

Opinion No. 4/2009 of the Group of Experts on Trafficking in Human Beings set up by the European Commission

On a possible revision of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

16 June 2009

Considering the Council of Europe Convention on action against trafficking in human beings, which recognises that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;

Conscious, moreover, that this Convention emphasises that respect for human rights and protection of victims, along with action to combat trafficking in human beings, must be paramount objectives;

Recalling the Brussels Declaration on Preventing and Combating Trafficking in Human Beings as the final outcome of the European Conference on Preventing and Combating Trafficking in Human Beings-Global Challenge for the 21st Century, from 18 to 20 September 2002;

Recalling the Recommendations on the identification and referral to services of victims of trafficking in human beings, issued on the occasion of the 2007 Anti-Trafficking Day.

Recalling the Opinion of the Group of Experts on Trafficking in Human Beings of 17 October 2008, on the revision of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, in particular the statement that unconditional assistance should be granted to trafficked persons regardless of whether the trafficked person is able or willing to give evidence;;

Noting with approval the proposal, as contained in Article 9 paragraph 5 of the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protection of victims, repealing Framework Decision 2002/629/JHA, that each Member State shall ensure that victims of trafficking in human beings receive suitable protection on the basis of an individual risk assessment, and have access to witness protection programmes;

Agreeing with the European Commission, that “those who are most vulnerable, women victims of violence and dependent persons must be afforded greater protection, including legal protection;¹

Recalling the European Commission’s Decision of 17 October 2007 setting up a consultative group, to be known as the “Group of Experts on Trafficking in Human Beings” (2007/675/EC) and the mission of the Group to issue opinions at the Commission’s request or on its own initiative, as set forth in Article 2, paragraph 2(e);

The Group of Experts issues the following opinion with regard to the possible revision of Council Directive 2004/81/EC.

Introduction

[1] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (the Directive) was a welcome addition to the legal regime of anti-trafficking. It obliged participating Member States to take several measures to support victims of trafficking who agree to assist in the prosecution of suspected traffickers.

[2] The Group considers that the Directive has inherent flaws in securing the human rights of victims which the Group considers need to be addressed. There are two, connected, reasons for these flaws. First, the primary purpose of the Directive was to promote the successful prosecution of traffickers; second, these prosecutions were to be facilitated through the cooperation of victims of trafficking. The Directive linked cooperation with the competent authorities with assistance for victims by providing them with a short-term residence permit that would enable them to remain in the State while the relevant national proceedings (e.g. criminal and/or administrative) took place.

[3] The current Directive insufficiently addresses the legitimate needs and rights of victims to support and assistance. In particular, the granting of the residence permit and the related assistance is made necessarily conditional on cooperation of the victim in relevant national proceedings. Furthermore, there are insufficient guarantees concerning a possible right to remain on the territory after relevant national proceedings have been completed, as well as with regard to assistance to victims. Consequently, victims may be reluctant to give evidence, given that such an act may expose them or third parties to further risk. The requirement to place human rights at the centre of anti-trafficking measures necessitates superior protection measures for victims, irrespective of whether they participate in relevant national proceedings.

¹ Communication from the Commission to the European Parliament and the Council – an area of freedom, security and justice serving the citizen, COM (2009) 262

[4] The Group considers that recognition of the vulnerability and protection needs, including international protection needs, of victims will encourage and promote their cooperation with law enforcement authorities, which should increase the likelihood and number of prosecutions.

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[5] *Purpose.* The purposes of a new Directive should be, first, to broaden the grounds on which Member States should issue residence permits to third country nationals who have been trafficked; second, to ensure that European Union nationals, as well as third country nationals who are legally resident in the European Union, who are victims of trafficking have equal access to the possibilities and entitlements offered by the Directive.

[6] *Scope.* The Directive currently applies not only to trafficking of human beings but also to smuggling of human beings. These are two different crimes. While they may have elements in common, trafficking is a criminal act aimed at the exploitation of the victim, to which the victim cannot give consent. Smuggling, on the other hand, entails an element of consent on the part of the person who is being smuggled across a border. The Group considers that measures to address these two different offences, as well as to assist and protect individuals who are trafficked or smuggled, should reflect these differences. Accordingly the different nature of these two offences, as well as the particular challenges and threats they pose, should be addressed by separate instruments.

[7] *Special position of children.* The Group considers that the Directive must also apply to children, i.e., all those under the age of eighteen years. Where a child is concerned, a legal guardian should be immediately appointed and any action taken should be predicated on the best interests of the child. Therefore, child victims who are not nationals or habitually resident in the territory of the Member State in which they find themselves, should be granted a temporary humanitarian visa or other form of judicial and/or administrative leave to stay in the Member State, pending a final decision on jurisdiction and competence relating to all measures concerning the child and her/his best interest.

[8] *Identification of trafficked persons.* The Group considers it essential that a revised Directive require Member States to adopt measures to promote the prompt and effective identification of trafficked persons.

[9] *The obligation to inform.* The obligation of Member States, to inform those who may fall within the scope of the Directive of their rights and entitlements under the Directive, should be carried out in a language understandable to the person concerned, and in a way that the person concerned understands.

[10] *Reflection period.* The Group considers that the current provision on the reflection period needs to be strengthened. A reflection period - the purpose of which is to enable presumed trafficked persons to recover and consider their situation in a safe and non-

threatening environment by preventing their removal from the country - should be granted immediately to all those with regard to whom it is established, or where there is an indication, that they have been trafficked. It should be assumed, until established otherwise, that the individual has been trafficked.

[11] The purpose of the reflection period should be enlarged to also enable the trafficked person to seek independent advice from appropriate agencies regarding her/his rights in order to make a fully informed decision about her/his options, including the decision whether to assist in criminal proceedings and/or to pursue legal proceedings for compensation.

[12] *Duration of reflection period and treatment granted.* The reflection period should be for not less than three months². During this period, and as soon as possible after the reflection period has started if this has not already been done, the State should inform the trafficked person about appropriate service providers and refer the person to such providers so that the trafficked person may obtain access to, and receive, appropriate assistance. The Group considers a three-month reflection period to be the minimum time-frame in which to ensure that the presumed trafficked person receives appropriate assistance and support. These should include, as a minimum: comprehensive support aimed at the trafficked person's social inclusion as well as relevant services, including: safe and appropriate accommodation, counselling, cultural mediation, health care, legal assistance, education for children, vocational and employment opportunities. Services should be available to trafficked people who wish to access them but use of these services should not be compulsory. They should be offered in a non-discriminatory and non-judgmental manner, in compliance with the State's human rights obligations, in particular, but not only, the obligations to respect the individual's right to privacy, confidentiality, self-determination and freedom of movement, as well as the duty to refrain from subjecting individuals to degrading treatment. Specialised services should be provided for trafficked children to meet their particular needs, as well as to ensure protection of, and respect for their rights. In appropriate cases, in particular based upon humanitarian grounds, it may be necessary to extend the reflection period.

[13] *Residence permit.* The Group considers that the granting of a residence permit, of a minimum period of one year, should not be solely predicated on the participation by the trafficked person in criminal proceedings against alleged traffickers. Rather, in accordance with a human-rights based approach, the granting of a residence permit should also be based on the personal situation³ of the trafficked person, independently of any relevant national proceedings. The trafficked person should not be treated as an instrument for the prosecution. Accordingly, where a trafficked person is assisting the competent authorities, the termination

² Experts Group on Trafficking in Human Beings, Opinion on reflection period and residence permit for victims of trafficking in human beings, 16 April 2004, paragraph 3.

³ This implies that the competent authorities should take into account the trafficked person's safety, state of health, family relationships, integration into the labour market, enrolment in an education or vocational training programme, and participation in a social protection programme.

of criminal proceedings should not, of itself, have any impact on the validity or duration of the residence permit.

[14] The Group considers it important to stress that cooperation with the competent authorities does not necessarily mean formal participation, in particular but not only the formal giving of testimony, in criminal proceedings. Victims may assist the appropriate authorities in other ways, such as by giving information. Such acts should be recognised as formal cooperation with the authorities.

[15] During the period of validity of the temporary residence permit the holder of the permit should have access to social inclusion measures. They should include safe and appropriate accommodation, counselling, cultural mediation, interpretation/translation, health care (at the same level enjoyed by nationals of the Member State where the permit is held), legal assistance, education for children, vocational and employment opportunities. These social inclusion measures should be covered by adequate and sustainable government funding. Access to social inclusion programmes should be available to the trafficked person on a voluntary basis, in a non-discriminatory and non-judgmental manner and in compliance with basic principles founded upon international human rights norms, in particular, but not only, the obligations to respect the individual's right to privacy, confidentiality, self-determination and freedom of movement, as well as the duty to refrain from subjecting individuals to degrading treatment. Specialised services should be provided for trafficked children to meet their particular needs, as well as to ensure protection of, and respect for, their rights.

[16] *Renewal of residence permits.* The residence permit should be renewed annually as long as the conditions for issuing the original permit subsist. It may be appropriate to alter the person's status because of international protection obligations owed by the State. Should the trafficked person's status be changed for this reason, such change should not, of itself, result in any reduction of assistance provided to the trafficked person.

[17] *Convertibility.* The residence permit should be capable of being converted into a residence permit issued under the ordinary immigration rules of the relevant Member State. The period of residence under the permit should count, in full, towards fulfilment of the requirements for permanent and/or long-term resident status.

[18] *Withdrawals.* The Group recognises that, in certain cases, it may be appropriate for a Member State to withdraw a residence permit. This is particularly so where the trafficked person has acted fraudulently or made a fraudulent or wrongful complaint. The Group recognises that Member States are entitled to control access of third-country nationals to their territory. Where a Member State proposes to withdraw a residence permit granted on the basis of this Directive, it must make a proper assessment whether it owes any protection obligations to the individual concerned.

[19] EU nationals should be entitled to at least the same assistance measures and entitlements granted to third country nationals. This may imply derogation from Article 7 of Directive 38/2004/EC⁴ concerning their entitlement to reside in the territory of the Member State.

[20] *International protection obligations.* The Group wishes to state that Member States may owe international protection obligations towards individuals falling within the scope of a revised Directive. Indeed, where a trafficked person has assisted the authorities, that very act of assistance may have exposed the trafficked person to further risk. Accordingly, the Group considers that a revised Directive should contain an obligation on Member States to ascertain the extent of their international protection obligations, if any, towards those covered by the Directive, in accordance with the law of international protection, in particular, but not only, the *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.*⁵

⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of all citizens of the Union and their family members to move and reside freely within the territory of the Member States.

⁵ OJ L 304/12