ΣΥΝΗΓΟΡΟΣ ΤΟΥ ΠΟΛΙΤΗ
ΑΝΕΞΑΡΤΗΤΗ ΑΡΧΗ

Conference

«Asylum in Greece and the transposition of the EU Directives »

Tuesday, 3 July 2007
Conference Hall, the Greek Ombudsman's Premises

Programme

Morning Session

8.30-9.00 Registration

9.00-9.30 *Welcoming interventions*
Giorgos Kaminis*, the Ombudsman*
Giorgos Tsarbopoulos *Head of Office, UNHCR Greece*
Ambassador Ailianos *Secretary General of the Ministry of Public Order*

9.30-10.15 *Chair :* Giorgos Tsarbopoulos

Presentations

«The EU Asylum Directives: Problems of interpretation and implementation»
Achilleas Skordas, Proffessor, University of Bristol

«Council of State: The jurisprudence acquis for asylum»
Dimitrios Gratsias, Councellor of State

Written communication from the European Commission (to be confirmed)

10.15-11.00 Discussion
11.00-11.30 Coffee Break
11.30-12.30 Discussion (cont.)

12.30-13.00 Light lunch

Afternoon Session

13.00-15.00	*Round Table discussion with the participation of State authorities and agencies (Ministries, Ombudsman, the National Commission for Human Rights) and UNHCR* *Chair: **Andreas Takis**, Deputy Ombudsman for Human Rigths*

Questions for Ms Zeta Georgiadou, member of the Asylum Department of the European Commission, in view of a UNHCR Greece/Greek Ombudsman's Conference on the implementation of the asylum directives in Greek law

Procedures Directive

1. Art. 15.3(a) [Right to legal assistance and representation]

In case that the national legislation provides for an administrative appeals' stage in between the decision of the determining authority and the appeal to a court, does the obligation to provide for legal assistance, at least at the appeals' stage, covers also that intermediary stage?

The right to legal assistance and representation enshrined in Article 15 is a constitutive element of the right to an effective remedy referred to in Article 39. Article 15(1) in particular aims at ensuring that Member States *may in no way impede* the consultation *in an effective manner* of a legal adviser *at any stage of the asylum procedure.* This applies also to the intermediary administrative appeals stage.

In its second paragraph, this Article provides that, as a general rule, *free* legal assistance *must be ensured*, upon request, in the event of a negative decision by a determining authority. However, in its third paragraph, this Article allows Member States to limit this right to free legal assistance in certain - exhaustively enumerated - cases. In particular, under (a), it allows Member States to limit the right to free legal assistance to procedures before a court or a tribunal in accordance with chapter V.

As a result, **Member States are not, in principle, obliged to ensure free legal assistance for procedures at an administrative appeals stage**. However, **it should be ensured that the refusal to grant free legal assistance** for such procedures, assessed in the context of the administrative and judicial system of the individual Member State seen as a whole, **does not result in obstructing the consultation in an effective manner of a legal adviser at this stage of the asylum procedure***,* thus obstructing the effective enjoyment of a right guaranteed by this Directive. Useful indications on the interpretation of the right to an effective judicial remedy can be drawn from the case law of the European Court of Justice, as well as from the case law of the European Court on Human rights on Articles 6 and 13 of the ECHR.

2. Art. 23.4(c) [Examination procedure]

I) **In the context of the alinea (c) of this paragraph, "unfounded" are considered two specific categories of asylum claims (safe country of origin-safe third country). Would it be compatible with the directives if all the other categories of claims (elaborated in alineas (a) to (o)) were to be included in the "unfounded" claims?**

II) **The provision of an accelerated procedure shouldn't be accompanied by <u>deadlines</u> within which the determining authority should complete the examination of the application, in order to be effective as a procedure? The provision of 6 months (para. 2) isn't it**

considered to be a ceiling beyond which no procedure should continue unless there is a reason for the delay?

I) Article 23(4) sets out an exhaustive list of the cases where the examination procedure may be prioritized or accelerated, and includes in this list certain cases where the applications are considered to be unfounded, referring to the relevant provisions of the Directive. *This Article does not purport to define the concept of unfounded applications or to delineate its scope.*

The definition of unfounded applications is contained in Article 28, which underlines that asylum applications may be considered as unfounded *only if the determining authority has established that the applicant does not qualify for refugee status pursuant to the Qualification Directive. This implies,* as it becomes clear from recital 22 of the Directive, *an examination of the application on the substance*.

In the second paragraph of this Article, the Directive lists exhaustively the cases where Member States may consider an application as *manifestly* unfounded.

However, the Directive *does not regulate more precisely the conditions for considering applications as unfounded nor does it provide any exhaustive enumeration of categories of applications that may be considered as such*. **Member States remain therefore free to define such categories of applications in their national legislation, provided they respect the defining element in Article 28(1).**

II). The deadline mentioned in Article 23(2) concerns the "regular" procedures, and it has an indicative value, indicating what could be considered as a usual duration of an asylum procedure, under normal circumstances. However, it does not impose any obligation on Member States to actually terminate the procedure within 6 months, or to justify the reason for the "delay", but only an obligation to inform the applicant of the delay, once the 6 months have passed, or to inform him/her of the time-frame within which a decision is to be expected.

So the 6 months deadline cannot be construed as a binding "ceiling" neither for the regular nor for the accelerated procedures.

3. Art. 25.1 [Inadmissible applications]

In case the MS decide to insert this category in their legislation, shouldn't they be obliged to transpose also par. 1 of the article, since it determines how the states should treat inadmissible applications?

Article 25 determines, in its first paragraph, the treatment that Member States should reserve to inadmissible applications and lists *exhaustively*, in its second paragraph, the cases where Member States may consider asylum applications as inadmissible. Further indications regarding the nature of the assessment of these cases and the exceptional character of this treatment are provided in recitals 22 and

23. **Therefore, if a Member State decides to treat certain or all of the categories of applications listed in Article 25 as inadmissible, it is obliged to transpose paragraph 1 of this Article and to treat them in the manner prescribed in this provision.**

4. Art. 30 [National designation of third countries as safe countries of origin]

As regards para. 4 and 5 of that article, isn't it obligatory to be transposed in the national legislation?

Firstly, it should be pointed out that Article 30 does not oblige in any way Member States to designate at the national level third countries as safe countries of origin; it only offers such a possibility. If, however, Member States make use of this possibility, they are obliged to respect the conditions set out in this Article. In such a case, they are therefore **obliged, inter alia, to transpose and comply with the provisions of paragraph 5.**

A distinction has to be made between the different possibilities allowed by the first three paragraphs of Article 30. In its first paragraph, Article 30 establishes *the rule* according to which Member States may designate as safe countries of origin third countries other than those appearing on the minimum common EU list in accordance with the criteria set out in Annex II.

In its second paragraph, this Article provides for *a derogation* to this rule*, allowing Member States to retain in force* national lists which were already in place on 1 December 2005 and which were based on less strict criteria than those of Annex II, provided that they satisfy the relevant conditions set out in this Article.

Paragraph 3 allows Member States to retain legislation in force on 1 December 2005 regarding the designation of *part of a country as safe* or of a country or part of a country as *safe for a specified group of persons.*

As explicitly indicated in paragraph 4, **this paragraph is applicable and should be transposed only where a Member State makes use of the possibilities provided and defined in paragraphs 2 and 3, i.e. where it retains in force national lists which already existed on 1st December 2005.** For the lists introduced afterwards, it is Annex II which provides the elements for the assessment of the safety of a third country.

5. Art. 39.1 [Appeals' procedures- The right to an effective remedy]

As in art. 15.3a, in case that the national legislation provides for an administrative appeals' stage in between the decision of the determining authority and the appeal to a court, do the guarantees of this chapter apply to that procedure? What is the difference between a court and a tribunal, a difference that is not reflected in the Greek translation of the directive?

It should be underlined that **chapter V contains certain safeguards regarding the judicial appeals procedures and is not intended to cover administrative appeals as well.**

It should also be stressed that the two terms used in the English version of the Directive reflect a specific distinction existing in the UK legal order; they do not introduce new concepts in other legal orders. In particular, **the reference to a "court or tribunal" in Article 39 reflects the notion used in Article 234 TEC and aims to cover all national judicial bodies ("δικαιοδοτικά όργανα") within the meaning of the case law of the Court of Justice on Article 234 TEC.**

Therefore, guidance for the assessment of whether a certain body qualifies as a court or a tribunal within the meaning of Article 39 should be sought in the relevant case- law of the Court of Justice. In particular, it should be noted that a national body which a Member State does not consider to be a court under national law, might fall within the definition of a court or tribunal as set out in the case-law of the Court of Justice. If so, this body would be covered by the Community notion of a court or tribunal.

In the same vein, **the question whether and to what extent the guarantees of chapter V should apply also to an administrative appeals procedure provided for by national law needs to be assessed in the light of the requirement to guarantee a right to an effective remedy, as interpreted in the case law of ECJ and ECHR.**

Indeed, the concept of effectiveness of a judicial remedy does not lend itself to a generalized answer in this context. Effectiveness is a result of the interplay of various factors, which might differ according to the national review structures; as indicated in recital 27 of the Directive, it depends on the administrative and judicial system of each Member State seen as a whole.

So, the question whether the safeguards surrounding an administrative appeals procedure provided for by national law satisfy the requirements of guaranteeing a right to an effective remedy **can only be assessed in the context of the administrative and judicial system of the Member State concerned seen as a whole, taking into account, inter alia, the aggregate of remedies provided for by national law and the powers of the administrative and judicial bodies concerned pursuant to such law.**

<u>Qualification directive</u>

Art. 26 [Access to employment]

What is exactly the differentiation in treatment between refugees and beneficiaries of subsidiary protection status as regards the access to employment, namely the difference between par. 1 and 2 of the article? More specifically, what are the consequences for the exercise of the right of access to employment of the provision of "possible prioritization of access to employment for a limited period of time"?

Article 26(1) **grants refugees an unconditional access to employment**, whereas paragraph 3 of this Article **allows Member States to apply the so-called "labour**

market test" or "preference rules" before granting access to employment to **beneficiaries of subsidiary protection**. According to these rules, for reasons of labour market policy, Member States may give preference to EU citizens and to third-country nationals when provided for by Community legislation.

In practice this means, essentially, that a Member State may decide to grant beneficiaries of subsidiary protection access to certain posts only where vacancies cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in this Member State and already forming part of its regular labour market. However, **such a prioritization rule can be applied only for a limited period of time** to be determined in accordance with national law. Moreover, where a beneficiary of subsidiary protection has received an offer following the application of this rule, **the Member State "shall ensure"** that he/ she has access to the post concerned.

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Conference
«Asylum in Greece and the transposition of EU Directives»
3 July 2007

Conclusions

On 3/7/2007, UNHCR (Office for Greece) and the Greek Ombudsman organised a conference titled "Asylum in Greece and the transposition of EU Directives". Two specialised lectures were presented in this conference, namely one by the Alternate Professor of International Law of the University of Bristol, Mr. Achilles Skordas, titled "EU Asylum Directives: Problems of Interpretation and Implementation", and one by the Counsellor of State Mr. Dimitrios Gratsias, titled "Council of State: the Jurisprudence Acquis on Asylum". Interpretational guidelines on specific legal aspects of the Directives were also provided by the EU Commission, through its representative of the Asylum Department of the General Directorate of Civil Liberties, Security and Justice, Ms. Zeta Georgiadou. At the inauguration of the conference, the Secretary General of the Ministry of Public Order, Ambassador Costis Ailianos, and the heads of the co-organising agencies (UNHCR/Ombudsman) made introductory opening speeches. The conference was attended, among many others, by the President of the Greek Council of State, Mr. Panayotopoulos. The Ministry of Public Order was represented by a significant team of officials, responsible on asylum and aliens' matters, while other ministries were also represented. The open discussion was attended by a wide range of members of agencies and non-governmental organisations, as well as by judges of the Council of State. The general conclusions, as drawn from the conference, were the following:

- The national legislator who examines the transposition of EU Directives ought to take into account that the legislation under adoption must be **in conformity with the international obligations of the state, as these derive from the international and European conventions which the latter has ratified**, and particularly in the asylum field the 1951 Convention on the Status of Refugees and the European Convention for Human Rights and Fundamental Freedoms.

- EU Directives are legislative texts different from national laws. Their interpretation does not necessarily follow the interpretative rules which apply in the national legislation. They include provisions which may either pose an obligation on the state to adopt regulations with a specific content, or leave to Member States a discretionary power to adopt or not to adopt certain provisions. In the latter such case, in which the Directive's rule includes the potential of the wording "may", the application of this discretionary power must not always lead to the adoption of a lowest common denominator, as this would entail **a serious danger to violate conventional obligations** for respect of human rights**.** The Member State is not

altogether free to decide on any content during the adoption of pertinent national legislation. It is bound by the international and European conventions and covenants which it has ratified.

- Both the **1951 Convention on the Status of Refugees** and **the European Convention on Human Rights and Fundamental Freedoms** supersede the derivative European law, according to article 28 of the Constitution. National courts, insofar as they determine a **deviation of the applicable national law**, which is set to transpose a Community law, from the provisions of international texts that are binding on Greece, are obliged to seek for a **preliminary ruling** by the Court of the European Communities. The clarification of such legal interpretational issues, already at the stage of the formulation of the law provision, through the efforts of the national legislator to **compromise binding -for the country- provisions,** is imperative not only for the clarity and precision of the regulations, but also for the economy of future administrative and judicial action.

- Even if the burdening of the asylum systems by migratory movements does not support the below-mentioned goal, the **distinction between migrants and refugees** must be constantly taken into account, by both the legislator and the administration. This distinction enables referral to different legislative frameworks, and notably, to different state obligations. Member Stats maintain the **right** to regulate the status of migrants, but have a **conventional obligation** to provide protection to refugees. In this context, the **institutionalization of screening mechanisms,** which will enable the identification of refugees from among mixed migratory groups and the guaranteeing of **unhindered access of asylum seekers to the asylum procedure,** gain paramount importance.

- In today's reality, the provision for the granting of **subsidiary/complementary protection**, which is granted to persons who do not fulfill the criteria of their recognition as refugees according to the 1951 Convention, has gained particular importance. The conditions for granting subsidiary protection must be clearly defined, particularly in the cases where **article 3 of the ECHR** becomes applicable, as the binding nature of this provision to contracting states is of **absolute nature.** A living example of today as to the unquestionable right to seek subsidiary protection is the case of **Iraqis**, who should be protected against any deportation or refoulement to their country, where generalized violence and mass violations of human rights prevail.

- Notwithstanding the fact that the deprivation of liberty constitutes a fundamental issue of human rights protection, the issue of **detention of asylum seekers** is not sufficiently regulated with appropriate guarantees by the European Directives. The few rules imposed by the 1951 Convention concern (a) the obligation of States to abstain from imposing the measure of detention to asylum seekers on the basis only of his/her illegal entry in the country, as applied by migration policies, and (b) the obligation of Member States to impose the measure of detention only exceptionally and to have it specifically justified. The continuous referral to those rules appears to become necessary in the case of Greece, so far as the detention of asylum seekers has become a generalized phenomenon, applied **indiscriminately** to all illegal entrants in the country.

- One of the **main guarantees of the Asylum Procedures Directive** is the obligation of Member States to grant asylum seekers the possibility for a **true and effective remedy to a judicial organ,** in cases where his/her asylum application has been rejected. The compliance with these rules and guarantees by the national law and order will be assessed in the framework of the administrative and judicial system of each Member State, **viewed as a whole,** and taking into account, inter alia, the means of effective remedy provided for by the national legislation, and the competences and the composition of involved administrative and judicial organs. In this respect, and as far as the refugee status recognition procedure in Greece is concerned, the issue of the **independence of the Appeals' Committee** from the first instance decision makers remains paramount.

- The **Council of State,** through its evolving jurisprudence, has become a primary warrantor for the protection of refugee rights in Greece. It has provided guiding comments for the interpretation of basic rules of refugee law, such as, for example, the issues of "agents of persecution" or "particular social group". It has also developed in such means the mechanism to grant a **temporary judicial protection** to cases deemed to be of serious nature, so as to enable analysers to talk about an effective protection guarantee to the majority of cases brought before the Council and benefiting from its action.

- One of the basic rights guaranteed by the Asylum Procedures Directive is the **right of asylum seekers to legal aid and representation.** Despite the fact that members states are not explicitly, and in principle, obliged to secure and provide free legal aid for administrative appeals procedures, **their refusal to provide for free legal aid** must not lead to an **impediment to effective access to a legal counselor.** Particularly in the Greek reality, and because of the increase in the numbers of asylum seekers, the problem of an **insufficient legal aid system** during the administrative stages of the asylum procedure, is still very much identified.

- As far as the **transposition process** of European directives into Greek law is concerned, the **substantial consultation** on the various drafts of the imminent Presidential Degree for adoption, with a number of agencies of the Greek society which are mobilized in refugee protection in Greece, is deemed to be of great importance, in order for the future legislation to correspond, effectively, to the needs of the Greek asylum system, as these are documented in practice.

3.8.2007, *Kalliopi Stefanaki*, *Protection Officer, UNHCR Athens*