

**EXPLANATORY MEMORANDUM ON THE EUROPEAN UNION
DOCUMENT**

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL ON THE APPLICATION OF THE DIRECTIVE
2004/83/EC OF 29 APRIL 2004 ON MINIMUM STANDARDS FOR THE
QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS OR
STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO
OTHERWISE NEED INTERNATIONAL PROTECTION AND THE
CONTENT OF THE PROTECTION**

Submitted by the Home Office on *JULY 5* 2010

SUBJECT MATTER

1. This Explanatory Memorandum relates to a Commission Report on the 'Application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection'. The Commission is required to make such a report under Article 37 of Council Directive 2004/83/EC ("the Qualification Directive").
2. The report aims to give an overview of the transposition and application of the Directive by Member States and to identify possible problematic issues. This report has been published after the Commission presented a new proposal for the amendment of the Qualification Directive on 21 October 2009.

SCRUTINY HISTORY

3. The original Directive was the subject of Explanatory Memorandum (13620/01) submitted by the Home Office on 19 November 2001. Further EMs (12620/02 & 14643/02) were submitted on 30 October 2002 and 27 November 2002 to take into account subsequent amendments to the Directive.
4. The ESC considered the document to be both politically and legally important. Sub-Committee E of the EUC made this proposal the subject of a short enquiry. Angela Eagle MP, former Parliamentary Under-Secretary of State at the Home Office, gave evidence to this inquiry on 15 May 2002.
5. The proposals (13620/01 and 12620/02) were finally cleared on 11 December 2002, reports 22885 and 22919. Proposal 14643/02 was cleared by the ESC on 12 May 2003 and was also deemed to be legally

and politically important. This was subsequently cleared by the EUC on the 21 April 2004.

MINISTERIAL RESPONSIBILITY

6. The Home Secretary has overall responsibility for UK immigration and asylum.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

7. Asylum and immigration policy is reserved to UK Government Ministers. The devolved administrations have been consulted on and are content with the terms of the EM.

LEGAL AND PROCEDURAL ISSUES

8. These are as follows:

- i) Legal basis

- The legal base for the Qualification Directive was Article 63 TEC. This evaluation report is not a legal text.

- ii) European Parliament procedure

- Not applicable.

- iii) Voting procedure in the Council

- Not applicable.

- iv) Impact on United Kingdom Law

- Not applicable.

- v) Application to Gibraltar

- Not applicable.

- vi) Fundamental Rights Analysis

- Not applicable.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

9. Not applicable

SUBSIDIARITY

10. The proposal was designed to reduce differences and discrepancies in Member States' asylum systems and therefore to promote a "level playing field" for asylum seekers in Europe. The Directive therefore complies with the subsidiarity principle.

POLICY IMPLICATIONS

11. The Qualification Directive was implemented in UK law through a combination of The Refugee or Person in need of International Protection (Qualification) Regulations 2006 and Part 11 of the Immigration Rules (HC 395). Part 11 and the Regulations both came into effect on 9 October 2006.
12. The document evaluates Member States' implementation of the Qualification Directive and does not put forward legislative proposals. There are no direct policy implications. Practical issues and observations are discussed below.

Observations and Points of Concern

13. Article 37 of the Qualification Directive stipulates that by 10 April 2008 the Commission shall report to the European Parliament and the Council on the application of the Directive and propose any amendments that are necessary. The Commission does not give an explanation for the lateness of the report or for its publication after the amendments to the Qualification Directive had already been brought forward (in the revised Directive proposed on 21 October 2009).
14. Overall the Commission expresses the view that the majority of Member States have failed to transpose elements of the Qualification Directive in certain areas, in some cases because, in the Commission's view, the provisions of the Directive itself were vague and ambiguous.
15. The most significant areas relate to the assessment of applications for international protection, how a refugee qualifies for asylum and subsidiary protection and how Member States go about revoking or ending that status when it is no longer needed. The Commission also comments on the way in which Member States have afforded rights and social benefits to those who have qualified for international protection.
16. In general, the report suggests that the UK has fared well amongst its EU counterparts in transposing the Qualification Directive. Some Member States (particularly those who have acceded to the EU more recently) have been slow in implementing all or most of the provisions of the Directive. In particular, Member States such as Romania, Bulgaria, Finland, Greece and Cyprus have all come under scrutiny for failing to apply the Directive correctly.
17. The Commission has made some positive observations about the way in which the UK has implemented the Qualification Directive. In particular it notes in section 5.1.5 that we are compliant with the provisions under Article 8 which refer to internal relocation and makes reference to the UK as one of ten Member States that have fully transposed this provision. Additionally, it notes that the UK goes above the minimum requirements with respect to the length of residence permits issues both to refugees and beneficiaries of subsidiary protection. The Commission has also observed (section 5.5.14) that in the UK we do not differentiate between

refugees and beneficiaries of subsidiary protection with respect to access to integration facilities.

18. In their evaluation the Commission alleges in section 5.1.1 of the report that the UK's approach to assessing an applicant's 'general credibility' is more restrictive than allowed by the Directive "because it raises the standard of the level of credibility required by Article 4(5)". We do not agree with this statement. Our assessment of credibility can be found in Part 11 of the Immigration Rules, under paragraphs 339I-339L, which transpose Article 4 of the Qualification Directive accurately. In particular, the principle of the "benefit of the doubt" required by Article 4(5) of the Directive is transposed by paragraph 339L of the Immigration Rules.
19. The statement in the draft report may be referring to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. This requires us to take into account, as damaging to the claimant's credibility, any of the behaviours listed under S.8 (e.g. applicants destroying their passports without reasonable explanation, producing fraudulent documents to an immigration officer or failing to claim asylum in a safe third country) when determining whether to believe a statement made by or on behalf of a person who makes an asylum or human rights claim.
20. The UK does not agree that this approach raises the level of credibility above that required by Article 4(5). We believe that Section 8 is compatible with the Directive and are concerned about the Commission's remarks. Nothing in Section 8 of the 2004 Act prevents a decision maker from allowing an individual the benefit of the doubt in the circumstances in which the Directive requires it. Credibility is assessed in the round by a decision maker, taking into account all material facts that are presented throughout an asylum claim.
21. The report (section 5.1.4) also criticises the UK for allegedly considering Non-Governmental Organisation (NGOs) as 'actors of protection' with respect to women at risk of female genital mutilation (FGM) and "honour" killings. In the view of the report, NGOs cannot provide effective and long term protection to women in these situations. It is incorrect to assert that the UK relies upon the protection afforded by certain NGOs in the applicant's country of origin as a justification for refusing asylum and the Commission's contention is not affirmed in our domestic guidance.
22. Where women in fear of non-state/domestic abuse could in some countries have little effective protection from the authorities, and could even fear approaching them, the existence (and state tolerance or support) of women's refuges or NGO assistance may suggest the availability of help which the victim might have considered. But unless an effective internal relocation alternative can be identified, the existence of NGO 'protection' would be insufficient and could not be relied upon to justify refusing asylum.

23. The Commission has also criticised the UK for allegedly not transposing certain elements of the Qualification Directive into our domestic law. In particular the Commission states that the UK has not transposed the last clause in Article 10 (1) (d) which provides that, when considering whether an applicant faces persecution for membership of a particular social group, “Gender-related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.”.
24. We have transposed the rest of Article 10(1)(d) in The Refugee or Person in Need of International Protection Regulations 2006, Article 6(d). We take the view that the obligation in the last sentence is encompassed by our approach to such cases which ensures that gender-based persecution is fully considered during the decision making process. This approach is endorsed in our published Asylum Policy Instruction on Gender Issues in Asylum Claims which is available to the public.
25. The report (section 5.4) criticises the UK for allegedly introducing additional grounds to those contained in Article 12 and 17 of the Directive. These relate to exclusion from international protection and can be found in our domestic legislation. It is not clear exactly what additional grounds the Commission is referring to here. We can only speculate that it may be referring to S.54 of the Immigration, Asylum and Nationality Act 2006, which relates to exclusion on the grounds of committing or instigating terrorism. Although terrorism is not an act explicitly specified in Article 1F of the 1951 Convention it is clearly contrary to the purposes and principles of the United Nations so falls within Article 1F (c). We therefore disagree with this criticism.
26. The report also states (section 5.5.2) that we have not transposed Article 20 (3), which requires Member States to take account of the specific situation of vulnerable persons such as unaccompanied minors when determining the content of international protection. We disagree with this statement. The UK Border Agency provides detailed guidance on handling claims from vulnerable people. Targeted training is provided for UKBA staff who deal with victims of torture or those who have suffered mental or physical torture. Further policy instructions have also been issued to cover the individual evaluations outlined in Article 20. There are also additional Immigration Rules that specify how to handle asylum claims from unaccompanied minors.
27. The report also states (paragraph 5.5.2) that the UK has not transposed the “best interests of the child” principle laid down in Article 20(5) of the Directive. We disagree with this statement. The principle is given effect by S.55 of the Borders Citizenship and Immigration Act 2009, which requires the UK Border Agency to make arrangements to safeguard and promote the welfare of children in discharging its immigration, nationality and general customs functions.

28. The report states (section 5.5.10) that the UK has not transposed the provision requiring equal treatment between refugees and people with supplementary protection and our own nationals in the recognition of foreign qualifications as stated in Article 27 (3). We do not agree with this statement. The UK National Agency responsible for providing information, advice and expert opinion on vocational, academic and professional skills and qualifications (UK NARIC) is contracted to provide recognition and information on all international qualifications from 183 countries. People with international protection are not treated any differently from EU nationals in this respect.
29. The report (section 5.5.12) criticises the UK for failing to transpose Article 29 (3) which obliges Member States to provide for adequate healthcare for beneficiaries of international protection with special needs. National Health Service (NHS) primary medical services are free to all persons lawfully resident in the UK, including refugees and people with humanitarian protection. Under section 1 and 16C(1) of the NHS Act 1977, each Primary Care Trust (PCT) has a duty to exercise its powers so as to provide or secure the provision of primary medical services within its area. NHS secondary care is also provided free of charge to those granted refugee status or humanitarian protection.
30. In the Commission's conclusion it highlights what it believes to be the wide divergences in practice and legislation by Member States in implementing the Qualification Directive. It argues that some of these discrepancies are due to what it says is the vague and ambiguous wording of the current Directive. It also argues that the existing Directive allows too much discretion to Member States, for example over the level of protection granted to refugees and people with subsidiary protection. Its response to these stated shortcomings was to introduce an amending Qualification Directive on the 21 October 2009. However, the report provides no real evidence to back up its assertions, and we are not convinced that the further limitations on Member States' freedom of action that are proposed in the amending Directive are justified. The UK has not opted in to that Directive.

IMPACT ASSESSMENT

31. Not applicable.

FINANCIAL IMPLICATIONS

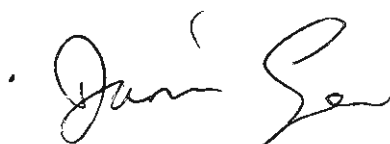
32. None arising as a consequence of this Report.

CONSULTATION

33. Not applicable in this context

TIMETABLE

34. The report does not contain proposals for negotiation in Council, so a timetable is not relevant in this context. However we are expecting the Commission to publish their report on the evaluation of the Procedures Directive 2005/85/EC later in the year.

A handwritten signature in black ink, appearing to read 'Damian Green', written in a cursive style.

Damian Green
Minister of State for Immigration
Home Office