

refugee council

policy response



Refugee Council response to the Home Office
Consultation on the Qualification Directive:

*Implementation of 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*

August 2006



Other Refugee Council publications are available at www.refugeecouncil.org.uk

Registered charity no. 1014576 Registered company no. 2727514 Registered address: 240-250 Ferndale Road London SW9 8BB

About the Refugee Council

The Refugee Council is the largest non-governmental organisation in the UK working with asylum seekers and refugees. We give help and support to asylum seekers and refugees, promote their rights in the UK and abroad, 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 sit on ECRE's Executive Board and represent the UK in ECRAN, ECRE's Advocacy Network. We 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.

The Refugee Council welcomes the opportunity to respond to the Home Office consultation on the implementation of Council Directive 2004/83/EC ('the qualification Directive'). We are pleased that the Home Office has chosen to consult formally on implementation of this Directive. We additionally welcome the initiative taken by the Home Office in conducting a roundtable consultation exercise with stakeholders in July. We look forward to further similar consultation on implementation of the Procedures Directive¹, the remaining element of the Common European Asylum System whose deadline for implementation has not yet passed.

We have divided our consultation response into two sections. The first contains general observations on the consultation process and the UK's role in negotiations. The second follows the structure of the consultation document and contains specific responses to the proposals it contains. Our response focuses on whether the proposed changes to the Immigration Rules and contents of the draft Regulations satisfactorily implement the Directive. We have not commented on all elements of the Directive and have not addressed the Directive's impact on devolved legislation in Scotland, fully endorsing the response of the Scottish Refugee Council in this regard. Additionally, we support the submission made by Refugee Action on the implications for the UK of Articles 20, 22, 26, 27, 28 and 31.

Section One

General observations on the negotiation of and consultation on the qualification Directive

The Refugee Council welcomes the UK's participation in the qualification Directive and hopes that its implementation will contribute to establishing a Common European Asylum System based on the highest standards of refugee protection. We believe that the Directive is long overdue and has the potential to close the current 'protection gap', whereby asylum seekers refused asylum in one country may have been recognised as being entitled to international protection had they applied in another.

Currently, Member States vary vastly in their interpretations of who is a refugee and who is otherwise entitled to international protection, as well as the rights of those with recognised protection needs. There are particularly pronounced differences in the treatment of those with subsidiary/ complementary protection needs²: often, subsidiary/complementary protection status

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

² The qualification Directive refers to subsidiary protection. However, the Refugee Council believes that the rights attached to refugee and subsidiary protection status should be identical, and we therefore advocate for the use of the term 'complementary'. Other Refugee Council publications are available at www.refugeecouncil.org.uk

amounts to little more than tolerated presence, or protection against removal. We welcome the fact that the Directive represents the first time that the obligation to grant protection status to those not fulfilling the strict criteria contained within the 1951 Refugee Convention is enshrined in an international instrument. We are particularly pleased that the definitions contained within the Directive include recognition of persecution by non state agents and gender-based persecution. We are hopeful that this Directive will support a more consistent approach to granting status across Member States, and will enhance the protection and entitlements attached to legal status in a large number of EU countries.

The Refugee Council would have welcomed formal public consultation on the initial draft of the Directive, in order to enable stakeholders' expertise to inform the UK's negotiating positions. We regret that the minimum standards contained in the Commission's initial proposal were substantially watered down during the course of negotiations. We understand that the UK played a leading role in this regard, seeking to ensure that the Directive would not require any substantial changes to practice in this country. As a result, only minor adjustments are required in the UK in order to comply with the Directive, and an opportunity to enhance refugee protection in the UK has been missed.

Nonetheless, we warmly welcome the Home Office decision to consult on implementation of the agreed Directive, an example of good practise that should be replicated across the EU. We welcome the inclusion in the consultation of the draft Regulations and proposed changes to the Immigration Rules. However, we note that much of the UK's interpretation of the qualification Directive will be contained in changes made to policy documents and regret that we are not being consulted on the proposed changes to the Asylum Policy Instructions (APIs). We would welcome the opportunity to input into the revision of these IND policy documents which are likely to have significant implications for asylum seekers and those with status in the UK.

Section Two

Response to proposed implementation of the reception Directive

Descriptions and Definitions

Article 1: Subject Matter and Scope

The Refugee Council welcomes the UK's intention to apply the provisions of this Directive to all applications for asylum. We believe that no country can be declared safe for all time, let alone a group of states that has recently expanded from 15 to 25 and is shortly to expand further. As a matter of principle, we believe it essential that EU member states are not seen by other countries to exclude EU nationals from the scope of the Directive. Any geographical restriction of refugee and subsidiary/complementary protection status establishes a dangerous precedent for the rest of the world, since EU policies have proven export value and other groupings of States might decide to follow suit and exclude nationals of certain countries from eligibility for international protection. Whilst we regret that in practise in the UK asylum applicants from EU member states will have their asylum claims refused and certified as 'clearly unfounded', we urge the UK to use its influence and encourage other member states to implement this Article of the Directive in a similar way.

as opposed to 'subsidiary' protection. We use both terms together in this consultation response, unless referring directly to the text of the Directive.

Other Refugee Council publications are available at www.refugeecouncil.org.uk

Registered charity no. 1014576 Registered company no. 2727514 Registered address: 240-250 Ferndale Road London SW9 8BB

Article 3: More favourable standards

The Refugee Council has long been concerned that the harmonisation process has the potential to lead to reductions in national standards to meet the minimum requirements contained in the Common European Asylum package. We welcome the fact that the UK has not outlined any intention to lower domestic standards in relation to the areas covered by the qualification directive. However, we note that in recent years, the UK has progressively reduced national standards, with profoundly negative consequences for those seeking asylum in this country. Additionally, as noted above, we regret that during the course of negotiations on this directive, the UK sought to reduce standards in the draft text in order to ensure that UK standards would not have to be raised. Throughout this consultation response, we indicate areas where we believe current UK policy and practice should be improved so that those in need of international protection are provided with the status and rights that enable them integrate rapidly and to rebuild their lives in the UK. We urge the UK to use its position of influence with EU partners to minimise the extent to which other member states reduce national standards to meet the minimum requirements of the Directive. In this vein, whilst we welcome equivalence of entitlements between those with Convention status and those given subsidiary/complementary protection status, it is essential that equivalence is not achieved by watering down the rights of Convention refugees.

Article 2: Definitions

The Refugee Council welcomes the UK's proposed use of the phrase 'grant of asylum' as opposed to 'refugee status.' This is in line with UNHCR's recommendations and reflects that fact that a grant of asylum is declaratory of a pre-existing status: a person is a refugee from the point at which they fulfil the requirements of the Convention definition. We additionally welcome that 'refugee' is defined by reference to Article 1A of the 1951 Refugee Convention, the cornerstone of the international refugee protection system.

Article 37: Reports and Article 38: Transposition

The Refugee Council welcomes the UK's proposed approach to providing information to the Commission in accordance with Article 37. However, we note that the UK was late in providing its report on the reception Directive to the Commission, and indeed did not appear to have any intention to produce a report until NGOs requested sight of it. Further, we note that the UK has not shared its report to the Commission on the Dublin II Regulation with NGOs and other interested stakeholders. We are hopeful that the Home Office will meet reporting deadlines in the future, and urge that the European Asylum Policy Unit takes into account feedback from NGOs in assessing the application of the qualification Directive in the UK. We further hope that, in the interests of collaborative working and transparency, the Home Office will share reports on the application of EU Directives and Regulations with NGOs as a matter of course and will make copies of the 'Transposition note' available to NGOs and other interested stakeholders.

Persecution and Protection

Article 5: International protection needs arising sur place

The Refugee Council welcomes the UK's intention not to implement Article 5 (3) of the Directive, which covers those who are purported to have manufactured a risk of persecution or serious harm by acting in ways that are not a genuine reflection of their beliefs. We agree that this provision is not compatible with the Refugee Convention and thus cannot be implemented without prejudice

to that Convention. Individuals may well change their religion or political beliefs after leaving their country of origin and it cannot be assumed that in doing so they are acting in bad faith.

We note that the UK's preferred approach to assessing sur place claims is 'to test rigorously any asylum claim where we feel a person is acting inconsistently with their previous beliefs for the purpose of trying to create the conditions for an asylum application'. This approach is welcome, but as with many assessments of asylum claims, it depends on Home Office asylum decision-makers' ability to test the credibility of asylum applicants in an appropriate manner. Evidence from the UNHCR's Quality Initiative Project suggests that there are severe deficiencies in many asylum caseworkers' skills in this regard. In its October 2005 report, UNHCR stated:

"UNHCR has observed a large number of cases where one statement deemed by the caseworker to be untrue, often on weak grounds, is relied upon to dismiss the credibility of the entire claim. UNHCR has seen instances where this has resulted in important aspects of a claim being prematurely discarded when they should have been taken into account in considering the ultimate question of whether the applicant has a well-founded fear of future persecution for a Convention reason."³

In June 2006, UNHCR stated:

'The assessment of credibility still poses a particular problem for Home Office decision makers.'⁴

We urge the Home Office to take steps to address skills deficiencies and to introduce appropriate training and accreditation for caseworkers at the earliest opportunity. We welcome the Home Office's commitment to do so in relation to caseworkers working under the New Asylum Model, and are hopeful that this will, over time, lead to significant improvements in the quality of asylum decision making. However, we believe that all caseworkers should have access to training and accreditation at the earliest opportunity in order to ensure that asylum seekers in need of international protection are recognised as such and granted status accordingly.

Article 6: Actors of persecution or serious harm

The Refugee Council welcomes the Directive's guarantee of recognition of refugee status irrespective of the source of the persecution. In the UK context, we recognise that this inclusion of non-state agents of persecution is broadly reflected in UK policy and practice. However, we draw attention to UNHCR's concern in relation to Article 6(c) that 'the term "demonstrated" should not increase the applicant's burden of proof. Lack of state protection should be assumed if the standard of proof for a well-founded fear of persecution is met'.⁵ We recommend that this be clearly reflected in the re-drafted UK Asylum Policy Instruction on *Assessing the Claim*.

³ UNHCR Quality Initiative Project: Second report to the Minister. <http://www.ind.homeoffice.gov.uk/aboutus/reports/unhcr> accessed 26 August 2006.

⁴ UNHCR Quality Initiative Project: Third report to the Minister <http://www.ind.homeoffice.gov.uk/aboutus/reports/unhcr> accessed 26 August 2006.

⁵ UNHCR (January 2005) *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004* <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=43661eee2#search=%22UNHCR%20annotated%20commentary%20qualification%20directive%22> accessed 26/8/06

Article 7: Actors of protection

The Refugee Council remains alarmed by the provision in Article 7 (1) (b) that protection can be provided by 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State'. Along with our partner ECRE members, we have consistently expressed our opposition to this provision on the grounds that state-like authorities are not, and cannot, be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations. Further, non-state organisations have limited ability to enforce the rule of law and the very absence of a state authority is an indication of political instability. It is hard to conceive of a situation where an authority that is not a state could be regarded as enjoying sufficient, durable stability and as having the political, military and civil police capacity that would enable it to offer a level of protection consistent with the 1951 Refugee Convention or the European Convention on Human Rights. The recent history of international organisations providing 'safe havens' is not a proud one, notably in Bosnia, but also in Kosovo where UNMIK has repeatedly been unable to protect individual members of minority groups from gross human rights violations. We urge the UK to change current policy and draw up guidelines that make it clear that national protection provided by States cannot be equated with the exercise of limited authority over an area by parties, organisations or international organisations on a temporary or transitional basis.

We have further concerns about the proposed Regulations, which mirror the wording of the Directive in stating that 'Protection shall be regarded as having been provided when the actors mentioned in 1a and b take reasonable steps to prevent the persecution or suffering of serious harm' (draft Regulation 4 (1)(2)). We do not believe this is adequate. The State's obligation is to provide protection. UNHCR has stated that the test is not whether 'reasonable steps' are taken to protect an individual, but whether 'the applicant's fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm'.⁶ We urge the Government to adopt standards in this area that are higher than the minimum level outlined in the Directive.

Article 8: Internal protection

The Directive's approach to internal protection is an example of a protection standard which has dropped to the lowest possible level. UNHCR guidelines clearly state that internal protection should be subject to a two stage test. The first stage establishes whether internal protection is relevant to the case at hand by assessing:

1. whether the territory is practically, safely and legally accessible,
2. whether the individual would be protected from persecution by state or non state actors (bearing in mind the fact that that persecution by state actors 'normally excludes' internal protection),
3. whether the individual would be at risk of persecution or serious harm in the territory (including harms not falling within the ambit of the claim).

The second stage is a reasonableness test assessing whether 'the claimant [can], in the context of the country concerned, lead a relatively normal life without facing undue hardship'.

It is clear that the standard set by the Directive falls well below that suggested by UNHCR. In particular, Article 8(3) allows internal protection to apply where there are 'technical obstacles' to return.

⁶ *Ibid.*

The Refugee Council strongly opposes the notion that an individual can be denied international protection when there is a part of their country of origin where they would be safe, but to which 'technical obstacles' prevent their return. It is manifestly unreasonable to deny someone protection on the basis that they could be protected in a place that they cannot actually access. UNHCR has made it clear that such an approach is inconsistent with Article 1 of the Refugee Convention, which makes no requirement that the fear of persecution should extend to the whole territory of the country of origin. Further, its Guidelines on Internal Protection explicitly provide that where the proposed protection space is not practically or safely accessible, internal protection cannot be considered a viable option.

In the UK, such policies have already led to immense suffering and hardship. Refugee communities, NGOs, faith organisations and other civil society groups support an ever-growing number of individuals who need protection, but whose asylum claims have been rejected and who are consequently destitute. A minority of these people are entitled to s4 support (in the form of full board housing, or housing and vouchers) on the grounds that the Government accepts there is 'no safe route' of return to their country of origin. The majority are left without any support at all, despite no genuine likelihood of voluntary or forced return.

We strongly urge the Government to reconsider its position in this regard, and to ensure that protection is only denied to individuals in exceptional circumstances. We urge that the Immigration Rules and the API on Internal Relocation be amended to reflect the full two stage test set out in the UNHCR Guidelines on Internal Protection.

Article 9: Actors of persecution

The Refugee Council welcomes the UK's commitment to continue current practice whereby lesser forms of harm may also constitute persecution in certain circumstances. However, we are disappointed that the consultation document makes no reference to acts of a gender-specific or child-specific nature. We would welcome further clarity as to what guidance and training the UK will provide for decision makers to ensure that they recognise such acts as acts of persecution.

Article 10: Reasons for persecution

The Refugee Council welcomes the fact that the UK will continue to adhere to current caselaw which does not require that the particular social group should be perceived as different by the surrounding society. We note that at the consultation roundtable it was suggested that the revised API on Membership of a Particular Social Group be amended to reflect this.

Qualification and Disqualification

Article 4: Assessment of facts and circumstances

There is substantial evidence that the quality of decision-making in the UK is not sufficiently high to ensure that asylum seekers with protection needs are identified and granted status accordingly. For example, UNHCR's Quality Initiative Project has identified severe shortcomings in the ability of case workers to reach appropriate decisions on asylum claims. When taken in conjunction with the UK's system of non-suspensive appeals, fast-tracking and the well documented problems of obtaining adequate legal representation, these deficiencies in decision making raise a serious risk that individuals will be refouled.

We recognise that the UK has taken significant steps to improve the quality of decision making

and the ability of caseworkers to assess claims appropriately, in particular through the development of the New Asylum Model (NAM). We believe that the New Asylum Model has the potential to bring improvements in decision making, particularly if the case owner is in a position to liaise with an asylum seeker's legal representative about additional information required to make an informed decision on the asylum claim, and to delay deadlines if this is in the interests of reaching the correct decision on a claim.

However, we believe that much more must be done to ensure that all caseworkers, not just those who are recruited to the NAM, are in a position to be able to perform basic tasks such as assessing the general credibility of the applicant, and assessing applications in line with up to date, comprehensive and impartial country of origin information. Further, evidence from NAM's operation to date suggests that there is some way to go before an appropriately high standard of decision making is met.

With this in mind, we are pleased that the API on Assessing the Claim will include further guidance on credibility, but urge that this guidance be backed up with comprehensive training for all caseworkers at the earliest possible opportunity.

Article 12: Exclusion

The Refugee Council repeatedly expressed its concerns about Section 54 of the Immigration Asylum and Nationality Act 2006 during its passage through Parliament. Our key concern is that, taken in conjunction with the broad definitions of terrorism in the Terrorism Acts 2000 and 2005, Section 54 directly undermines one of the core purposes of the Refugee Convention: to provide protection for people seeking asylum on grounds of political persecution. We believe that the 1951 Refugee Convention and UK criminal law provide the necessary statutory framework for ensuring that refugees can be protected and the imperatives of national security met. We draw the Home Office's attention to the United Nations High Commissioner for Refugee's concerns about Section 54, as well as UNHCR's commentary on Article 12 in its annotated comments on the qualification Directive. The Refugee Council's position on exclusion from asylum is outlined in our submission to submission to the review by Lord Carlile of Berriew QC of the definition of terrorism in UK law⁷, and in our briefings on the Immigration, Asylum and Nationality Bill 2005.⁸ We do not seek to revisit our arguments here, beyond urging the Home Office to ensure that exclusion is only ever used in line with 1951 Convention and UNHCR guidance.⁹

Article 11: Cessation

The Refugee Council strongly supports the Government's intention not to revoke Indefinite Leave to Remain (ILR) from refugees where their status ceases as a result of an assessment based on a significant and non-temporary change in country conditions. With respect to cessation as a result of individual actions, we draw the Home Office's attention to UNHCR's advice that 'A clear distinction should be drawn between actual re-availing of protection and occasional and incidental contacts with the national authorities.'¹⁰ As UNHCR states, a temporary visit by a

⁷ Refugee Council submission (2006) available at http://www.refugeecouncil.org.uk/downloads/policy_briefings/RCresponseCarlileterrorismreviewMay2006.pdf#search=%22Refugee%20Council%20exclusion%202005%22

⁸ Refugee Council briefings on the Bill available at http://www.refugeecouncil.org.uk/infocentre/asylumlaw/parliamentary_briefings.htm

⁹ UNHCR (2003) *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*.

¹⁰ UNHCR (January 2005) *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*

Other Refugee Council publications are available at www.refugeecouncil.org.uk

refugee to their country of origin does not constitute re-establishing themselves there, nor re-availing themselves of that state's protection, and will not necessarily entail the same risks as a longer stay. The Refugee Council strongly supports the establishment of Explore and Prepare Programmes for those with status in the UK who are considering voluntary return to their country of origin, such as the programme in place for Afghan refugees. We urge the Government to ensure that a refugee's participation in such a programme will not, as a result of implementation of this Directive or otherwise, result in cessation of their status or rejection of any subsequent application for ILR.¹¹

Subsidiary Protection and Serious Harm

Article 15: Serious harm

The Refugee Council welcomes the qualification Directive's creation of an obligation on member states to grant subsidiary/complementary protection to those at risk of serious harm who do not fall within the strict criteria established by the 1951 Convention. We note, however, that the UK makes very few grants of Humanitarian Protection (HP) as compared to Discretionary Leave (DL), which falls outside the scope of the qualification Directive and entails a lower standard of rights.¹² We urge the Home Office to conduct a review of grants of Humanitarian Protection and Discretionary Leave to ensure that individuals entitled to HP are not inappropriately being granted DL. Further, we believe that the Home Office should implement the Directive in such a way that individuals facing flagrant breaches of any of their ECHR rights fall within the definition of Humanitarian Protection.

With regard to Article 15 (c) we share the concerns raised by UNHCR and other refugee-assisting organisations that the notion of an 'individual threat' should not lead to the imposition of an additional threshold for those facing a serious threat to their life or person because of indiscriminate violence. If there is a serious threat it is, by definition, a threat to the individual, even if they are not specifically targeted. We recommend that the Home Office ensure that Article 15 (c) is interpreted broadly so that protection is provided to those who have fled serious threat to their life or person, including indiscriminate violence and gross human rights violations outside the context of 'internal or international armed conflict'.

Article 17: Exclusion from subsidiary protection

Our principal concerns about this provision are laid out in our response to Article 12 on exclusion from refugee status, and Article 21 on protection from refoulement. However, we note that in addition to the grounds for exclusion enumerated at Article 12, Article 17 further proposes that people be excluded from subsidiary protection where:

- he or she constitutes a danger to the community or to the security of the Member State in which he or she is present (Article 17 (1) (d))

<http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=43661eee2#search=%22UNHCR%20annotated%20commentary%20qualification%20directive%22> accessed 26/8/06

¹¹ The Refugee Council would like to reiterate our concerns about the new policy, introduced in August 2005, whereby refugees are only initially granted limited leave, as opposed to ILR. We are fundamentally opposed to this decision to stop giving refugees ILR in the UK. It is not helpful to force refugees to live through five years of uncertainty before the Government will confirm that they can remain here permanently. We believe that this policy contradicts the Government's stated commitment to help refugees integrate in the UK, and undermines the Home Office integration strategy.

¹² In 2005, of 25,710 initial decisions made on asylum applications, 1,940 (7%) were granted of asylum, 2675 were granted discretionary leave (10%) , and only 120 (less than 0.5%) resulted in a grant of humanitarian protection.

- if prior to his or her admission to the Member State [he or she] has committed one or more crimes outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes (Article 17 (3)).

The Refugee Council is concerned that Article 17(1)(d) is imprecise, and extremely broad in its application, broader in fact than the API on Humanitarian Protection, about which we have repeatedly expressed our concerns.¹³ We urge the Government to revise the API to restrict, rather than extend, the scope of exclusion.

We also seek assurances that the Government does not intend to 'make additions to the immigration rules' in order to reflect the provisions of A17(3), which allows exclusion on the basis of having committed any imprisonable offence, notwithstanding considerations of seriousness. We do not regard the requirement that a person has left their country of origin 'solely in order to avoid sanctions' as an appropriate safeguard, as the prevailing culture of disbelief in IND decision making gives cause for concern that this would be the default presumption.

Articles 16 and 17: cessation and exclusion from subsidiary protection

The Refugee Council believes that grants of subsidiary/complementary protection and refugee status should entail equivalent rights. Once an individual has been recognised as in need of protection, it is perverse to treat them differently according to their motivation for flight. We agree with the Home Office Explanatory Memorandum on the Commission's initial proposal for the qualification Directive, which stated that 'an individual's needs are the same regardless of the status granted'. Thus, our concerns about cessation and exclusion from subsidiary/complementary protection are the same as those we have presented in relation to refugee status.

States' Obligations

Article 20: General rules

The Refugee Council welcomes the UK's intention not to implement Articles 20 (6) and (7) of the qualification Directive. However, we regret that the consultation document makes only passing reference to Article 20 (5) on the best interests of the child, and then only in the context of separated children.

We are also concerned at the government's approach to Articles 20 (3) and (4) which impose a duty to take into account the specific situation of vulnerable persons when implementing Chapter VII of the Directive. The consultation document states that 'the UK is not obliged by this article to carry out, or arrange to be carried out, an individual evaluation of a vulnerable person's situation to determine whether s/he has special needs'. Whilst it is true to say that the Directive does not impose a duty on the UK to identify and assess needs, a proper asylum determination process should identify potential vulnerabilities as relevant to the claim, and there are wide ranging duties under domestic health and welfare law to assess, and where appropriate meet the needs of vulnerable individuals. We urge the Home Office to adopt a more positive approach to implementation of Article 20, by developing in consultation with key stakeholders, policies that

¹³ For example, see the Refugee Council's response to the Home Office consultation on exclusion or deportation from the UK on non-conductive grounds. Available at http://www.refugeecouncil.org.uk/downloads/policy_briefings/HO_counter_terror_measures.pdf

integrate appropriate assessment of vulnerability during the claim, with effective services and integration support for those granted refugee and subsidiary/complementary protection.

The consultation document makes reference to the API on gender issues. The Refugee Council advocated for many years for the introduction of gender guidelines in the UK and we welcomed the adoption of the API on gender issues. However, we have substantial concerns about the extent to which the API is adhered to in practice by caseworkers. A recent report by Asylum Aid found that while there are examples of good practice in making decisions according to the Home Office gender guidance, a lack of awareness of gender issues, and a failure to systematically implement the guidance remain widespread within the decision making system.¹⁴ The Refugee Council was further concerned to see that, in its response to the UNHCR's third Quality Initiative Project report, the Home Office rejected UNHCR's recommendation that gender-sensitive interviewing and interpreting should be automatic and introduced immediately (subject to operational constraints). Nor did the Home Office accept that where an interview has been arranged that is not gender appropriate, a mechanism should be in place to allow for the postponement of the interview.¹⁵

Given this evidence of serious deficiencies in relation to the gender-sensitivity of the UK asylum determination system the Refugee Council calls for the immediate introduction of additional measures. These should include continued auditing of caseworkers' performance as well as enhanced training and supervision to ensure that caseworkers understand and apply APIs appropriately.

Article 21: Protection from refoulement

The Refugee Council remains deeply concerned by the UK's statutory interpretation of 'a particularly serious crime' for the purpose of allowing for refoulement. UK legislation sets a threshold way below that set out in the Refugee Convention and applies it to asylum seekers as well as those already granted leave as refugees. Under Section 72 of the Nationality, Immigration and Asylum Act 2002, offences attracting a custodial sentence of as little as two years could lead to refoulement. In addition any conviction under the Immigration (Specification of Offences) Order 2004 has the same effect. This latter order specifies offences which can lead to exclusion and includes shoplifting (s1(1) Theft Act 1968, Schedule 2), graffiti (s.1(1) Criminal Damage Act 1971, Schedule 2), and offences under the Road Traffic (Northern Ireland) Order 1995 [68] (Schedule 5). UNHCR has made it clear that the order represents a wholly inappropriate and disproportionate use of the notion of "particularly serious crime", commenting that a "serious crime" is a capital or a very grave crime normally punished with long imprisonment, and a "particularly serious crime", must belong to the gravest category.¹⁶

We have similar concerns about the provision within the Asylum Policy Instruction on Humanitarian Protection, referred to in the consultation document in relation to Article 17 of the Directive, which provides for exclusion where an individual "has committed a serious crime in the United Kingdom or overseas." A "serious crime" for these purposes is one for which a custodial sentence of at least twelve months has been imposed in the United Kingdom.

¹⁴ Asylum Aid (2006) *"Lip Service" or implementation? The Home Office Gender Guidance and women's asylum claims in the UK.*

¹⁵ Annex to letter from Liam Byrne MP to Bemma Donkoh, UNHCR UK Representative (June 2006) *List of UNHCR recommendations and IND responses.* http://www.ind.homeoffice.gov.uk/6353/aboutus/Microsoft_Word_-_Sub_Annex_1.pdf accessed 26/8/06

¹⁶ UNHCR Comments (November 2004) *The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004.*

The Refugee Council believes that the UK has set the threshold for exclusion and exceptions to the principle of non-refoulement at a dangerously low level. We urge the Government to introduce standards in this regard above the minimal level outlined in the Directive, and in accordance with UNHCR guidance.

Article 22: Information

The Refugee Council welcomes the Directive's requirement to provide information to those with status on their rights and obligations, in a language likely to be understood by them. We further welcome the Home Office's proposal to amend the Immigration Rules to ensure that this information is provided. We trust that information will be provided in a language that an individual will understand, and that inappropriate decisions will not be made about which languages an individual is 'likely' to understand. The Refugee Council would also like to draw the Home Office's attention to the need to provide accessible information to those with status who cannot read. In the context of the NAM, where the caseworker will serve the asylum decision to the asylum applicant in person, this might be done through the use of interpreters.

In relation to the content of the information provided, the Refugee Council urges the Home Office to shape its approach to implementing this element of the Directive by drawing on the findings from the evaluation of the SUNRISE programme, and the wider evidence base on effective approaches to integration.

Art 23: Maintaining family unity

The Refugee Council welcomes the UK's commitment to maintaining family unity. We believe that dependents should be granted the same status and entitlements as the principle asylum applicant. However, we note that the consultation document itself does not set out the definition of 'family' that will be used in the UK in relation to implementation of the qualification Directive. We believe that it is of utmost importance that the principle of family unity is upheld in a way that is meaningful for those who are affected by it, and that a broad definition of family is retained so that relatives are kept together and reunited wherever possible. Thus, the definition of a family unit should be flexible and culturally-sensitive, and not limited to the nuclear family.

The definition contained in Article 2 (h) of the Directive makes respect for family unity conditional on the family being established prior to flight from the country of origin: this is reflected in draft Immigration Rule 352. We believe that such a restriction will have negative repercussions for refugees who form relationships during the time that they are seeking sanctuary. We urge the UK to adopt UNHCR's position that families which have been founded during flight or upon arrival in the asylum State also need to be taken into account.¹⁷ We additionally oppose the requirement that a dependent child must be unmarried in order to fulfil the requirements to join or remain with the parent who has been granted status in the UK. We believe that this unfairly penalises some children, including those who have been left behind in their country of origin and have been forced into marriage as a means of survival.

Article 30: Unaccompanied Minors

¹⁷ UNHCR (January 2005) *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*
<http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=43661eee2#search=%22UNHCR%20annotated%20commentary%20qualification%20directive%22> accessed 26/8/06

The Refugee Council does not concur with the Government's view that the provision of services for separated children by Local Authorities is sufficient to meet the requirements of Article 30(1), which calls for 'representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation'. Local Authorities' duties to provide care for separated children do not extend to the full range of legal guardianship functions, nor can Local Authorities be regarded as wholly independent of the Home Office while they are dependent on funding from the Home Office in order to be able to discharge their duties.

We believe that guardians should to be appointed to children as soon as possible after their arrival in the UK and should be independent of organisations responsible for delivering services to children, including Local Authority social services. Guardians should be able to instruct a legal representative, exercise parental responsibility and be responsible for assessing and making recommendations on the best interests of a separated child with regard to his/her protection and care. The Refugee Council would like to see an independent body appointed by government to provide a legal guardian to every separated child in the UK, to represent their best interests in all decisions that affect them for the time that the child is in the country.

The consultation document makes passing reference to the obligation on the UK to trace close relatives of a child as soon as possible. We fully support the provision of services to trace family members of separated children and the linking of children with the Red Cross family tracing service. However, we are concerned that the consultation document is silent on the Directive's requirement that care be taken to ensure family tracing is undertaken with sufficient regard for any threat to the life or integrity of the child or his or her close relatives, particularly if they have remained in the country of origin, and urge the Home Office to reflect this requirement more explicitly in the relevant policies.

Articles 35 and 36: Administrative cooperation and staff

The Refugee Council is keen that the Home Office make details of the national contact point available to interested stakeholders, to ensure that we are in a position to provide information relating the UK's implementation of the qualification Directive to that person. In relation to training staff on the correct implementation of the Directive, we regret that the Home Office has not provided any information about how it will fulfil this obligation by the October 2006 deadline for all authorities whose work relates to the issues covered by the Directive. We would be keen to work with the Home Office to ensure that training includes raising awareness about the needs of refugees and those with other forms of status, including the barriers that are often faced in accessing mainstream service and procedures that can be introduced to help lessen those barriers.

Article 24: Residence permits

The Refugee Council believes that the UK policy of granting five years leave to remain to refugees and others with recognised international protection needs hinders integration and has the potential to create significant problems in relation to their access to education, training and employment. There is little hard evidence of the precise impact of the new policy of granting only limited leave to refugees, though we are concerned that refugees will increasingly be pushed into short term agency work as they reach the end of their period of leave, even if they subsequently receive ILR. For refugees undertaking degrees, particularly part time degrees which are often a more appropriate study route for refugees, there will be no guarantee that they will be able to complete their course. Limited leave additionally affects refugees' ability to access funding: career development loans require that an individual has ILR, and mainstream lenders are unlikely to

provide finance that has longer term repayment. The situation is similar for refugees wanting to start their own business as most Community Development Finance Institutions (CDFIs) require applicants to have ILR. Further, the Chartered Institute of Housing has noted that limited leave will frustrate people's ability to look for permanent housing.¹⁸ We urge the Home Office to review its decision to provide only limited leave to recognised refugees, and to undertake a thorough analysis of the extent to which the Government's integration strategy is undermined by the move to time limited status for refugees.

Article 25: Travel documents

The Refugee Council welcomes the Home Office intention to continue issuing travel documents to cover the period of leave an individual has in the UK. In our experience it is of the utmost importance that people are able to visit relatives in other countries, particularly when families have been split up during the chaos of flight and seek asylum in different countries. We are concerned, however, about current requirements that an individual provide evidence that they cannot obtain a national passport before being eligible for a Certificate of Identity (CID) travel document. This requirement is only waived if IND accepts that an individual has a fear of their national authority. In practise, whilst some recipients of subsidiary/complementary protection are rightly exempted from the need to provide this proof, many others are unreasonably required to approach their national authorities for evidence of being formally and unreasonably refused a passport. In many cases, national authorities fail or refuse to provide such evidence. As a result, individuals are left unable to travel outside the UK. We urge the Home Office to relax its policy on requiring evidence of refusal to issue a travel document.

We have additional long-standing concerns about problems with the recognition of the CID. We regularly hear from people who have been recognised by the UK as being in need of protection, have obtained a CID and are deeply distressed to find themselves unable to travel elsewhere in Europe, for example to meet relatives after years of separation. The fact that no signatory to the Schengen Agreement recognises the CID is a sign of the severity of the problem. We would therefore welcome additional efforts to ensure the recognition of travel documents issued to people with subsidiary/complementary protection status. We believe that this is an opportune moment to raise the issue with our EU counterparts, given the provisions on travel documents in the qualification Directive and the forthcoming deadline for all EU member states to comply.

Articles 26 and 27: Access to employment and education

The Refugee Council supports measures to ensure that refugees and others with status have access to employment and employment-related education and training opportunities under equivalent conditions as nationals. We note, however, that some employers, including government bodies such as Jobcentre Plus, impose restrictions on employing non-nationals. These restrictions have a negative impact on those with recognised international protection status, and we would welcome an end to such practices.

We believe that greater efforts are required to create a level playing field for those with protection status who face distinct barriers as they strive to integrate. For example, there is little structured provision for those with status to: receive accreditation of prior (experiential) learning; to access NARIC, which establishes the UK equivalent of qualifications; to embark upon vocational ESOL training; to be assisted to conduct skills audits; and to benefit from appropriate information, advice and guidance. These are not currently provided through SUNRISE or Jobcentre Plus (JCP). As a majority of refugees have higher level skills and education (NVQ level 3 and above), JCP is

¹⁸ See <http://www.cih.org/news/view.php?id=525>. Accessed 26 August 2006.

largely unable to offer tailored support and appropriate employment to them. Neither is there a consistent JCP policy allowing advisers to be flexible in allowing refugees to take extended or additional training while remaining on benefits. This has created an increasing problem of underemployment of those with protection status, which we predict will be exacerbated for refugees by the granting of only five years leave to remain.

The Refugee Council believes that there is a tension between the policy of encouraging refugee integration and the treatment of refugees in relation to access to Higher Education. We believe that the Department for Education and Skills should take a stronger role in promoting refugees as fully eligible for home student fees and student support. Student support is currently available to those with ILR and refugee status. We would like this to continue, despite the policy on granting limited leave to refugees, and believe those with subsidiary/complementary protection should be included. At present, the latter have to satisfy the 3 year 'ordinarily resident' test *before* the start of the course in order to be eligible for student support.

In relation to children, the Refugee Council welcomes the UK's commitment to continue its legal responsibility to make education available for all children of compulsory school age, irrespective of immigration status. Furthermore, we welcome the Government's support of the development and dissemination of high quality information to education professionals working with refugee pupils in the context of its commitment to raise the attainment and achievement of all children and young people. We are disappointed, however, that the Government has not introduced a dedicated grant to support local authorities and schools to develop resources and continuous professional training for teachers working with refugee pupils. Furthermore, we are concerned that the DfES' new Ethnic Minority Achievement Grant funding formula and the replacement of the ring-fenced Vulnerable Children's Grant with the new un-hypothecated Children's Services Grant will impact on the delivery of high quality support for refugee pupils.

Article 29: Healthcare

The Refugee Council recognises that the UK is in compliance with the minimum standards on access to health care outlined in the qualification Directive. However, we would like to reiterate our concerns about the barriers faced in accessing health services by many people with protection status in the UK.

In addition to barriers stemming from poverty, social exclusion and a lack of cultural awareness amongst providers, language can be particularly problematic where access to high quality interpreting services is not ensured as a matter of course. There are additional problems with access to GP registration, as well as refugees' awareness of their own rights and entitlements. We are hopeful that the newly translated information provided to people at the point of granting leave to remain will contain comprehensive information about entitlement to healthcare services.

The Refugee Council is aware that some people with protection status are being denied care as a result of confusion about entitlement among health providers. This confusion has become particularly problematic since April 2004, and the introduction of the NHS (Charges to Overseas Visitors) (Amendment), which ended free entitlement to secondary care for rejected asylum seekers. The UK should restore entitlement to secondary care for all refugees and asylum seekers, but pending this, there is an urgent need for more effective training for health providers and information, interpreting and advocacy services to ensure that refugees are able to access the healthcare to which they are entitled.

Gemma Juma
Protection Policy Team