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The Qualification Directive

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The following two tables set out the substantive differences between the Council Directive 2004/83/EC (“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 contention of the protection granted”) and,

- (a) The 1951 Convention Relating to the Status of Refugees;
- (b) The Refugee or Person in Need of International Protection (Qualification) Regulations;
- (c) The Immigration Rules;
- (d) The Human Rights Act 1998 / European Convention on Human Rights.

The legal relationship between these different provisions will be considered in the talk.

1. Relationship with Refugee Convention

| | Directive | Refugee Convention | Regulations /Immigration Rules | Comment |
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| 1. | A refugee is a <i>non-EU national</i> or stateless person (“third country nationals”): A.2(c) | A refugee is a person outside his country of nationality or a stateless person: A.(2) | Refugee is a non-UK citizen: Reg. 1 | Directive has no application to EU migration. |
| 2. | There must be a <i>connection</i> between the reasons for the feared persecution (race, religion etc) and the acts of persecution: A.9.3 | Convention simply states that persecution feared must be for reason of race, religion etc.: 1(A) HL has held that it is not sufficient connection that ‘but for’ race, religion etc. the abuse would not take place: <i>Shah & Islam</i> [1999] 2 AC 629. | Follows Convention: Reg.1. | Appears to affirm more relaxed approach to causation and make clear that indirect discrimination may suffice. |
| 3. | Protection can be provided by parties or organisations, including international organisations, controlling at least a substantial portion of the state: A.7.1(b) | Protection can only be afforded by a state or an entity accountable under intentional law and / or capable of granting nationality: <i>Gardi v Home Secretary</i> [2002] EWCA Civ 750 at [37]; ¹ <i>R (Mahmud) v Immigration Appeal Tribunal</i> [2003] EWHC 148 (Admin) at [17]. | Protection can be afforded by any party or organisation, including any international organisation, controlling at least a substantial part of the territory of the state: r. 4(1)(b) | Directive may differ from the approach taken in domestic law under the Convention by broadening the actors that can provide protection capable of denying a person protection as a refugee. |

¹ Finding that any protection afforded by the Kurdish Autonomous Region, which was not controlled by the Iraqi Government, had to be disregarded.

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| 4. | Protection is generally provided [by an entity referred to above] where it takes reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishments of acts of persecution and serious harm, and the applicant has access to such protection: A.7.2 | <p>The Convention merely states that a <i>person</i> is “unable or unwilling to avail himself of the protection of that country”.</p> <p>The HL has held that the state of origin must be “unable or unwilling” to discharge its duty to provide protection: <i>Horvath</i> [2001] 1 AC 489, 500G-501A; <i>Bagdanavicius</i> [2004] 1 WLR 1207 (CA).</p> <p>Cf. UNHCR: “<i>internal protection element is best considered and determined as element of the well-foundedness of the fear.</i>”²</p> | Protection shall be regarded as generally provided [by an entity referred to above] where it takes reasonable steps to prevent the persecution by operating an effective legal system for the detention, prosecution and punishment of acts constituting persecution or serious harm and the person has access to such protection. | <p>Directive has affirmed UK principle of surrogacy – that a person can only turn to international law when own state cannot protect you.</p> <p>Reasonable steps may water-down <i>Horvath</i> test and regulations suggest that, save exceptionally, the operation of an effective legal system is sufficient.</p> |

² “IPR: Interpreting Article 1 of the 1951 CRSR” April 2001 at [37] and at [15]: “*The question is whether the risk giving rise to the fear is sufficiently mitigated by available and effective national protection from that feared harm. Where such an assessment is necessary, it requires a judicious balancing of a number of factors both general and specific, including the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.*” This approach has been followed in Australia and New Zealand: *Khawar* [2002] HCA 14; *Refugee Appeal No 71427/99* [2000] INLR 608.

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| 5. | A social group is constituted by an innate characteristic <i>and</i> the group has a distinct identity because it is perceived as being different by the surrounding society: A.10.1(d) | The HL has held that International law regards a social group as constituted <i>either</i> by an innate characteristic <i>or</i> a distinct identity because it is perceived as being different by the surrounding society <i>K</i> [2007] 1 AC 412. HL also held that the Directive and Regs must be interpreted in such a way: <i>K</i> , at [16] and [118]. | Reg 6(2) follows Directive. | This is an example of where the Directive confers less protection than the Refugee Convention. The HL has indicated that the Convention approach should be taken. Query, however, whether the view that institutionalised discrimination by the State is necessary before women = social group (<i>Shah</i> [1999] 2 AC 629; <i>ZH Iran CG</i> [2003] UKIAT 00207) is good law (cf. <i>K</i> at [103] (Hale)). |
| 6. | Acts of gender-specific or child-specific nature are included as examples of acts of persecution: A9.2(f) | No reference. | Omitted from Reg. 5(2) listing examples of acts of persecution. | The list in 5(2) are expressed to be examples. Directive prevails. |

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| 7. | Without prejudice to the Geneva Convention, Member States may determine that a person who files a subsequent application shall not normally be granted refugee status where the risk of persecution is based on circumstances created by his own decision since leaving his country of origin: A.5.3. Also 4.3(d) ³ | Not mentioned. Position in English law was that opportunistic sur place conduct went to credibility, but this approach has been disproved: <i>YB (Eritrea)</i> [2008] EWCA Civ 360, [13]. | Not mentioned. 333P simply states asylum claims can be based on sur place conduct. | Directive makes clear that opportunistic activity sur place is not an automatic bar to asylum, but does not answer what relevance it has: <i>YB (Eritrea)</i> , at [13]-[14] also see A.20.6. It possibly authorises departure from well-founded fear test in respect of subsequent applications. ⁴ But unclear what is meant by “ <i>subsequent application</i> ”. It may mean after creating circumstances, or it may mean second application (<i>YB (Eritrea)</i> , at [14]). |
| 8. | Person is excluded from being a refugee if serious reasons to consider he has committed a serious non-political crime prior to issuing residence permit on the basis of granting refugee status: A.12.2(b) | Person is excluded from being a refugee if serious reasons to consider he has committed serious non-political crime prior to admission to the country: A.1.F(b) | Person is excluded from being a refugee if serious reasons to consider he has committed serious non-political crime prior to issuing of a residence permit: Reg. 7(2)(b) | Where serious crime is committed after entering country before residence permit issued, a person might (depending on meaning of “admission”) be a Convention refugee but not a Directive refugee. |

³ This provision is in addition to A.4.3(d) which provides that in assessing applications, Member States shall take into account “*whether the applicant’s activities since leaving the country or origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country*”. See also A.5.2 and 3.

⁴ In *YB (Eritrea)* Sedley LJ took the view, with some hesitation, that A.5.3 applied in second applications and A.4.3(d) referred to situations where the home government might not be concerned about opportunistic acts. This analysis is somewhat artificial, although it greatly assists sur place claims.

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| 9. | Serious non-political crimes may include particularly cruel actions with an allegedly political objective: A12.2(b) | No such rider. | Serious non-political crime include particularly cruel actions with an allegedly political objective Reg. 7(2)(a) | |
| 10. | Where there are reasonable grounds to regard a person as a danger to the security of the host country or a danger to community after conviction of serious crime, refugee status <i>may be</i> refused or revoked: A.14.4. | Where there are reasonable grounds to regard a person as a danger to the security of the host country or a danger to community after conviction of serious crime a refugee can be expelled or returned (but refugee status is not affected): A.33(2) | A person is a refugee if Refugee Convention criteria satisfied: Reg. 2 334 (i) and (iv) 339A(ix) and (x) states that asylum will be refused or revoked in such circumstances (but does not affect refugee status). NB s.72 of NIAA 2002 presumption of serious crime if 2yr sentence. May breach Directive ⁵ | If Directive approach adopted, a person who loses status as refugee but cannot be expelled or returned on human rights grounds will not be able to claim rights associated with refugee status. However, domestic law does deny a person asylum in A.14.4/A.33(2) circumstances so should retain status for refugee benefits under Directive. |
| 11. | Change of circumstances -- No reference to compelling reasons for a refugee refusing to avail himself of protection of home state: A.2.(e) | After a change of the circumstances forming the basis for recognising a person as a refugee, compelling reasons can be a justification for a refugee continuing to refuse to seek protection of home state : A.1C.(5). But held to apply only to statutory refugees: <i>Hoxha</i> [2005] 1 WLR 1063 (HL). | No provision in Regs. 339A(v) follows Directive | The omission of saving provision was deliberate. Endorses <i>Hoxha</i> approach. Negligible relevance as applies only to statutory refugees. |

⁵ See Guy Goodwin Gill's Paper, "Challenges to the Protection of Refugees and Stateless Persons – Compliance with International Law" at para. 14.

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| 12. | In order to facilitate integration, Member States shall make provision for integration programmes: A.33 Member States may provide assistance to persons wishing to repatriate: A.34 | Shall as far as possible facilitate the assimilation and naturalisation of refugees. In particular, expedite and ease naturalisation proceedings: A.34 | | No obligation to facilitate naturalisation under Directive. |
| 13. | Definition of family in respect of provision guaranteeing family unity, means close dependent relatives who lived together. | Council of Europe's Recommendation (99) 23 on family reunion of refugees follows ECHR case law on Article 8 which has a wider definition of a family (see below) | | |

2. Relationship with European Convention on Human Rights

| | Directive | ECHR | Regulations / Immigration Rules | Comment |
|----|---|--|---|---|
| 1. | "A person is eligible for subsidiary protection if, not being a refugee, there is substantial grounds to believe that <i>if returned to his country of origin</i> the person would face is a real risk of serious harm ...": A.2(e) | ECHR principles apply irrespective of country removed to. ECHR protection applies even if no removal (e.g. exclusion or deprivation of citizenship, or in-country hand-over: <i>Al-Saadoon</i> [2008] EWHC 3098, [2009] EWCA Civ. 7) ⁶ | " <i>substantial grounds have been shown for believing that if he returned to the country of return, would face a real risk of suffering serious harm</i> ": Reg.2 and 339C(iii). | The protection of the Convention applies in factually wider circumstances than the Directive, unsurprisingly since it is not limited to immigration situations. |

⁶ See also *Al-Jedda* (SIAC) Judgment awaited (person deprived of citizenship whilst detained in Iraq and excluded from UK).

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| 2. | Serious harm consists of torture or inhuman or degrading treatment or punishment of <i>an applicant in the country of origin</i> : A15(b) | Breach of Art. 3 where expulsion will give rise to real risk of Art. 3 ill-treatment in receiving country: <i>Soering v UK</i> (1989) 11 EHRR 439. Also, any act constituting inhuman or degrading treatment in Contracting State also = breach of Art. 3 | “torture or inhuman or degrading treatment or punishment of a person <i>in the country of return</i> ”: Reg.2, 339C(iv) | Subsidiary protection not applicable where removal or the prospect of removal <i>would itself</i> be inhuman or degrading. E.g. <i>D v UK</i> (1997) 24 EHRR 423, abrupt removal of person in advanced stages of AIDS inhuman. Note that country of return and country of origin might not be the same. Also see <i>TI v United Kingdom</i> , App. No. 43844/98, 7 March 2000 (Art. 3 applies even when removed via safe third country). |
| 3. | Serious harm includes serious and individual threat to a civilian’s life or person by reason of <i>indiscriminate violence</i> in situations of internal or internal armed conflict: A.15(c). Does not require a person to show they were specifically targeted. Applies, exceptionally, where degree of violence is so high that presence in territory gives rise to a threat: <i>Elgafaji, C-</i> | “...[T]he Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. <i>Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual</i> | Reg. 2 and 339C follow Directive | The ECJ referred to <i>NA v UK</i> and concluded that has a “different content” from Art. 3 ECHR: <i>Elgafaji, C-465/07</i> , 17 Feb. 09, at [27]-[28]. Being subject to a threat of violence may not be the same as subject to a real risk of inhuman or degrading treatment: see <i>KH</i> [2008] UKIAT 00028, at [31]. ⁷ But otherwise, difficult to see clear water between ECHR and Directive ⁸ . |

⁷ “...it is simply not possible to equate ill-treatment with a threat of ill-treatment” (and see [124] and [127]). Later, the IAT noted, “Article 15(c) reflects the view that it cannot be right in principle to return civilians to a situation where they ...would face a realistic threat of being victims of war crimes or other serious breaches of IHL” (at [51]). The IAT also noted that A.15(c) is “tortuously worded” (at [32]).

⁸ Cf. Guy Goodwin Gill, *supra*, at para. 11.

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| | 465/07, 17 Feb. 09, at [43]. A.15(c) has a separate field of application from A.15(b): <i>Elgafaji</i> , C-465/07, 17 Feb. 09, at [28]. | <i>being exposed to such violence on return.</i> " <i>NA v UK</i> , App. No., 25904/07, 17 July 2008, at [115] | | |
| 4. | Serious harm does not include breach of Article 8 | Article 8 can prevent return | Serious harm does not include breach of Article 8 | The fact that the Directive does not prohibit removal for breach of Article 8 (or Arts. 6 or 9) is a significant lacunae and is an area where direct reliance on ECHR will remain necessary. |
| 5. | Actors of serious harm include non non-state actors if it can be demonstrated that state is unable of unwilling to provide protection: A.6.(c) Protection generally provided where state takes reasonable steps prevent serious harm, inter alia, by operating an effective legal system: A.7.2 | The HL has held that where risk relied upon comes from non-state actors, a person must show that state itself has breached Art. 3 by putting in place a <i>reasonable level of protection</i> against mistreatment: <i>Bagdanavicius</i> [2005] 2 AC 668 | Actors of serious harm include non non-state actors if it can be demonstrated that state is <i>unable of unwilling</i> to provide protection: Reg 3(c) | Approach in <i>Bagdanavicius</i> may provide greater protection because Art 3 ECHR also imposed positive operational obligations – effective legal system not sufficient. But <i>Bagdanavicius</i> approach also wrongly assumes that Art. 3 can only be breached by State. ECtHR holds Art. 3 violated so long as state protection does not obviate risk: <i>HLR v France</i> , 1997 III, at [40], ⁹ but cf. <i>Bensaid</i> (2001) 33 EHRR 218, at [40] – actor relevant to level of risk. Thus, Strasbourg may offer greater protection than domestic Cts and ECJ. |

⁹ See also *A v UK* (1999) 27 EHRR 611: The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals." (at [22])

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| 6. | Subsidiary protection ceases where circumstances that led to granting of subsidiary protection ceases to exist or changes to such a degree that protection is no longer required: A.16 | The basis for protection may change, risk has to be judged at the time of the expulsion: <i>Saadi v Italy</i> , at [133] | | It is difficult to envisage circumstances where this difference would be material. |
| 7. | A person is excluded from subsidiary protection in certain circumstances such as committing serious crime. | No conduct can exclude a person from protection of ECHR: <i>Saadi v Italy</i> , at [138]-[140] | | The effect is that a person will be able to fall-back on ECHR protection but will not be entitled to benefits of subsidiary protection status. |
| 8. | Member states shall ensure family unity can be maintained (whether for refugee or protected person). Family member may include close relatives who are dependents, living with person at time of flight: A.23.5 | The protection of Article 8 is broader: e.g. <i>Berrehab v The Netherlands</i> (1989) 11 EHRR 322. | | There will be circumstances where subsidiary protection status (and refugee status) does not protect Art. 8 rights. Breach of A.8 but no right to status unless Directive terms are themselves unlawful as breach of Art. 8 / Art. 14. |
| 9. | If an eligible person is removed there would be a possible <i>Francovich</i> damages claim for breach of statutory duty. | Can claim under Convention even after expelled: <i>Vilvarajah v United Kingdom</i> (1994) 19 EHRR 193. Claims can be brought under HRA s.7, including for damages. | | Given that there are examples of Art. 3 and 8 cases being brought after expulsion, one issue for the future is whether the Directive confers any remedies in such situations. |