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**JCWI submission to the Home Office Consultation Document
on the implementation of Council Directive 2003/9/EC of 27 January 2003
laying down the minimum standards for the reception of asylum seekers
- December 2004 -**

JCWI is the leading, independent voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides expert legal advice and representation, runs training courses for solicitors and other practitioners, and undertakes research and analysis in all areas of immigration, asylum and nationality law and policy.

Progress has been slow in creating a European Common Immigration and Asylum policy. One of the policy's cornerstones is this Directive, laying down the minimum standards for the reception of asylum seekers. In some member states the Directive will certainly lead to an improvement of reception conditions. However there is concern that in countries currently operating higher standards the transposition of the Directive will be used as an opportunity to level down. We believe that this tendency might be facilitated by the fact that in a number of areas the Directive is vague and capable of several interpretations. There is a danger that this lack of clarity will permit of a more restrictive approach than may have been originally intended.

Our comments are divided into three principal categories, which are;

1. *Areas where the Directive contains provisions generating higher standards of protection, and which are not properly transposed (Articles 5, 6, 8, 10, 11, and 12);*
2. *Areas where the transposition reflects a set of minimum standards which, if adopted in this form, will reduce current UK standards, (Articles 2, 9)*
3. *Areas where the Directive and transposition may potentially breach international law and thereby be open to legal challenge (Articles 7, 13, 14, 16, 18, 19).*

1. Areas where the Directive contains provisions generating higher standards of protection, and which are not properly transposed

Information (Article 5)

We welcome that the provision of information will become a legal obligation, although we are concerned that the Home Office may not be able to meet the requirement in practice before the Directive comes into force.

The Home Office's target to reach an initial asylum decision within 6 weeks means that asylum seekers will need to be provided with the relevant information at the onset of their application. This is particularly the case in view of the proliferation of deeming provisions within UK legislation which require an asylum seeker to behave in a certain way, with a failure to do so being held against their application. This information must also be provided in a language the asylum seeker is "likely" to understand. To ensure the asylum seeker is fully informed, and complies with any obligations imposed, it is absolutely vital that they receive this information in a language that they *actually* understand.

Documentation (Article 6)

JCWI welcomes the requirement that providing documentation to an asylum applicant will become a legal obligation. This should explicitly incorporate the Directive's recommendation that it be issued within three days of making the application.

The transposition refers to Article 6.5 as an "option", however, we believe that to choose not to implement this provision will run counter to the Directive's intentions. There may well be circumstances where an asylum applicant needs to travel on humanitarian grounds, bereavement or other such reasons. There should be a provision that allows an individual to do so.

Families (Article 8)

We believe that family unity is of absolute importance. Special attention should be given to minor children of applicants because of their special needs and the importance of adequate accommodation. JCWI welcomes this provision as long as the definition is amended to reflect a wider interpretation of what constitutes family life (see below, article 2).

Education (Article 10)

We welcome the government's policy that children in asylum seeking families have access to education as provided for under the Education Act.

However, the government does not intend to extend this principle to children in accommodation centres. The principle that children of asylum seekers will be removed from main-stream schooling points to the creation of a two-tier education system. The potential for sub-standard education provision increases bearing in mind that neither the Department of education nor ODSTED may be responsible for education provision.

For children at secondary school level, the transposition states that those whose needs cannot be met by the accommodation centre, will have access to education within the community. The transposition further states that this only applies in exceptional

circumstances. This is unhelpful. The assessment of the adequacy of the education facilities for secondary school level students should be on an educational needs basis alone. In all circumstances where this is deemed inadequate within the accommodation centre the appropriate arrangements should be made at local secondary schools.

The Directive states that *“access to education shall not be postponed for more than three months from the date the application for asylum was lodged”*. We are concerned that this is not reflected in the transposition and the implication that the Government does therefore not intend to implement this. It is absolutely vital, in terms of personal development, that a child has access to schooling shortly after arrival in the UK. We seek to remind the Home Office that the right to education is a human right as enshrined in the First Protocol, 1998 Human Rights Act.

Employment (Article 11) / Vocational Training (Article 12)

We welcome the provision that an asylum seeker should have access to the labour market, but are disappointed this is not extended to include vocational training. We understand that around 25% of asylum applications are not decided within the timeframe the Home Office has set down for the standard procedure, and are unaware of an assessment of the time period taken to decide the balance of these applications.

The Directive leaves it open to member states to determine the timeframe within which they may grant access to the labour market, depending on the workings of its asylum process, with the injunction that it will be permitted after 12 months. Given the framework of the procedures now operating in the UK we think it appropriate that permission to work or undertake vocational training should be granted to all asylum seekers whose application has not been finally determined with the Home Office's own target for the standard procedure. Allowing asylum seekers to work saves “taxpayers' money” and boosts the UK economy, not to mention the benefits to asylum seekers themselves. The potential to access jobs, training and to build up savings could function as an incentive to co-operate with immigration control. In any event we are certain that the opportunity to work is not a significant “pull-factor”; the reason used by the government to abolish the employment concession in 2002.

When an asylum seeker requests permission to work, the Home Office should also be required to reply within a certain time-frame, in order to avoid the extensive delays that occurred in this respect in the past. This allows the asylum seeker also to gain maximum benefit from this provision.

2. Areas where the transposition reflects minimum standards only and may reduce current UK standards

Definitions (Article 2)

The definition of what constitutes an application for asylum is incomplete if restricted to claims under the Geneva Convention only. We believe that an application for asylum is a request for international protection and should therefore include claims on humanitarian grounds and by virtue of the European Convention on Human Rights.

The definition of family members is too narrow. It should also include other family members who formed part of a family unit prior to coming to the UK. The current definition does not take into account different cultural meanings of what constitutes the family unit.

Medical screening (Article 9)

JCWI is concerned about the implication of this article as it suggests that asylum claimants will be referred for medical screening over and above the concept of “*sparingly*” currently in the Immigration Rules (paragraph 36 HC 395). Furthermore, we submit that medical screening should not be a blanket policy to impose HIV screening. Medical screening should only be carried out by professionally trained people and with cultural sensitivity. Furthermore, in order to fully comply with article 17.2 of the Directive, mental health assessments within a screening framework will be required.

3. Areas where the Directive and transposition may breach (international) law and will be open to legal challenge

Residence and freedom of movement (Article 7) / Accommodation (Article 14)

The transposition states that the UK does not restrict freedom of movement as such, which is a misleading statement. The UK’s current policies on detention and accommodation, does conflict with the Directive’s principle of freedom of movement.

The Directive implies that the use of “confinement” (detention) should only be used as an extraordinary measure. In the UK, asylum applicants are commonly detained as an administrative convenience. Therefore, the UK’s detention policy blatantly falls outside the scope of the Directive. In addition, the UK’s policy on detention does not have regard to the overriding objective in the Directive relating to the preservation of an asylum claimant’s right to private and family life. It is telling that the Home Office does not mention its policy of detention at all in the transposition. This omission suggests that the Home Office does not intend to revise its current policy to square it with the Directive, and therefore could be subject to challenge.

Although not detention centres, similar criticism in relation to accommodation and induction centres apply as these impose a degree of compulsion and give asylum applicants little choice with regard to accommodation.

Similarly, electronic monitoring of asylum seekers falls outside the scope of the Directive. This clearly does not uphold the principle of freedom of movement. Electronic monitoring affects the individual’s sphere of private life, and could well be vulnerable to a human rights challenge.

The operation of the NASS dispersal policy restricts the freedom of movement of asylum applicants in the UK. Asylum applicants are commonly dispersed to areas where access to benefits such as legal advice, specialist healthcare as well as access to families and communities is not guaranteed. Furthermore, it is NASS policy to withhold support if the asylum applicant does not live where NASS prescribes he/she should live. The assertion that the Home Office may require residence in a particular location does not constitute freedom of movement.

We are concerned that the Home Office will maintain and add provisions in legislation where asylum support is terminated if the asylum applicant does not behave in a certain way. The transposition is too widely drawn and has the consequence of aggravating further the means, not least because of the bureaucracy involved, by which asylum applicants may be deprived of support. The withdrawal of support for trivial failures or breakdown in communication

between the state and the individual will cause destitution and hardship, and will be subject to ECHR challenges. NASS has overall responsibility and withdrawal of support should only occur where there was a substantial flouting of conditions.

Requirement to provide support (Article 13)

We welcome the intention of the government to impose a requirement to support as a duty to ensure destitute asylum seekers are provided with accommodation and support. However there should be an indication of intention to ensure that the legislation will be changed to reflect this obligation.

The requirement to provide support is dependant on whether the claim was made as soon as reasonable practicable (Article 16). We do not need to remind the Home Office of the extensive involvement of the courts in determining this point as a result of the implementation of Section 55, 2002 Act. It is unfortunate that the same may now happen in other member states who would take just as a restrictive approach as the UK did to what constitutes “as soon as reasonably practicable”. The Directive itself is vulnerable to human rights challenge in this respect.

Reduction on withdrawal of reception conditions (Article 16)

It is extremely important that if sanctions are imposed the decision is based on the asylum applicant’s individual circumstances. It must be taken on clear, objective grounds, with an obligation to consider the proportionality of withdrawal as a sanction. In any case, no applicant should never be denied access to healthcare, housing and basic support as it is not the purpose of the Directive to deny the applicant of basic needs. This would be in breach of the European Convention on Human Rights.

Minors and unaccompanied minors (Articles 18 and 19)

The Directive recognises that young people in asylum procedures are in an extremely vulnerable situation. In order for the UK government to fully comply with the Directive’s intention to provide the proper levels of care and support, it is inappropriate to continue its current unsafe policy and practice in relation to the assessment of age of asylum seeking minors. The current use of casual visual assessment of age is unacceptable and should be abandoned. Those who claim to be minors should always be given the benefit of the doubt, and where age cannot be clearly assessed, there should be a presumption in favour of the applicant until such time competent authorities can make a reliable assessment. The balance of probabilities has to be significantly against the applicant in order for their rights as a minor to be set aside.

The Directive allows minors from 16 years old to be housed in accommodation centres together with adults. This means in practice that minors of this age are treated as adults. JCWI believes this is very wrong. All minors, regardless of their age, have special needs and therefore require special care, which an accommodation centre is unlikely to provide.

CONCLUSION

The current transposition is inadequate on many levels, and does not always reflect compliance with international and domestic law. The standards in the Directive are considered to be the minimum to which compliance is required, and it is stipulated that

member states may introduce more generous provisions. It is JCWI's hope that the UK Government will take this opportunity to apply a liberal, humane and positive approach to the Directive and improve on its current system of reception.