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Dear Bill

Draft Instruction on Humanitarian Protection

Thank you for giving ILPA the opportunity to comment on this draft instruction. With three new Statements of Changes in Immigration Rules in the period since you sent it, you will understand that the time we have been able to devote to looking at it has, of necessity, been brief. We have used the numbering in the draft.

1 Introduction

1.1 The word 'asylum' is used in different ways in different parts of the immigration acts, sometimes to refer to the 1951 UN Convention relating to the Status of Refugees only, sometimes to encompass Article 3 of the European Convention on Human Rights as witness paragraph 2 of the introduction. To write in paragraph 1 "if the applicant does not qualify for asylum" is thus likely to confuse and it may be better to say "does not fall to be recognised as a refugee."

1.2 Classed for what purpose? Is this is an instruction as to how to record the claim on an electronic system etc.? Perhaps this could be made explicit.

1.5 The reference to "Convention" without more may confuse in an instruction where reference is made both to the 1951 UN Convention relating to the Status of Refugees and to the European Convention on Human Rights.

2. Key Points

"Application of this guidance to children and those with children"

Under the subheading "*Application of this guidance to children and those with children*", there is included the following statement:

> "*The statutory duty to children includes the need to demonstrate that asylum applications are dealt with in a timely and sensitive fashion where children are involved and that their interests are taken into account in decision-making...*"

These duties arise not only from the section 55 duties but from the UK's treaty obligations.

We should suggest expanding this phrase to include express reference to the obligations contained in the 1989 United Nations Convention on the Rights of the Child, to the Treaty of the European Union and Article 24 of the Charter of Fundamental Rights of the European Union.

The first sentence understates the significance of children's interests and should be amended. While the paragraph does go on to identify that children's best interests are a primary consideration, it does not reflect the weight to be given to those best interests or that those best interests should be considered first (*ZH (Tanzania) v SSHD* [2011] UKSC 4); is diluted by a reference merely to taking into account children's 'interests' rather than their "best interests" and by failing to include the duty to ascertain the views of the child as expressly required ((*ZH (Tanzania) v SSHD* [2011] UKSC 4).

The same paragraph finishes:

> "*This is most likely to apply in cases where they are dependent on the main applicant.*"

It is not wholly clear to what "this" refers and the sentence is in any event inaccurateand needs to be redrafted. We expect that what is intended here is to emphasise the need to ensure that children's best interests are considered, including where they are not the main applicants – i.e. to remind caseworkers of the need to consider children's interests in those cases where it may be most likely that they forget. However, this is not what the sentence says. It says that the best interests of the child will most likely apply where children are dependent on the main applicant. This is ambiguous – dependent on the claim or dependent in the world? – the latter category encompassing British and settled children as well as children under immigration control. But even absent the ambiguity, the sentence is wrong. The need to consider the best interests of the child is present wherever and whenever a child is or may be affected, directly or indirectly, as dependant of a claim or otherwise.

3. Grounds for the grant of Humanitarian Protection: Articles 15(a) and 15(b) of the Qualification Directive/Rule 339C

Unlawful killing

You asked us specifically to consider whether there was a use for paragraphs 3.4 ad 3.5 under the heading unlawful killing in its own separate section or whether this should be part of the consideration under the guidance on Article 15(c).

Paragraphs 3.4 and 3.5 should continue to be separate from the guidance on Article 15(c). Article 15(c) concerns certain harms or threats arising in situations there specified. An unlawful killing that was not "*by reason of indiscriminate violence*" or not "*in a situation of international or internal armed conflict*" would nonetheless be contrary to Article 2 of the 1950 European Convention on Human Rights. Humanitarian protection would still be an appropriate grant of leave where a person seeking asylum was at risk of unlawful killing but could not meet the requirements for recognition as a refugee or did not fall within Article 15 (c).

The question may have been prompted by the concern that "*unlawful killing*" is not a head of 'serious harm' to be found in Article 15 of the Qualification Directive. Paragraphs 3.4 and 3.5 are appropriate

and useful guidance to caseworkers concerning Article 2 of the European Convention on Human Rights. If the "*unlawful killing*" is to be removed as a subheading, these paragraphs should not be lost and should not be moved to the section on Article 15(c). The better option would be to explain that these paragraphs relate to Article 2 of the European Convention on Human Rights, and to revise the general heading to section 3 to incorporate reference to both the European Convention on Human Rights and the Qualification Directive.

Return that would expose a person to torture or inhuman or degrading treatment

Prison conditions

Paragraph 3.10 begins:

> "*The most severe prison conditions will be contrary to Article 3 where they are systematically inhuman and life-threatening and would, for example, entail torture.*"

The words "*The most severe*" add nothing to this sentence. If prison conditions are systematically inhuman and life-threatening, they will be contrary to Article 3. However, this threshold is too high. The issue is whether the conditions facing the claimant are inhuman or degrading. If so, Article 3 will be breached. As to how that may be established, in the case of a person whose single relevant characteristic is that he or she is facing imprisonment, it may be that absent systemic inhuman or degrading conditions such a person will be unable to show a real risk of a breach of Article 3 in his or her case. It is not, however, the case that conditions must systemically reach the threshold for inhuman or degrading conditions in respect of any particular prisoner to breach Article 3. Paragraph 3.11 does go some way to addressing these concerns, but paragraph 3.10 should be revised to make clear that what is described there is not the relevant threshold.

Paragraph 3.15 says *"The Article 3 threshold is also met in very exceptional cases where there are dire humanitarian conditions which are solely attributable to poverty, or the State's lack of resources..."*

The courts have consistently warned of the dangers of inadvertently creating rules of exceptionality, (particularly in Article 8 claims - see *Huang* [2007] UKHL 11, *Razgar* [2004] UKHL 27). There is a real danger that decision-makers may read "very exceptional" as creating such a threshold test and not as may have been intended, simply trying to describe the severity of the circumstances/conditions on which the claim is made. In any event, conditions may be "dire" and "solely attributable to poverty" but not " exceptional" at all. We question the need to introduce the concept of exceptionality into this section at all

Medical cases

The first sentence of paragraph 3.17 should be qualified explicitly. While the threshold is high, paragraph 3.18 makes clear that it is not an absolute requirement that harm be "*deliberately inflicted*".

This section should also deal with:

- suicide risk cases: see *J v SSHD* [2005] EWCA Civ 629.
- pregnant women : see *CA v SSHD* [2004]EWCA Civ 1165
- children with medical needs

In relation to medical, including suicide risk, cases, it would be useful to remind caseworkers that where there are other relevant factors relating to private and family life, including the best interests of children, all health-related factors will need fully to be considered together with those other factors in assessing Article 8.

It would also be useful to remind caseworkers that where a person's entry or presence in the UK is or has been on a lawful basis, this will be a relevant factor in the assessment of Article 8: see *JA (Ivory Coast) & Anor v SSHD* [2009] EWCA Civ 1353.

In the final sentence it may also be worth referring to those too ill, or unable on medical grounds, to be removed.

4. Grounds for the grant of Humanitarian Protection: Article 15(c) of the Directive

In this section, the only specific examples of relevant harms or threats (car bombs or snipers) identified are those covered by Article 15(b) or Article 2 or 3 of the 1950 European Convention on Human Rights. More useful examples might be provided by considering other harm that might not normally reach the relevant threshold – e.g. the medical cases. Hence, the situation of a person living with HIV/AIDS might (subject to *N v SSHD* [2005] UKHL 31 and consideration of Article 8 factors, see above) not reach the relevant threshold for a grant of humanitarian protection. However, where he or she was facing return to a situation as covered by Article 15(c), the indiscriminate violence might be such as to increase the risks and threats to him or her so as meet the relevant threshold.

In paragraph 4.2 it is perhaps not helpful, unless frequent revisions are anticipated, to say "…has needed substantial revision as a result of". A phrase such as "was substantially revised in the light of" might better stand the best of time.

In paragraph 4.5 the words "fall within" might usefully be replaced by "meet", for clarity. Similarly, the word "they" in "If applicants do not meet the above tests, they may also be applied on a sliding scale" could usefully be replaced with "the tests". In the final sentence of that paragraph it is misleading to state "in case refugee status is more appropriate than humanitarian protection" as it may be taken to suggest that there is a choice between the two, rather than the caseworker being required to recognise a person as a refugee if the requirements for such recognition are met.

4.6 This contains reference only to operational guidance notes and the tribunals' assessments. It could usefully make explicit mention of the Country of Origin Information Service and, for example, in cases involving children, the need to obtain and consider child specific country information addressing the Article 15 (c) risk and impact.

5. Grounds for exclusion from Humanitarian Protection

Paragraph 5.3 is unfinished.

Much of this section derives from the Qualification Directive (2004/83/EC), and much of that in respect of subsidiary protection derives from the approach of that Directive to refugee status. ILPA concurs with UNHCR's concerns as to the compatibility of the Qualification Directive with the 1950 UN Convention relating to the Status of Refugees. [1] We do not set out those concerns in full here but place on record that we do not endorse the approach adopted in this part of the draft guidance.

[1] See *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*

6. Granting or refusing humanitarian protection

Refusing asylum but granting humanitarian protection

6.1 See comments at 1.1 on the way in which the words "asylum claim" are used.

6.3 The sentence "These cases will need to be genuinely compelling in order to succeed." is confusing. "Nothing is added by using the word " genuinely" in understanding what may or may not be "compelling". We assume that by "to succeed" is meant "to secure indefinite leave to remain rather than five years limited leave. If this is what is meant, this should be said; otherwise the sentence might be taken to be saying something more generally about succeeding in securing a grant of humanitarian protection for five years.

7. Appeal outcomes and further submissions

7.1 At end, replace "applies" with "apply".

Paragraph 7.2 begins:

> "*By the time all rights of appeal have been exhausted, there will be very few cases that would merit consideration of Humanitarian Protection...*"

This should be deleted, as it serves no purpose other than to inhibit careful consideration of any further submissions that may be made. Whatever may be the experience or view of the Agency as regards the further submissions that it has received, it is unknown to the Agency what the quality and content of any future further submission may be and unwise and unsafe to make a general assertion such as that made here.

8. Revocation of Humanitarian Protection

Much of this section derives from the Qualification Directive (2004/83/EC), and much of that in respect of subsidiary protection derives from the approach of that Directive to refugee status. As with the discussion of exclusion above, ILPA concurs with UNHCR's concerns as to the compatibility of the Qualification Directive with the 1950 UN Convention relating to the Status of Refugees.[2] We do not set

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on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004), UNHCR, January 2005. That these concerns remain live can be verified by consideration of UNHCR's comments on the re-cast qualification directive: *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009).

[2] See *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* (OJ L 304/12 of 30.9.2004), UNHCR, January 2005. That these concerns remain live can be verified by consideration of UNHCR's comments on the re-cast qualification directive: *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of*

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ILPA

20 July 2012

Cc Alexandra Pamela McDowell, UNHCR

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international protection and the content of the protection granted (COM(2009)551, 21 October 2009).