

Advisory Committee on Migration Affairs

Ms N. Albayrak
State Secretary for Justice
PO Box 20301
2500 EH The Hague

6 May 2009

Dr P.J. van Krieken
070 370 8013
ACVZ/ADV/2009/006

Dear Ms Albayrak,

Re: Request for advice: follow-up study on categorial protection policy

In your letter of 5 November 2008 you asked the Advisory Committee on Migration Affairs (ACVZ) to carry out another study as follow-up to the preliminary comparative study conducted in connection with its 2006 advisory report entitled ‘Categorial protection policy, a necessity’. Below you will find the results of this study.

The preliminary study (‘Comparative Study on Categorized Protection’) was carried out for the ACVZ by the International Centre for Migration Policy Development (ICMPD) in Vienna. The ACVZ regards the follow-up study you requested as an update on this study.

The follow-up study that forms the basis for this advisory letter was conducted by the ICMPD and by the European Council on Refugees and Exiles (ECRE). It focuses on the period 2006-2008, and examines developments in legislation, policy and the implementation of various forms of subsidiary or categorial protection in a number of European countries. It also looks at the transposition of the Asylum Qualification Directive 2004/83/EC into national law.

This advisory letter examines the question of whether these developments can be linked to influx figures and if there is any correlation or causal relationship at issue.

Introduction

This letter is based on the ACVZ 2006 advisory report on categorial protection policy. In that report, the ACVZ advocated the continuation of the policy and noted that it had not in fact attracted a greater influx of asylum seekers. Its main conclusion was:

‘The ACVZ deems it desirable to maintain section 29, subsection 1(d) of the Aliens Act 2000, in which categorial protection is laid down. Extensive research has shown that

*improper use of this particular ground for asylum has so far not occurred. In addition, a fine-tuned policy can prevent abuse: the discretionary nature of the power to provide categorial protection makes it possible to limit the policy to situations that truly require it. Removing this provision will in any event involve the risk that its safety-net function ceases to exist, a function the ACVZ regards as extremely important. Furthermore, the ACVZ would prefer to ensure compliance with the European Qualification Directive 2004/83 by incorporating the definition laid down in article 15(c) of the Directive in the Aliens Decree 2000.'*¹

Although the 2006 ACVZ report devoted considerable attention to the relationship and the balance between article 15(c) of the Qualification Directive and article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on the one hand, and section 29, subsection 1(d) of the Aliens Act 2000 on the other, this advisory letter does not go into further detail on this specific legal issue, despite the recent preliminary ruling given by the ECJ in Luxembourg.²

Approach

Since the ECRE published an authoritative report on subsidiary protection in 2003³ that was consulted in preparing the advisory report on categorial protection policy, and since the ICMPD was commissioned by the ACVZ in 2006 to conduct the preliminary study for that report, the ACVZ asked both organisations to carry out a preliminary study for the purposes of this advisory letter.

The ECRE was asked to update its survey of December 2003, with particular reference to the amendment of existing legislation and/or introduction of new legislation in the field of subsidiary protection.

The ICMPD was asked to conduct a further study of changes to policy or the implementation of that policy. These did not therefore necessarily entail amendments to legislation.

Like the earlier study produced for the purposes of the 2006 advisory report, the study covered the following ten countries: Austria, Belgium, Denmark, Germany, Finland, France, Ireland, Sweden, Switzerland and the United Kingdom, although, for the record, it should be noted that the ICMPD did not in fact manage to include Denmark and Sweden in its survey. The ECRE and ICMPD data are given per country, indicating which data come from which organisation.

¹ See 'Categorial protection policy, a necessity', The Hague, ACVZ, 2006, p.10.

² The ACVZ report 'Categorial protection policy, a necessity' suggested two options for maintaining the categorial protection policy while optimising alignment with the Netherlands' obligations under European law (see ECJ 17 February 2009, no. C-465/07, Meki Elgafaji, Noor Elgafaji v. the State Secretary for Justice, pp. 53 and 54).

³ www.ecre.org/files/survcompro.pdf; 'Complementary/subsidiary forms of protection in the EU member states: an overview', December 2003.

Categorical protection: terminology

The basic premise of this advisory letter is that categorical protection constitutes the provision of protection on grounds that do not refer to the individual and which complement the grounds recognised at international and European level, as laid down in the Refugee Convention (article 1 A(2)), the European Convention on Human Rights (ECHR; article 3) and the Qualification Directive (2004/83/EC; article 15).

The legislation of virtually all European countries adopts the following construction:

- protection on the basis of the UN Refugee Convention;
- subsidiary protection, whether referring explicitly or not to article 3 of the ECHR and/or article 15 of the Qualification Directive;
- supplementary, national forms of protection (all forms of protection that supplement obligations under international or European law).

If categorical protection is defined as the provision of protection on grounds that do not refer to the individual, it need not by definition constitute the provision of supplementary, national forms of protection that are not prescribed by international law. In some cases, it is quite possible to categorise such a form of protection under article 15 of the Qualification Directive.

UNHCR has long worked with the concept of *prima facie* recognition or determination of refugee status. This is in fact a form of categorical protection. This precise wording does not appear in the Refugee Convention. UNCHR gives a more detailed definition of the term in its Handbook⁴ and a number of other documents.⁵

In this context reference should also be made to the scope for offering protection under the Temporary Protection Directive (2001/55/EC). Adopted in response to the crises in Bosnia and Kosovo, the Directive lays down minimum standards for giving temporary protection in the event of a mass influx of displaced persons. It also contains measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. These standards come the closest to the Dutch concept of categorical protection. In practice, the Directive has never been applied and the chances of its application are small, since a decision from the Council of the European Union is required first (article 5).⁶

⁴ *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, UNCHR 1992. Paragraph 44 states: ‘While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called “group determination” of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.’

⁵ For example: ‘The traditional response has been to use *prima facie* determination or acceptance on a group basis because of the obvious refugee character of the individuals concerned, without going into any formal, individual determinations. More recently, principally but not exclusively in Europe, States faced with large numbers of arrivals have adopted and indeed legislated for the device of “temporary protection”, which allows them to extend protection and assistance to the group without initially going into individual status determinations. In such cases, it has been acknowledged that individual procedures under the 1951 Convention can be kept “on hold” for use if or when it becomes necessary to determine individual protection needs and consequent State responsibilities’. www.unhcr.org/protect/PROTECTION/3ae68f3c24.pdf (2001).

⁶ The Directive enables the Council of the European Union to decide, following a proposal from the European Commission, that a designated group of displaced persons will enjoy protection for a specified period.

The ECRE and ICMDP studies show that the various forms of supplementary protection in the countries surveyed can in some cases be regarded as subsidiary and in some as country-specific. They also show that these countries have all kinds of protection that in terms of results can be regarded as roughly similar to the Dutch forms of group-based protection. The differences – apart from the name – lie in the formulation of the grounds on which protection is granted, the degree to which there is individual assessment and the nature of the protection offered. The similarity lies in the fact that quite apart from individual circumstances, protection is linked in some way or another with the general situation in the country of origin.⁷

The various criteria and terms used in the countries surveyed are set out in Annexe 1. No conclusions – let alone any clear conclusions – can be drawn from the terminology used. The status resulting from the provision of protection, on grounds specific to each country, varies little in practice. However, none of these countries has a form of protection identical to the Dutch categorial protection, although Germany has a *de jure* group-protection policy, while Denmark, Finland and Sweden pursue a *de facto* policy that in terms of implementation and results can be compared to Dutch categorial protection policy.

The differences with regard to the consequences of granting protection status are also small. The next section goes into more detail on this topic, with particular reference to access to the labour market and the right to family reunification.

Figures

A question the ACVZ wished to address was whether entry figures throw any light on the creation or application of forms of protection on non-individual grounds. Annexe 2 contains entry figures for the period between 2006 and 2008 in the ten countries surveyed plus the Netherlands and for all EU member states. This makes comparison in principle possible.

The Dutch figures show that the total influx in 2008, as a proportion of the total influx into the EU, has increased in comparison to 2007 (13,400 out of 238,084 in 2008 and 7,100 out of 221,954 in 2007, in other words 5.6% as opposed to 3.2%). The figure for 2006 was 7% (14,470 out of 201,000) but the figures for that year include second applications and are therefore difficult to compare.⁸ The number of asylum applications submitted by Iraqi nationals in the EU member states fell by 30% from 2007 to 2008.⁹

Following changes to categorial protection policy relating to asylum seekers from Central Iraq in November 2008, over 1200 asylum applications from Iraqi nationals were assessed. Over 400 of these were granted.¹⁰ The influx of Iraqi asylum seekers declined in the period between November 2008 and February 2009 compared to preceding months. The figures include first asylum applications and follow-up applications by Iraqi nationals. In any event it may be noted that, timewise, this decline followed the scrapping of categorial protection for persons coming from Central Iraq.¹¹

⁷ See too the ACVZ advisory report 'Categorial protection policy, a necessity', The Hague, ACVZ, 2006, p.11.

⁸ The figures are based on UNCHR's *Asylum Levels and Trends in Industrialized Countries 2008*, UNHCR March 2009, p. 13. The percentages for 2004 and 2005 are 3.5% and 5.1% respectively.

⁹ 38,000 in 2007, 26,000 in 2008 (source: UNHCR).

¹⁰ Answers to written questions; House of Representatives, letter of 27 March 2009, question 20.

¹¹ Answers to written questions; House of Representatives, letter of 27 March 2009, question 33.

Policy changes were introduced in Sweden in 2007 which led to a more restrictive approach to applications submitted by Iraqi asylum seekers. The figures show a comparable decline: the influx fell from 18,500 applications in 2007 to 6,000 in 2008. At the same time, an increase in applications from this group was noted in neighbouring Norway and Finland.¹²

UNHCR statistics relating to the influx into the EU in 2008 show that:

- 64% of all Iraqi asylum applications were submitted in three countries (Germany 24%; Sweden 22% and the Netherlands 18%);
- 68% of all Somali asylum applications were submitted in three countries (Italy 26%; the Netherlands 22% and Sweden 20%);
- 57% of all Afghan asylum applications were submitted in three countries (the UK 27.5%; Greece 17% and Austria 10%).

Findings

Most EU member states, with the exception of Finland and Sweden, have completed the transposition of the Qualification Directive into national legislation.¹³ Denmark is able to ignore the Directive,¹⁴ while Switzerland is not a member of the EU.

All the countries surveyed have subsidiary protection grounds for granting temporary status. In addition, virtually all of them have created scope for granting categorial or supplementary/national status, or deferment of expulsion or ‘Duldung’.

Conclusion: differences in volume of influx between European countries cannot be linked to differences in the wording of legislation, since any differences that exist are minimal.

The causes of any differences in numbers must therefore probably be sought in adjustments to policy or in the implementation of that policy. In this case there are indications that changes in numbers are connected with changes to policy. Although this would seem highly probable if we look at a number of examples (Sweden, Norway, Finland), on the basis of the survey results, however, we can only speak of a correlation (bearing in mind the passage of time) and certainly not of any causal link.¹⁵

Conclusion: currently available figures do not contradict the view that there is a correlation between policy and policy changes and influx.

Other factors

In view of the fluctuations in influx and the above conclusions drawn from the studies, it would seem highly probable that other factors are at work which co-determine the influx (pull

¹² Norway: from 1250 in 2007 to 3150 in 2008; Finland: from 310 in 2007 to 980 in 2008.

¹³ The deadline for transposition of Directive 2004/83/EC was no later than 9 October 2006; the Finnish Parliament adopted a legislative amendment in February 2009: see Annexe 1 for details.

¹⁴ Denmark negotiated an opt-out under the Treaty of Amsterdam (1999).

¹⁵ Sweden: a significant increase in the influx of both Iraqis and Somalis; in 2007 policy on these two groups was broadened. In that same year 18,500 Iraqis applied (compared with 9000 in 2006) and 3500 Somalis (compared with 1000 in 2006). Policy was then tightened up and the figures for 2008 were 6000 Iraqis and 3500 Somalis. Figures in Switzerland paint another picture: although policy became more stringent, the influx of Iraqis rose from 935 in 2007, to 1440 in 2008. In the UK the influx of Somalis in 2008 declined compared to 2007 (2007: 1960, 2008: 1575).

factors). On the basis of an analysis of the annexed results of the studies and informal talks with experts in the Netherlands and abroad, the ACVZ sees the following possible pull factors:

- presence of compatriots in the country of destination (chain migration);
- presence of historical (colonial) ties;
- knowledge of the language of the country of destination;
- the absence of an obligation to carry an identity card (in the UK there is no such obligation, which probably makes illegal residence there easier); however, as far as we know, hardly any research has been done into this factor;
- the practical implementation of policy on return;
- the scope for work as illegal resident;
- decentralisation of decision-making (the German states are involved in decision-making, which can lead to differences between them);
- the perceived chance of prolonged residence status (regularisation);
- a uniform status system.

These are all cautious assumptions which the survey results do not definitely confirm. The following section deals with one aspect for which data is available and which is relevant to the Netherlands, namely the uniform status system.

Differences in status

Central to the question of whether there are differences in status is the issue of whether the treatment of persons enjoying subsidiary protection status is different in the countries surveyed than in the Netherlands. The Netherlands has a uniform status system (all status-holders have the same rights as refugees under the Convention). This prevents asylum seekers from applying for refugee status. Other aspects related to status include the right to family reunification and access to the labour market. The ECRE study revealed the following:

a) Family reunification

The right to family reunification exists in Belgium, Denmark, Finland, France and Sweden. Austria, Germany and the UK do not allow family reunification. Ireland's position is unclear in that the legislation does not permit it, but practice seems to differ.¹⁶

b) Access to the labour market

Of the countries surveyed only Austria and Germany allow no access, though Austria makes an exception for the liberal professions.

No correction or causal link can be established on the basis of the entry figures for either of these factors.

¹⁶ It is in fact the case that the Qualification Directive (2004/83/EC) in conjunction with the Family Reunification Directive (2003/86/EC) allows scope for a restrictive policy or indeed one that excludes the possibility for persons with subsidiary-protection status (even though article 23 of the Qualification Directive speaks of 'maintaining family unity'); the question is whether this will remain a tenable position.

Conclusions and recommendations

The results of the ICMPD and ECRE studies lead to the conclusion that the protection policy pursued in other European countries does not in practice differ in any essential way from Dutch policy.

In view of the minor differences in legislation, it would seem highly likely that there are other reasons that explain the sometimes considerable differences in entry figures. Experts mentioned a number of factors connected with practical implementation. Analysis of the entry figures does not exclude the possibility of a correlation between actual policy and these figures.

Nevertheless, the follow-up study provided no insights that would justify a fundamental change in categorial protection policy or the uniform status system. The ACVZ would recommend, however, the development of initiatives within the EU to harmonise international law standards to endow them with a specifically European character. For the same reasons, it considers the harmonisation of policy a worthwhile goal.

The ACVZ would be happy to provide any further details required.

Adriana C.J. van Dooijeweert

Chair

W.N. Mannens

Secretary

Annexe 1

The following terminology is used in the countries surveyed for various forms of subsidiary and/or categorial protection and/or protection under national law.

Austria:

- subsidiary protection (*Status des subsidiär Schutzberechtigten*);
- humanitarian residence permit (*Aufenthaltstitel aus humanitären Gründen*);
- deferment of deportation.

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

Belgium:

- subsidiary protection (not related to the individual - *status de protection subsidiaire*);
- suspension of deportation on exceptional grounds and for medical reasons.

Denmark:

- protection status (*beskyttelsesstatus*);
- humanitarian status (*humanitær opholdstilladelse*);
- exceptional reasons;
- deportation impossible (*opholdstilladelse efter udlændingelovens § 9c, stk. 2; midlertidig opholdstilladelse*).

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

Finland (old):

- residence permit based on the need for protection (88 – *Uppehållstillstånd på grund av behov av skydd*);
- immigration for humanitarian reasons (51 – *Uppehållstillstånd på grund av individuella mänskliga orsaker*);
- residence permit on other grounds (such as obstacles to return (52 – *Uppehållstillstånd på grund av hinder för avslägsnande ur landet*);

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

Finland (new: amendment of para. 88, adopted February 2009; not yet entered into force):

- residence permit based on the need for protection (88 – *Uppehållstillstånd på grund av behov av skydd*); divided into 88 and 88a:
- 88 subsidiary protection;
- 88a humanitarian grounds (*humanitärt skydd*) ‘... who cannot return ... because of an environmental catastrophe or because the security situation in the country is poor, for example as a result of an international or internal armed conflict or a serious human rights situation’; in all probability also for groups.

France:

- subsidiary protection (*protection subsidiaire*);
- constitutional protection (*protection constitutionnelle*);

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

Germany:

- temporary protection (*Aufenthaltsgewährung zum vorübergehenden Schutz*);
- humanitarian grounds (*Aufenthalt aus humanitären Gründen*);
- residence granted on account of acute humanitarian need (*Aufenthaltsgewährung in Härtefällen*);
- residence permit granted by the federal states (*Aufenthaltsgewährung durch die obersten Landesbehörden*; also for groups)
- admission on the basis of exceptional political interests (*Aufnahme bei besonders gelagerten politischen Interessen*; also for groups)
- prohibition of deportation (*Verbot der Abschiebung*);
- suspension of departure; tolerated residence (*Vorübergehende Aussetzung der Abschiebung*; *Duldung*; also for groups)

Ireland:

- subsidiary protection;
- leave to remain.

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

Sweden:

- persons who otherwise need international protection/subsidiary protection (*skyddsbehövande i övrigt*; 4.2);
- temporary residence on the grounds of exceptionally serious situations (*tidsbegränsat uppehållstillstånd, TUT*; also for groups);
- acute humanitarian need (*synnerligen ömmande omständigheter*; 5.6)
- measures in the event that the decision to deport cannot be enforced (*verkställighetshinder*).

Switzerland:

- temporary protection (*protection provisoire/ (d)*);
- residence permit granted on the grounds of exceptional circumstances (*autorisation de séjour en cas de rigueur*);
- temporary admission (*admission provisoire*).

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

United Kingdom:

- humanitarian protection status;
- discretionary leave.

Strictly speaking, none of these constitute a form of categorial protection comparable to that granted in the Netherlands.

Annexe 2: STATISTICS

Asylum applications in **2008** (source: UNHCR, March 2009)¹⁷

Country	Afghanistan	DRC (Congo)	Iraq	Somalia
EU (27)	13,497	4,220	27,607	17,093
Austria	1,365	56	494	392
Belgium	879	588	1,070	163
Denmark	418	9	543	58
Germany	650	166	6,697	166
Finland	249	31	1,253	1,176
France	263	2,214	627	92
Ireland	79	178	203	141
Sweden	784	70	6,083	3,361
Switzerland	405	220	1,440	2,014
United Kingdom	3,730	380	2,030	1,575
Netherlands	395	40	5,027	3,842

Asylum applications in **2007** (source: UNHCR, March 2009)¹⁸

Country	Afghanistan	DRC (Congo)	Iraq	Somalia
EU (27)	8,321	3,999	38,117	10,102
Austria	761	37	472	467
Belgium	696	716	825	168
Denmark	144	-	700	35
Germany	329	173	4,171	126
Finland	70	35	307	81
France	184	2,126	144	47
Ireland	78	149	285	144
Sweden	609	66	18,559	3,349

¹⁷ UNHCR, *Asylum Levels and Trends in Industrialized Countries 2008*, UNHCR March 2009, pp. 17,19. NB: UNHCR emphasises that the figures in the report are provisional. Subsequent changes and adjustments may mean that the figures are slightly different from those given in earlier UNHCR publications and the official annual figures published by individual countries.

¹⁸ UNHCR, *Asylum Levels and Trends in Industrialized Countries 2008*, UNHCR March 2009, pp. 17-18.

Switzerland	322	217	956	464
United Kingdom	2,815	440	2,075	1,960
Netherlands	143	15	2,004	1,874

Asylum applications in **2006** (source: UNHCR, March 2008)¹⁹

Country	Afghanistan	DRC (Congo)	Iraq	Somalia
EU (26) ²⁰	7,612	4,764	19,375	5,996
Austria	699	47	380	183
Belgium	365	843	695	124
Denmark	122	7	507	57
Germany	525	218	2,065	147
Finland	96	39	227	91
France	82	2,278	116	52
Ireland	88	109	215	161
Sweden	594	59	8,951	1,066
Switzerland	233	160	816	273
United Kingdom	2,650	685	1,305	2,155
Netherlands	932	266	2,766	1,462

¹⁹ UNHCR, *Asylum Levels and Trends in Industrialized Countries 2007*, UNHCR March 20089, pp. 16-17.

²⁰ NB: EU 27 minus Italy.