NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Mr James Brokenshire MP
Minister of State (Minister for Immigration)
Home Office
Immigration and
Border Policy
Directorate
2 Marsham Street,
London,
SW1P 4DF

8 September 2015

Dear Mr Brokenshire,

Re: Reforming support for failed asylum seekers and other illegal migrants.

I write in response to the consultation 'Reforming support for failed asylum seekers and other illegal migrants' ('the consultation').

The Northern Ireland Human Rights Commission (NIHRC) is one of the three A status National Human Rights Institutions (NHRIs) in the United Kingdom and is required by Section 69 (1) of the Northern Ireland Act 1998, to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights". This mandate extends to both matters within the competence of the Northern Ireland Assembly and those within the competence of the Westminster Parliament.

The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998 and the treaty

obligations of the Council of Europe (CoE) and United Nations (UN), emanating from the treaties ratified by the UK.

Presumption against retrogression and prohibition on discrimination in the enjoyment of European Social and Cultural rights

The International Covenant of Economic, Social and Cultural Rights (ICESCR),[1] Article 11(1) provides for the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.[2] Furthermore, ICESCR, Article 9 obliges States to recognise the right of everyone to social security, including social insurance.[3]

Under Article 2, both these rights are to be realised "progressively". The Committee on Economic, Social and Cultural Rights (CESCR) has stated this imposes an obligation on States to,

> move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[4]

In addition, ICESCR, Article 2 sets out an immediate obligation on States to ensure that the rights protected within the Covenant are enjoyed without discrimination, including on grounds of nationality. The CESCR states that,

> [t]he ground of nationality should not bar access to Covenant rights e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.

[1] UK ratification 1976.
[2] See also, UNCRC, Article 27.
[3] See also, UNCRC, Article 26.
[4] CESCR, General Comment 3, para 9.

On the right to social security, the CESCR has also noted that,

> [n]on-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable.[5]

The consultation includes the intention of the Home Office to:

> (1) close off section 4(2) support for failed asylum seekers who make no effort to leave the UK at the point that their asylum claim is finally rejected. Where there was a genuine obstacle preventing return to the country of origin at that point, support could be provided until that obstacle was removed; and,
>
> (2) change [] section 95 support arrangements so that those who have a dependent child or children with them when their asylum claim is refused and any appeal is finally rejected are no longer classed as "asylum seekers" for the purposes of eligibility for support.[6]

Currently the Home Office has an onus to establish that the failed asylum seeker is not taking the necessary steps to leave before support can be ceased. The NIHRC is concerned that the consultation proposes to transfer the onus to those in receipt of state support to make the application before the grace period expired and to demonstrate why they could not leave the UK and that they would otherwise be destitute. This is a retrogressive measure as it removes the responsibility from the Home Office to the rights holder.

The NIHRC notes that the proposals are retrogressive concerning the enjoyment of the right to an adequate standard of living and the right to social security. The NIHRC advises that given the strong presumption against retrogression, a full justification by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources should be

[5] CESCR, General Comment 19, para 37.
[6] Consultation, para 29.

given. This should include an explanation of how any possible impacts of the measures are proportionate to the goal to be achieved.

Freedom from inhuman and degrading treatment

The European Convention on Human Rights (ECHR), Article 3 provides that no one shall be subject to inhuman and degrading treatment. In *Pretty v UK* (2002), the European Court of Human Rights (ECtHR) stated that treatment can be inhuman or degrading if it,

> humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance […] The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.[7]

In the House of Lords case of *R v Secretary of State for the Home Department ex parte Limbuela and others* (2005), the domestic court affirmed a breach of Article 3 concerning a decision not to provide support to asylum seekers on the basis of a late application. Lord Bingham noted that:

> A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food, or the most basic necessities of life.[8]

Baroness Hale further stated that,

> …this is not a country in which it is generally possible to live off the land, in an indefinite state of rooflessness and cashlessness. It might be possible to endure rooflessness for some time without degradation

[7] *Pretty v UK,* ECtHR, Application no. 2346/02 (29 July 2002).
[8] *R v Secretary of State for the Home Department ex parte Limbuela, Tesema and Adam* [2005]UKHL 66, para 7.

> if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age.[9]

The ECtHR also held that asylum seekers faced with the prospect of living on the street, with no access to resources, engages Article 3 of the ECHR. In the case of *MSS v Belgium and Greece,* the Court held that the Greek authorities did not have due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considered that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considered that such living conditions, combined with the prolonged uncertainty in which he remained and the total lack of any prospects of his situation improving, attained the level of severity required to fall within the scope of Article 3 of the Convention.[10]

Furthermore, the ECtHR has held that poor detention conditions in reception centres in the context of migrants may amount to a violation of Article 3. In the case of *Khlaifia and Others v Italy,* the Court held that there was a violation of Article 3 in respect of detention conditions at a reception centre which encountered serious overcrowding, poor hygiene and lack of outside contact. The Court held that the conditions had diminished their human dignity; the situation had gone beyond the suffering inherent in detention and amounted to degrading treatment contrary to Article 3.[11]

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[9] *R v Secretary of State for the Home Department ex parte Limbuela, Tesema and Adam* [2005]UKHL 66, para 78.

[10] *MSS v Belgium and Greece,(Application no. 30696/09)* para 263

[11] *Khlaifia and Others v Italy,(Application no.16483/12)*

The NIHRC notes that the consultation proposals put in place additional barriers for failed asylum seekers with dependents to access support. These include:

- transferring the burden from the State onto failed asylum seekers with dependents to demonstrate why they could not leave the UK and would otherwise become destitute;[12] and,
- allowing no right of appeal for a refusal to extend the grace period.[13]

The NIHRC acknowledges that the consultation contains safeguards for asylum seekers with dependents, including proposals to extend the grace period to 28 days and the possibility of an extension on application if there is a practical obstacle preventing the family's departure from the UK. However the NIHRC advises that these safeguards may not be sufficient to meet human rights requirements.

The NIHRC advises that increasing the difficulty of failed asylum seekers with dependents (who are unable to leave the UK and are already at risk of falling into destitution) to access support, will increase the risk of destitution for those persons, as well as widen the pool of persons already at that level of risk.

Given that the State already recognises these individuals and their families are at risk of destitution, it is not clear from the consultation how the State has satisfied itself that it has sufficient mitigating measures in place to manage that risk and ensure destitution is avoided.

Best interests of the child

The UN Convention on the Rights of the Child (CRC), Article 3 provides that,

> [i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[12] Consultation, paras 28 and 32.
[13] Consultation, paras 28 and 34.

Furthermore, Article 26 of the UNCRC provides that State parties shall "recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law." Article 27 of the UNCRC also requires State parties "to recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

The NIHRC advises that removing section 95 support for failed asylum seekers with dependents and thereby putting the onus upon parents and guardians to demonstrate their why they cannot leave the UK and would otherwise become destitute before support can be continued is contrary to the best interests of the child principle.

Finally, the NIHRC advises this matter will be raised before the ICESCR Committee in the upcoming examination on the UK's obligations under the Covenant.

We trust our suggestions will be taken into consideration by the Home Office and if you have any further queries please do not hesitate to contact my office.

Yours sincerely

Les Allamby
Chief Commissioner