MILLION

Consultation response:
UK implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status.

19 October 2007

This document is aimed at:

- European Asylum Policy Unit of the Border and Immigration Agency

"The 11 MILLION children and young people in England have a voice"
Children's Commissioner for England, Professor Sir Albert Aynsley-Green

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1 Who are we?

11 MILLION is a national organisation led by the Children's Commissioner for England, Professor Sir Al Aynsley-Green. The Children's Commissioner is a position created by the Children Act 2004.

Our mission

We will use our powers and independence to ensure that the views of children and young people are routinely asked for, listened to and that outcomes for children improve over time. We will do this in partnership with others, by bringing children and young people into the heart of the decision-making process to increase understanding of their best interests.

The Children Act 2004

The Children Act requires the Children's Commissioner for England to be concerned with the five aspects of well-being covered in *Every Child Matters* – the national government initiative aimed at improving outcomes for all children. It also requires us to have regard to the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC underpins our work and informs which areas and issues on which we focus our efforts.

Our long-term goals

Children and young people see significant improvements in their wellbeing and can freely enjoy their rights under the United Nations Convention on the Rights of the Child (UNCRC).

Children and young people are more highly valued by adult society.

For more information

Visit our website for everything you need to know about 11 MILLION www.11MILLION.org.uk

Spotlight areas

'Asylum and Trafficking' is one 11 MILLION's 'Spotlight' areas for 2007/8. These are areas in which we will influence emerging policy and debate.

2 Executive summary

11 MILLION's response to this consultation focuses on the implementing provisions that relate directly to children in the asylum system and not the wider asylum seeking community.

Chapter 1 – General provisions

We welcome the proposed change to the Immigration Rules ('the Rules') that clarifies that an asylum seeker does not need specifically to request recognition as a refugee in order to make an asylum claim. Children frequently do not use or know terms such as 'refugee' or 'asylum' but may still fear harm.

We **recommend** that the definition of an 'unaccompanied minor' used in the Directive is incorporated into the Rules.

Chapter 2 – Basic Principles and Guarantees

Children accompanying parents who are seeking asylum should be allowed to claim asylum in their own right *and* as a dependant of a parent. We **recommend** that this is clarified in the Rules.

We welcome the decision to amend the Rules to clarify that all decisions on asylum claims must be given in writing and reasons for any refusal of asylum provided even where another form of leave is granted as in the case of unaccompanied children.

We **recommend** that the person conducting the personal interview with the child has sufficient knowledge of the child's country and knowledge of any child-specific persecution that occurs there.

We welcome the provisions that require personal interviews to be conducted without the presence of other family members, unless necessary for examination of the claim and for these interviews to take place in conditions which ensure confidentiality. We **recommend** that the Border and Immigration Agency (BIA) accelerate its provision of childcare facilities at its regional offices to facilitate these requirements.

We welcome the Directive's requirement that interpreters must be able to 'ensure appropriate communication' between the applicant and the case owner and regard this as vital where children are interviewed. We **recommend** that the language used in the Directive is reflected in the proposed change to the Rules.

We welcome the Directive's requirement to ensure provision of legal representation where a negative decision is made by the determining authority subject to certain provisions. To ensure that unaccompanied minors' access to such representation is not 'arbitrarily restricted' we **recommend** that the more generous application of the merits test to

unaccompanied children, as reflected in Legal Services Commission policy, is incorporated into national law.

We welcome many of the suggested amendments to the Rules in respect of guarantees to unaccompanied minors but are very concerned at the proposed amendment which would make it a *requirement* for all children over 12 to be interviewed about their claim. More flexibility is required in order to avoid 're-traumatising' children unnecessarily. We **recommend** that the current wording in the Rules is maintained.

We oppose incorporating permissive changes to the Rules in respect of medical examinations of those claiming to be unaccompanied children and **recommend** that the proposed changes to the Rules are dropped.

We **recommend** that the requirement to have *the best interests of the child as a primary consideration* in implementing Article 17 of the Directive is incorporated into the Rules. The refusal to do so on the ground of the UK's reservation to the United Nations Convention on the Rights of the Child is at best misguided and at worst unlawful.

Chapter 5 – Appeals Procedure

Article 39 of the Directive requires Member States to ensure that there is an effective remedy before a court or tribunal against a decision taken on their asylum application. For many unaccompanied minors such a remedy does not currently exist because of the provision of Section 83 of the Nationality, Immigration and Asylum Act 2002. We **recommend** that the Government reviews section 83 in light of the Directive's requirement.

3 Summary of Recommendations

Article 2 (b): We recommend that the amendment to paragraph 327 of the Immigration Rules should specifically mention that any request or expression of fear of return should be presumed to be an application for asylum.

Article 2 (h): We recommend that the definition of 'unaccompanied minor 'used in this and other Directives is incorporated into the Immigration Rules.

Article 6: We recommend that the Immigration Rules should make clear that two concurrent applications are possible from an accompanied minor, one as an applicant in his or her own right and one as a minor dependant of the principle applicant.

Article 6 (5): We recommend that, as a minimum, the police and local authority children's services departments are named authorities.

Article 9 (2): In respect of unaccompanied minors granted Discretionary Leave of less than one year under Section 83 of NIA 2002 we recommend that the information on how to challenge the decision should include information on applying for an extension of the leave granted in order to access a first instance appeal against the refusal of asylum.

Article 12 (1): The Immigration Rules should, for persons conducting the 'personal interview', define a minimum standard for what is meant by 'a person competent in national law'. In the case of persons interviewing children this should include knowledge of child specific persecution in the child's country of origin.

Article 13 (1) and (2): We agree with the suggested changes to the wording of the Immigration Rules and recommend that BIA accelerate the provision of child care facilities at its regional offices in order that this part of the Directive can be fully complied with.

Article 13 (3) (b): We recommend that the planned addition to the Rules regarding the standard for interpreters in the personal interview should follow the language used in the Directive rather than the language used in the implementation paper.

Article 15: In order for representation of unaccompanied children before the AIT not to be 'arbitrarily restricted' we would recommend that the merits standard provided for in Legal Services Commission policy is incorporated into national law.

Article 17 (1): We recommend that the current wording in paragraph 352 of the Immigration Rules ('may be interviewed') is retained rather than replaced by 'will be interviewed'. In the alternative, if the

Government insists on maintaining the change to the Rules, Article 17(6) should be transposed into the Rules as an additional safeguard.

Article 17 (5): We recommend that the proposed changes to the Rules in relation to medical examinations are not incorporated into national law without further public consultation on this issue.

Article 17 (6): We recommend that the Government reconsiders its position on Article 17(6) and makes explicit provision for ensuring that the best interests of unaccompanied children are made a primary consideration when incorporating the rest of Article 17 into the Rules.

Article 39 (1): We recommend that the Government reviews Section 83 of the Nationality, Immigration and Asylum Act 2002 in light of its obligations under Article 39 of the Directive.

4 Introduction

11 MILLION welcomes the opportunity provided by the Border and Immigration Agency (BIA) to comment on its proposals to implement Council Directive 2005/85/EC of 1st December 2005 on minimum standards in member states for granting and withdrawing refugee status.

11 MILLION consults regularly with young asylum seekers and frequently the issues raised with us concern the fairness and transparency of the procedures they encounter. We believe that our considered response to the proposals to implement the Directive are well informed by the issues young asylum seekers have discussed with us.

There is much to welcome both in the Directive and in the proposals on implementing its provisions. However, we remain very concerned about the Government's refusal to reflect the Directive's requirement to ensure that the best interests of the child are a primary consideration in implementing the measures contained in Article 17. We have a number of other concerns and hope the Government will consider carefully the recommendations that we make in this response.

We have not attempted to comment on all the implementing measures but have chosen to focus on those we regard as having the greatest impact on children in the asylum system whether they be unaccompanied or seeking asylum with their families.

5 Comments on chapter 1: general provisions (articles 1-5)

Article 2: Definitions

Article 2 (b): We welcome the proposed change to paragraph 327 of the Rules which aims to clarify that a person need not specifically request to be recognised as a refugee in order to make a claim for asylum. We have a particular concern that children with a fear (including of serious harm) who are seeking protection may not be aware of terms such as 'refugee' and 'asylum'. We recommend that the amendment to paragraph 327 should specifically mention that any request or expression of fear of return should be presumed to be an application for asylum.

Article 2 (h): We note, as we have done in a previous implementing consultation[1], that there is no definition of 'unaccompanied minor' in the Rules or in national legislation. We reiterate our concern about this and recommend that the definition used in this and other Directives is incorporated into the Rules.

[1] "*Response to the Public Consultation on the European Union Asylum Qualification Directive (Council Directive 2004/83/EC) from the Office of the Children's Commissioner*, Office of the Children's Commissioner, 28.08.06, page 4.

6 Comments on chapter 11: basic principles and guarantees (articles 6-22)

Article 6: Access to the procedure

The implementation of this article should not prevent children who are accompanied by a parent from claiming asylum in their own right, as well as being able to apply as a minor dependant of the principle applicant. We recommend that the Rules should make clear that two such applications are possible, one as an applicant in one's own right and one as a 'minor dependant'. It follows that where the claim from an accompanied child does not demonstrate sufficient risk of harm on return, the claim as a minor dependant may lead still to a grant of status in line with any status granted to the principle applicant.

With regard to the implementation of Article 6(5) and the proposed change to the Rules we recommend that, as a minimum, the police and local authority children's services departments are named authorities.

Article 9: Requirements for a decision by the determining authority

Article 9(1): We welcome the decision to amend the Rules to clarify that all decisions on asylum claims must be given in writing. Section 83 of the *Nationality, Immigration and Asylum Act* 2002 (NIA 2002) principally affects unaccompanied asylum seeking children. It is essentially unjust that there has been no requirement to notify a refusal of asylum in writing when granting leave of less than one year to unaccompanied minors.

Article 9(2): We welcome the decision to amend the Rules to ensure that all negative decisions are accompanied by a statement of reasons and information on how to challenge the decision. In respect of unaccompanied minors granted Discretionary Leave of less than one year under Section 83 of NIA 2002 we recommend that the information on how to challenge the decision should include information on applying for an extension of the leave granted in order to access a first instance appeal against the refusal of asylum. We comment further on section 83 of NIA 2002 in response to the implementing provisions of Article 39.

Article 10: Guarantees for applicants for asylum

Article 10 (1) (d) requires the determining authority to give notice of the decision on an asylum application 'in reasonable time'. We are aware of cases where unaccompanied minors have failed to receive a decision within what we would regard as a 'reasonable time'. In some cases this has resulted in them failing to be granted a period of Discretionary Leave in line with Government policy on unaccompanied children who are not awarded status on refugee or humanitarian protection grounds. The 'reasonable time' requirement is not reflected in any proposed change to the Rules. We acknowledge that the 'target' set by BIA in

respect of the processes under the New Asylum Model is a period of six months. We think that ought to be the longest any asylum applicant, and especially an unaccompanied asylum seeking child, ought to have to wait for a decision. Only if it is in the child's best interests for the decision to take longer should this be departed from.

Article 12: Personal Interview

Article 12 (1) requires the applicant to be given the opportunity of a personal interview which must be conducted by a person 'competent under national law' to do so. We recommend that the Rules should spell out what this means and must include sufficient level of knowledge about the 'country of origin' material relevant to the application. In the case of applications from children, the personal interview should be conducted by a person with knowledge of any child-specific persecution that occurs in the country of origin including trends around child trafficking.

Article 13: Requirements for a personal interview

Article 13 (1) requires that the personal interview should not normally take place in the presence of family members unless necessary for an appropriate examination of the claim. We take this to include the child or children of an adult asylum applicant. Article 13 (2) requires that a personal interview shall take place under conditions which ensure appropriate confidentiality.

These two mandatory requirements mean that no asylum seeking parent should have to proceed with a personal interview in the presence of their child unless the child's presence is necessary for a proper examination of the claim. Currently, this is a very live issue at BIA's regional offices (where personal interviews are conducted). The regional offices do not always have sufficient facilities or capacity to meet these requirements. We welcome the decision to provide for changes to the Rules to accommodate these provisions and recommend that BIA accelerate the provision of child care facilities at its regional offices accordingly.

Article 13(3) (b): We welcome the decision to set out in the Rules that the interpreter chosen must be able to 'facilitate communication' between the applicant and the case owner. The Directive, laying down the minimum standard for an interpreter in the personal interview, uses the phrase *'able to ensure appropriate communication'.* We recommend that the planned addition to the Rules should follow this language rather than the phrase 'facilitate communication' used in the implementation paper. Where children are interviewed, *appropriate* communication is vital. We have received numerous complaints from children about interpreters – not only about their 'gate keeping' role (concern over whether what the child has said is being accurately reported) but also about good use of tone and body language.

Article 15: Right to legal assistance and representation

We welcome the proposed amendment to the Rules to ensure that asylum applicants are entitled to a right to consult a legal advisor.

Article 15 (2) requires that in the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representations are granted on request subject to the provisions of paragraph 3.

Paragraph 3(d) states that member states may provide in their national legislation that free legal assistance and/or representation is granted *'only if the appeal or review is likely to succeed'* and that representation under point (d) is not *'arbitrarily restricted'.*

We are very aware that significant numbers of unaccompanied children go unrepresented on appeal against refusal of asylum. In many cases this leads to the Immigration Judge adjourning the appeal in order that representation can be sought. We believe that many legal representatives considering an appeal from an unaccompanied child adopt the merits standard reflected in 3(d) and will only consent to granting controlled legal representation 'if the appeal is likely to succeed'. This does not reflect the more generous provision in Legal Services Commission policy on representation of unaccompanied children[2]. In order for representation of unaccompanied children before the AIT not to be 'arbitrarily restricted' we would recommend that the merits standard provided for in Legal Services Commission policy is incorporated into national law.

Article 17: Guarantees for unaccompanied minors

We welcome amendments to the Rules aimed to ensure that unaccompanied children are able to access legal representation and that the representative has the right to speak to the applicant before the personal interview.

We welcome the decision to continue with the status quo and not make use of the exemptions in paragraph 2 of Article 17.

We further welcome that the Rules will be clarified to provide for legal representatives being able to engage with the interviewing process and

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[2] "**Controlled Legal Representation (CLR)** Where an UASC has a right of appeal under section 83 of the Nationality, Immigration and Asylum Act 2002 and the appeal is being brought on grounds contained in section 84(3) of the Act that removal of an UASC from the United Kingdom would breach the United Kingdom's obligations under the 1951 Refugee Convention the following guidance should be considered: The right of appeal under section 83 is on asylum grounds only. It is not possible to bring an appeal under this section on any basis other than that the applicant's (hypothetical) removal
from the UK would breach the United Kingdom's obligations under the 1951 Refugee Convention (section 84(3)). Where a representative is able clearly to identify the 1951 Refugee Convention reason Controlled Legal Representation will be granted on the basis that an asylum claim by an UASC will meet the merits test to at least borderline." *LSC Immigration Service Team Newsletter*, 20th June 2005.

that case-owners dealing with unaccompanied children will be appropriately trained.

We are very concerned at the proposal to change Paragraph 352 of the Rules which currently states that an unaccompanied child 'may' be interviewed about their claim to a requirement that he or she 'will' be interviewed about the substance of the claim. We do not read Article 17(1) as making this a mandatory requirement.

While we are generally supportive of the current arrangement to interview children aged over 12, we have made the point that there has been, to date, no research into the impact of this process on children. It must be the case that for some children there will be a real prospect of them being 're-traumatised' by having to recall and recount the events that form the basis of the asylum claim on several occasions to several unfamiliar adults.

In order to ensure sufficient discretion within the Rules, we recommend that the current wording of paragraph 352 ('may be interviewed') is retained. We would add that we are not satisfied that the suggested provision of Rule 339NA (ii), permitting the interview to be omitted where it is not 'reasonably practicable', offers a sufficient safeguard to children.

We would envisage a decision not to proceed with an interview being taken following representations from the child's legal representative and/or local authority carer who may both have significant knowledge about the child that could inform such a decision.

The suggested replacement of the word 'may' be the word 'will' in paragraph 352 of the Rules would be more acceptable if the Government was proposing to incorporate Article 17(6) into the Rules (see below). We therefore urge the Government to think again about this proposed change.

Article 17 (5) permits, but does nor require, the use of medical examinations to determine the age of a child. We do not accept that any current medical examination can, with reasonable accuracy, 'determine' the age of a child. We therefore regard the wording of Article 17(5) itself as inappropriate and misleading.

Paragraph 5 of Article 17 'permits' the use of medical examinations to 'determine' age and sets down three conditions for such an examination. While we accept that the proposed changes to paragraph 352 of the Rules meets these conditions, we recommend that these provisions are not incorporated into national law without further public consultation on this issue.

We regard it as inappropriate to incorporate any aspect of Article 17(5) into the Rules currently, given that the Government has yet to:

- publish its own research on the use of medical examinations;
- publish the results of the recent consultation that addressed this question;
- respond to the views of the professional associations that would have a direct interest in the use of medical procedure and are known to oppose it, or
- consider how such arrangements would meet the requirements of national and European legislation on the use of ionising radiation.

Paragraph 17 (6) requires that the best interests of the child *shall* be '**a'** primary consideration for Member States when implementing Article 17 (emphasis added). This makes it mandatory for Member States to incorporate the 'best interests' principle when interpreting the other provisions of Article 17 into national legislation and we strongly recommend that the Government does so.

We have already stated that were the Government to incorporate this, we would have less concern about the amendment to the Rules *requiring* unaccompanied children to be interviewed as a 'best interests' consideration could override this where it was deemed necessary.

The reliance (at paragraph 79 of the implementation paper) on the UK's reservation to the United Nations Convention on the Rights of the Child (UNCRC) in refusing to incorporate this provision is potentially unlawful and open to challenge. It is of no relevance to the implementation of the Directive that the UK Government has entered a reservation to the UNCRC. Article 17 of the Directive is a provision which the UK has signed up to and must now accept[3]. We would point out that the wording of the Directive states that the best interests of the child shall be **a** primary consideration. The implementation paper distorts this requirement by referring to the Directive as requiring that the best interests of the child shall be **the** primary consideration. This is a very significant difference.

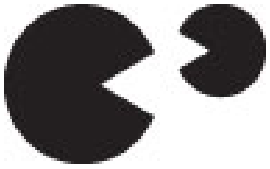
We therefore recommend that the Government reconsiders its position on Article 17(6) and makes explicit provision for ensuring that the best interests of unaccompanied children are made a primary consideration when incorporating the rest of Article 17 into the Rules.

[3] "In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty of the European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 24th January 2001, its wish to take part in the adoption and application of this Directive." *Official Journal of the European Union L326/13*, 13.12.2005, paragraph 32.

Chapters III and IV: procedures at first instance (articles 23-36) and procedures for the withdrawal of refugee status

We have no comments to make in respect of the implementing provisions of the articles in chapters III and IV.

7 Chapter V: appeals procedures (article 39)



Article 39: The right to an effective remedy

Article 39 (1) requires member states to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against.... (a) '*a decision taken on their application for asylum.*...'

Current provision for unaccompanied children refused asylum and granted a period of leave of less than one year (in line with the policy on Discretionary Leave) does not provide an effective remedy as required.

Section 83 of the *Nationality, Immigration and Asylum Act 2002* denies unaccompanied children refused asylum but granted leave of less than a year a statutory right of appeal against the decision on their asylum claim.

In order to access a first appeal, a child granted Discretionary Leave of less than one year would either have to wait until a further grant of leave 'aggregated' at over one year in total 'triggering' a statutory appeal, or apply for an extension of that period of leave before its expiry and, where refused an extension, apply against the refusal of an extension on asylum grounds. If they failed to lodge an 'in-time' application, perhaps because of negligence on the part of their immigration lawyer, or lack of a lawyer, their only appeal would arise once removal directions had been set.

In our view the current arrangements do not provide fair, prompt or timely access to an effective remedy before a court or tribunal and materially disadvantages the child . Where an application does eventually reach an appeal - usually when the child has reached, or is near to the age of, majority, the lapse of time between the events forming the basis of the claim and the hearing of the asylum appeal bears negatively on the prospects of the appeal succeeding. We take the view that this discriminates against these children.

Paragraph 129 of the consultation document argues that where no statutory right of appeal exists the applicant can still seek judicial review of the decision. We do not regard this as amounting to an 'effective remedy' against a statutory provision denying an appeal. We recommend that the Government reviews Section 83 in light of its obligations under Article 39 of the Directive.

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