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Dear Amelia,

RE: Commission's proposal recasting Council Directive 2004/83/EC

I am writing with Asylum Aid's comments on the European Commission's proposals for amendments to the Qualification Directive and in response to the Explanatory Memorandum submitted by the Home Office on 5 November 2009. Thank you for agreeing to consider our views.

Asylum Aid is of the view that the UK should opt-in to the proposed re-cast Directive. We consider that it is both in the interests of those seeking international protection in the European Union and the UK's national interest that the minimum protection standards contained in the Directive are raised to create clear binding obligations in European Union law.

It should be noted that the majority of the Commission's proposals relate to standards already guaranteed by international human rights law. Consequently many of the proposals represent a codification of current obligations rather than a raising of international obligations per se.

Our response takes the form of replying to the issues raised in the Home Office's Explanatory Memorandum by references to the articles in the Commission's proposals. Many of the points made attempt to address concerns raised in the document about the effect that the proposals would have on current UK law and practice. Inevitably, these submissions are technical and legal in nature. However, Asylum Aid considers that they go a long way towards meeting the policy concerns expressed.



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Articles 1 and 2 - scope of the Directive

The Home Office's Explanatory Memorandum states that the proposal to introduce a new concept of beneficiaries of international protection to include both refugees and beneficiaries of subsidiary protection would cause no change to UK law or practice as the UK already operates a single procedure for both types of claim. Asylum Aid considers that this amendment to the Directive is a matter that the UK should actively support because the adoption of a single procedure in all member states will facilitate practical cooperation and the work of the European Asylum Support Office.

The Explanatory Memorandum expresses concerns about the extension of the definition of family members in the proposal. Asylum Aid considers that these concerns are not well founded for a number of reasons.

First of all, as stated in the Commission Staff Working Document, this amendment "does not go beyond what is necessary to ensure respect of the primacy of the best interests of the child in line with the UN Convention on the Rights of the Child"¹. The UK's reservation in respect of the effect of the provisions of that Convention on immigration matters was lifted in December 2008. Consequently, any objection to this amendment is inconsistent with the UK's obligations under the Convention of the Rights of the Child.

Secondly, and in any event, the UK's current practice does countenance a broader definition of family members than that set out in the transposed provisions of the original Qualification Directive and expressed as the definition of dependents in paragraph 349 of the Immigration Rules. This point is slightly qualified because the Asylum Policy Instruction (API) on Dependents has been under review for a considerable period of time and not publicly available. However, a previous version of the API on Dependents mandated caseworkers to consider the possible existence of compelling and compassionate circumstances for family members who are not spouses or minor children not living an independent life.

Furthermore, in accordance with section 6 of the Human Rights Act 1998, the previous version of the API on Dependents mandates that the decision maker must consider the provisions of the European Convention of Human Rights² (in particular Article 8 which requires respect for, amongst other things, family life). In this regard it should be noted that the European Court of Human Rights has increasingly looked to the Convention on the Rights of the Child in assessing the scope of protection afforded by its rights³ and that, consequently, the revised definition of family members in the Proposal could be encompassed within the concept of family life within Article 8 ECHR.

¹ Page 38

² Hereafter ECHR

³ For example see [Maslov v Austria](#) [2008] ECHR 546



This point is underlined by UK caselaw on how the term “family life” within Article 8 ECHR ought to be interpreted. Following the lead of the European Court of Human Rights, the UK courts have taken an increasingly inclusive interpretation of that term. For example, in Singh v ECO (New Delhi)⁴ the Court of Appeal made it clear that family life is a broad concept that needs to be interpreted inclusively. On the facts the Court found that a Sikh couple enjoyed family life with an Indian child in India that they had adopted in a religious ceremony. However, the reasoning of the judges made it clear that it would be a mistake to draw arbitrary and culturally insensitive lines as to what relationships can constitute family life and, consequently, the sorts of relationships encompassed in the Commission’s proposals are within family life protected by Article 8 ECHR⁵.

In summary, the family members identified in the Commission’s proposed expanded definition of family members are part of an applicant’s family life, protected by Article 8 ECHR and consistent with the UK’s obligations under the Convention on the Rights of the Child. It appears that current UK policy recognizes that such family members can be treated as dependents, in order to meet human rights obligations. Thus it is questionable whether, in fact, this proposal represents a raising of legal minimum standards in the UK. It appears more likely that the proposal in respect of family members represents a codification of a number of present human rights law obligations.

Actors of Protection- Article 7

The Explanatory Memorandum raises a concern that the proposal confuses the purpose of international protection and would require member states to grant protection to those who come from states who do not operate a formal legal system. Asylum Aid considers that if the proposal in respect of Article 7 is properly understood, the objection that has been raised falls away.

First of all, the provisions of the proposed Directive require that an applicant for international protection must establish, *inter alia*, that either they at risk of an act of persecution (Article 9) or serious harm (Article 15) in their country of origin *before* any consideration of whether appropriate protection can be provided. Consequently, only applicants who can establish the requisite degree of risk in Articles 9 or 15 will be entitled to protection. Fulfilling the test in Article 7 as to the lack of protection alone would not be sufficient. Thus the amendment in no way imposes a “requirement to provide international protection for people who can obtain protection in their home countries, simply because those providing the protection do not operate a formal legal system”.

Secondly, the requirement for the applicant to establish risk identified above accords with the UK Courts’ interpretation of the 1951 Convention on the Status of Refugees,

⁴ [2004] EWCA Civ 1075

⁵ See in particular see paragraphs 57 to 68



Article 1 A (2) and Article 3 of the European Convention on Human Rights⁶. It is clear that it is for the applicant to show the risk of persecution *and* the absence of state protection. There is no possibility that the revised text would place the burden on the government to show that non-state agents are “willing and able to enforce the rule of law” because there is no indication in the amendment that the normal burden of proof is reversed. This further confirms that the concern set out in the explanatory memorandum on this issue is not well founded.

Thirdly, House of Lords authority has already established the requirement of the level and quality of protection that a protection seeker must establish is missing, most notably in non-state actor cases. In Hovarth v SSHD⁷, Lord Clyde held:

“There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.

It seems to me that the formulation presented by Stuart-Smith L.J. in the Court of Appeal may well serve as a useful description of what is intended, where he said [2000] INLR 15, 26, para. 22):

"In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders."

And in relation to the matter of unwillingness he pointed out that inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection. "It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy." The formulation does not claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance."

The test set by Lord Clyde is entirely consistent with the Commission’s proposed amendment to Article 7.

⁶ See for the Refugee Convention Hovarth v SSHD [2000] 3 WLR 379 and for Article 3 ECHR R (Bagdanivicius) v SSHD [2005] 2 WLR 1359

⁷ [2000] 3 WLR 379



That said what would the effect of the amendment be on UK law? The proposed amendment would have the effect of overruling a reported but not Country Guidance decision of the Asylum and Immigration Tribunal which held that, on the basis of the provisions of the current Qualification Directive, Somali majority clans were capable of providing protection⁸.

In Asylum Aid's view that decision is aberrant and would not withstand further judicial scrutiny. It is notable that in one case where a similar issue of law was raised, namely whether Fatah in Lebanon were able to be actors of protection, DM (Somalia) was distinguished⁹. Asylum Aid is of the view that the Tribunal's decision in DM (Somalia) is inconsistent with House of Lords authority and the correct interpretation of the 1951 Convention on the Status of Refugees.

Furthermore, from a policy perspective, Asylum Aid considers that the UK would not and should not wish to remove applicants for international protection who had established a risk that they faced persecution to a country where they were required to seek the assistance of an armed group, clan, or militia to gain protection. Such a policy position would be inconsistent with a desire to provide protection to those who deserve it and would bring the UK's Refugee Status Determination system into disrepute. It would place the particularly vulnerable from failed states forcibly returned after their claims has failed, such as lone women or children, in an unacceptably precarious position.

Asylum Aid considers that if properly understood, the Commission's proposal in respect of Article 7 is unobjectionable.

Internal Protection - Article 8

The Explanatory Memorandum raises the concern that the Commission's proposed amendments would place a "more onerous" test for member states in the assessment of internal relocation. As the Explanatory Memorandum recognises, the Commission's justification for the amendments is the European Court of Human Right's decision in Salah Sheehk v The Netherlands¹⁰.

The first point to make in respect of the proposed amendments is that, as the Commission states in its working document, they would "not go beyond the transposition of the Member States obligations under the ECHR into the EU acquis"¹¹. The present Qualification Directive provides an entitlement to subsidiary protection to those who can show that they are at real risk of "torture, inhuman or degrading treatment or punishment of an applicant in the country of origin" and who meet the other relevant criteria. The European Court of Justice in Elgafaji v Staatssecretaris van Justitie¹² has held that Article 15(b) "corresponds, in essence, to

⁸ DM (Majority Clan Entities Can Protect) Somalia [2005] UKAIT 00150

⁹ WD (Lebanon – Palestinian – ANO – risk) Lebanon CG [2008] UKAIT 00047

¹⁰ *Application No. 1948/04*

¹¹ Page 24

¹² C-465/07



Article 3 of the ECHR”. The Court also noted that the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court¹³. Consequently, the UK is already bound by the requirements that are contained in the amendments when assessing applications for subsidiary protection.

Secondly, existing UK caselaw in respect of internal relocation in the context of the Refugee Convention requires the decision maker to consider the applicant’s ability to access the area of proposed internal relocation. The Explanatory Memorandum is correct to say that “undue harshness” is the test in UK law for assessing the viability of internal relocation. However, it overlooks the point that, in making the assessment, the decision maker must consider “if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible”¹⁴ and whether the internal relocation would expose them to a breach of their fundamental human rights¹⁵ (e.g. being refused entry to the safe area or being expelled from it, forcing the applicant to return to a place where they faced persecution). Consequently, the Explanatory Memorandum’s concerns that the amendments create a more onerous test than is presently the case in UK law are not supported by a detailed analysis.

Acts of Persecution -Article 9

Although not mentioned in the Explanatory Memorandum the amendment to Article 9 reflects current UK caselaw¹⁶ and should present no issue.

Reasons for Protection- Article 10

Asylum Aid is particularly pleased to see that government supports the inclusion of the requirement to give due consideration to gender issues in determining membership of a particular social group.

Cessation - Article 11

The Explanatory Memorandum is correct to say that the proposed amendments to Article 11 and 16 would raise standards of protection in the UK as a matter of law. However, it should be noted that the proposed amendments arise, in essence, from an interpretation of Article 1C of the 1951 Convention on the Status of Refugees which is supported by UNHCR and implemented in some member states, but not the UK¹⁷. In that sense, the proposals have their origins in international refugee law and cannot be said to afford protection to “those who no longer need it”.

¹³ See paragraph 28 of the judgment

¹⁴ See for example, *R v Secretary of State for the Home Department, Ex p Robinson* [1998] QB 929 paragraphs 18, 19 and 28, cited without dissent by the House of Lords in *Januzi v SSHD* [2006] UKHL 5

¹⁵ See *Januzi v SSHD* [2006] UKHL 5 paragraph 20

¹⁶ See Lord Hoffman in *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v.* [1999] UKHL 20 approved by Hale, LJ in *Horvath v SSHD* [1999] EWCA Civ 3026

¹⁷ See *In re B, R (Hoxha) v Special Adjudicator* [2005] UKHL 19



Asylum Aid notes that this raising of standards would have little impact on UK practice because the cessation clause is rarely invoked and officials have made it clear in respect of 5 year reviews of grants of refugee status and humanitarian protection will, absent other factors, not involve a detailed examination of ongoing protection needs. In any event, Asylum Aid considers that the individuals who might benefit from the proposed provision may currently benefit from the protections against removal of the ECHR. For example this could occur where the proposed cessation of status and removal of a traumatised victim of torture could constitute inhuman or degrading treatment or a disproportionate interference with family or private life established in the UK.

Content of International Protection, General Rules – Article 20

The Explanatory Memorandum does not consider that the proposed amendments to Article 20 would raise standards in the UK. However, it is concerned that by listing specific examples of those with special needs there is a risk that an applicant that has a special need will fall through the gap. Asylum Aid considers that this concern is misplaced because it is clear from the use of the phrase “such as” that the examples listed are mandatory, but not exclusive.

The Explanatory Memorandum is concerned about the deletions of Article 20(6) and (7). It is correct in stating the UK does not use these provisions but it is not correct to state that Member States would have an unregulated discretion to make reductions in benefits to so called “bootstraps refugees”. Refugees, regardless of how their status arose, are entitled as a matter of international law to the rights set out in Articles 13 to 34 of the 1951 Convention on the Status of Refugees. Furthermore, all of those recognised as refugees and those granted subsidiary protection benefit from the human rights protections of the ECHR. Consequently, the extent to which such rights could, in law, be limited is regulated by these international law obligations.

Article 23- Maintaining Family Unity

The Explanatory Memorandum raises no issue in respect of the proposed amendments to Article 23

Article 24, 26, 29, 31-33 – Residence Permit, Employment, Social Welfare, Accommodation and Integration Facilities

The Explanatory Memorandum notes that the proposals that those given subsidiary protection should receive a residence permit of at least 3 years, access to employment and access to social welfare as is currently guaranteed to refugees does not affect UK practice. Asylum Aid is surprised that the government considers that the amended Directive should not make a number of these provisions minimum standards for all member states given that the Commission’s justification for these proposals is partly based upon the need to respect the principle of non-



discrimination, reflected in recent European Court of Human Rights caselaw¹⁸. Asylum Aid supports the Commission's proposal on the basis that it is a sensible rationalisation which accords with the principle of non-discrimination. The proposals also minimise any incentive that might exist to grant refugees subsidiary protection, rather than recognising their legal entitlement and should be supported on those grounds.

Article 28 - Access to Procedures for recognition of qualifications

Asylum Aid notes with support the Explanatory Memorandum's support of the proposal to assist beneficiaries of protection to prove their previous qualifications as it is a matter that will aid integration of those entitled to international protection.

Article 31- Tracing for Unaccompanied Minors

Asylum Aid considers that the provision of a procedure in law to facilitate the tracing of members of unaccompanied minors' family is one which should be welcomed. It is difficult to understand why there should be any reluctance to provide this guarantee to the most vulnerable of children, particularly when the UK is under international human rights law obligations to act in their best interests and co-operate with efforts to trace parents or family members¹⁹.

Conclusions

In summary, the Commission's proposals for the recast of the Qualification Directive provides for moderate and considered amendments that, in the main, reflect the UK's pre-existing legal obligations and do not require any substantive change in current practice. Asylum Aid considers that, when subjected to close analysis, the concerns raised in the Home Office's Explanatory Memorandum can be assuaged. Consequently, the government should choose to opt in to the recast Directive.

Yours sincerely

Nick Oakeshott
Asylum Aid

¹⁸ See Commission's Explanatory Memorandum, p8

¹⁹ UN Convention on the Rights of the Child, Articles 3 and 22

