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A Joint Response from the Refugee Council and Refugee and Migrant Justice to the Immigration Simplification Bill – draft Protection Rules

14th May 2009

About us

The Refugee Council is a human rights charity, independent of government, which works to ensure that refugees are given the protection they need, that they are treated with respect and understanding, and that they have the same rights, opportunities and responsibilities as other members of our society.

We achieve this mission by:

- supporting refugees and working with them as they build a new life
- speaking up for refugees and ensuring that refugees themselves have a strong voice in all areas of UK life
- building links with people from across our society to increase mutual understanding of refugees
- making the case for a fair and just asylum system
- taking a leading role in helping to build up a vibrant, sustainable and successful refugee sector in the UK and internationally

Refugee and Migrant Justice is an independent, not-for-profit organisation and a registered charity. We provide a free legal service to asylum seekers and refugees in the United Kingdom. The RMJ has twelve regional offices in addition to its head office in London. Our 200 caseworkers and legal officers across the country represent thousands of asylum seekers in initial asylum applications and appeals every year, making us the largest specialist provider of legal advice and representation to asylum seekers in the UK.

We welcome the opportunity to comment on these draft Rules and have commented under the various headings as listed in the draft Rules.

General: Supremacy of the Refugee Convention over the Rules

A number of the Rules seek to define terms that are used in the Refugee Convention. This is a matter of concern since the Convention is a living instrument and there is the danger that any interpretation in the Rules may be, or may become, misleading and out of date.

We recommend that:

- there should be a clear statement at the outset of the Rules that the Refugee Convention is supreme over the Rules. We suggest the following:

“nothing in the Protection Rules shall lay down any practice contrary to the United Kingdom’s obligations under the 1951 Convention relating to the Status of Refugees”

Interpretation:

“**child**” means a person who is less than 18 years old or who, in the absence of documentary evidence establishing age, appears to be under that age.

We do not accept that it is the role of immigration officers to be estimating the age of children and the definition of a child should be simply that it is somebody who is under the age of eighteen.

Article 1 of the 1989 UN Convention on the Rights of the Child states simply:

“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

We recommend that:

- The meaning of child should be the same as the UNCRC

Interpretation:

Unaccompanied child

b) includes a child who is left unaccompanied after arriving in or entering the UK but before making an application for protection

This is a welcome addition but fails to go far enough. The definition of an unaccompanied child should be simply a child who is unaccompanied. Whether or not the separation from the lawful or customary carer occurs before or after the claim for protection is made is not relevant.

We recommend that:

- the definition should omit the words after “entering the UK” to ensure that children who are unaccompanied at any stage of the process receive the requisite protection.

3.¹ Dependants of applicants

This rule permits dependants to be added to the asylum claim of a principle claimant provided they were part of the claimant's family unit before he or she left the country of origin, and provided they are "accompanying" the claimant.

It is not clear as presently drafted whether the dependant must have arrived at the same time as the principle claimant, but we see no reason why dependants who arrive later (but before the determination of the claim) should not be able to be listed as dependants. The rule requires that adult dependants must consent to being treated as such "at the time the application is lodged" however for the same reasons we see no reason why the timing of consent should be so restrictive.

The Rule permits the interviewing of any dependant, irrespective of age. While this replicates the existing rules, we consider that children should not ordinarily be interviewed and at minimum the current provisions in respect of unaccompanied children should be extended to dependant children, so children under the age of 12 could not be interviewed whether unaccompanied or not.

Where dependants are interviewed it should be under conditions of appropriate confidentiality and in the absence of other family members.

We recommend that:

- the paragraph be amended to ensure that dependants who arrived after the claim for protection is made can still be recorded as dependants, provided they notify the UKBA as soon as reasonably practicable.
- the final words of subparagraph (a): "... at the time the application is lodged" should be removed.
- subparagraph (b) conclude with: "... provided the dependant is not aged under 12 years."

4. Recording of applications: An application for protection will only be recorded if the applicant for protection ("P"): (a) applies in person.

There will clearly continue to be circumstances where it is simply impractical for the person to apply in person – for example in situations of serious illness, incapacity, or incarceration. In our view the rules ought to make provision for these exceptional circumstances.

We also consider that the rules should require that the making of any protection-based application (whether it is an initial application, a fresh claim, or an application to extend existing immigration permission on protection grounds) should be acknowledged in writing to the applicant and their legal representative without delay. This would resolve the current practical difficulties experienced by applicants, particularly in cases involving fresh claims and extension applications, of evidencing the fact that an application is outstanding to their Local Authority, the Job Centre, or other service-provision agencies, where entitlement is based on having leave to remain / immigration permission.

We recommend that:

- there should be provision in the Rules allowing applications to be made in writing where it is not reasonably practicable for the claimant to apply in person.

¹ Numbers refer to the actual draft Rule

- the Rules should place a duty on the Secretary of State to acknowledge the making of any protection-based application in writing to the applicant and their legal representatives.

5. Applications made in another member State to UK authorities

Applications for protection made in another member State to UK authorities carrying out immigration controls there will be dealt with by the member State in whose territory the application is made.

This paragraph is a curious addition to the Immigration Rules, having no precedent in the current rules so far as we are aware. We are concerned that the paragraph as currently drafted could lead to outcomes which are inconsistent with the UK's obligations under the Dublin Conventions.

We recommend that:

- the paragraph be deleted.

7. Credibility: In determining whether to believe a statement made by or on behalf of an applicant for protection ("P"), regard will be had to matters which may damage P's general credibility. Among such matters are..

This provision largely replicates the provisions of section 8 of the Immigration and Asylum (Treatment of Claimants, etc) Act 2004, which has itself been the target of considerable judicial criticism since it was introduced. We regard any provision which "deems" certain matters to be indicative of a lack of credibility as objectionable in principle, given that credibility must always be assessed contextually and 'in the round'.

The behaviours listed under b) all relate to the use of false documentation used in order to flee persecution and seek asylum. Article 31 of the 1951 Refugee Convention expressly makes provision for the fact that refugees may be forced to use false documentation in order to be able to flee persecution and states that provided they can show good cause for their behaviour they should not be penalised as a result. We are hence concerned that such penalties are built into the draft Rules in a way which stifles the holistic credibility assessment required.

Our concern is heightened by the fact that many asylum seekers currently arrive in the UK using false documentation as the only means of effecting entry to seek asylum. An increasing number are prosecuted for doing so and sentenced to periods in prison. In our experience it is common for these people to be advised by a criminal lawyer to plead guilty on the basis that this will produce a lesser time in prison than by trying to defend their behaviour by pleading not guilty. This conviction will then often be used to undermine their credibility when coming to consider their asylum claim. This is entirely wrong. Asylum seekers may adopt all kinds of strategies in order to flee persecution and gain entry to a country and which have no bearing at all on the substance of their protection claim. Their claim should be considered in full on its merits and not be prejudiced by the means used to gain entry to the UK.

We are also concerned that many of the provisions here do not contain the defence of "reasonable excuse", for example in subparagraph (b) (ii). A vulnerable individual under the control of an agent might well produce a document which is not a valid passport as if it were, and it is unjust that such behaviour should automatically count against them. The drafting of subparagraph (c) is unclear as to whether reasonable excuse is a defence to each of the following types of behaviour, or whether such behaviour will be deemed to have been committed without reasonable excuse. Clearly all of those types

of behaviour might be fully explicable and justified in the individual circumstances, and the drafting of the provision should be clarified accordingly.

We recommend that:

- paragraph 7 be removed because it is an objectionable constraint on the holistic credibility assessment required.

If it is to remain, we recommend that it be amended as follows:

- subparagraph (b)(ii) ought to include a defence of reasonable excuse;
- subparagraph (c) ought to be re-drafted to clarify that each of the behaviours listed includes a defence of reasonable excuse; and
- the inclusion of a provision confirming that the decision-maker must have regard to any evidence of minority, mental illness, history of torture or human trafficking, or other vulnerabilities before relying on paragraph 7 to impugn the claimant's credibility.

7. Credibility: (d) The fact that P has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of P's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

This provision mirrors paragraph 339K of the current rules, and relates not to credibility but to the assessment of risk of ill-treatment on return for individuals who have shown that they were subjected to threats of persecution in the past.

We recommend that:

- the provision be retained but moved to its own separate paragraph.

9. Work

(a) If:

(i) a decision at first instance has not been taken on an application for protection within 1 year of the date on which it was recorded, and

(ii) the applicant for protection ("P") is subject to a condition prohibiting work, then P may apply to the Secretary of State for the removal of such a condition. However, this does not include the removal of a condition prohibiting self-employment or engagement in a business or professional activity. The Secretary of State will only consider an application if, in the Secretary of State's opinion, any delay in reaching a decision at first instance cannot be attributed to P.

(b) If the condition prohibiting work is removed under subparagraph (a) this will only be until such time as the application for protection is determined.

We support a reduction in the waiting time from one year to six months in order for a person to be eligible to apply for permission to work. We believe that this should apply to all asylum seekers, including dependents, of working age. In addition, there should be no restrictions on the type of

employment a person is able to take. This is particularly important for overseas qualified professionals for whom early entry into UK training and work is essential, and who could make a particularly valuable contribution to the UK economy and skill-base.

The six months eligibility period should apply from the day of the asylum claim until their case is finally concluded. A case would be deemed to be concluded if the applicant is granted some form of leave, leaves voluntarily or is actually removed. Once granted permission to work, we believe that the person should continue to have that entitlement until their case is concluded.

If an applicant is refused permission to work, we believe that they should have the right to appeal to an independent adjudicator.

We recommend that:

- the criteria as to when permission to work may be granted should be published with a presumption that it will be granted unless there are compelling reasons not to do so.
- asylum seekers should be allowed to work after six months rather than twelve.
- there should be no restriction on the type of employment.
- they should have the right of appeal to an independent adjudicator if refused.
- the right to work should continue until their case is finally concluded.

11. Postponement of protection consideration for those eligible for temporary protection

If an applicant for protection is eligible for temporary protection the application for protection may not be considered until the applicant ceases to be entitled to temporary protection.

This differs from the existing Rule which affords the Secretary of State discretion to defer a claim for protection during a period of temporary protection, rather than requiring her to do so. We believe people should be able to have their claim for protection considered without delay. Council Directive 2001/55/EC a) requires that recipients are allowed to make an asylum claim at any time (Article 17(1)), and b) envisages that the claim may be considered while Temporary Protection is in force (Article 17(2)). We appreciate that there may be circumstances where a sudden influx of people in need of Temporary Protection might overwhelm the asylum determination system, but the correct course of action is to start from the premise that all asylum claims will be determined speedily, and to permit deferral of claims from individuals with Temporary Protection only where it is necessary to prevent the asylum determination system being overwhelmed.

We recommend that:

- the Secretary of State should consider such claims as soon as possible, and should only exercise her discretion to defer consideration where the asylum determination system would otherwise be overwhelmed.

13. Special considerations for applications by children

(a) Account should be taken of the maturity of the applicant for protection and, in assessing the application for protection of a child, more weight should be given to objective indications of risk than to the child's state of mind and understanding of the child's situation. An application for protection made on behalf of a child should not be refused solely because the child is too young to understand the situation

or to have formed a well-founded fear of persecution. Close attention should be given to the welfare of the child at all times.

(b) In view of the potential vulnerability of unaccompanied children, particular priority and care is to be given to the handling of their cases.

We consider that in light of the UK's ratification of the UN Convention on the Rights of the Child, this duty ought to be strengthened. The welfare of the child requires more than "close attention", it must be a primary consideration in all of UKBA's work. We further support the recommendation in the Children, Schools and Families Select Committee report "Looked-After Children" that independent guardians should be appointed to promote and safeguard the welfare of children.

We recommend that:

- this duty be strengthened by requiring that the best interests and welfare of the child be treated as a primary consideration at all times; and
- the proposal for independent children's guardians be adopted and incorporated into the Rules.

14. Circumstances in which a person's statements do not need confirmation

It is the duty of the applicant for protection ("P") to establish eligibility for protection. Where aspects of P's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

- (a) P has made a genuine effort to establish that P is eligible for protection,
- (b) all material factors at P's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given,
- (c) P's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to P's case,
- (d) P has made an application for protection as soon as possible, unless P has a reasonable excuse for not having done so, and
- (e) the general credibility of P has been established.

This provision mirrors the current rule 339L. For the same reasons as given above in respect of Rule 7, we consider that this paragraph is objectionable in principle and ought to be removed.

The provision appears to require an asylum seeker to provide "documentary or other evidence" to substantiate their claims unless all of the five listed criteria are met. The difficulty of obtaining documentary evidence in cases where an applicant is fleeing a place of persecution are well known. We believe that the significance of an absence of corroboration should be part of the holistic credibility assessment carried out by the decision-maker, not something to be prescribed by legislation.

In any case, it is far from clear what is meant by the phrase "general credibility" in subparagraph (e). If someone's general credibility has been established surely they need not additionally show, for example, that they made their claim as soon as possible before the requirement for corroboration kicks in.

We recommend that:

- this paragraph be deleted because it is objectionable in principle, and unnecessary in practice.

15. Legal advice: Applicants for protection will be allowed an effective opportunity (to seek legal advice)

Whilst this statement is welcome we would like to see a more robust commitment to ensuring that asylum seekers have the benefit of competent legal advice and representation particularly in the light of the positive findings of the "Solihull pilot".

We recommend that:

- a duty be placed on the Secretary of State to take reasonable steps to ensure that all applicants for protection have access to quality legal advice, and have such access at the earliest opportunity.
- there should be a duty to facilitate such access where people are particularly vulnerable, for example on the grounds of age, ill-health, history of ill-treatment, or illiteracy.

18. Duty to Provide the Opportunity of a Personal Interview

This paragraph would allow a personal interview to be omitted in various circumstances. Some of these are uncontentious, such as where a positive decision can be taken without an interview. Some however are deeply concerning, in particular subparagraphs (b) (ii), (iii), (iv) and (v).

We consider that as currently drafted the Rule would permit the Secretary of State to dispense with the most fundamental fact-finding tool on the basis of a cursory and preliminary impression that the claimant has (for example) only raised matters which are of minimal relevance to their asylum claim. It is easy to envisage a situation in which an unrepresented, uneducated and illiterate asylum seeker might not be able to disclose the real substance of their fears without the benefit of a full personal interview. To give such a wide discretion to circumscribe the fact-finding process in such a case is to invite injustice and unfairness.

We recommend that:

- subparagraphs (b)(ii), (iii), (iv) and (v) be removed for the reasons given above. If they are to remain, the procedural protections set out in Council Directive 2005/85/EC must be fully rather than selectively incorporated. In particular the rules should enshrine the requirement in Article 12(5) of that Directive that the absence of a personal interview ought not to adversely affect the consideration of the claim, and the requirement in Article 12(2)(c) that a decision to omit a personal interview should not be taken until the claim has received a "complete examination of information" already provided by the applicant.
- one practical way of ensuring that a complete examination of information takes place would be the inclusion of a duty to give the applicant and any legal representative written notice that the Secretary of State is considering omitting a personal interview, and inviting representations within a given timeframe.
- a provision be added to paragraph 18 requiring the Secretary of State to notify any legal representative of the time and place of any personal interview, so that the applicant can be suitably advised.

20. Written report of personal interview

(a) A written report will be made of every personal interview containing at least the essential information regarding the application for protection as presented by the applicant in accordance with paragraph 6.

(b) The Secretary of State will ensure that the applicant has timely access to the report of the personal interview and that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.

While we welcome confirmation that a written record will continue to be kept, we are profoundly concerned that the current requirement to keep a verbatim record of the personal interview (see the Asylum Process Guidance on Interviewing) is being watered-down.

We see no justification for building in further uncertainty and variability into the quality of these records, and in contrast we see real reasons to be concerned about the practical effects of this proposal. We are further concerned that the written record need only be provided “timely access” to the record, rather than being given a copy at the conclusion of the interview. It would appear that the intention is that the written record will no longer be completed contemporaneously, but rather on the basis of the interviewer’s recollection or notes only, a state of affairs which would very considerably increase the scope for error. It also appears that interview records might not be made available until the case reaches the appeal stage, which would unfairly compound the time pressures in the appeals system. It would also remove the possibility for simple errors in the interview record to be addressed in advance of a decision being taken, rather than requiring expensive and potentially unnecessary appeals – the very opposite of the front-loading approach found so successful in the Solihull Pilot. Finally we are concerned that there is no provision for the routine tape-recording of interviews, a measure which is widely regarded by legal representatives including RMJ as an important safeguard – one which can be implemented without any delay or inconvenience, and at minimal cost.

We recommend that:

- subparagraph (a) be amended to require the keeping of a verbatim record of the interview;
- subparagraph (b) be amended to require a copy of the written record to be provided to the interviewee at the conclusion of the interview; and
- an additional subparagraph be inserted to require the Secretary of State to tape-record all personal interviews, give a copy of the tape to the applicant at the conclusion of the interview, and to keep a copy of the tape on the applicant’s file.

21. Interview of children who have made an application for protection

Applicants for protection who are children will be interviewed in accordance with paragraph 18 unless the applicant is unfit or unable to be interviewed.

This provision permits unaccompanied children to be interviewed provided the interviewer is specially trained and a responsible adult is present. However it does not include the provision in the current Rules that only unaccompanied children aged over 12 may be interviewed. It is a matter of some concern that the Secretary of State wishes to give herself the power to interview children of any age; we regard 12 as the absolute youngest that a child should be interviewed. While the current drafting suggests that the circumstances in which a personal interview may be omitted (as discussed above) will not apply to children unless they are unfit or unable to be interviewed, we see no reason why a child must be

interviewed even if a positive decision can be taken without an interview – plainly if a positive decision can be taken the child should not be put through the stress and anxiety of a personal interview.

We recommend that:

- the provision be amended so that unaccompanied children under the age of 12 may not be interviewed. We further recommend that children ought not to be interviewed where a positive decision can be taken without an interview.

22. Decisions as soon as possible

Where a decision is going to take longer than six months:

b (ii) if the applicant has made a specific written request for it provide information on the time frame within which the decision on the application is to be expected.

We see no justification for the person themselves having to request this information. It should be a matter of good practice to inform the applicant why there is a delay in resolving their case, what the continuing obstacles are and how long it is likely to be before they are resolved.

We recommend that:

- people should be automatically informed of the reasons for delay and when a decision might be expected.

23. Notice of decisions

Written notice of decisions on applications for protection will be given in reasonable time. Where the applicant for protection is legally represented, notice may instead be given to the representative.

There can be problems of communication between representatives and their clients and we believe that an essential safeguard is for the both the applicant and their legal representative to receive a notice of the decision.

We recommend that:

- both applicant and legal representative should be notified of the decision.

24. Information

(a) The information listed in subparagraph (c) will be provided to applicants for protection in a language they may reasonably be supposed to understand and within a reasonable time not exceeding 15 days after their application for protection has been recorded.

(b) The information will be available in writing or and it may also be supplied orally.

This is a welcome addition to the Rules, although we assume that the word “or” in subparagraph (b) is a typing error. The information should always be provided in writing, with oral confirmation used as a

supplement where there is reason to believe that the written information may not be understood. We are also concerned that the list of information to be provided in subparagraph (c) does not include the name and contact details of the applicant's UKBA Case Owner.

We recommend that:

- subparagraph (b) be replaced with: "The information will be available in writing, and may also be given orally especially where it appears that the applicant may be unable to read."
- the inclusion of a rule requiring a check to ensure that the information has been understood;
- the inclusion of a requirement to provide the name and contact details of the applicant's UKBA Case Owner under subparagraph (c).

25. Limitations on disclosing and obtaining information

(a) For the purposes of examining applications for protection:

(ii) information will not be obtained from the alleged actor(s) of persecution or serious harm that would result in their being directly informed that an application for protection has been made by P

It would clearly be every bit as harmful for the alleged actors of persecution to be indirectly informed of an application.

We recommend that:

- the word "directly" should be removed.

26. Redocumentation

... the Secretary of State may submit to a foreign government any relevant identity or biographical information...

Even if the government is not the actor of persecution, many countries maintain criminal penalties for those who have sought asylum abroad. Given the UK's recognition of the right to claim asylum, it would be inconsistent and potentially damaging to permit information about the making of an asylum claim to be disclosed to any foreign government.

We recommend that:

- there should also be a Rule stating that the Secretary of State must protect the confidentiality of the person's asylum claim, or the fact that an asylum claim had been made, to avoid compromising them in relation to their government.

28. Tracing family members of unaccompanied children

(a) So as to protect an unaccompanied child's best interests, the Secretary of State will endeavour to trace the members of the child's family as soon as possible after the child makes an application for protection.

The tracing of an unaccompanied child's family members must only be done if this is in the child's best interests. However the effect of subparagraph (a) as currently drafted is to 'deem' the tracing of family members to be in the child's best interest. In some cases, notably where the child's family are the actors of persecution, this will plainly not be so. It is difficult to see how it can be either necessary or safe to begin tracing family members at all before the claim for protection has received some consideration by a specially trained officer.

We recommend that:

- subparagraph (a) be re-drafted to ensure that the obligation to trace family members is subject to the best interests of the child; and
- consideration is given to the tracing being conducted by an independent officer, for example the independent children's guardian discussed above, subject to best interest, confidentiality and extreme care being taken in any enquiries.

30. Withdrawal of an application (a) When an applicant for protection explicitly withdraws the application for protection by signing the relevant form provided by the Secretary of State, the Secretary of State will take a decision to discontinue examination of the application and will make a note to this effect on the person's file.

(b) Where there is reasonable cause to consider that an applicant for protection ("P") has implicitly withdrawn the application for protection the Secretary of State will take a decision to discontinue examination of the application and will make a note to this effect on P's file.

This paragraph would permit the Secretary of State to treat an asylum claim as implicitly withdrawn in certain listed circumstances. These include non-attendance at the personal interview which is already provided for in the current Immigration Rules at paragraph 333C, but it is expanded to include situations where for example the applicant has failed to make a prompt and full disclosure of material facts, or where the applicant breaches a residence or reporting condition.

Clearly if an applicant has absconded and does not make contact within a reasonable time it may be reasonable to treat the claim as withdrawn, but in our view the paragraph as currently drafted affords the Secretary of State far too much discretion in this area. Equally, while a failure to make a prompt and full disclosure of material facts is a relevant matter to consider in determining the claim (and is implicit in paragraphs 7 and 14) it should not be a basis for treating the application as implicitly withdrawn. Treating an application as implicitly withdrawn has serious repercussions for an asylum seeker, in particular in relation to their appeal rights, and it should not be done unless it is clear from the applicant's behaviour that he or she has in fact abandoned their claim.

We recommend that:

- the Secretary of State should be required to contact the applicant and any legal representative for explanation before treating an application as implicitly withdrawn;
- the failure to make a prompt disclosure of material facts, or breaches of residence and reporting conditions, should not be grounds in themselves to treat the application as implicitly withdrawn; and
- an application should not be treated as implicitly withdrawn unless it is clear from the applicant's behaviour that they have in fact abandoned their claim.

38. Reasons for persecution

(a) In deciding whether an applicant for protection is a refugee:
(iv) a group will be considered to form a particular social group where, for example:
(1) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
(2) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society

The House of Lords recently authoritatively ruled in SSHD v K and Fornah [2006] UKHL 46 at §16 that the tests in subparagraphs (a)(iv)(1) and (2) above are alternative rather than mandatory tests.

We recommend that:

- in light of the opinion of the House of Lords cited above, “and” be replaced by “or” at the end of subparagraph (a)(iv)(1) to avoid any misapprehension about the relevant legal test on the part of UKBA decision-makers

45. Grant of permission

We welcome the inclusion of a duty to implement a decision within 28 days of the decision being made, although for the sake of completeness we consider that the paragraph should require implementation of a finding that a person is a refugee within 28 days of the decision under paragraph 22 **or of any final appeal** in which the applicant’s refugee status is recognised.

We are concerned that subparagraphs (d) and (f) appear to permit permission to be granted for a shorter period and with conditions (presumably as to residence, reporting, permission to work, and access to public funds etc) where the provisions of Article 32(2) of the Refugee Convention apply to the applicant. This is a clear misunderstanding of the requirements of the Convention. The Convention permits a member-state to remove a refugee to a place of danger where the criteria in Article 33(2) are met, but it plainly does not permit the placing of any limitations on their rights to work, free movement, or public funds while they remain in the country of refuge.

The inclusion of subparagraph (f)(iii) appears to be a drafting error; certainly it is hard to see why a person who cannot be removed without breaching the Convention (which presumably applies to almost all refugees) can or should be made subject to restrictions on their immigration permission.

Finally, subparagraph (g) appears to mirror the provisions of section 72 of the Nationality, Immigration and Asylum Act 2002. Our concerns about this provision are well-known and widely shared throughout the sector. The provision is an attempt to broaden the scope of Article 33(2), which should in contrast be given a restrictive and narrow interpretation.

We are particularly concerned about the reference to crimes specified by order in subparagraph (g)(iii). The current order is the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004. The range of offences listed is extremely wide and extends to relatively minor matters such as graffiti, criminal damage and theft. None of these could be regarded as “particularly serious” or constituting a danger to the community. This Order consequently appears to be trivialising the serious intent of the exception to the right on *non-refoulement* contained in Article 33(2) of the Refugee Convention. This is a view shared by the United Nations High Commissioner for Refugees.

It is not clear whether this Order will be revised as part of the Simplification process but we would urge that it should be. As it stands this provision is inconsistent with the UK's obligations under the Refugee Convention and should be removed.

We recommend that:

- subparagraph (a) be amended to extend the 28-day implementation duty to apply following allowed appeals as well as positive initial decisions;
- subparagraphs (d) and (f) be amended so a person to whom Article 33(2) applies cannot have conditions imposed on their leave;
- subparagraph (f)(iii) be removed as a drafting error;
- subparagraph (g) be removed, and Article 33(2) of the Refugee Convention be left to its natural and ordinary meaning;
- the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 be reviewed in order to ensure that only crimes that are genuinely "particularly serious" are specified.

46. Travel documents

For people with Humanitarian Protection:

(c) Where (they) can obtain a travel document but have not done so, (they) will be issued with a certificate of travel where (they) can show that (they have) made reasonable attempts to obtain a travel document and there are serious humanitarian reasons for travel.

Under the current UKBA policy people with Humanitarian Protection or Discretionary Leave may refuse to approach their Embassy first for a travel document where they have a reasonable excuse for not doing so based on their fear of such authorities. We are concerned that this paragraph removes that vital exception, because it will prevent such people from travelling internationally (including where there are serious humanitarian reasons for such travel) unless they can show that they have made reasonable attempts to secure a passport from their Embassy – something which they may understandably be unwilling to do.

We recommend that:

- this provision should be amended to allow for flexibility similar to current practice.

47. Gateway protection programme

A person who has been accepted by the UK under the Gateway Protection Programme will be granted permanent permission.

We welcome this provision as we believe all refugees should have the reassurance of long term settlement from the time that they are recognised as refugees. There needs to be in addition a Rule specifying that where spouses, partners or dependants of refugees recognised under the Gateway Protection Programme arrive under the family reunion provisions that they will also be given permanent permission.

We recommend that:

- families and dependants exercising family reunion rights under the Gateway Programme also be granted permanent permission.

49. Actions of representatives

The actions of the applicant for protection's representative(s) may also be taken into account when considering the actions of the applicant for protection.

It is our view that the ordinary rules about attributing the actions of legal representatives to their clients should not be applied inflexibly in this area, where the prospect of vulnerable applicants is so high and the consequences of failure are so grave.

We recommend that:

- the Rule should also stipulate that where the representatives have clearly not acted in the best interests of their client this should not prejudice the client, especially where the client is vulnerable.

52. Qualifying criteria for permission as child of person granted protection

Purpose

This route is for the child of a person with protection.

Entry to the UK

All persons arriving in the UK and wishing to enter as the child of a person with protection must have immigration permission for this purpose before their arrival in the UK. If not, entry will be refused.

We understand that this provision largely mirrors the provisions for family reunion contained in paragraph 352D of the current Immigration Rules. We welcome the inclusion on the face of the Rules that the child need only be under 18 at the time of the application, but we are concerned by the provision for mandatory refusal of entry where immigration permission has not been obtained in advance. We appreciate that this is a category for which prior permission ought normally to be obtained, however there is a risk in cases involving children that a failure to allow the child to enter notwithstanding the absence of prior permission could put them at risk of being returned to danger.

The Secretary of State currently needs to be satisfied that there are adequate reception arrangements in place before returning an unaccompanied minor to their country of origin, and we would strongly support the extension of this principle to children who seek entry under the family reunion rules in order to prevent the risk of harm to them too.

We recommend that:

- the provision be amended so that a child arriving at port without prior permission, but who would otherwise meet the requirements of the rule, cannot be refused entry unless SSHD is satisfied that adequate reception arrangements are in place for their return.

Enforcement

53. No removal action while application for protection is outstanding

This paragraph confirms that an applicant cannot be removed from the UK until various matters have been concluded by the decision-making authorities. We are concerned that this list does not provide that removal cannot be carried out until any appeal or judicial review has been finally determined, subject to the certification provisions outlined in primary legislation. Clearly it ought to.

We are also concerned that in cases involving fresh claims, removal could be initiated after the representations have been "considered" but before the decision has been communicated to the applicant. This plainly runs the risk that a fresh claimant could be removed before they have had the opportunity to take legal advice on the legality of the Secretary of State's decision on their fresh claim.

We recommend that:

- that the provision be amended to confirm that no removal can be taken until a claim is "finally determined" including the determination of any appeal or judicial review
- that subparagraph (a)(ii) be amended so that removal action cannot begin until fresh claim representations have been considered: "... and the reasons for the refusal to record those submissions as a fresh claim have been notified in writing to the applicant and his legal representatives at least three working days previously."

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