the common definition of subsidiary protection should be based on already existing obligations of Member States, in particular Article 3 of the European Convention of Human Rights (ECHR) regarding torture or inhuman or degrading treatment and punishment and Article 1 of the 6th Protocol to ECHR regarding the abolition of the death penalty.

Moreover, a number of delegations stressed that the definition of subsidiary protection should be precise and clear, leaving no doubt as to the scope of subsidiary protection. Several delegations expressed the concern that sub-paragraph (d) of Article 15 (as in doc. 1356/02 ASILE 40) would be too open for interpretation.

At the meeting several delegations additionally expressed that subsidiary protection should be granted to a person facing a serious threat to life and physical integrity in situations of indiscriminate violence.

In order to progress on this important issue the Danish Presidency is, on the basis of discussions in the Asylum Working Party, presenting a proposal for a definition of subsidiary protection to the Strategic Committee. The aim of the Presidency is to reach agreement on both the refugee definition and the definition of subsidiary protection at the Council Meeting on 14-15 October 2002.

### **Proposal by the Danish Presidency on the definition of subsidiary protection<sup>1</sup>**

The definition of subsidiary protection is defined in Article 2, sub-paragraph (e), of the Directive. This Article should be read in conjunction with Article 15, which defines serious and unjustified harm.

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<sup>1</sup> During discussions in the Asylum Working Party some delegations have expressed their concern with regard to the following point: It would appear that an ordinary criminal should be granted subsidiary protection status, if:

- a) upon return to his country of origin he would as a result of his crimes face e.g. the death penalty or punishment amounting to torture; and
- b) the concerned person would not be excludable in accordance with the presently formulated exclusion clause relating to subsidiary protection.

It is the opinion of the Presidency that such cases, although covered by the non-refoulement obligation of Article 3 of EHRC, should not be granted subsidiary protection status. Instead each Member State should be left to decide which status and benefits they would wish to grant such persons. To ensure this outcome it is the intention of the Presidency to put forward a proposal for a revised version of Article 17 regarding exclusion from subsidiary protection as soon as possible.

The proposal reads as follows:

### **Article 2(e)**

*"Person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious and unjustified harm as defined in Article 15, and to whom Article 17 does not apply.*

### **Article 15**

#### **Serious and unjustified harm**

*Serious and unjustified harm consists of:*

- a) death penalty or execution; or*
- b) torture or inhuman or degrading treatment or punishment of an applicant in his or her country of origin, or in the case of a stateless person, in his or her country of former habitual residence; or*
- c) serious and individual threat to life or physical integrity of a civilian by reason of indiscriminate violence in situations of international or internal armed conflict; or*
- d) acts or treatment outside the scope of sub-paragraphs (a) to (c) in an applicants country of origin, or in the case of a stateless person, his or her country of former habitual residence, when such acts or treatment are sufficiently severe to entitle the applicant to protection against refoulement in accordance with the international obligations of Member States.*



## **Explanation to Article 2, sub-paragraph (e)**

The Article defines a person eligible for subsidiary protection. The risk assessment criteria in Article 2, sub-paragraph (e)

*“substantial grounds for ...real risk ...”*

has been taken from the language used by the European Court of Human Rights (ECtHR) in its rulings relating to Article 3 of the ECHR.

A vast majority of Member States have supported the present wording of Article 2, sub-paragraph (e).

## **Explanations to Article 15**

**Article 15, sub-paragraph (a):** Sub-paragraph (a) is based on the obligations of Member States flowing from Article 1 of the 6<sup>th</sup> protocol to the ECHR and the jurisprudence of the ECtHR according to which a person may not be refouled to a country, where that person would face the death penalty.

The risk of being subjected to the death penalty was not explicitly included in the definition of subsidiary protection presented by the Commission. However, there is consensus among Member States that persons facing such a risk should be granted subsidiary protection, provided that they cannot be excluded.

**Article 15, sub-paragraph (b):** Sub-paragraph (b), which is generally supported by Member States, is based on the obligations of Member States laid down in Article 3 of the ECHR and the jurisprudence of the ECtHR.

However, if sub-paragraph (b) was to fully include the jurisprudence of ECtHR relating to Article 3 of EHRC, cases based purely on compassionate grounds as was the case in *D versus UK* (1997)<sup>1</sup>, also known as the *Stt. Kitt's* case, would have to be included.

In the *Stt. Kitts* case, although the lack of access to a developed health system as well as lack of a social network in itself was not considered as torture or inhuman or degrading treatment, the expulsion to this situation, which would have been lifethreatening to the concerned person, was described as such.

Consequently, to avoid the inclusion of such compassionate grounds cases under a subsidiary protection regime, which was never the intention of this Directive, the Presidency is suggesting to limit the scope of sub-paragraph (b) by stating that the real risk of torture or inhuman or degrading treatment or punishment must prevail in his or her country of origin.

**Article 15, sub-paragraph (c):** Subparagraph (c) takes its outset in Article 15, sub-paragraph (c), as presented by the Commission and has been supported by a vast majority of delegations.

Sub-paragraph (c) describes a situation where a civilian faces a serious and individual threat to his life or physical integrity in a country involved in an armed conflict, be it international or internal.

Sub-paragraphs (a) and (b) would in all cases appear to cover applicants facing a serious threat to life or physical integrity. However, threats arising in situations of indiscriminate violence, would not be covered since such situations can not be described as treatment or punishment or suffering the death penalty.

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<sup>1</sup> *D versus the UK* 30/440/96 of 2 May 1997. The case concerned an AIDS-patient, who the UK wanted to return to Stt. Kitt (his country of origin). In the ruling the Court considered the expulsion as such to the prevailing situation in Stt. Kitt to be an inhuman treatment. The reasoning was that the patient had become dependent on the medical treatment in the UK. Furthermore he could neither receive a similar treatment in Stt. Kitt nor did he have a social network there.

Hence a separate subparagraph has been drafted in order to include this situation. This would simultaneously be in line with the jurisprudence of the ECtHR relating to Article 3 of ECHR, namely as was indicated in *V versus UK*<sup>1</sup>, that an expulsion as such to a situation with a high level of danger and insecurity/indiscriminate violence could be considered an inhuman or degrading treatment.

**Article 15, sub-paragraph (d):** This sub-paragraph is based on Article 15, sub-paragraph (b), as presented by the Commission.

The intention of sub-paragraph (d) is to create a definition of subsidiary protection, which will be able to take into account other violations of humans rights than the ones deriving from Article 3 of the ECHR and Article 1 of the 6th Protocol to the ECHR. The ECtHR has on several occasions stressed that other articles of the ECHR, such as Article 6 regarding the right to a fair trial, may invoke the principle of non-refoulement.

This was stated for the first time in the case of “*Soering*”<sup>2</sup> according to which “the Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”.

By using the wording “acts or treatment” it is ensured that only man-made situations, and not for instance situations arising natural disasters or situations of famine, will lead to the granting of subsidiary protection.

As was the case with regard to sub-paragraph (b), it has to be ensured that an applicant will only qualify for subsidiary protection, if he or she is exposed to such an act or treatment in the country of origin. Similarly, where the ECtHR has ruled that an expulsion, which separates a person from his close family members residing in the expelling country, is a violation of Article 8 of the ECHR, such cases would not be included.

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<sup>1</sup> *Vilvarajah versus UK* 13164/87 of 30 October 1991. In this case the Court stated that it would not exclude the possibility of applying the principle of non-refoulement in a situation where a country would seek to expel an individual to a country where a high level of insecurity prevailed.

<sup>2</sup> *Soering versus UK* 14038/88 of 7 July 1989

**Questions for the Strategic Committee:**

1. Delegations are requested to confirm the agreement on the definition of a refugee as mentioned in 12148/02 ASILE 43.
2. The proposal of the Presidency seeks to cater for the concerns presented by the delegations. On this basis delegations are requested to clarify whether the proposal on the definition of subsidiary protection as mentioned in 12148/02 ASILE 43 can be accepted. With regard to Article 15, sub-paragraph (d), the Presidency wishes delegations to reflect on the concerns expressed by several delegations regarding this sub-paragraph.



**Article 2**  
**Definitions**

...

- (c) "Refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, and a stateless person, who, being outside the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 14 does not apply.<sup>1</sup>
- (e) "Person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real<sup>2</sup> risk of suffering serious and unjustified harm<sup>3</sup> as defined in Article 15, and to whom Article 17 does not apply;

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<sup>1</sup> **IRL/S** : scrutiny reservations.

<sup>2</sup> **F** : add "and individual" in order to limit the scope of subsidiary protection to cases of persons suffering individual menace.

**S** : scrutiny reservation, wants the wording "well founded fear" (as in the original Commission proposal) instead of "real risk". The same proof requirements should be established here as for refugee status. Wording from decisions of the Committee against Torture should be taken into account.

**NL** supported **S** in the sense of avoiding the risk of having different rulings from different Courts or bodies (e.g. European Court of Human Rights and Committee against Torture) concerning similar situations.

**D** : the present wording could provoke problems of proof assessment. Questions concerning proof evaluation should be solved in Article 7.

<sup>3</sup> **D/EL/S** : avoid reference to "unjustified harm" which is an inappropriate expression and risks allowing the acceptance of "justified harm".

**Article 15**  
**Serious and unjustified harm<sup>1</sup>**

Serious and unjustified harm consist of:<sup>2</sup>

- (a) death penalty or execution; or
- (b) torture; or inhuman or degrading treatment or punishment of an applicant in his or her country of origin, or in the case of a stateless person, his or her country of former habitual residence; or<sup>3</sup>
- (c) serious and individual threat<sup>4</sup> to life or physical integrity<sup>5</sup> of a civilian<sup>6</sup> by reason of indiscriminate<sup>7</sup> violence in situations of international or internal armed conflict;<sup>8</sup> or

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<sup>1</sup> Same comments concerning "unjustified harm" as in Article 2(e).

**E** : reservations on sub-paragraphs (a), (c) and (e). Wanted a more restrictive wording.

<sup>2</sup> **B** : reintroduce the idea of an individual examination of each claim and add that "protection shall be granted in the following cases" (subparagraphs (a) to (d)).

<sup>3</sup> **D** : scrutiny reservation linked to Article 17 (exclusion from subsidiary protection status).

**A** : scrutiny reservation.

<sup>4</sup> **B/IRL/UK** : scrutiny reservations on the expression "individual threat".

**D** : say "significant real threat" instead of "serious and individual threat".

<sup>5</sup> **D/FIN/Cion** : add "freedom" as initially proposed by the Commission.

**The Chair** explained that reference to freedom had been deleted in order to avoid unwanted widening of the scope.

<sup>6</sup> **Cion** : delete "of a civilian" (the addition of the words "of a civilian" was suggested by NL). Ex-combatants should be included.

<sup>7</sup> **EL/F** : scrutiny reservations on the word "indiscriminate".

<sup>8</sup> **F** : scrutiny reservation on the expression "international or internal armed conflict" which risks opening the possibility of obtaining subsidiary protection to the entire population of countries involved in conflicts.

**FIN** : the expression "armed conflict" should be clarified.

- (d) acts or treatment outside the scope of sub-paragraphs (a) to (c) in an applicants country of origin, or in the case of a stateless person, his or her country of former habitual residence, when such acts or treatment are sufficiently severe to entitle the applicant to protection against refoulement in accordance with the international obligations of Member States.<sup>1</sup>
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<sup>1</sup> **B/D/E/F** : reservations. The wording of this sub-paragraph is too vague and could allow a wide margin of interpretation.  
**A/EL/FIN/L/NL/S** : scrutiny reservations due to the possible consequences of such a wide wording.