

# **RESPONSE BY THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS TO THE CONSULTATION ON THE DRAFT ILLUSTRATIVE RULES ON PROTECTION**

## **The Joint Council for the Welfare of Immigrants**

The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively campaigns for changes in immigration and asylum law and practice. Its mission is to eliminate discrimination in this sphere and to promote the rights of migrants within an international human rights framework.

## **INTRODUCTION**

We welcome this opportunity to comment on the Draft Illustrative Rules on Protection (DIRP). What follows below does not purport to be an exhaustive analysis of these rules, but rather a selection of key concerns. We do not confine ourselves to *changes* in the rules but instead conduct a wider ranging analysis which mainly covers (i) conformity with the relevant Directives<sup>1</sup> (ii) conformity with the 1951 Convention on the Status of Refugees<sup>2</sup>, (iii) clarity of drafting, and (iv) consistency with international human rights principles and obligations.<sup>3</sup>

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1. EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third party nationals or stateless persons as refugees or as persons who are otherwise in need of protection and the content of the protection granted. Referred to here as 'QD', EU Council Directive 2005/85/EC on minimum standards for granting and withdrawing refugee status referred to here as 'PD' and Council Directive 2001/55/EC regarding the giving of temporary protection by Member States in the event of mass influx of displaced persons referred to here as 'TPD'.

2. QD itself leaves RC intact, and is itself purports to be based on the full and inclusive application of the RC and where this is not the case the Directive itself would be susceptible to challenge. As Hugo Storey points out Article 63 of TEC required the Council to adopt within 5 years 'measures of asylum in accordance with the Refugee Convention of 1951 and the Protocol of 1967'. QD states at Recital 2 that it is based on the full and inclusive application of the Geneva Convention, Recital 3 states that that RC and its protocol 'provide the cornerstone of the international protection of refugees, Recital 16 states 'minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention, Recital 17 states 'it is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention. 6. There are several references to the need to comply with international obligations in QD for example for which see R10, R11, R, 25, R30, R36, A20(7), A21 and see Recital 10 (H Storey, EU Refugee Qualification Directive: a Brave New World? IJRL, Vol. 20 issue 1.). Challenge would be either directly before the ECJ or indirectly via national courts through a preliminary reference see Arts 68, 220-45.

3. Under Article 307 (1) of EC Treaty Member States are required to give priority to commitments embedded in treaties concluded before the establishment of the EEC (01.01.58) in their relationships with third countries. See also Recital 10 on the Directive respecting fundamental rights.

Whilst we note that the extent to which the relevant Directives impose maximum, rather than minimum standards is not yet settled,<sup>4</sup> like the UNHCR<sup>5</sup>, we take the view that the Directives do not preclude states from adopting more generous laws. Our analysis proceeds on this basis but also makes reference to use of ‘mandatory’ wording where relevant. The structure of this paper follows the order of the DIRP with the exception of definitional issues which are dealt with in the context of the relevant paragraphs.

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4. i.e. the extent to which the more favourable standard provisions found in the Directives operates particularly in the face of the use of mandatory language.

5. Confirmed in a telephone conversation of 14.04.09 with JCWI and Alan Deve, senior protection clerk UNHCR, London.

## **1. GENERAL OBSERVATIONS**

Given that the principal role of QD is not to substitute RC but to offer interpretative guidance on the application of key elements of it, a genuine commitment to RC in our view requires its express incorporation into British law<sup>6</sup> and the corresponding generation of its full range of rights entitlements.<sup>7</sup>

## **2. HOW TO APPLY**

### **Paragraph 3**

Definition of ‘dependants’

The definition of dependants (and those who can therefore benefit from derivative status) does not extend to the parents of minors despite express recognition in QD that ‘child specific’ harm can in itself constitute persecution.<sup>8</sup> Nor does it extend to other de facto family members such as elderly relatives. Given that:

- (i) The internationally recognised *principle* of ‘protection of a refugee’s family’ and of family unity<sup>9</sup> requires that states not only to refrain from actions that would disrupt families, but also that they take *positive actions* to enhance family unity;
- (ii) TPD and the rules transcribing TPD recognise a wider and more appropriate class of dependant including adult children, siblings,

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6. RC is a treaty binding in international law creating obligations between states. S.2 of the Asylum and Immigration Appeals Act 1993 does not incorporate RC for the effects of which see *R v Asfaw* [2008] UKHL 31.

7. RC contains a number of other social and economic rights which QD does not. In particular there are no provisions replicating Arts. 3, 7, 8, 10, 11, 12, 14, 15, 16, 20, 25, 27, 29, 30, 31, 34 and 35

8. Article 9(2)9f)QD

9. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc. A/CONF.2/108/Rev. 26 Nov. 1952 Recommendation B

uncles, aunts, parents and grandparents.<sup>10</sup> A different and more restrictive definition is therefore logically difficult to justify;<sup>10</sup>

- (iii) International human rights and humanitarian law recognise a far broader family unit and the question of who can therefore be a dependant;<sup>11</sup> In particular, Article 9 of the 1989 Convention on the Rights of the Child specifically requires that states 'shall ensure that a child shall not be separated from his or her parents against their will' save for when 'separation is necessary for the best interests of the child',<sup>12</sup>
- (iv) The Parliamentary Assembly of the Council of Europe has recommended that elderly, infirm or otherwise dependent relations are classified as family members of asylum seekers;<sup>13</sup>
- (v) The API on Dependants which we note is currently in the process of revision has historically recognised other family members as amounting to dependants in all be it limited and inadequate circumstances;
- (vi) The text of QD/PD/RD does not prevent a wider class from being classified as a dependant.<sup>14</sup>

We take the view that the definition of dependants should be redrafted to include at a minimum; parents, grandparents and siblings. It should however ideally also extend

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10. See paragraph 1 of Annexe to Temporary Protection section and Article 15 of TPD;

11. The European court of Human Rights recognises a broad family unit with family life capable of existing between near relatives, including brothers and sisters, grandparents and grandchildren (*Marckx v Belgium*, 1979, Series A, no.31) divorced parents and their children even 'if the parents are not living together.' *Berrehab v The Netherlands*, 1998, Series A no.138 even in cases where the parties are adults. International humanitarian law recognise the existence of families in circumstances where members consider themselves and each other to be part of the same family and intend to live together.

12. The Committee on the Rights of the Child has already noted that this extends to supporting an actual route of entry for parents and minors granted protection for which see Committee on the Rights of the Child, Concluding Observations on Australia, UN doc. CRC/C/15/Add.79, 10 Oct 1997, para.30. The Committee called for Australia to introduce legislation and policy reform that would guarantee that the children of asylum seekers and refugees are reunited with their parents in a speedy manner

13. See Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), para.8 (vii) (o);

14. Article 6(3) PD, and Article 9(3)

to other family members, in particular other elderly family members who have formed part of the applicant's de facto family unit.

**3(a) (i)**

The restriction on the ability of some family members to secure derivative status as a result of the requirement that the individual must have lived with 'P' in *P's country of former habitual residence prior to P's leaving to seek protection in the UK* does not reflect the reality of forced migration. It is common place for families to be separated during times of conflict. The imposition of this requirement is therefore inappropriate. The central issue should simply revolve around whether the individual is a member of the applicant's family or not.

**c. 3(a) (ii)**

The current wording would suggest that even in circumstances in which the definition of a 'dependant' is fulfilled, there remains a discretionary power to refuse the benefit of derivative status through non classification as a dependant. From the point of view of clarity of drafting and legal certainty 'may' should be amended to 'is entitled to.'

**3 (a) generally**

Article 6 PD places a mandatory obligation on states to ensure that dependant adults *consent* to the making of applications on their behalf. This should therefore be reflected in this paragraph. Further, gender sensitive analysis would require that applicants are given information about what this entails and the implications that flow from this. This should be codified in the Rules.

**Paragraph 4**

An asylum seeker may not be able to make a claim in person most obviously for health reasons. Paragraph 4 should be amended to reflect this.

## **Paragraph 5**

Paragraph 5 should be deleted as it raises very serious concerns from the perspective of non refoulement under Article 33 RC which extends to refoulement ‘*in any manner whatsoever*’ together with Article 3 ECHR.

Specifically, the effect of paragraph 5 will be to require immigration officers posted in member states to refuse protection applications from those fleeing torture/persecution despite the fact that they will exert no control over how any application is dealt with, or indeed whether it will in fact be dealt with by the ‘member state.’ The ultimate effect of this is will be that refugees and others seeking protection may well be refouled on account of the actions of UK agents.

Both the European Court of Human Rights and the International Court of Justice accept that the duty to respect ECHR/ RC rights inheres wherever a state exercises effective or de facto extra territorial jurisdiction. A state will be exercising jurisdiction where through consent, invitation or acquiescence a contracting state exercises some or all of the public powers normally exercised by that state.<sup>15</sup> This will arguably be the case in the above circumstances.<sup>16</sup>

Additionally, as a drafting point we are assuming that ‘member state’ should read ‘EU member state.’

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15. *Bankovic v Belgium* (2001) 11 BHRC 435 at Para. 73

16. See J Hathaway, *The Rights of Refugees under International Law*, (Cambridge, Cambridge University Press, 2005), p. 335-342, see also legal opinion by Sir Elihu Lauterpacht and Daniel Bethlehem QC in Feller, Turk, Nicholson (eds.) *Refugee Protection in International Law UNHCR’s Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2005)110-112

### **3. THE APPLICANT**

#### **Paragraph 7**

##### **7(ii)**

Paragraph 7(ii) should be amended to replicate the ‘reasonable excuse’ provisions that appear throughout paragraph 7.

See the submissions of the Immigration Law Practitioners Association (ILPA) generally on this paragraph.<sup>17</sup> ILPA notes the significant confusion, error and distortion that section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 has led to. We concur with the view that whilst guidance may be necessary, legislating on the evaluation of evidence and credibility in this way undermines core principles of refugee/human rights adjudication.<sup>18</sup>

#### **Paragraph 9**

The UK has signed and ratified Article 6 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6 recognises a general right of those within the territory to work. Given that the progressive implementation provisions within ICESCR are inapplicable to the UK, the UK is bound to provide a general right to work for all asylum seekers. In line with its inappropriate reservation to a *human* rights treaty, the only circumstance in which it could lawfully deny this would be where it is able to justify that such action is necessary for the purpose of safeguarding employment opportunities in the UK. Further, given that under NAM, cases will allegedly conclude within 6 months, there can be little justification for the one year waiting period. Accordingly, we believe that the provision should either be amended to provide asylum seekers with the right to work on arrival, or alternatively the period should be reduced to six months, with provision for those whose claims

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17. ILPA response to the consultation on the draft illustrative Immigration Rules on Protection, [www.ilpa.org.uk](http://www.ilpa.org.uk)

18. i.e. the requirement for an evaluation of all necessary facts together with the recognition that deception on one or a few matters should not necessarily render the claim false.

are refused in circumstances where delays in removal are anticipated. There is nothing in Article 11 of RD that prohibits this

#### **4. THE UK BORDER AGENCY**

##### **Paragraph 12**

See comments on paragraph 34 in relation to sur place claims

##### **Paragraph 13**

This should reflect the more demanding standard in Article 3 of the 1989 Convention on the Rights of the Child (CRC) and Recital 12 of QD. Accordingly, '*close attention be given to the welfare of children*' should be amended to read the '*best interests of the child shall be a primary consideration...*'

A meaningful way to implement the duty in Recital 12 of QD would be to re-audit these rules for conformity with this obligation. There seem to be a multiplicity of ways in which the duty could be better reflected particularly with regards to family reunion, derivative protection status, and the applicability of exclusion and cessation clauses given the age for criminal responsibility in the UK. We have highlighted some of the issues arising from these in the commentary below on the relevant paragraphs.

##### **Paragraph 18**

###### **18(b)**

By way of general observation it is unsatisfactory that in matters concerning life and death there are circumstances where an interview can be omitted prior to reaching a decision. Article 12(2) of PD certainly does not make this a mandatory requirement. The factors listed in paragraph 18 (b) with the exception of (b)(i) often make it *far*

*more pressing* than an applicant *has an interview* given that ‘raising issues of minimal relevance’ and making ‘inconsistent statements’ could arise for diverse reasons including for example, psychiatric problems, learning difficulties or poor legal representation.

Additionally, given that Recital 10 of QD now expressly recognises the ‘*right to asylum*’ this is now arguably a *civil right* which is capable of engaging Article 6 ECHR. The effect of this could arguably be to import some Article 6 procedural standards into first tier adjudication of asylum claims. This could potentially have implications for paragraph 18(b) and its implementation, and indeed the ability more generally to reach negative decisions without the applicant being given an opportunity to refute findings or fully disclose their case.<sup>19</sup>

Additionally, paragraph 18(b)(iv) goes beyond the text of Article 12(c) PD which is to be read by reference to Article 23(g) PD through the inclusion of the possibility of the omission of an interview where there are unconvincing claims in relation to an assertion that an applicant is the object of ‘*serious harm*’. Article 23.2 (g) is confined **only** to assertions relating to ‘persecution’.

## **Paragraph 20**

Paragraph 20(b) should be amended to reflect a commitment to the obligation in Article 13(2) of PD for ‘timely access’ to the personal interview record. In our view this warrants ensuring that the record is available *before* a decision is reached with a view to enabling post interview submissions. This would also save unnecessary time and public money that might otherwise be spent on pursuing unnecessary appeals.

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19. See obiter by Longmore LJ in *HH (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 504

**Paragraph 23**

Notices of decisions concern nothing less than questions of life and death. They ought therefore to be sent to both parties in all circumstances.

**Paragraph 24**

Rule of law principles require that the exact circumstances that the Secretary of State is permitted to refuse an application are codified in the rules.

**Paragraph 26**

Given the inherent scope in asylum adjudication for erroneous decision making, the consequences of disclosing information to the wrong actors could be death. Accordingly the requirements in paragraph 25 should be applicable.

## **5. CRITERIA FOR GRANT**

### **Paragraph 31**

#### **31 (a)-(b)**

This fails altogether to deal with dual and multiple nationality issues in Article 1A of RC. The principle of legal certainty requires its inclusion.

#### **31(b) (i) (1)**

This paragraph is unclearly drafted and could cause misunderstandings in future given that ‘protection of that country’ is not defined nor aligned with paragraph 36.

#### **31(b) (ii)**

This is arguably unlawful and incompatible with both QD and RC. See our detailed analysis of paragraph 39 below.

### **Paragraph 32**

#### **32 (b) (ii)**

This rule is unclearly drafted and risks creating future difficulties as ‘protection of that country’ is not defined.

### **32(b) (iii)**

This is arguably unlawful and incompatible with QD. See our detailed analysis of paragraphs 39 and 40 which applies here given that no separate definition is given in QD.

### **32 (c) (iii)**

Whilst it *may arguably* be the case that flagrant violations of derogable rights fall within paragraph 32(c)( iii) given that the jurisprudence from the House of Lords and Strasbourg accept that the scope of Article 3 ECHR may extend to include these in any event,<sup>20</sup> the logic behind humanitarian/ subsidiary protection i.e. *complementary protection* to the RC, demands that Article 32 (c )(iii) should be amended with a view to including ‘flagrant violations of other ‘derogable rights.’

Additionally, whilst reflecting the terms of Article 15 QD, we note that the effect of the use of the words ‘*country of return*’ is to exclude ‘domestic’ health based expulsion cases from humanitarian protection and its associated entitlements despite the reach of Article 3 ECHR extending to these cases<sup>21</sup> The effect of this is to maintain a protection gap that we consider to be unjustifiable when viewed in the context of a human rights framework.<sup>22</sup>

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20. *Ullah* [2004] UKHL 26 [2004] 3 WLR 23

21. *D v UK* , Application no. 30240/96, judgement of 2 May 1997

22. This would not be precluded by virtue of Article 3 QD, but we see that Article 15 of QD employs mandatory language.

## **6. ASSESSMENT OF APPLICATIONS**

### **Paragraph 33**

#### **33 (a) - (c)**

Paragraph 33 (a) differs from Article 8 QD as it substitutes discretionary language “may determine” for mandatory language “will not.” This creates further difficulties. Specifically paragraphs 33(a) (i) and (ii) do not require that the place of contemplated internal relocation be accessible. As such, refugee status can be refused on the basis of an entirely theoretical prospect of relocation to places such as mountains or caves which cannot in fact be reached. It might be argued that accessibility is incorporated into reasonable expectation that a claimant stay in that part of the country, but protection claims are generally addressed on the basis of conjectural return because of the imperative of status determination under RC.<sup>23</sup> There is a great danger particularly in the face of paragraph 33(c) read with 33(a) that the Rules will exclude those refugees who qualify because of their continued exclusion- such as in deprivation of nationality cases, in which case it is clear given recent Court of Appeal decisions that conjectural return is not an appropriate approach.<sup>24</sup>

#### **33(b)**

Paragraph 33(b) amends paragraph 339O(ii) of the exiting Rules with the possible effect that SSHD will now be permitted to raise internal relocation points at appeal even though these did not form the basis of the original decision and no notice of this was given. This is inconsistent with existing authorities on this point and should be amended.<sup>25</sup>

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23. See *Saad, Diriye, and Osorio v SSHD* [2001] EWCA Civ 2008; [2002] INLR 34.

24. See *EB (Ethiopia)* [2007] EWCA Civ 809; [2008] 3 WLR 1188 and *MA (Ethiopia)* [2009] EWCA Civ 289.

25. This would not be precluded in our view by QD which itself employs the terminology of ‘application’.

### **Paragraph 34**

Paragraph 34 reflects Article 5(2) QD, and should be read in conjunction with paragraph 12(d). Whilst it does not expressly exclude claims where there is no continuation of convictions or orientations held in the country of origin, the cumulative affect of the two provisions *may* be to prejudice such claims. Given that; Article 5 QD employs discretionary rather than mandatory language, and the RC as interpreted by the Court of Appeal allows for self created sur place cases without limitation,<sup>26</sup> we believe that this position should be codified within these rules.

### **Paragraph 36**

#### **36(a) (ii)**

Whilst this reflects Article 7 QD, the UNHCR and a number of other commentators<sup>27</sup> including Professor Hathaway<sup>28</sup> take the view that it is contrary to international law and the RC for non state entities to be treated as actors of protection given that they are only limited subjects of international law and given also their limited ability to enforce the law. Again, whilst we note the use of mandatory language in QD, given it arguably does not impose maximum standards, and may itself be open to challenge on this point, we believe that ‘actors of protection’ should not extend to non state entities.<sup>29</sup>

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26. *Danian v Secretary of State for the Home Department* [200] Imm Ar 96 (CA)

27. M Garlick ‘UNHCR and the Implementation of the Qualification Directive’ in K. Zawan (ed), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Nimegen, 2007) and see A Klug, *Harmonisation of Asylum in the European Union- Emergence of an EU Refugee System?* (2004) 47 *German Yearbook of International Law* (GYIL) 594-628

28. Hathaway at Para. 14 cited in *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750,

29. We note the decision in decisions in see *R (on the application of Vallaj) v Special Adjudicator and Canaj v Secretary of State for the Home Department* [2001] INLR 342 CA, and *DM (Majority Clan Entities Can Protect) Somalia* [2005] UKIAT 00150) in which it was accepted that non state entities can be actors of protection

### **36(b)**

As a matter of principle, we do not favour the reasonableness test given that it generates a protection gap through shifting the enquiry from the risk of harm, to one of state culpability. (assessed by reference to the taking reasonable steps to provide protection.) However we recognise that both the British courts and QD do favour this approach. In so far as the wording of the rule goes, whilst it reflects the wording of Article 7QD and the existing regulations, it is ambiguous and unclear. We note that AIT has already examined the provision and accepted that the wording ‘*generally provided*’ is ‘*unmistakably defeasible*’, leaves open the possibility that there can be cases where additional protection is required, and leaves intact post *Hovarth* case law.<sup>30</sup> Accordingly, for the avoidance of confusion we believe that paragraph 36 should be drafted in terms that more clearly reflect this.

### **Paragraph 37**

#### **37(a) (i) and (ii)**

Paragraph 37(a) represents a hardening of approach to persecution under the RC<sup>31</sup> as historically interpreted by British Courts by i. significantly limiting the circumstances in which breaches of other tiers of human rights that are derogable (such as the right to liberty and social and economic rights) can constitute persecution and ii. requiring that the ‘accumulation of measures...involving a human right’ must affect an individual in a similar way to violations of non derogable rights.<sup>32</sup>

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30. *IM* (Sufficiency of protection) Malawai [2007] UKIAT 00071 at para. 50. See this also for a useful a summary of when this might be the case.

31. The Court of Appeal has held that the threshold higher for which see *SH (Palestinian Territories) v Secretary of State for the Home Department* 2008 [EWCA] Civ 1150

32. British courts have historically in so far as the human rights approach goes have broadly accepted Hathway’s 3 tiered approach to persecution see *Gashi v Secretary of State for the Home Department* [1997] INLR 96 and *Ravichandran (Senathirajah) v Secretary of State for the Home Department* [1996] Imm AR. Lord Hope approved the approach in *Hovarth v Secretary of State for the Home Department* [2002] 1 AC 489). See also *Chiver* (10758) on 3<sup>rd</sup> level rights in which the applicant’s claim concerned 3<sup>rd</sup> tier rights i.e. denial of the right to a livelihood through employment

Given that QD arguably does not impose maximum standards, we believe that the three tiered human rights based approach to persecution should be reflected in these rules.<sup>33</sup>

### **37 (b)**

We note that paragraph 37(b) omits “*acts of a gender-specific or child-specific nature*” which appears Article 9(2)(f) QD. Given that there has been a persistent failure in the UK to recognise gender based acts of persecution at all levels, and given that the IAA Gender Guidelines have been withdrawn, we believe that the inclusion of the above would be useful.

### **37 (c)**

This is inconsistent both with Article 9 QD, and the RC as interpreted by British courts on the question of the causal nexus between persecution and Convention grounds<sup>34</sup> Specifically, the text of the QD requires that there is merely a ‘*connection*’ between the persecution and the Convention grounds. Paragraph 37 (c) however imposes a higher and more exacting standard through requiring that the act of persecution ‘must be *committed for* at least [one of the Convention reasons]’

## **Paragraph 38**

### **38 (iv)**

Paragraph 38 (iv) through requiring the satisfaction of both social perception and

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33. We note the use of mandatory language on Article 9

34. See *SSHD v K; Fornah v SSHD* [2006] UKHL 46. Lord Bingham at Para 17 states ‘The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason.’ See also *SB (Moldova CG)* [2008] UKIAT 00002)

immutable characteristics tests in order to establish membership of a particular social group is inconsistent with British approaches to this. *In SSHD v K; Fornah v SSHD*<sup>35</sup> Lord Bingham expressly considered Article 10(d) of QD which paragraph 38(iv) (1) and (2) reflects and noted:

*‘If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority’*<sup>35</sup>

The former IAA Gender Guidelines which emanated from the Government<sup>36</sup> and the UNHCR also take the view that immutable characteristics and social perception questions should be approached in the alternative.<sup>37</sup> Accordingly, we believe that the two tests should appear in the alternative. This would not in our view be inconsistent with QD.<sup>38</sup>

### **38(a) (v) and (VI)**

Paragraphs 38 (a)(v) and (vi) do not correctly reflect Articles 10(d) and (e) of QD as Article 10 makes it clear that its provisions are elements to be ‘*taken into account*’ when assessing the reasons for persecution, and Article 10 (e) employs qualificatory words ‘in particular’. The provisions should, like those that precede them in the rules, contain the words ‘for example’ to adequately reflect this.

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35. 2006 UKHL 46 at para.16

36. See Para. 3.34 Asylum Gender Guidelines, Immigration Appellate Authority, 2000. We note that these have been withdrawn now on the basis that they are dated

37. See Para. 16 of *SSHD v K; Fornah v SSHD* [2006] UKHL 46

38. We the use of mandatory language in Article 9- but are referring to Article 3 QD.

## **7. EXCLUSION**

### **Paragraph 39**

#### **39 (b)**

By way of general observation:

- (i) As children in the UK will not assume criminal responsibility for acts undertaken when they were under the age of 10 years, in keeping with the Lisbon expert roundtable recommendations,<sup>9</sup> and the duty to promote the best interests of the child,<sup>40</sup> these exclusion provisions should be inapplicable to any child under the age of 10 years;
- (ii) It would be useful if the rules could clarify in a way that is consistent with internationally accepted good practice the standard of proof to be applied in Article 1F cases. The Lisbon Expert roundtable concluded that the standard should at a minimum require ‘clear evidence to indict’.<sup>41</sup> and the full Federal Court of Australia based on a review of scholarship and comparative law post dating *Gurung* held that the appropriate standard is whether there is ‘clear and convincing evidence that the appellant had committed such crimes.’<sup>42</sup>
- (iii) For completeness and the principle of legal certainty, these rules should address the position of those who are excluded from a grant of refugee status.<sup>43</sup>

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39. See Summary Conclusions: exclusion from refugee status Expert roundtable organised by the United Nations High Commissioner for Refugees and the Carnegie Endowment for International Peace, hosted by the Luso-American Foundation for Development, Lisbon, Portugal, 3- 4 May 2001 in Feller, Turk and Nicholson (eds.) *Refugee Protection in International Law UNHCR’s Global Consultations on International Protection*. (Cambridge, Cambridge University Press, 2005) p. 483

40. Article 3 1989 Convention on the Rights of the Child and recital 12 QD

41. n. 39 at p.482. We note that the approach of starred tribunal case of *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115 was to decline to find that the Secretary of State has any legal burden of proof.

42. *SRYYY v MIMIA*, 2005 FCAFC 42 (Aus. FFC, Mar 17, 2005)

43. We presume that the provisions in the Criminal Justice and Immigration Act 2008 will apply but this is unclear

### **39(b) (i)**

Rule 39 (b) (i) is neither fully consistent with the text of Article 1D of RC as interpreted by British courts<sup>44</sup> or Article 12 QD for the following reasons:

(i) Both Articles 1D and 12 of QD are contingent inclusion clauses rather than simply exclusion clauses. The chief difficulty with paragraph 39 (b)(i) is that it omits the text of the inclusion provisions located in the QD and RC which allow for the ‘ipso facto’ entitlement to the benefits of the Convention and Directive to be extended to refugees and stateless persons where protection by UN agencies has ceased for any reason.<sup>45</sup>

(ii) If it is argued in the light of the *El Ali* case that the provision is consistent with Article 1D, then at a very minimum, given that this is treated solely as an exclusion clause, in order to reflect the judgment, the rules should make clear that that the provision is inapplicable to Palestinian refugees who began to receive assistance or protection after 28 July 1951 in order to preserve the ability of the remainder of refugees to seek appropriate protection.

### **39 (b) (ii)**

As currently drafted, this would allow for the exclusion of British nationals abroad without the right of abode from RC/ QD protection. Given that as professor Goodwin-Gill points out, the reference to nationality is a reference to ‘*an effective nationality*’ consistent with international norms,<sup>46</sup> ‘UK nationality’ should be replaced with ‘British citizenship’.

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44. *El-Ali and Daraz v Secretary of State for the Home Department* [2002] EWCA Civ.1102

45. Whilst the approach of the Court of Appeal prior to the transposition of the Qualification Directive was to interpret Article 1D restrictively so that ‘any reason’ would only occur in circumstances where UNWRA assistance ceases altogether this is arguably incorrect and susceptible to challenge under the Directive in the light of the wording and purpose of both the Directive and the Refugee Convention. As Professor Goodwin-Gill notes, the resolutions adopted by the General Assembly and practice of UNWRA, the object and purpose of the Convention, and the wording of the provision would all point to a wider definition that would cover those currently receiving protection and therefore those circumstances where protection or assistance come to an end for other reasons e.g. occupation of territory in which UNWRA operates. See G S Goodwin-Gill and J McAdam ‘The Refugee in International Law’ (Oxford: Oxford University Press, 2007) p.151--159

46. G S Goodwin-Gill and J McAdam ‘The Refugee in International Law’ (Oxford: Oxford University Press, 2007) p.161

**39 (b) (iii) (2) and 39 (d)**

These:

- (i) Amend the definition of a serious non political crime which will now be fulfilled in circumstances where there has been ‘particularly cruel action’ even if committed with an allegedly political motive; and
- (ii) Allow for ‘serious non political crime’ committed ‘up to and including the day on which permission is granted’ to be taken into consideration for exclusion purposes.

Whilst the above reflect the terms of Article 12 QD we do not believe that they are consistent with the text of RC. They should not therefore be replicated in these rules.<sup>47</sup> Specifically in relation to (i) the text in Article 1F of RC makes no reference to ‘particularly cruel actions even if committed with allegedly political motives’. Further this definition is also arguably inconsistent with the domestic interpretation of ‘serious non-political crimes’. In *T v Secretary of State for the Home Department* the House of Lords accepted that non political crime must bear the same meaning as it does in extradition law.<sup>48</sup>

In relation to (ii) the RC contains temporal and geographical limitations and expressly requires that the act must have been committed *outside* of the country in question and *prior to admission* as a refugee. A person is ‘admitted’ to a country before status adjudication is commenced upon physical presence. Indeed, this must logically be the case given that certain RC rights such as A.33 inhere until and unless an individual is found not to be a refugee.

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47. A reference under Article 68 of TEC will ultimately need to be made on this point about compatibility and whether these provisions are ultra vires Article 63 of the TEC. Article 3 QD would arguably in any event apply despite the use of mandatory language permit departure from the Article 12.

48. [1996] 2 All ER 865. ‘It was common ground that the words [non-political crime] must bear the same meaning as they do in extradition law. Indeed it appears from the travaux preparatoires that the framers of the convention has extradition law in mind in drafting the convention, and intended to make use of the concept, although the application of the concepts would, of course, be for a different purpose,’ per Lord Lloyd. On the question of political purpose the approach was to require a political purpose and a sufficiently close and direct link.

### 39(b) (iii) (3) and 39(e)

Paragraph 39(b) (3) reflects Articles 1F(c) of RC and Article 12 of QD. Paragraph 39(e) reflects Recital 22 which in turn reflects the terms of UN Resolutions 1377 and 1373. These in summary declare ‘terrorism’ related acts to be acts contrary to the purposes and principles of the UN. The term ‘terrorism’ in these Rules is defined by reference to section 1 of the Terrorism Act 2000 as amended.<sup>49</sup>

Given that A.12 QD has direct effect, the term ‘terrorism’ will need to be given its *autonomous meaning* in a way that is consistent with RC and international law.<sup>50</sup> So far as international law goes, there is no universally agreed definition of terrorism. Resolution 1377 itself does not specify this. Attempts have been made to define terrorism in for example the 1999 International Convention for the Suppression of Terrorist Financing<sup>51</sup> and the Terrorist Financing Convention. Accordingly one approach might be to employ the definitions that appear in these conventions to the question of the definition of ‘terrorism’.

The other ‘international’ approach favoured by Professor Goodwin Gill<sup>52</sup> would be to require that the act falls within one of the criminalised acts set out in one of nineteen regional and international treaties or within customary international law, and be designed to generate terror. In either case however the provision would need to be read in the light of further developments including the passage of UN resolution 1624.<sup>53</sup>

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49. Section 1 of the Terrorism Act 2000 states (1) In this Act “terrorism” means the use or threat of action where— (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it— (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person’s life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied. (4) In this section— (a) “action” includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom. (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organization.

50. See generally the approach adopted in *IH* (s.72; ‘Particularly Serious Crime’) Eritrea [2009] UKIAT 00012).

51. Article 2(1) (b)

52. G S Goodwin-Gill and J McAdam ‘The Refugee in International Law’ (Oxford: Oxford University Press, 2007) p.184-191

53. This requires the conformity of domestic anti-terror measures with international law and specifically international refugee and human rights law. It also recalls the right to asylum under Article 14 of the Universal Declaration on Human Rights, and the importance of the principle of non refoulement.

Whichever international approach however one adopts, the term ‘terrorism’ is far narrower than under the domestic definition. Accordingly, in our view, this definition is unlikely to withstand a challenge to its legality.

### **39 (c)**

Paragraph 39(c) replicates Article 12 (c) of QD and Recital 22 which reflects UN Resolution 1377/1373. It is inconsistent with A1F of RC to the extent that instigation of, and participation in the listed crimes do not themselves form the basis for a crime e.g. conspiracy to commit or aid and abet.<sup>54</sup> The above point applies with regards to the definition of ‘terrorism’ is also applicable here.

### **Paragraph 40**

#### **40(b) (ii)**

See above points in relation to paragraph 39(b) (iii) (3) and 39(e) as these are arguably applicable.

#### **40(b) (iii) and (c)**

See below points in relation to paragraph 45 as these are arguably applicable.

### **40. General observation**

By way of general observation these rules should address the position of those who are excluded from humanitarian protection.<sup>55</sup>

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54. There is also a question mark about the extent to which UN Resolutions 1373 and 1377 can interfere with international agreements more generally for which see 52. G S Goodwin-Gill and J McAdam ‘The Refugee in International Law’ (Oxford: Oxford University Press, 2007) p.193

55. We are presuming that the Criminal Justice and Immigration Act will apply but this is unclear.

## **Paragraph 41**

### **41 (viii)**

Whilst we note that this broadly replicates Article 1 C of RC and A11 QD, para.41 (viii) should be amended to better reflect the intention behind it. The current wording could be used to capture deception employed in order to gain access to the asylum procedure.<sup>56</sup> This could be more appropriately worded by amending the wording to require that the prohibited activities were decisive ‘*in the decision* to grant refugee status.’<sup>57</sup>

## **Paragraph 43**

### **43(iii)**

Our comments in relation to Para. 41(viii) apply i.e. the wording should be amended to ‘decisive *in the decision* to grant humanitarian protection status.’

## **Paragraph 44**

Para. 44 (a) and (b) contains a discretionary power to cancel or not renew permission both for an individual applicants and any dependants in circumstances where protection is cancelled. It is not clear whether there is an intention to employ the discretion, or whether cancellation would necessarily follow. Given however that removal engages Article 8 ECHR, if the intention *is* to exercise discretion, in the absence of clear criteria governing this, this will arguably be too vague to comply with the requirement for legal certainty in Article 8 ECHR.

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56. It is noteworthy that in *Adimi* [1999] INLR 490 the Divisional Court held that illegal means may be used by asylum seekers to gain entry, yet such actions would have no relevance to the merits of the asylum claim, and should not be used to diminish credibility.

57. Additionally we note that the reference to the exemption clause for *statute refugees* able to invoke compelling reasons arising from previous persecution has been omitted but are aware of the interpretation of Article 1 C in *Hoxha* [2005] UKHL 19

## **8. BENEFITS OF BEING GRANTED PROTECTION**

### **Paragraph 45**

#### **45(b)**

The UK is bound by Article 34 of RC. Article 34 of RC requires that states facilitate naturalisation for refugees.<sup>59</sup> The above places refugees in an analogous position to those migrant workers under the points based system. In so far as the journey to naturalisation goes, both are presently required to wait 5 years before securing settlement, and a further year before being able to naturalise. Accordingly in our view, the qualified facilitative requirement in the Convention is not fulfilled.

#### **45 (d)**

If the result of the non renewal of immigration permission for refugees would result in the withholding of cultural, social and economic rights under RC,<sup>60</sup> the provision would be inconsistent with RC and QD given that the effect of falling within the scope of those provisions is to divest the UK or its particularised protective responsibilities rather than annul refugee status.<sup>61</sup>

#### **45(f)**

This would appear to contain a typographical error given that the effect of f (iii) would appear to undo what 45(a)-(c) seek to achieve.

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59. Article 34 states 'The contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall make every effort to facilitate naturalisation proceedings....'

60. See for example Articles 34, 17, 24, 23 of the RC)

61. Article 14 QD. The Government's own legal advisor to the Foreign and Commonwealth Office, Daniel Bethlehem QC notes in his legal opinion on Article 33.2 that its applicability in no way affects the other Convention entitlements of refugees for which see Sir Elihu Lauterpacht QC and Daniel Bethlehem QC, *The scope and content of the principle of non refoulement* in Feller, Turk and Nicholson (eds.) *Refugee Protection in International Law* UNHCR's Global Consultations on International Protection. (Cambridge, Cambridge University Press, 2005) p. 164

Again, if the outcome of the refusal to grant permission is to withhold RC entitlements referred to above, the provisions would be inconsistent with RC and QD on account of the definitional issues addressed above.

The draft protection rules should for clarity and comprehensiveness address the how it is intended to deal with those individuals who fall within 45(d) and 45(f).

#### **45(g)**

Specifically as we understand it, the definition of ‘particularly serious crime’ reflects section 72 of the Nationality, Immigration and Asylum Act 2002. There is reference to ‘an order under the Borders and Citizenship Act’ which we have clearly not had sight of, but assume will replicate the Specification of Particularly Serious Crimes Order 2004. There are several problems with rule 45 (g) which we deal with below:

##### *(i)The definition of a ‘particularly serious crime’*

Paragraph 45(g) is inconsistent with the RC and Article 21 QD as interpreted by British courts given that presumptions on whether a crime is a ‘particularly serious crime’ **cannot** be irrebuttable. These provisions would only allow for the rebuttal of the presumption relating to *whether an individual is a danger to the community*.<sup>62</sup>

Further, the Tribunal in *IH* accepted the approach in *Betkoshabeh v MIMA*<sup>63</sup> which requires consideration of whether a crime is a particularly serious be applied in a fact sensitive way taking into account all of the circumstances of the offence and the offender including; the nature, gravity and consequences of the offence and any aggravating mitigating circumstances that are known about the offender. Accordingly in our view, this should replicated and made clear within these rules.

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62. At paragraph 134 in *IH* (s.72; Particularly Serious Crime) Eritrea [2009] UKIAT 00012 the Tribunal presided over by the deputy president were clear that: ‘...it is impossible to read s.72(4) as creating anything other than an irrebuttable presumption that any offence specified in the 2004 Order is a particularly serious crime. The same would follow for the presumption in s.72(2) where the individual is convicted on an offence for which he receives a sentence of imprisonment of at least 2 years and also in s.72 in respect of the equivalent overseas.’

63. (1998) 157 ALR 95 (Aus. FC)

Whilst we note that the Tribunal in *IH* rejected the assertion that the entire system of presumptions replicated here offends Article 33.2,<sup>64</sup> we prefer the views of the UNHCR and the Joint Committee on Human Rights in this respect who accept that a many of the offences listed in the instruments could not be considered particularly serious, and that Article 33.2 presupposes that the burden of proof is on the state, and that the effect of presumptions of this kind is effectively to reverse this in an inconsistent way.<sup>65</sup> Accordingly, as a matter of principle we would not wish to see them replicated within these rules.

*(ii) Danger to the community*

Given that the danger to the community test imposes a second and additional test, whilst we note that paragraph 45(g) does allow for the possibility of rebutting the relevant presumption, our comments concerning the reversal of the burden of proof following simple conviction, and the need for the rules for assessment of individual circumstances apply here. This is a view shared by the JCHR and UNHCR.<sup>66</sup>

*(iii) The absence of temporal limitations*

As the *Government's own legal advisor* to the Foreign and Commonwealth Office, Daniel Bethlehem QC points out Article 33.2 RC (and therefore Article 21 QD) are inapplicable to offences committed outside of the country *prior to admission as a refugee*. Paragraph 45 however imposes no such limitation and should be remedied to correct this deficiency.<sup>66</sup>

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64. Para. 72 *IH* (s.72; Particularly Serious Crime) Eritrea [2009] UKIAT 00012 the Tribunal

65. see The Nationality and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, Twenty-second Report of Session 2003-04, HL Paper 190, HC 1212 (27 October 2004) and see UNHCR's paper, The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, UNHCR Comments (November 2004).

66. See The Nationality and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, Twenty-second Report of Session 2003-04, HL Paper 190, HC 1212 (27 October 2004) and see UNHCR's paper, The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, UNHCR Comments (November 2004). The case is subject to an ongoing appeal)

*(iv) The omission of an analogous section 72(7) NIAA 2002 provision clarifying what is a 'final judgment' and limiting the application of paragraph 45*

Given that the rules and the text of QD and RC refer to a 'final judgment' where as paragraph. 45(g) (v) only refers to a conviction, it should be amended to reflect that it will only be applicable where appeal rights have been fully exhausted or have expired.

*(v) The best interests of the child*

In order to reflect the best interests of the child obligation, these provisions should be inapplicable to any child under the age of 10 years given that children cannot assume criminal responsibility until they are 10.

## **Paragraph 46**

### **46 (c)**

QD at Recital 10 notes that it respects fundamental rights within the European Union. The right to leave a country is a fundamental right and is enshrined in Article 2 of Protocol 4 ECHR<sup>67</sup> and Article 12 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

In relation to Article 12 ICCPR, restrictions on the right to leave a country are only permissible to the extent that they are provided for by law, and necessary for the protection of national security, public order, public health, morals and the rights or freedoms of others. UN General Comment 27<sup>68</sup> notes that Article 12 (i) extends to

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66. Sir Elihu Lauterpacht QC and Daniel Bethlehem QC, *The scope and content of the principle of non refoulement* in Feller, Turk and Nicholson (eds.) *Refugee Protection in International Law* UNHCR's Global Consultations on International Protection. (Cambridge, Cambridge University Press, 2005) p.139.

67. The UK has not ratified protocol 4 though almost every other European states has

68. General Comment 27: Freedom of movement (Article 12): 02/11/99 CCPR/C/21/Rev.1/Add.9

non nationals, (ii) creates obligations on the *state of residence* and the state of nationality, and (iii) is capable of being breached by administrative measures and legal rules.

Paragraph 46 may depending on the way in which it is applied in practice, raise compatibility concerns with Article 12 ICCPR given that it potentially allows for interference with the right to leave the UK in a way that goes beyond the permissible grounds for restriction. A better, human rights based approach would be to align the drafting of this provision with the terms of Article 12 ICCPR itself.

## **9. MISCELLANEOUS**

### **Paragraph 47**

This paragraph does not address (i) the status of dependants and (ii) the rules to be fulfilled by those seeking entry as dependants under The Gateway Protection Programme which are presently addressed in the API. For completeness, the relevant rules should appear here.

## **10. FAMILY MEMBERS**

### **Paragraphs 50- 53**

As the same points emerge in each of the paragraphs we deal with them collectively, and in the light of the knowledge that the API on ‘Family Reunion’ is in the process of revision:

**The overly narrow definition of family members able to take the benefit of family reunion**

In our view the category of family members identified in paragraphs 50-53 who are *entitled* to family reunion under the rules is overly restrictive and should be drafted

in such a way that would better reflect human rights and international humanitarian law approaches to the question of ‘family members’.<sup>69</sup>

As regards minors in particular, it is specifically worth noting that the Committee on the Rights of the Child have held that Article 9 of CRC 1989 strongly supports the existence of the route of entry not only for minors *but for the parents of minors granted protection*.<sup>70</sup>

## **2. 50(b) (i), 51(b) (i) and 52(b) (i)**

Whilst this reflects the existing position, and is consistent with QD and the text of the RC, we note that the Parliamentary Assembly of the Council of Europe has expressly recommended that members of the same family *should be* allowed to reunite *during the status determination procedure*.<sup>71</sup> UK *practice* under the previous API on Dependents and Family Reunion also permitted this in limited circumstances. Accordingly, we believe that it should be reflected here

## **3. 50(ii), 51(iv) and 52(iv)**

See above comments about the reality of forced migration in relation to the definition of ‘dependants’ set out under paragraph 3.

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69. See above at n.11. International humanitarian law recognises the existence of families in circumstances where members consider themselves and each other to be part of the same family and intend to live together. QD Directive would allow for this. On this see Article 23(5) which permits member states to apply the right to family unit to other dependant relatives, note also that the definition of family member only relates to that within the country or origin, and note that Article 3 permits ‘Member States may introduce or retain more favorable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.’

70. See Committee on the Rights of the Child, Concluding Observations on Australia, UN doc. CRC/C/15/Add.79, 10 Oct 1997, para.30. The Committee called for Australia to introduce legislation and policy reform that would guarantee that the children of asylum seekers and refugees are reunited with their parents in a speedy manner)

#### **4. 50(e) (g), 51 (e) (g), 52(e) (g)**

See above criticisms in relation to the domestic rules on exclusion set out in paragraph 39.

#### **51 (b) (ii), (iii)**

Article 23 QD creates an entitlement to a residence document for family members of someone with protection. We note that the qualifying criteria for permission as the unmarried or same sex partner differs from that for spouses or civil partner, as unmarried or same sex partners must fulfil paragraph 51(b) which (i) requires that any previous marriage or relationship must have broken down and (ii) that the parties must have been in a relationship for two years.

Two issues emerge from the above. Firstly, the provisions may be discriminatory on grounds of status in a way that is inconsistent with Articles 14 in conjunction with 8 ECHR. Secondly the provisions may well be inconsistent with QD itself given that this imposes no time frame, but simply states that the relationship must be ‘stable’ which arguably requires an individualised fact based assessment.’<sup>72</sup>

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71. See Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), para.8 (vii) (p)

72. Article 2(h)

## **11. ANNEXE – TEMPORARY PROTECTION**

### **Paragraph 2**

#### **2(b)**

For completeness the rules should reflect the provisions of the Temporary Protection Directive rather than refer to them.

#### **2 (iv)**

See above criticisms on the definitional issues in relation to the exclusion provisions under paragraph 39.

### **Paragraph 5**

#### **5(b) (ii)**

See above criticisms of exclusion provision in relation to paragraph 39.

### **Other- Article 17 TPD**

Article 17 TPD imposes a mandatory obligation on states to permit those enjoying temporary protection to lodge an application for asylum at any time. For clarity and legal certainty, the Rules should expressly codify this as a right for those with temporary protection.

**For further information about this briefing please contact Hina Majid who is JCWI's legal policy director on 0207 553 7463 or by e mail on [hina.majid@jcw.org.uk](mailto:hina.majid@jcw.org.uk)**