OBSERVATIONS ON THE PROPOSAL FOR A COUNCIL DIRECTIVE ON MINIMUM STANDARDS ON PROCEDURES IN MEMBER STATES FOR GRANTING AND WITHDRAWING REFUGEE STATUS BY THE STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW

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Comments by the Standing Committee of experts on international immigration, refugee and criminal law on the Proposal for a council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status [24.10.2000, COM (2000) 578 final, PB 2001, C62 E/231]

The Standing Committee appreciates the proposal for the directive as fully considered and well balanced. Nevertheless, it recommends modification of the Directive on the following points.

1 A provision stating that the Directive is without prejudice against the principle of non-refoulement should be added.

2 A stand still clause as to the existing level for relevant standards in the Member States should be added.

3 The services of an interpreter to be paid for out of public funds for submitting the case should be available upon request by the applicant (Article 7(b)).

4 The possibility to limit the scope of the personal interview to the admissibility of the application should be taken away (Article 8(1)).

5 Free legal assistance should be available for the applicant in further appeal (Article 9(4)).

6 A third country should not be considered as safe unless re-admission of the applicant is guaranteed (Article 22).

7 The suggestion that the determining body can refrain at will from holding a personal interview in the case of presumably inadmissible or presumably manifestly unfounded applications should be taken away (Articles 23(1) and 29(1)).

8 The burden of proof for the applicant as to the grounds for not considering his country of origin as safe should be specified (Article 31).

9 The application for leave to remain in the Member State until the competent authority has decided on appeal against the denial of suspensive effect during the appeal against a rejection in connection with a safe third country should be granted suspensive effect (Article 33(3)).

10 Leave to remain in the Member State until the competent authority has decided on appeal against the denial of suspensive effect during the appeal against a rejection should be applied for to a reviewing body (Article 33(3)).

11 A country is to be considered as a safe third country or safe country of origin on the basis of Annex I and II if it does observe the mentioned standards, not if it generally observes them (Annex I and II).

12 No country should be considered to be safe unless it meets the requirements laid down in Annex I A (1).

Explanation

1 Article 63 of the EC Treaty, which the present Directive is envisaged to implement, states that EC measures on asylum have to be in accordance with the Geneva Convention on Refugees and other relevant treaties. The keystone of the Geneva Convention and the other relevant treaties is the principle of non-refoulement. This principle is contained in Article 33(1) of the Geneva Convention, Article 3 of the European Convention on Human Rights and Article 3 of the Convention Against Torture and a number of other treaties to which all Member States are party. Although the Directive is presumably meant to respect this prohibition of refoulement, which is the absolute minimum standard, it does not explicitly state so. **In order to avoid any**

possible lack of clarity in this respect, the Standing Committee suggests to add to Chapter II, preceding Article 4 the following supplementary provision:

"This Directive is without prejudice to the prohibition of refoulement as enshrined in Article 33(1) Geneva Convention of 28 July 1951, Article 3 ECHR and Article 3 CAT and other relevant international treaties."

2 The standards in this Directive are not meant to be an exhaustive arrangement, but to set a minimum level. This means that Member States are free to maintain provisions which are more favourable for the applicant for asylum than the provisions in the Directive. The Commission stresses this point in its Explanatory Memorandum to the proposal (p. 3-4). The Directive however could have the effect of tempting Member States to lower current national, more favourable standards to the level prescribed in the Directive. Such a tendency would be a denial of the very character of minimum harmonisation. **This can be averted by adding a stand still clause. For this reason, the Standing Committee proposes to supplement Article 3 with a paragraph 4 that reads as follows:**

"The Member States can not change their standards on procedures for granting and withdrawing refugee status to the detriment of asylum applicants."

3 According to Article 7(b) of the proposal, the services of an interpreter must be paid for out of public funds only if the interpreter has been called upon by the competent authorities. Taking into account the utmost importance of proper submission of an application for asylum and especially of the personal interview ex Article 8 for the assessment of the application, the rendering of the services of an interpreter should not depend on the discretion by the competent authorities, especially the determining body. **Therefore, the Standing Committee proposes to add to Article 7(b) the following clause:**

"The determining body will assign an interpreter upon request by the applicant for asylum."

4 According to Article 8(1) of the proposal, it is possible to limit the scope of a personal interview to the question of the admissibility of the application for asylum. According to Article 18, an application is inadmissible if another Member State or a safe third country is considered responsible for the application. Thus limiting the scope of a personal interview to the question of the admissibility of the application has to be deemed to be at variance with international public law. In it's judgement of 7 March 2000 *T.I. v UK*, the European Court of Human Rights (No 43844/98) performed an examination of the concerns as to the risks faced by the applicant upon return to the country of origin, i.e. an examination of the substance of the application. This holds also for applications for asylum on the basis of the Geneva Convention. **The Standing Committee therefore proposes to strike out the words "the admissibility and/or" and thus to rephrase Article 8(1) as follows:**

"Before a decision is taken by the determining authority, the applicant for asylum must be given the opportunity of a personal interview on the substance of his application for asylum with an official competent under national law."

5 According to Article 9(4), applicants for asylum are entitled to receive the assistance of a legal advisor after an adverse decision by a determining authority, which must be given free of charge if the applicant has no adequate means to pay for it himself. This provision can be read as not granting this free assistance after an adverse decision by a *reviewing* body. Absence of legal assistance in the further appeal, which may solely be concerned with points of law (cf. Article 38(2)), would render this remedy often largely illusory. **Therefore, the**

Standing Committee proposes to add to the first period of Article 9(4) the following words:

" ... or reviewing body."

6 Article 22 of the proposal lays down the requirements for dismissing an application as inadmissible on the basis of the safe third country concept. One of the requirements, Article 22(b), states that there have to be "grounds" for considering that the applicant will be re-admitted in the third country. In asylum law three standards for considering so are available, ranging from "grounds", "sufficient grounds" to "guaranteed". Taking into account the far reaching consequences of considering a country as safe in a specific case and having regard to the Comments on Article 22, especially the clause "any examination into the application of the safe third-country concept should take into account how the authorities of the third country will respond to the arrival of the applicant" (p. 20), the standard "grounds" has to be considered as being too weak. **Therefore, the Standing Committee proposes to substitute for article 22(b) the following clause:**

"(b) the re-admission of this particular applicant to its territory is guaranteed;"

7 According to Article 8(1), every applicant for asylum is entitled to have a personal interview on the admissibility and/or substance of his application for asylum. Article 8(5) gives an exhaustive account of the exceptions. However, the discretionary wording of the Articles 23(1) and 29(1) might be taken to suggest that the authorities can refrain from the interview when dealing with supposedly inadmissible claims as well as in the accelerated procedure for manifestly unfounded claims. Such a discretionary competence to refrain from the interview would run counter to Article 8. Moreover, the Standing Committee points out that a personal interview is an absolute necessity for reaching a proper and lawful decision on an application for asylum. It follows from the European Court of Human Rights judgement, *T.I. v UK* (No 43844/98) that every person applying for asylum should have the opportunity to explain why the Member State or the third country in question can not be considered as safe in his case. Further, EXCOM conclusion 30 (e) contains the following recommendation by the UNHCR: "As in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and whenever possible by an official of the authority competent to determine refugee status." So, bestowing discretionary power upon the determining authorities to refrain at will from a personal interview is at variance with international public law. **In order to avoid such a suggestion the Standing Committee proposes to rephrase Article 23(1) as follows:**

"If Article 8 (5) is not applied, the Member States shall ensure that the competent authorities conduct the personal interview within 40 working days after the application of the person concerned has been made."

and to rephrase art. 29 (1) as follows:

"If Article 8 (5) is not applied, the Member States shall ensure that the competent authorities conduct the personal interview on the application for asylum within 40 working days after the application of the person concerned has been made."

8 On the basis of Chapter IV, Section 2, Member States can apply an accelerated procedure for processing claims from applicants from safe countries of origin. According to Article 31, countries can only be considered as safe countries of origin if they meet the requirements of Annex II and if there are no grounds for considering it not to be safe in the particular circumstances of the applicant for asylum. As the Comments do not specify the burden of proof

on the applicant for submitting the grounds mentioned, the requirements as to these grounds can be very high. Moreover, the short time limits in the accelerated procedure will proof it often very difficult if not impossible for the asylum applicant to adduce materials on the general situation in the country of origin. A too high burden of proof in conjunction with the short time limits in the accelerated procedure may amount to a breach of Article 3 of the Geneva Convention, which prohibits discrimination between refugees on the basis of the country of origin. To avoid this, the requirements as to the grounds meant in Article 31 should be specified. **The Standing Committee proposes to rephrase the final clause of Article 31 as follows:**

"…and if the applicant does not adduce any materials in the personal interview that may give rise to grounds for considering… "

9 Article 33(1) states that appeals shall have suspensive effect. However, following Article 32 (a) suspensive effect can be withheld in cases where a country which is not a Member State is considered as a safe third country for the applicant. Article 33(3) states that if suspensive effect is withheld, the applicant can apply for leave to remain on the territory of the Member State and can not be expelled until the competent authority has decided on the request except for cases where a third country which is not a Member State is considered as safe for the applicant. So, an applicant for asylum can be expelled to such a third country without having been heard by judicial authorities on his possible objection that the third country in case is not safe for him. This must be considered as being at variance with international public law. The right to remain on the territory of the state where the asylum claim has been lodged until proceedings are complete is contained in Article 3 ECHR (ECtHR 7 March 2000, No 43844/98, *T.I. v UK*) as well as in article 13 ECHR (ECtHR 30 November 1991, *Vilvarajah v UK*, Series A 215, par. 125). Besides, from Article 33(3) read in conjunction with Article 33(1) follows that in the case of expulsion to a third country which *is* a Member State, suspensive effect of the appeal against the denial of suspensive effect can *not* be withheld. One wonders how withholding suspensive effect to appeals against expulsion to other third countries can be based on their alleged safety if Member States are apparently not deemed to be safe enough in this respect. **For these reasons, the Standing Committee proposes to drop the final clause (the words "*except in cases* …") of article 33(3).**

10 Article 33(3) states that applications for leave to remain on the territory of the Member State during appeal can be lodged with the competent authority. This means that upon a negative decision, the applicant can be expelled without being heard by another authority than the determinant authority. Such an expulsion would be incompatible with the demands from Article 13 ECHR. By substituting "reviewing body" for "competent authority" access to a judicial authority for is secured as Article 38(1) grants a right to further appeal in all cases, i.e. also in case of denial of leave to stay in the Member State. **Therefore, the Standing Committee proposes to substitute the words "competent authority" in Article 33(3) for the words "reviewing body".**

11 According to Annex I, a third country can not be considered as safe unless (A) it "generally" observes the standards laid down in international law for the protection of refugees and (B) it "generally" observes basic standards laid down in international human rights law. According to Annex B, a country is considered as a safe country of origin if it "generally" observes the standards mentioned. The Standing Committee feels that the word "generally" undermines the normative strength of the requirements. **Therefore, the Standing Committee proposes to delete the word "generally" in clause A and clause B of Annex I.**

12 In Annex I under A, a distinction is made between States which are party to the Geneva Convention, observe the provisions thereof and whose asylum procedures meet the listed requirements (under 1), and States which are not party to the Geneva Convention, but do observe the provisions thereof or have established a minimum standard of treatment of refugees or

complies with the need for international protection of applicants for asylum in any manner whatsoever through co-operation with the UNHCR or by other means deemed generally adequate by the UNHCR Office (under 2). The Standing Committee observes that the latter standard is far below the level set in the other provisions of Annex I. Moreover, the Standing Committee does not understand why States which are not party to the Geneva Convention and eventually do not generally observe the standards thereof should meet less strict requirements than the States which are. Bearing in mind the far reaching consequences for applicants of considering a third country as safe, the safeguards as to both the observance of the Geneva Convention as well as to the procedural standards for the application should hold for all third countries to be considered as safe. Besides, as the requirements mentioned under A(1) indicate, being party to the Geneva Convention does not necessarily entail strict observance. **Therefore, the Standing Committee proposes to delete Annex I A under 2 in total and delete the words "that has ratified the Geneva Convention" in Annex I A (1), thus rephrasing the opening line of Annex I A (1) as follows:**

"A safe third country is any country that observes the provision of the Geneva Convention …."

On behalf of the Standing Committee of experts on international immigration, refugee and criminal law,

Prof. mr. B.P. Vermeulen

Amsterdam, 18 May 2001