

Refugee Council

policy response



Refugee Council response to UK Implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status

October 2007

About the Refugee Council

The Refugee Council is the largest organisation in the UK working with asylum seekers and refugees. We give help and support to asylum seekers and refugees and work with them to ensure their needs and concerns are addressed by decision-makers. Our members range from small refugee-run community organisations to international NGOs, such as Christian Aid, Save the Children and Oxfam.

The Refugee Council is a leading member of the European Council on Refugees and Exiles (ECRE). We represent the UK in ECRAN, ECRE's Advocacy Network and are currently working with our partners across Europe to monitor the transposition of the Common European Asylum System instruments and their impact on refugees and asylum seekers.

General Comments

The Refugee Council welcomes the opportunity to comment on the UK's implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter 'the Directive'). We agree with ECRE's view that the Directive falls well short of the standards conducive to a full and fair examination of an asylum claim and would refer the Home Office to concerns expressed in ECRE's Information Note on the Directive.¹ Our comments should be read against this background, as is often highlighted, transposition affords states the opportunity to implement higher standards. The Refugee Council would therefore urge the UK to give serious consideration to building on recent

¹ ECRE's Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, IN1/10/2006/EXT/JJ
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improvements in procedural standards, as seen, for example in certain aspects of the New Asylum Model (NAM).²

The Refugee Council believes that refugee status determination procedures underpin an individual's ability to exercise the right to seek asylum. The imposition of stringent procedures can render an asylum system meaningless and deprive the examining state of the opportunity to identify protection needs and avoid refoulement.³ The Refugee Council remains particularly concerned about the concept of 'safe' countries of origin and 'safe' third countries and concomitant non-suspensive appeal procedures, as well as the lack of legal representation, interpreters, the use of fast tracking asylum claims and detention impinging on the individual's ability to properly make an asylum claim.

The Refugee Council would recommend an independent evaluation of the impact of the Directive in the UK, including any legal challenges arising post- implementation. Such an evaluation could also examine the extent to which harmonisation of asylum procedures amongst EU Member states has been achieved. The Refugee Council would be willing to contribute to such an evaluation.

Much of the effect of the Directive will be felt in the implementation of the Immigration Rules we are being consulted on. We therefore would like to request the opportunity to comment on proposed revisions to Asylum Policy Instructions, Operational Guidance Notes and Asylum Instructions.

Consultation response

Article 2: Definitions

The Refugee Council notes that it is proposed that any application for international protection shall be presumed to be an application for asylum. Whilst this is welcome, the Refugee Council has concerns in relation to stand-alone humanitarian claims made by unaccompanied minors. We work with some children and young people whose claim for international protection is based upon their rights under the European Convention on Human Rights. These children and young people do not claim a well founded fear of persecution for a Refugee Convention reason and have made applications for protection making this clear. However, such applications have proved problematic for the Border and Immigration Agency (BIA) to process. The young people encounter problems at the Asylum Screening Unit as they are obliged to enter an asylum procedure that will inevitably result in a refusal. In addition these applications are often left unprocessed for considerable lengths of time and it is unclear how this will improve under the new asylum process.

The Refugee Council believes that the BIA should provide clear guidance to operational staff to enable them to process claims made on humanitarian grounds. In communicating a refusal of asylum to an applicant who has not claimed to be a refugee, the Refugee Council requests that the decision be drafted in a way that clarifies the UK's obligations in relation to the claimant in order to avoid confusion and distress.

Article 3: Scope

The Refugee Council seeks clarification as to whether the Directive's provisions will be extended to British Overseas Territories, such as Gibraltar and the Cayman Islands.

² For example, investment in training for NAM caseowners; Solihull pilot encouraging access to early legal advice; COI improvements under the influence of APCI.

³ The preamble to the Directive makes reference to the Council's commitment made at Tampere in 1999, in which it "agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention...thus affirming the principle of non-refoulement..."

Article 4: Responsible authorities

The Refugee Council understands that the Case Owner acts on behalf of the 'responsible authority', namely the Secretary of State, to determine asylum applications. We understand that NAM Case Owners receive in-depth training and guidance in refugee and human rights law and procedure. The Refugee Council is concerned that whilst the UK has not designated to 'other authorities' the responsibility for certain decisions such as entry for those presumed to have come from a 'safe' third country, those decisions are, in practice, taken by immigration officials who may not have expertise in asylum and human rights and the UK's international legal obligations. Admissibility decisions require a high level of expertise in view of the grave consequences of indirect refoulement. It is recommended, therefore, that all officials responsible for immigration control receive training in refugee and human rights law. This is particularly relevant given concerns raised with regard to the implementation of Dublin II.⁴

Article 5: More favourable provisions

The Refugee Council is pleased that the UK has taken this into account in its deliberations over the implementation of the Directive. We hope that where our suggestions are for more favourable provisions, the UK will consider their implementation in the spirit of the Directive.

Article 6: Access to the Procedure

The Refugee Council welcomes the express requirement of consent by an individual before s/he is included as a dependant on an asylum claim. A higher and more meaningful standard could be reached if all Case Owners were required to see dependants and advise them of their right to make an individual application. This has particular implications for female applicants who may fall victim to assertions of damaged credibility on account of late disclosure. The Refugee Council recommends that dependants be fully appraised in a language they understand of their right to lodge a claim for asylum.

The Directive obliges Member States to ensure that authorities that are likely to be addressed by someone who wishes to claim asylum are able to advise the person how and where s/he can do so. In our experience, officials at a local level are often not aware of where and how asylum applicants should address themselves which may cause delays. In the implementation of this 'shall' clause, the Refugee Council would recommend a written Protocol and training be provided to such authorities, including police stations and social services.

Whilst it is helpful that authorities direct asylum applicants how and where to apply, it is meaningless unless matched by means to enable the person to get to where they should apply for asylum. Asylum applicants who find themselves outside of the two UK cities- Liverpool and Croydon- that accept asylum claims are at times stranded with no money, no directions and unable to speak English which may impact on existing vulnerability and cause delay. The Refugee Council recommends local BIA offices receive asylum applications and carry out localised screening or that Protocols be established for the BIA to assist and fund travel to Croydon or Liverpool. This proposal would also make sense in light of the regionalised structure of the BIA. The Refugee Council would welcome discussion on the implementation of improving access to the procedure in this way in view of our presence in the regions.

Article 7: Right to remain in the Member State pending the examination of the application

In order to avoid refoulement, the Refugee Council believes that applicants for asylum should have an absolute right to remain on the territory until a final decision on their application has been made. The Refugee Council shares ECRE's disappointment that this Article provides that the right to remain on the territory only lasts until the first instance decision is made as is already the practice in the UK.

⁴ See, for example, the Refugee Council's briefing: "Unaccompanied Children and the Dublin II regulation". November 2006

The increased use of 'clearly unfounded' certification and safe country of origin concepts has resulted in the regrettable increase of non-suspensive appeals.

Article 8: Requirements for the examination of applications

The Refugee Council is pleased that asylum decision makers are required to have expertise with respect to relevant standards in the field of asylum and refugee law. UNHCR's Quality Initiative reports have repeatedly called for clear guidance for decision makers on establishing the facts of a claim for international protection. They further point out the need to avoid confusion between this stage of assessing a claim and applying the accepted material facts to the refugee or ECHR criteria. In our view, these concerns would need to be addressed in order to meet the standards of the Directive.

The Refugee Council understands the intention to amend the Immigration Rules to reflect that the timing of lodging the claim cannot be the sole reason for refusal. We believe that the time at which an asylum application is lodged is not necessarily connected to its merit. This is particularly relevant in claims where essential elements of an asylum claim, such as rape are disclosed at a late stage.

The Refugee Council seeks clarification as to the content and availability of 'reliable and up-to-date' information on countries of origin. We agree that the country of origin information used in asylum claims should always be 'precise and up-to-date and from various sources' as required by the Directive but fear that this standard has yet to be reached. In spite of progress made by the Advisory Panel on Country Information, in practice Case Owners often rely on Operational Guidance Notes and Asylum Instructions. The Refugee Council recommends independent scrutiny of these important documents to ensure that such important internal guidance to Case Owners meets the requirements of the Directive. This should also cover country of origin information collected on 'fact-finding missions' conducted by the Home Office.

Article 8 (4) of the Directive outlines that Member States may provide for rules concerning the translation of documents relevant for the examination of applications. In view of the increasing number of applicants that are unrepresented, the Refugee Council requests that the BIA set up provisions to translate documents submitted in an applicant's own language.

Article 9: Requirements for a decision by the determining authority

The Refugee Council recommends that all decisions and their reasoning are given in writing. This includes positive decisions in light of possible future active review and would assist both the asylum applicant and the examining state.

Article 10: Guarantees for applicants for asylum

The Refugee Council notes that the Directive guarantees that applicants for asylum 'shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary'. The proposed amendment to the Immigration Rules does not satisfactorily implement this in our view.

The Directive obliges states to guarantee that asylum applicants are informed of their rights and obligations during the procedure. The proposed amendment to the Immigration Rules replicates this but does not expressly include that the applicant be informed of their right to an interpreter. The Refugee Council would recommend this inclusion into the Asylum Policy Instructions in order to comply with the minimum standard.

Proposed amendments further fail to conclude who decides when an interpreter is required. For the UK to meet the Directive's requirement for "appropriate communication", the Refugee Council takes the view that the asylum applicant is the key person in the proceedings who can clarify whether s/he needs an interpreter. Safeguards should be included to ensure that applicants are not pressured into going ahead with asylum interviews in the absence of an interpreter who speaks a

language they understand. Furthermore, the applicant and the interviewer should be able to raise issues relating to the quality of the interpreting which is instrumental in establishing the facts of an asylum claim.

Numerous studies have indicated that gender plays a very important role in the asylum interview. A study by the Refugee Women's Resource Project found that

"Many problems were identified with interviewing procedures including lack of provision of female interviewers and interpreters. This had a serious impact on the ability of women to tell their stories in full, especially when they had experienced sexual violence."⁵

The Refugee Council would recommend incorporating into the Immigration Rules and procedures that the applicant should be informed of their right to request an interviewer and interpreter of their preferred gender. This would assist the applicant and the Case Owner in identifying key aspects of the claim at the earliest possible stage and avoid later accusations/misunderstandings. Provisions for female interpreters could be made in advance of any interview and the BIA should be adequately funded to make arrangements operational. This would further meet the reference in Article 10 and Article 13 (3) (b) to "appropriate communication". Indeed, the Consultation asserts at paragraph 52 that the BIA "will make it clear the interpreter chosen will be able to facilitate communication between the applicant and the Case Owner."

Article 10 (e) of the Directive guarantees that applicants who are without legal representation shall be informed of the result of the decision in a language s/he may reasonably understand. The Refugee Council believes that this obligation is not fully reflected in proposed amendments to the Immigration Rules. The Refugee Council places importance on this provision in view of the increased number of appellants who are unrepresented and would recommend communicating the decision and reasoning to the applicant as well as how to challenge the decision.

The Refugee Council notes that the proposed provisions for the Asylum and Immigration Tribunal (AIT) and the Special Immigration Appeals Commission (SIAC) to provide the services of an interpreter are limited to the appellant giving evidence and in other circumstances when the AIT or SIAC deem necessary. For unrepresented appellants already facing lack of legal expertise, interpretation would be rendered more meaningful if provided throughout the entire appeal proceedings.

Article 11: Obligations of the applicants for asylum

Whilst the Refugee Council understands the obligations of asylum applicants, we would like to point out that there is likewise a need for the BIA to act reasonably in its requests to asylum applicants. This includes not losing documents, carrying out searches only where necessary and not imposing overly –restrictive reporting requirements in the absence of absconsion risk or where this overly burdens the applicant such as walking very long distances to a reporting centre.⁶

Article 12: Personal Interview

The Refugee Council believes that all claimants should have the opportunity to be interviewed about their claim for asylum. We urge the BIA not to utilise the exceptions to the entitlement to an interview. However, we agree that in certain circumstance applicants suffering from mental or emotional disturbance should not be interviewed. In these circumstances, the Refugee Council

⁵ 'Lip service' or implementation? The Home Office Gender Guidance and women's asylum claims in the UK, March 2006

⁶ See, for example, Refugee Council briefing on the New Asylum Model, August 2007

recommends an explicit requirement that the interviewer seeks a medical report in order to safeguard the applicant and the decision maker.

The stipulation in Article 12(5) that the absence of a personal interview shall not adversely affect the decision of the determining authority has not been included in the Immigration Rules; we would advise its inclusion in order to ensure compliance, for example in cases where the personal interview is omitted where the authority considers the case unfounded.

Article 15: Right to legal assistance and representation

The Refugee Council believes that legal assistance and representation underpins an individual's ability to access the asylum procedure. We welcome the UK's provision of free legal assistance and representation for first instance procedures but remain extremely concerned in respect of access to legal representation at appeal and review stages.

The Directive obliges states to provide free legal assistance and/or representation in the event of a negative decision but qualifies this right such as to circumstances where the appeal or review is likely to succeed. States must ensure, however, that legal assistance in these circumstances is not arbitrarily restricted. The Refugee Council has concerns in relation to the availability of legal aid to appellants in the detained fast track process. At initial stage, the procedures are so rapid that representation can be rendered ineffective. Subsequent application of the merits test at appeal stage requires the legal representative to assess the chances of success as greater than 50%, or 'unclear or borderline'. In the timescales allowed, it is very difficult for legal representatives to assess the merits of the case adequately, or for an appellant to appeal the funding decision or find alternative representation. As a result, significant numbers are unrepresented in detained fast track process appeals.

Article 16: Scope of legal assistance and representation

The Directive obliges states to provide that the applicant is allowed to bring with him/her to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law. The Refugee Council would urge that the government make provision for legal representation at the interview to be provided for within the Immigration Rules. This is the principle of "front loading" that is being piloted in the Solihull pilot and that the Refugee Council believes should be an integral part of the asylum process.

The Directive obliges Member States to ensure access to information in the applicant's file. The Refugee Council would like to highlight the issue of access to information of unrepresented applicants and urges the government to ensure their timely access to information. In practice, Freedom of Information Act requests may not fulfil this requirement as they take too long, in particular in view of fast-tracked cases.

Article 17: Guarantees for Unaccompanied Minors

Article 17 (1) (a) of the Directive sets out state responsibility to take measures as soon as is possible to ensure that a representative represents and/or assists an unaccompanied minor with respect to the examination of the application. The Immigration Rules or internal guidance for decision makers must clarify what is meant by "as soon as is possible" as it is unclear whether or not the BIA agrees that children should receive advice prior to screening and if so, how it will ensure that this happens in all cases.

The proposed implementation of the obligation to guarantee a representative for unaccompanied minors, in our view, fails to meet this requirement for the following reasons: The Refugee Council would like to make it clear that the statement made in the last sentence of paragraph 66 of the Implementation Paper is inaccurate: the Children's Panel of the Refugee Council does not provide legal representation. The BIA is also fully aware that although the Children's Panel is able to help a large number of unaccompanied children to access legal representation this is by no

means guaranteed for all children seeking asylum on their own. Significant increases in the funding for the Refugee Council's Children's Panel as well as improvements in referral arrangements from the BIA would be necessary to ensure that this arrangement fulfils the duty in paragraph 1 (a) of Article 17.

In addition it is unclear why the Implementation Paper includes details about how children are looked after by local authorities. If, as it appears, the BIA is of the opinion that this meets the obligations under Article 17 (1) (a) of the Directive we would disagree. In fact many local authorities express that they feel unable to recommend one legal representative over another. Reasons for this will include the requisite experience and/or training, as well as a duty to remain impartial regarding signposting to private companies without a competitive tendering process.

Article 17 (1) (b) obliges the UK to ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. The UK is further obliged to allow the representative to be present at the interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Although we agree that the proposed text of the Immigration Rules reflects the obligation regarding contact between the child and his/her representative and the involvement of both in the personal interview, we are concerned that the wording "within the framework set by the interviewer" is merely replicated and not explained in terms of UK policy. We urge the BIA to make it clear what the conditions are relating to the full involvement of the representative to avoid inconsistencies in the system.

We welcome the decision by the BIA not to make use of the exemptions to the obligation to appoint a representative. It is unclear what decision has been made regarding the Directive's provision that Member States may refrain from appointing a representative for children aged 16 or over.

We are also pleased that the Immigration Rules will reflect existing policy to make it clear that interviews of unaccompanied children must only be conducted by specially trained Case Owners and that BIA will ensure that decisions should similarly be made by such people.

Whilst we acknowledge that the Directive allows Member States to use medical examinations to determine the age of unaccompanied minors we are disappointed that the BIA has chosen to transpose this into the Immigration Rules. It is unclear how much weight will be given to medical evidence as the proposed text for paragraph 352 of the Immigration Rules states firstly that

"...he may be subjected to a medical examination as part of the age assessment process."

However, the following sentence states that

"He must be told of the possibility that his age may be determined by medical examination."

These two sentences do not mean the same thing. The Immigration Rules should reflect the policy, as we understand it this would mean using the phrase "may be subjected to a medical examination as part of the age assessment process" in both instances.

The process used to determine age and the examination of a person's need for international protection should not be connected and we are extremely concerned that paragraph 5 (c) of Article 17 has been transposed without clearly uncoupling the medical examination from the asylum claim. We urge the BIA to remove the word 'solely' from the transposition so that the last sentence of paragraph 352 of the Immigration Rules reads

"If the applicant refuses to undergo a medical examination this shall not be used as a reason for refusing the application for asylum."

The Directive obliges states to give primacy to the best interests of the child as a primary consideration for Member States. In selecting to transpose paragraph 6 of Article 17 to a limited degree and differently from other Member States because of the reservation on the UN Convention on the Rights of the Child, we would argue that the BIA risks contravention of the Directive. We support the position taken by the Joint Committee on Human Rights that this reservation should be removed.⁷

Article 18: Detention

The Directive prohibits states from detaining persons for the sole reason that he/she is an applicant for asylum. The government does detain people purely because they are asylum applicants in the detained fast track process and evidence would suggest that the mechanisms for screening whether such detention is appropriate are ineffective. The Refugee Council is concerned that the result is that many victims of torture, people with mental health problems or minors whose age is disputed are detained inappropriately.

The Directive obliges states to provide for speedy judicial review where an applicant for asylum is held in detention. The Refugee Council does not accept that current arrangements ensure “speedy judicial review”. For most, judicial review or writs of habeas corpus are not realistic options. There are profound problems of access to quality legal advice and problems of finding accommodation and/or sureties.

Article 23: Examination procedure

The Directive obliges states to ensure that the asylum examination procedure is concluded “as soon as possible, without prejudice to an adequate and complete examination.” The Refugee Council would draw attention to the “without prejudice” clause. We believe that the current focus on fast-tracking asylum applications does not comply with the Directive as the very existence of the fast-track process impacts on the ability of the applicant to adequately make their claim.

Article 25: Inadmissible applications

The Refugee Council agrees with ECRE that the inclusion of safe third country cases in the admissibility procedural stage is inappropriate. The safety of a country for a particular applicant should be dealt with in the substantive determination procedure.

The Refugee Council notes that the UK procedure allows for substantive examination of claims where the person could be returned to a ‘safe’ (non-Dublin) third country. We believe that certification of such claims and the lack of an in-country appeal right results in the conflation of admissibility and substantive decisions.

Article 26: The concept of first country of asylum

The Refugee Council agrees with ECRE’s concerns that this Article contains inadequate safeguards. We would urge the UK to implement the provision that the applicant has ‘sufficient protection’ in the country of first asylum to mean that the applicant has effective protection. This entails an assessment of whether the country can and will provide protection to the particular applicant and may be particularly relevant if there is a large refugee population.

The Refugee Council believes the UK should examine the range of rights required to prevent refoulement, including the right to legal protection, access to legal status and necessary documentation as well as rights instrumental to protection including civil and political rights, economic, social and cultural rights. Furthermore, UNHCR carrying out refugee status determination

⁷ House of Lords and House of Commons Joint Committee on Human Rights “The Treatment of Asylum Seekers”. Tenth Report of Session 2006-97, March 2007, paragraphs 181 -182
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in a country should not be used as criteria for sufficient protection as the state in such cases usually does not have capacity to determine claims nor provide protection.

Article 27: The safe third country concept

The Refugee Council is concerned that the applicability of the concept of safe third country may lead to direct or indirect (chain) refoulement. The Refugee Council agrees with ECRE's view that safe third country should be strictly limited and is concerned about its application to many states on the periphery or outside the EU. Mere transit should not be deemed to be considered a 'meaningful link' with a third country. Asylum claims should be examined individually and the individual must be able to lodge a claim for asylum in the third country to which they are being sent. This latter would require the country to have ratified the 1951 Geneva Convention and have an asylum procedure in place.

Article 27(3) (a) requires Member States to inform the applicant when implementing a safe third country decision. The Refugee Council recommends the UK to implement this by way of providing the individual with a reasoned decision on removal to a safe third country. This would enable the applicant to understand the way in which the decision to remove was reached and clarify the issues for both parties should a legal challenge be made.

Article 37: Withdrawal of refugee status

The 1951 Convention provides for circumstances that may lead to the withdrawal of refugee status including cessation, cancellation, revocation and withdrawal under Article 33 (2). The Refugee Council submits that withdrawal of refugee status under any of these provisions should be individually determined and accompanied by an opportunity to give reasons in writing. The Refugee Council recommends the extension of legal aid provisions for representation and interpreters to be used in withdrawal proceedings. This is for reasons of due process further compounded by the complicated nature of withdrawal of refugee status.

Article 39: The right to an effective remedy

The Directive obliges states to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision to withdraw refugee status. The Refugee Council does not agree that the UK's existing legislation already results in an appeal mechanism against decisions to withdraw refugee status and believes the setting up of an appeal right is necessary to ensure compliance with the Directive.

The Refugee Council reiterates its disappointment that the Directive provides for the suspension of appeal rights in certain asylum cases. We agree with ECRE that it is vital that asylum seekers have a right to remain on the territory until their appeal is decided because a right to appeal becomes meaningless if the asylum seeker has already been sent to the country where they face persecution, torture, inhuman, or degrading treatment. Moreover, it becomes impossible to assess at a distance essential elements of a case, such as the credibility of the applicant.

Miscellaneous

The Refugee Council welcomes provisions that a person need not specifically request to be recognised as a refugee in order to make an asylum claim. Whilst this may clear for a Case Owner once a claim has been lodged, for immigration officials operating at border controls, this provision necessitates training to increase awareness of the circumstances in which an individual may claim asylum and the legal obligations that arise from a claim being made. In particular, reference to gender and age considerations that act as obstacles in articulating protection needs, especially by female claimants and separated children, require specialised training. The Refugee Council would like to extend an offer to assist with training in this regard.

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