

THE COMMON EUROPEAN ASYLUM SYSTEM

**THE PROCEDURES DIRECTIVE
AND THE RETURN DIRECTIVE**

**Presented by Boldizsár Nagy,
at the Human rights Master's Programme
of the Consortium of Russian Universities
MGIMO, 2013**

Procedures directive

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

(OJ L 326/13 of 13.12.2005)

Directive on minimum standards on procedures

- History:
 - Predecessor: Resolution on Minimum Guarantees for Asylum Procedures, adopted on 20 June 1995 published in O.J. 1996 C 274/13, 19. 09. 1996
 - Original proposal (COM(2000) 578 final, 20.9.2000)
 - Amended proposal: COM (2002) 326 final O.J. C 291 E/143 26.11.2002

Recast Proposal: COM(2009) 554 final, 21 October 2009

Newer recast proposal: 2011

Directive on minimum standards on procedures

- Structure of the directive:
- I Scope, definitions, more favourable rules (1 – 5 §)
- II Basic principles and guarantees (6-22 §)
- III First instance procedure
 - Normal procedure (23 §)
 - Specific procedures (24 §) (subsequent applications 32 §, border procedures 35 §, „supersafe” third states 36 §)
 - Prioritized or accelerated procedures (list: 23 (4)§
sixteen reasons!)

Directive on minimum standards on procedures

- Inadmissible applications (25-27§)
 - another MS is responsible for the procedure (Dublin II)
 - protection in another MS (refugee status or equivalent)
 - Non MS as country of first asylum
 - Non MS as safe third country
 - identical repeat application
 - dependant lodges application after denied with applicant
- Unfounded applications (28 – 31 §)
 - the applicant does not qualify for refugee status
 - practically all in which accelerated or prioritized procedures may be applied (28 §)
 - safe country of origin (29-31§)
 - Non MS as safe third country /here again/
- IV Procedures for withdrawal (37-38 §)
- V Appeal (39 §)
- VI General and final provisions (40-46 §)
- Annex I and II („determining authority, safe country of origin)

Directive on minimum standards on procedures Scope, definitions, more favourable rules

- **Purpose:** common minimum standards for the procedures on recognizing and withdrawing refugee status
- **Scope:**
 - obligatory: for Geneva Conv status applications
 - optional: for protection other than Geneva

More favourable provisions: MS may maintain or introduce „insofar” as are compatible with this directive (5 §)

Directive on minimum standards on procedures

Basic principles and guarantees

- **Access** to procedure - each adult has the right
- **Right to stay** - until first instance decision (exception: subsequent application and European Arrest Warrant + int'l criminal courts)
- Procedural requirements: **appropriate examination**:
 - = individual, objective, impartial,
 - = up to date country of origin and transit info
 - = personnel knowledgeable about asylum law
 - = appeal authorities also informed about country of orig. and transit
- **Decision: in writing**, justification if negative (!)

Directive on minimum standards on procedures

Further guarantees

Information on procedure and consequences (in a language the applicant „may reasonably be supposed to understand”)

Interpreter „whenever necessary”

Access to **UNHCR** or an agency working on its behalf

Notice of the decision **on time** in a language supposed to be understood – if not assisted by lawyer

On appeal: only interpreter, access to UNHCR, timely notification

Directive on minimum standards on procedures

Duties of the applicant:

Report to authorities, hand over documents, report place of residence, allow search, photograph and recorded statement

Interview: Compulsory, but exceptions (Dublin II, assistance at submission of request, „not reasonably practicable” /e.g.unfit applicant/)

Requirements: minimal

- „steps” to ensure comprehensive account,
- interviewer „sufficiently competent”,
(to take account of applicant’s cultural origin or vulnerability)
- interpreter to ensure „appropriate communication”, not necessarily in language preferred by applicant.
- written report: access before or after the decision, approval of applicant not necessary!

Directive on minimum standards on procedures

Legal assistance:

- Applicant must have **access to lawyer** (at his cost)

Lawyers access to closed areas may be curtailed but not rendered impossible

- **Free legal assistance/representation**: MS „shall ensure” *after negative decision* on conditions as to nationals + further grounds for not offering:

- only for appeal (not admin. review)
- if applicant has no means to finance
- if „review is likely to succeed”
- only from among chosen representatives

Ms may set time or financial limits and not disclose sensible info

Presence at interview: MS discretion

Unaccompanied minors:

must have representative before interview

interviewer and decision maker has specialized knowledge

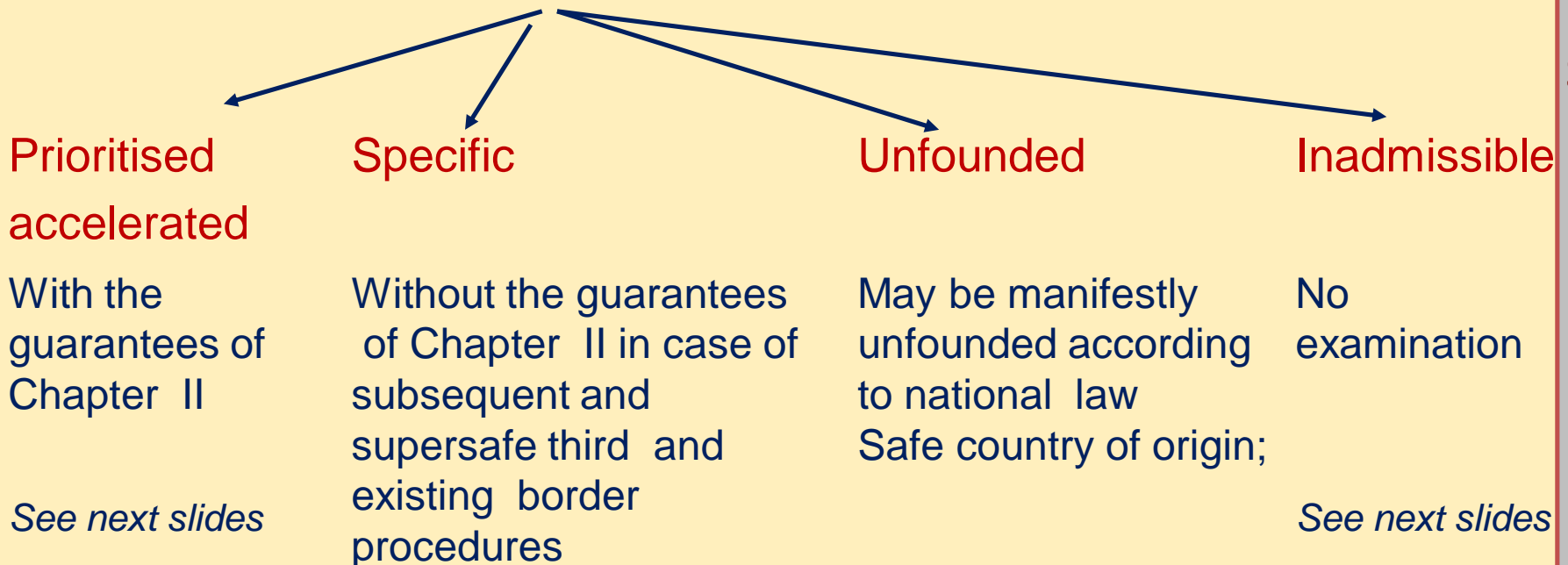
several exceptions to this duty (e.g 16 years of age, married etc.)

Directive on minimum standards on procedures

- **Detention:**
 - „shall not hold in detention for the sole reason that he/she is an applicant”
 - Condition, duration: not fixed, „speedy judicial review required”
- **Implicit withdrawal:** Conceivable if applicant does not report, absconds, does not appear for an interview, does not provide information
- **UNHCR** (and organizations acting on its behalf):
 - access to: applicant, information
 - right to present its view

Directive on minimum standards on procedures

- Normal „examination” procedure (Art 23, 1-2)
 - no deadline prescribed „as soon as possible” - after 6 months „information” on the delay and expected time frame
- Other procedures and applications



Directive on minimum standards on procedures Accelerated or prioritized procedures

M

1. No relevant issue raised
2. the applicant clearly does not qualify as a refugee
- 3 safe country of origin
4. safe third country (non MS)
5. misled the authorities by presenting false information or documents with respect to his/her identity
6. filed another application for asylum stating other personal data; or
- 7 destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or
- 8 the applicant has made inconsistent, contradictory, unlikely or insufficient representations
- 9 subsequent application raising no relevant new elements
- 10 failed to make his/her application earlier,
- 11 merely in order to delay or frustrate removal
- 12 violations of behavioural rules (reporting etc.)
- 13 entered unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible
- 14 the applicant is a danger to the national security or the public order
- 15 refuses to have his/her fingerprints taken
- 16 the application was made by an unmarried minor after the application of the parents responsible for the minor has been rejected

C-69/10 *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg)* decided: 28 July 2011. No separate appeal against a decision to examine in accelerated procedure, 15 days for appeal are enough, one level court review constitutes effective remedy

Directive on minimum standards on procedures Specific procedures-Unfounded – Inadmissible applications

Specific	Unfounded	Inadmissible
Subsequent application	safe country of origin	Dublin II applies
Border procedures		Refugee status in another MS
Supersafe" third country cases „European safe third countries" 36 § - CJEU abolished in 2008		Non MS = first country of asylum (already recognized there as refugee)
		„Normal" safe third country applies
		Other title to stay, with at least refugees' rights pending the determination of that other title
		identical repeat application
		Dependent repeating parents rejected application

Directive on minimum standards on procedures Specific procedures

- **Subsequent application** = preliminary examination to find out if there are new facts since withdrawal or decision on previous application. May be purely written procedure. If there are no new facts or if appeal was not submitted in the previous procedure – no further examination.
- **Border procedures**: existing rules may be maintained even if deviate from guarantees Detention at the border for a maximum of four weeks!

Directive on minimum standards on procedures Unfounded applications – safe country of origin

- EU common list of safe countries of origin to be adopted by qualified majority
- +
- MS may
 - adopt new legislation in accordance with Annex II
 - or retain existing legislation with less than Annex II guarantees
 - and so designate further countries or parts of countries as S.C.O.
- Annex II to the directive identifies the criteria of safe countries of origin
(see next page)

Directive on minimum standards on procedures Unfounded applications – safe country of origin

- A country is considered as a safe country of origin where, it can be shown that there is **generally and consistently no persecution** and no torture or inhuman or degrading treatment or punishment; and no threat by reason of indiscriminate violence in situations of international or internal armed conflict
- This is proved by **the legal situation, the application of the law within a democratic system and the general political circumstances.**
- Account shall be taken of the extent to which **protection** is provided **against persecution or mistreatment** through:
 - the relevant **laws and their application**;
 - **observance** of the **European Convention of Human Rights** and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture,
 - respect of the **non-refoulement** principle
 - provision for a system of **effective remedies**

Directive on minimum standards on procedures
Inadmissible applications – key concepts – first country of
asylum

First country of asylum (§ 26)

- the a.s. has been **recognised** in that country as a refugee
- and he/she can **still avail** himself/herself of that protection, **or**
- he/she enjoys **otherwise sufficient protection** in that country, including benefiting from the principle of non-refoulement,
provided
that he/she **will be re-admitted** to that country.

„Normal” **safe third country** (defined nationally) (§ 27)

- **life and liberty are not threatened** on account of 5 Geneva Convention grounds; and
- the principle of **non-refoulement** is respected; and
- the prohibition on removal in breach of the right to freedom from **torture and cruel, inhuman or degrading treatment** as laid down in international law is respected; and
- the **possibility exists to request refugee status** and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

Directive on minimum standards on procedures Inadmissible applications – key concepts – safe third cont'd

Minimum requirements concerning national rules on determining that a state is safe for a particular applicant:

- **meaningful link** between applicant and s.t.c.
- **investigation if a particular country is safe** for the particular a.s.(or national designation of s.t.c.)
- **a right of the a.s.to challenge the safety** at least when torture and inhuman or degrading treatment or punishment is threatening the a.s.

If inadmissible because of s.t.c. :

- inform a.s. accordingly,
- provide a.s. with document informing the s.t.c. that the application has not been examined in substance

Directive on minimum standards on procedures

Withdrawal of status

MS must act if indications to „reconsider the validity” of the status.

Procedure:

- inform refugee in writing,
- opportunity to contradict (interview or in writing)
- obtain pertinent info of country of origin
- legal assistance and UNHCR access as in examination
- reasoned decision in writing

MS may order by law that the refugee status „lapses” when the refugee re-avails herself of the protection or (re)acquires (new) nationality

Directive on minimum standards on procedures

Appeals (Effective remedy)

To: court or tribunal

Against: negative determination, inadmissibility decision
denial of reopening after abandonment, „supersafe” STC
decision, subsequent application, border procedure –
entry denial, withdrawal of status.

Suspensive effect: generally yes, or at least a separate appeal
against the decision to remove.

Suspensive effect may be denied in a long range of cases but
then a right to request a court to decide that the
applicant shall be allowed to stay must be granted.

Deadlines: MS may set

Directive on minimum standards on procedures final provisions

- The Council in November 2004 decided not to adopt the list of safe countries of origin to enhance the procedure
- Adoption by unanimity of the 25 MS on 1 December 2005
- Entry into force: 2 January 2006
- Transposal: by 1 December 2007, except for legal assistance (§ 15) for which: 1 December 2008

Directive on minimum standards on procedures

Criticism, concerns

- “**Safe third country**” criteria that go below any standards that could ensure effective protection and provisions that lack any possibility of individual review before return to a “safe” country, and extension of the concept to countries where the applicant may have no links and which he or she may not even have transited;
- Need for minimum principles and guarantees during **border procedures**;
- **Lack of “suspensive effect** of appeals” (or denial of right to remain in the country while an appeal is heard);
- Provisions that channel up to **16** different categories into **accelerated procedures**;
- Failure to limit or define permissible grounds for **detention** of asylum-seekers;
- **Restrictions on free legal assistance** and representation including at appeal, for asylum-seekers arriving irregularly as well as unaccompanied children;
- **Lack of** specific provisions to ensure the **gender sensitivity** of procedures;
- Failure to take advantage of the opportunity to introduce a **single procedure**.

Source: UNHCR Aide Memoire, November 2003

Parliament v Council , Case C-133/06 decided on 6 May 2008

- **Challenged:** Articles 29(1) and (2) and 36(3) - the procedure to create a list of **safe countries of origin** and another list of „**supersafe**” (European) third countries
(Implication of these designations: no, or no full procedure in cases of persons coming from these countries)
- **Parliament** claims that based on 67 (5) TEC **co-decision applies** not only consultation and Council wrongly created a legal basis for itself
- The **Council** submits that, nothing in the EC Treaty precludes an act which is adopted in due order from **creating a secondary legal basis** for further legislative acts in that area to be adopted by means of a **simplified decision-making** procedure. (They claim that political sensitivity and the need to react quickly require simplified procedure)
- **Court** rejects the Council’s argument and annuls articles 29 (1) and 36 (3)
 - The political importance of safe countries of origin and supersafe third countries does not justify reserving the implementation to Council and not to Commission as the general rule in Art 202 TEC requires
 - In fact creating those lists is not implementing but secondary legislation
 - After the adoption of the procedures directive all rules are to be adopted by co-decision

(That gives much more power to parliament than mere consultation)

Procedures directive Recast

***Political agreement achieved (March
2013)***

Critical issues

Criticism	2011 proposal	Text as of November 2012 Doc 17030/12	Political agreement 2013 March
Lack of single procedure	Single procedure for GC status and subsid prot (§ 3)	same	same (§ 3)
No deadline for first instance decision	6 months extendable with 6 months	6 months extendable with 12 months	6 months extendable with 9 month in defined cases (§ 31)
16 types of accelerated procedures	Reduced to 7: irrelevant, sco, false identity, destroyed docs, frustrate removal, security	Same + lack of credibility + subseq. appl which is not inadmissible +late application + denies fingerprint, + security	Same = Irrelevant, sco, false identity, destroyed docs, lack of credibility, subsequent application which is not inadmissible, frustrate removal, late application, denies fingerprint, security (31 § (6))
Border procedures may lack guarantees	Guarantees apply	same	Same (43 §)

M
G
I
M
O

2
0
1
3

Critical issues

Criticism	2011 proposal	Text as of November 2012 17030/12	Outcome
Safe third country rules are too lax	Improved: serious harm (QD §15) added, more grounds to challenge	same	same (38 §)
European („supersafe” third country	No common (EU) list, MS may retain concept	same	New: applicant has a right to challenge the safety (39 §)
Detention – no conditions defined	Refers to the Reception Conditions Directive recast that has rules on it - improvement	same	same (26 §)
Right to remain on territory -”suspensive effect of appeal”	No improvement	same	same
Limited access to report on interview	Improved, more detailed rules (§ 17)	same	same (17 §)
Free legal aid - limited	Free legal information given Free legal aid: extended optionally	same	same (20§)
Gender sensitivity	Enhanced (§ 10, 15, e.g.)	same	same (10, 11 15, §§)

M
G
I
M
O
2
0
1
3

Recast political agreement, 2013 March

Other major changes

- Refined definitions in line with the Qualifications directive (QD), the Reception Conditions Directive and the Convention on the Rights of the Child
 - New article (§ 8) granting access to border zones (HHC practice!)
 - Limits on avoiding personal interview
 - Separation of prioritized procedures from accelerated procedures
 - Prioritized = well founded or persons with special needs
 - Accelerated: abuse or no serious ground of the application
(Irregular entry, border application, lack of documents or forged documents – **not automatic accelerated** procedure)
- Even then reasonable time limits have to be set
- Abolition of the „specific procedures” category
 - Detailed rules on returnability following the rejection or inadmissibility of a subsequent application
 - Appeal against being recognised as beneficiary of subsid. prot. In order to be recognised as a refugee. (§ 46)

Return directive

The Return directive

**DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 16 December 2008 on common standards and procedures in Member States for returning illegally
staying third-country nationals**

Personal scope

Obligatory: third-country nationals staying illegally on the territory of a
Member State

Optional:

- those refused at the border or intercepted on land, sea or air
- subject to return as a criminal law sanction

Limits: MS must respect rights of persons entitled to free movement under
community law and the principle of *non-refoulement*

+ „due account of“ best interest of the child, family life, state of health of the
person

Member States may retain more favourable provisions

Return directive, 2008

Member states **must** issue the return decision to any illegal stayer (exceptions exist, like right to reside in other MS or humanitarian reasons)

Preferred return: **voluntary return** within 7-30 days

Exceptions:

risk of absconding,

manifestly unfounded or fraudulent application for stay permit

or if the person concerned poses a risk to public policy, public security or national security,

States **must** take all necessary measures to enforce the return decision if the third country national does not depart voluntarily or if the exception to voluntary departure is applicable

Compulsory entry ban (max five years) if no voluntary return within time

Proportionate coercive measure against resisting persons

Detention: max 18 months (if danger of absconding or hampering preparation of return or process of removal)

Strong critique (ECRE, UNHCR, NGO-s)

M
G
I
M
O
2
0
1
3

Thanks!

Boldizsár Nagy

Eötvös Loránd University and Central European University
Budapest

nagyboldi@ajk.elte.hu

www.nagyboldizsar.hu