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Maintaining Family Unity throughout the Asylum Support System in Policy and Practice

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Scottish Refugee Council is an independent charity dedicated to providing advice, information and assistance to asylum seekers and refugees living in Scotland. We also provide specialist services in areas such as housing and welfare, education and employment, family reunion, women's issues, community development, the media and the arts. We play a leading role in policy development and campaign on refugee issues to ensure that Scotland plays a full role in meeting the UK's legal and humanitarian obligations under the 1951 United Nations Convention on Refugees.

The aim of this research is to investigate the challenges to maintaining family unity and to protecting the best interests of the child which the policy and the practice of current asylum support provision pose. So far the debate on the impact of asylum policy on families has revolved around families who arrive together or refugees exercising their right to family unity. In contrast, we focus on families whose members arrived and sought asylum in the UK separately and on couples who started a relationship after arriving in the UK.

With regard to policy, we have identified as significant problem the current rule that a partner of a person seeking asylum - who is not a spouse or a dependant on their claim - can only be added to the asylum seeker's support application if they have lived together for two years. The rule disregards the rights of couples arriving separately in the UK and discriminates against those who started a relationship after arriving in the UK.

The rule also unfairly punishes children by preventing them from living with both parents. Thus, it constitutes a violation of the UKBA's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009 and the 1989 UN Convention on the Rights of the Child (UNCRC) which make the best interest of the child a primary consideration in all actions concerning children.

There is evidence to suggest that a number of decisions to refuse support based on the two years' rule have been successfully overturned on appeal. Given that the UK has only recently lifted its reservation on the UNCRC and the relatively recent introduction of Section 55 of the 2009 Act it can be assumed that the number of appeals will increase even further if no changes addressing the points presented in this report are introduced.

The research uncovers that the lack of subsistence-only option under Section 4 support forces individuals to choose between destitution and living with their children and leads to an unnecessary increase in asylum support costs.

We also find that a possible extension of the current definition of dependant can benefit asylum seekers and is cost-saving.

Concerning practice, the study suggests that the efficiency and integrity of the asylum system is compromised by not delivering decisions simultaneously to all family members who are treated as single for the purposes of their claim, but are nevertheless supported as a family.

Fleeing persecution and seeking protection is a particularly harrowing experience which shatters personal and family life. Fathers, mothers and children may have to endure months and years of separation before they can be reunited. Maintaining family unity should lie at the core of every humane and fair asylum system.

The UK government has recently announced the launch of the Asylum Improvement Project which aims to identify how to increase the efficiency and quality of asylum decisions (Home Office, “Draft Structural Reform Plan”, 2010). The complex issues facing families and the ways to address them should constitute an important element of the proposed reforms in line with the government’s belief that “families of all kinds are the bedrock of a strong and stable society” (The Coalition, “Our Programme for Government”, 2010).

The treatment of families in the asylum system has long been a concern of Scottish Refugee Council and is an area in which improvement is urgently needed. Scottish Refugee Council case workers, who are in daily contact with people claiming asylum, have repeatedly highlighted the maintenance of family unity as one of the most difficult issues people face.

Both the policy and practice of current asylum support provision pose a number of challenges to maintaining family unity and to protecting the best interests of the child. The current system is fraught with unfair and inefficient rules and procedures which lead to hardship, delays, and unnecessary expense. It also hampers the integration of families whose claims are accepted and decreases the chance of families whose claims have been refused leaving voluntarily.

The aim of this research is to identify gaps in existing asylum support policy and practice in relation to families supported by UKBA¹; demonstrate how they affect asylum seekers’ and refugees’ basic right to family unity; and provide a series of short- and long-term policy recommendations on how these gaps may be addressed. Dealing with the shortcomings of current policy and practice will contribute to the achievement of the primary objectives of the government’s asylum policy: increasing the speed and the quality of the asylum process and reducing its cost.

¹ This report does not focus on the equally important issue of separated children whose support is the responsibility of local authorities.

Stringent requirements to add dependants to asylum support applications disregard family unity and the best interests of the child

Scottish Refugee Council deals with 12-14 cases per month² of men and women seeking asylum who wish to add a dependant to their asylum support application but are unable to do so because of the rigid criteria the UKBA currently applies. According to the 2000 Asylum Support Regulations, a dependant who is not treated as a dependant on an asylum claim may be added to an asylum support application if they are the spouse of the asylum seeker or a person who has been with them as a member of an unmarried couple for at least two years³. For couples who are not married, or who are not in a possession of a marriage certificate, the only possibility to be supported together is to show proof that they fulfil the two-year cohabitation requirement. This requirement appears to derive from the Immigration Rules. These, however, were primarily developed to regulate the conditions under which unmarried or same-sex partners can obtain a leave to enter with a view to settlement (Immigration Rules 295A) or a leave to remain (Immigration Rules 295D).

The application of such a requirement to people seeking asylum, whose situation is profoundly different, coupled with other provisions in the current asylum system, leads to a separation of families, inflicts unnecessary hardship and goes against the best interest of the child.

Based on an analysis of complex case presentations of asylum seekers who sought assistance from Scottish Refugee Council in order to add dependants to their asylum support claims and on the basis of the input received from partnership organisations and various stakeholders, Scottish Refugee Council has identified the most common situations in which asylum seekers find themselves, the problems they face, and their impact on them, their partners and their children.

2.1. People seeking asylum and their partners arriving separately in the UK

The largest category of people affected by the two-out-of-three-years cohabitation requirement is people seeking asylum whose partners arrived separately in the UK. Due to the specific nature

of the process of seeking protection and the associated difficulties, families are often split with one partner fleeing the country and the other joining them after a long period of time, sometimes amounting to several years. While the UKBA acknowledges that assessing the credibility of a relationship should take into account the circumstances of a particular case, in practice the only proof of relationship other than a marriage certificate that is taken into account is whether the dependant was mentioned during the Initial Immigration Service screening interview. In contrast, if people arrive together and claim asylum, no proof of relationship is requested.

Once in the UK, the modalities of the asylum support system can then preclude families from living together. As a result, in order to be added as a dependant, people seeking asylum are required to fulfil a cohabitation requirement which is often impossible to satisfy in practice for the following reasons:

- **Dispersal:** a newly-arrived asylum seeker is often placed in initial accommodation regardless of where their partner is currently accommodated. Moreover, even after dispersal the couple may still be accommodated separately in different parts of the UK.
- Very often, one partner would try to visit the other one despite the physical distance and their limited means of support. However, living in the partner's accommodation without UKBA authorisation would constitute a breach of UKBA **accommodation rules**⁴. Thus, in many cases the visiting partner is forced to spend the night on the street. Moreover, such visits would normally not be considered as equivalent to 'living together as if married'. The case law on this matter is not conclusive: while some judges have accepted that 'applicants have fulfilled the requirement so far as they have been able', in another case the judge stated that even while taking into account that the couple were not permitted to live together, the regulation's requirements were not fulfilled (Asylum Support Tribunal, AS/09/09/20414).

² Based on an analysis of Scottish Refugee Council complex casework presentations during the period between January to April 2010.

³ The precise formulation reads: In these regulations "dependant", in relation to an asylum seeker, a supported person or an applicant for asylum support, means [...] a person in the United Kingdom who [...] had been living with him as a member of an unmarried couple for at least two of the three years before the relevant time. Asylum Support Regulations, 2000, regulation 2, Section 4(f).

⁴ UKBA, "Asylum Support Agreement"

- **Case Study 1:** A Chinese man spends the day with his partner and their three-year old child who are supported under Section 95. However, the father has to leave the flat at night and find accommodation at a friend's place as he is not authorised to live with his family. Even though the couple have been in a relationship since 2005 and have a child, the wife's request to add her partner as a dependant on her asylum support was turned down. The refusal was based on their failure to provide evidence demonstrating that they have been living together for the past two years. The couple appealed against the decision stating that they "wish to live together as a family as is our right". The appeal has been dismissed and the father continues to leave the family's home at night.

Currently, people seeking asylum are supported either under Section 95 or Section 4 of the 1999 Immigration and Asylum Act⁵. If partners have arrived at different times, one partner's asylum case may already have been refused. Where UKBA do not accept that a couple's relationship meets the requirements of the regulations, this partner may be eligible only to apply for Section 4 support, regardless of the fact that his/her partner and occasionally children are in receipt of Section 95 support. A request can be made for Section 4 and Section 95 support to be provided at the same address. However, lengthy delays inherent in the Section 4 application process⁶ can lead to one partner experiencing a period of destitution and separation from his/her family while the support application is under consideration. In cases where one partner is particularly vulnerable and needs care, the deleterious impact of such separation is even more pronounced.

The UK has clear obligations under the EU Reception Conditions Directive (Council Directive 2003/9/EC) to "maintain as far as possible family unity as present within their territory, if applicants are provided with housing" (Article 8). Domestic legislation reflects this obligation in the 2005 Asylum Seekers (Reception Conditions) Regulations which require UKBA to have

regard to family unity when providing accommodation under Section 95 of the 1999 Asylum and Immigration Act⁷.

The EU Reception Conditions Directive applies to both married and unmarried couples in a stable relationship (in so far as the family existed in the country of origin). While the Directive does not provide a definition of the term 'stable relationship' it can be argued that the same considerations that apply when defining the term 'durable relationship' should apply to the term 'stable relationship'. 'Durable relationship' is an EU concept found in the Directive 2004/38/EC. The Directive enshrines the obligation of Member States to facilitate the entry and residence of 'the partner with whom the EU citizen has a durable relationship' (Article 2) and their duty to 'undertake an extensive examination of the personal circumstances in justifying or denying entry or residence of such people.

While the Directive is obviously not directly applicable to all people seeking asylum, the UK domestic institutions' interpretation of a 'durable relationship' and the in-built discretion to assess the personal circumstances are relevant. The UK's Social Security and Child Support Commissioner has noted that:

"the length of time for which the partnership has survived will not be the only factor that is relevant. The circumstances will be as important as the duration of the relationship. Survival in times of wealth, health and good fortune is less an indication of durability than survival in terms of poverty, poor health and misfortune. And if the focus is on the present and future, the fact that it has lasted may, depending on the circumstances, be very good evidence that it is and will remain durable" (2008 UKSSCSC CIS_612_2008).

Clearly, a relationship between two unmarried people who did not arrive in the UK and claim asylum together and had been separated for a long period of time but managed to maintain their relationship despite their physical separation and personal hardship, should be considered 'durable'

⁵ Section 95 support is granted to eligible asylum seekers while their claim is under consideration. The applicant can choose whether to receive both accommodation and subsistence support or subsistence only. Section 4 support is provided to those asylum seekers whose claim has been refused but have a temporary barrier to leaving the UK and would otherwise be destitute. The support comprises accommodation and an Azure payment card with £35.39 per person per week which can be used to purchase food and toiletries. There is no possibility to obtain the card alone.

⁶ Scottish Refugee Council, "Even among Asylum Seekers we are the lowest: Life on Section 4 Support in Glasgow", 2010

⁷ See also NASS, "Policy Bulletin 83: Duty to Offer Support, Family Unity, Vulnerable Persons, Withdrawing Support"

and 'stable'. Moreover, the cohabitation requirement punishes not only couples but also children. The **existence of a child (sometimes even two children) is currently not considered sufficient evidence of a relationship** which deprives people seeking asylum of the possibility of enjoying family life. This contradicts both domestic and international laws and is quite surprising given that UK courts have recognised that in the case of natural parents and their minor children there is a general presumption of family life. The Court of Appeal in Singh confirmed that the "close personal ties" which establish family life "will be presumed to exist as between children and their natural parents". (Singh [2004] EWCA Civ 1075).

Depriving children of the presence of one of their parents also violates Section 55 of the Borders, Citizenship and Immigration Act 2009, which imposes a duty on the UKBA to take into account the need to safeguard and promote the welfare of all children in the UK. Forcing one parent to live separately from their child – provided that their presence does not constitute a threat to the child's well-being – will have a negative impact on the child's welfare. Such policy contradicts the obligation – enshrined in international law (1989 UN Convention on the Rights of the Child) - to make the best interest of the child a primary consideration in all actions concerning children.

- **Case study 2:** A Chinese couple have been in a relationship for more than two years and have two young children. Nevertheless, the mother's claim to add the father as a dependant on her asylum support was rejected on the formal grounds of not presenting evidence of having lived together. Their appeal was dismissed due to doubts about the authenticity of their relationship despite the Court recognising that the man is the father of their two children.

2.2. People seeking asylum who meet a partner (without status) after arriving in the UK

The stringent 'two-out-of-three-years' requirement also punishes those who found a partner after arriving in the UK. Couples would not be supported together unless they can prove that they have fulfilled the cohabitation requirement. In most

cases this is impossible: the sad reality of the UK asylum system is that some people seeking asylum are homeless or stay with friends. In such cases ordinary proof of having lived together such as a utility bill is impossible to obtain.

There is no reason why such couples should be treated differently from those where both partners are UK nationals. Such differential treatment is discriminatory because the couple's needs are the same regardless of their nationality.

UK nationals living together are supported as couples from the moment they decide to live together. According to the Department for Work and Pensions decision-makers' guide, "the length of time two people have been together is not proof of the stability of the relationship. There is no specified time limit in determining the stability of the relationship" (DWP, "Decision Makers' Guide: Living Together as Husband and Wife"). In fact, even the UKBA's own guidance - while adopting a more cautious wording - seems to agree that there is no specific time limit beyond which a relationship is to be considered as giving rise to 'family life': "If the relationship is of sufficient substance or stability, family life may exist between unmarried and same-sex partners even if they do not fulfil the two years' co-habitation requirement" (UKBA, Asylum Policy Instructions: Article 8 ECHR, 2009).

The majority of the cases which Scottish Refugee Council deals with in this category involve women who are already pregnant and who either have not been able to live with the father of their future child through no fault of their own, or have no proof of such a relationship. Due to the stringent cohabitation rule, however, these already vulnerable women cannot receive the much-needed support of the baby's father. Moreover, depriving the child of the presence of their parent is, as stated above, in clear violation of Section 55 of the 2009 Borders, Citizenship and Immigration Act and the 1989 UNCRC.

It is often argued that the two years' rule protects vulnerable women against exploitation and helps prevent abuse of the asylum support system. While such concerns are legitimate, violating couples' and children's human rights is certainly not the

appropriate way to address them. Introducing a more flexible system which pays particular consideration to the individual circumstances of the couple rather than to a strict period of cohabitation and providing more training to caseworkers would ensure that a balance between preventing abuse and providing support is achieved.

Allowing couples to live together before they meet the two years' requirement could in fact be beneficial to the integrity and efficiency of the asylum system. Living together would allow them to plan their long-term future. If they are granted refugee status, they can quickly start the integration process. If their asylum claims are refused, they can plan the return to their home country as a family unit. In addition, families will be encouraged to become self-sufficient and solve problems together instead of relying on service-providers for support leading to significant cost savings.

Furthermore, decisions to refuse to add a dependant to an asylum support application are often successfully appealed at the Asylum Support Tribunal. Given the substantive costs involved in the appeal process it would be more efficient to allow for more discretion and an individual assessment of each case which would result in sustainable decisions.

2.3. People seeking asylum in 'mixed households'

In the case of mixed households, where the partner of someone whose asylum claim has been refused is a British national or has leave to remain in the UK, Section 4 support in particular leads to the separation of families. This is because one partner is forced to move to specific accommodation in order to receive this support. The lack of a Section 4 support 'subsistence-only' option compounds these difficulties, as one partner is forced to choose between remaining with their partner whilst being destitute, or receiving support. This is not a free choice and definitely not one which any human being should be forced to make.

The UKBA has often argued that the negative impact on the family life of a person who has to move to particular accommodation to access support is mitigated by the proximity of the provided

accommodation and the short-term nature of Section 4 support. However, serious objections can be raised against both arguments. Regarding the proximity of the accommodation, as mentioned above the UKBA itself has maintained that couples who do not share the same accommodation are not living together as a husband and wife. Thus, the position that forcing couples to live separately does not interfere with their family life because of the short geographical distance between their respective accommodation becomes untenable. The argument that Section 4 support is only short-term is refutable on the basis of existing evidence. As of June 2009, some 9,354 people had been on Section 4 support for more than six months (Hansard July 15th 2009 Col 394W). Scottish Refugee Council's own research has shown that a significant number of people have remained on Section 4 support for over two years (Scottish Refugee Council, "Even among Asylum Seekers we are the lowest: Life on Section 4 Support in Glasgow", 2010).

The absence of Section 4 subsistence-only support exacerbates further the plight of mixed couples who have children. Depriving a child of the possibility to enjoy living together with both parents constitutes a failure to comply with Section 55 of the 2009 Borders, Citizenship and Immigration Act and the duty to safeguard and promote the child's welfare. For the reasons stated above, the arguments about the geographical proximity of accommodation and the short-term nature of Section 4 support cannot be used as mitigating factors. Moreover, the claim that the need to maintain the efficiency of the asylum system justifies the separation of families is unfounded: there is no evidence to suggest that those who have moved to Section 4 accommodation are more likely to leave the country voluntarily than those who choose to stay with their families.

Finally, the lack of subsistence-only option increases the cost of Section 4 support. Significant savings, amounting to £97 per person per week, could be made if people who are willing to stay with their partners (and children) are allowed to do so without losing their entitlement to support (Still Human, Still Here, "At the End of the Line", 2010).

2.4. People seeking asylum who are providing or in need of care

Asylum seekers often require or provide support to family members who do not fit the definition of 'dependant'. This definition is based on a western notion of the 'family' being the nuclear family. The presence of siblings and parents and the possibility of being accommodated together or in close proximity would be beneficial to people seeking asylum. Currently, there is a provision in the 2000

Regulations which allows an asylum seeker to add a member of the household as a dependant if that person is in need of care due to a disability. However, people can often be in need of care or support even though they do not necessarily have a 'disability'. If the required care could be provided by a person seeking asylum or to them by a member of their family, this could decrease pressure on social services. Such an approach would be in line with the UK government's objective of building a 'Big Society'.

3.0 Practice-related issues:

Granting status of family members in mixed households at different times violates family unity and impedes integration

Once granted leave to remain, refugees have to move to the mainstream benefits support system. However, there are many cases of mixed households where one partner has received status but the dependants – who have lodged separate claims on which no decision has been made – have not. In such cases, the transition to mainstream support leads to the splitting up of families. This is due to the fact that refugees are required to leave their accommodation in 28 days. The practice of granting status to family members at different points in time affects not only family unity but also the family's integration prospects if their asylum claims are upheld. It also incurs significant costs when the family members whose claims are accepted join those who have already been granted refugee status and the entire family has to move to different accommodation.

In cases where their claims are refused, the practice prevents families from making plans to return to their home country as a family voluntarily.

- **Case Study 3:** Having been granted refugee status following a fresh asylum claim and years of uncertainty, a Chinese mother and her child are enthusiastic about starting the integration process. But it turns out that their joy of being able to start a new life has been premature: the father, who had been supported as a dependant on his partner's Section 95 support for 15 months, has been told that he cannot move in with his family to their new accommodation. He is currently waiting for the outcome of his fresh asylum claim while his pregnant partner and their child are investing efforts in integrating despite the family's precarious situation.

Short-term:

- Existence of a common child should be taken as a proof of relationship if the father's name appears on the birth certificate unless there are significant reasons to believe that the certificate cannot be taken as reliable evidence;
- Instead of a minimum period of cohabitation, alternative means of assessing the stability of a relationship should be applied to pregnant women and other vulnerable persons. DWP guidance should be adapted and used;
- The presence of extended family members (e.g. siblings, parents) or other persons in need of care should be taken into account when granting accommodation;
- Section 4 subsistence-only support should be introduced;
- Before making a decision on an asylum claim, the case owner should check whether the asylum seeker who is treated as single for the purpose of their asylum claim is nevertheless financially supported as part of a family. If this is the case, the asylum claim, if any, of the other family member should be assessed at the same time with a view to reaching a decision on the status of the entire family; and
- Case owners should receive more training on the UK's obligations under Section 55 of the Act, Borders, Citizenship and Immigration Act 2009 and the 1989 UN Convention on the Rights of the Child (UNCRC).

Long-Term:

- The two years' cohabitation requirement should be replaced by other ways to determine the stability of a relationship in line with the ones applied to relationships between UK nationals or permanent residents. The DWP guidance should be used;
- Definition of 'dependants' should be expanded to encompass siblings and parents as well as persons in need of care beyond those with a disability; and
- All asylum seekers should be supported under Section 95 until they are granted status or removed to their country of origin.

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