A1088

INTRODUCTION TO THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002 – ENTITLEMENT TO SUPPORT

1 July 2003

AGENDA

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CASE STUDY

Support for Asylum Seekers An Overview

The Support System as a Control Mechanism

The NIAA seeks to provide a seamless system of support for asylum seekers from the point at which they initially make their claim until the time at which their application is finally determined or, if they are failed asylum seekers who are accompanied by children, the point at which they fail to comply with specific removal directions. (Paragraph 6 of Schedule 3 to the NIAA)

There are some obvious positive aspects to such an approach in that it brings some coherence to a system which has grown like Topsy as successive legislation has sought to restrict the rights of asylum seekers to firstly benefits and then to other forms of support. Resulting in a situation where some asylum seekers are entitled to benefits for historical reasons or as a result of entitlements arising from European law or other intergovernmental agreements. Others are still supported by local authorities under the Interim Support System and the remainder are dependent upon National Asylum Support Service ("NASS").

However, the benefit to the Government of the new system should not be overlooked and the importance of this becomes clear when one considers the detail of the new provisions.

The majority of destitute asylum seekers will continue to be offered support by NASS and to be dispersed to accommodation outside of the South East of England or London under powers derived from Section 94 the Immigration and Asylum Act 1999 (the "IAA"). They will also continue to be entitled to cash support made available through local post offices.

Unfortunately, no improvements to the dispersal system have been introduced by the Act. This is despite widespread criticism, which has been made of the inability of the NASS to make timely and accurate decisions and the very poor quality and location of the accommodation provided by it.

It is also important to remember that 18 year old asylum seekers, who have previously been "looked after" by local authorities should not be dispersed but NASS should reimburse the local authority so that they can remain in the area in which they were "looked after".[1]

Induction Centres

Section 70 of the NIAA, which came into force on commencement, provides the Secretary of State with the power to allocate all asylum seekers, apart from unaccompanied minors, to an induction centre or another named location for up to 14 days. Whilst there, they will be advised about the asylum process and NASS "so that they are fully aware of how the asylum procedures work and (so that they) understand what is expected of them". (See paragraph 4.21 of the White Paper, "Secure Borders, Safe Haven".)

There has been much criticism of the manner in which asylum seekers have been randomly dispersed around the country as accommodation has become available with scant regard to their individual needs. The introduction of an induction process would have provided the opportunity to address this problem by assessing individual need and allocating provision appropriately. However, it is clear from the debate, which took place in parliament that this opportunity is not going to be utilised. The emphasis will be on recording personal information, which will assist the Secretary of State to keep track of the asylum seeker in the

[1] NASS Policy Bulletin No 29 Transition at the age of 18

future, and on ensuring that they know how to comply with the asylum process and the support system.

The IND and Migrant Help Line have been running an induction "centre" in Kent for the past year. There are now plans to introduce induction "centre" for accommodation provided for asylum seekers by Leeds City Council and the Yorkshire and Humberside Regional Consortium. The process will include health screening.[2]

Definition of an Asylum Seeker

The emphasis on control is further exemplified by the alternation in Section 44 of the NIAA of the very definition of an asylum seeker to restrict it to, amongst other things, a person who has made a claim for asylum at a place designated by the Secretary of State. This will ensure that every asylum seeker is in the seamless system from the very point of application.

Asylum seekers have had to apply for asylum in person either at the Asylum Screening Unit in Croydon or in Liverpool. This has caused a number of difficulties. In *Musilkare,*. Ouseley J granted expedition in a case where an asylum seeker could not afford to travel from Plymouth where he had been dropped off to either London or Liverpool. (As he was not yet recorded as an asylum seeker he could not access any support for his travel expenses.) It is being argued that it is unreasonable not to accept an application for asylum when it is made to an immigration officer at a port or to any other agent of the Secretary of State for the Home Department. In the alternative, it is being argued that it would be a breach of Article 3 of the ECHR to render an asylum seeker destitute by depriving him of the opportunity of making a claim for asylum.

[2] Press Release by Beverley Hughes MP 19th June 2003

Permission was also granted by Moses J on an emergency basis in *Djanwova* (CO/884/2003) where there was a delay on the part of the Secretary of State in arranging for an asylum seeker to be given a screening interview.

In *Assoua*, the Secretary of State agreed to permit an asylum seeker to make a claim at a place other than Croydon or Liverpool as she was eight and a half months pregnant. However, the consent order stressed that this was only permissible in exceptional circumstances.

Imposing New Conditions on Present Asylum Seekers

The Secretary of State will also have a power, under Section 71 of the NIAA, to impose residence, reporting and occupational restrictions on any person who applies for asylum, even if they have extant leave to remain when they do so.

Cash Only Option

As from the date of commencement, which was 7th November 2002, Section 43 of the NIAA has also provided the Secretary of State with the power to make orders restricting the availability of cash support to those who have also accepted NASS accommodation. This would bring to an end the support only option, which has enabled many asylum seekers to remain living in London and the South-East with supportive relatives and other members of their own community.

The wording of the Section will also enable the Secretary of State to stipulate that those presently in receipt of support-only may also have to agree to being dispersed to NASS accommodation elsewhere or lose their existing entitlement to cash support.

During the consideration of the Act in the House of Commons, Labour back-bench opposition was silenced by the Government accepting an amendment. This amendment required the proposed order to be subject to an affirmative vote in each House of Parliament and by the belief that NASS just did not have the administrative or housing stock capacity to withdraw the support only option from new or established asylum seekers. However, it would appear that the Government has hired private contractors to carry out an audit of asylum seekers living in London boroughs, who are in receipt of "cash only" support. One must assume that if resources have been devoted to such an exercise, further measures are planned to implement Section 43.

It would appear that the Government are willing to incur the expense of providing accommodation as well as cash in order to make "cash only" recipients subject to the tougher controls now imposed within the support system. This would be in keeping with its decision last Summer to remove the concession, which previously enabled asylum seekers, whose application had not been determined after six months, to work. (However, this right to work may have to be restored as the Directive on Minimum Standards for the Reception of Asylum Seekers[3] requires Member States to give asylum seekers access to the employment market if their applications for asylum have not been determined within a maximum period of one year. However, conditions can be attached to this access in relation to first priority for employment being given to citizens of the EEA).

[3] Article 11 of the Council Directive 2003/9/EC which entered into force on 6th February 2003

Conditional Support

The Secretary of State will also be able to use powers deriving from Section 50 of the NIAA to make support conditional on not only complying with conditions related to the provision of the support, for example a requirement to live at an accommodation centre, but also on compliance with conditions attached to temporary admission or temporary release from detention. In this way the support system itself will be used to ensure compliance with the substantive asylum process.

Reporting Procedures

All asylum seekers will be required to report at regular intervals to designated reporting centres, but the Secretary of State will have a discretionary power under Section 69 of the NIAA to provide destitute asylum seekers with travel expenses to enable them to report.

From 16th June 2003, ARC holders have been obliged to report on a regular basis to a reporting centre in Liverpool. If this six week pilot is successful, ARC holders near Croydon will have to report from August/September 2003 and those near Leeds from September/October 2003.

The centres will be linked up with post offices and if an asylum seeker fails to report on two successive occasions their support will be stopped.
In areas where there are few asylum seekers, the IND plan to use mobile reporting centres. A three month mobile reporting pilot will start in August 2003. The bus will contain an interview room and also a detention cell.[4]

Accommodation Centres

Section 17 of the NIAA gives the Secretary of State the power to allocate any asylum seeker and his or her dependants to an accommodation centre. No such centres have yet been established, but planning permission for two large centres, which will each house 750 people in remote rural area, has been sought. (The Government is also committed to establishing a smaller pilot centre in a more urban or suburban area and to discuss a satellite model with the Refugee Council.)

Section 29 of the NIAA lists the services, which will be provided within the centre itself. These include food, health care, recreational and religious facilities, education and training. The effect will be to socially exclude the residents from the surrounding community and to increase the risk of racist abuse and attack.

Sections 36 and 37 of the NIAA will also prevent local education authorities from providing education to children resident in accommodation centres.

Exclusion from the Support System

Late Claim for Asylum

Section 55 of the NIAA was designed to limit the number of asylum seekers who were permitted to enter the support system in the first place. It re-introduced the distinction previously made between "at port" and "in country" asylum applicants. Since it came into force on 8th January 2003, neither the Secretary of State for the Home Department nor a local authority has been able to provide accommodation or support to an asylum seeker where the

[4] Letter from Bill Forshaw Chief Immigration Officer

Secretary of State "is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom".

The interpretation, initially accorded to the words "as soon as reasonably practicable" by the Secretary of State, was made very clear by the Home Office Minister, Beverley Hughes, in a press release on 28th November 2002, when she stated that asylum seekers would be expected to apply "as soon as they arrive" in the United Kingdom.

Emergency support is now provided until such a decision is reached[5] but if it is decided that an asylum seeker has not claimed as soon as reasonably practicable he or she then has to leave that emergency accommodation.

In practice the decision is made on the basis of one short screening interview conducted by an immigration officer.

The provision does not apply where the asylum seeker is under 18 or where he has any minor dependants or where a failure to provide support would lead to a breach of the person's rights under the European Convention on Human Rights.

However, where support is refused under this new provision, there is no right of appeal to an asylum support adjudicator and the asylum seeker's only remedy is to make a claim for judicial review. A great number of judicial review claims have been brought since 8th January 2003 and have largely focussed on :

[5] Paragraph 11.3 of NASS Policy Bulletin No. 75

- The rationality of the decision that the asylum seeker had not claimed as soon as reasonably practicable
- Whether the failure to provide support would amount to a breach of Article 3 of the ECHR
- Whether the failure to provide a right of appeal would amount to a breach of Article 6 of the ECHR
- Whether the targeting of a particular class of asylum seeker would amount to a breach of Article 14 of the ECHR

In the leading case of *Re (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, the Court of Appeal held that :

1. The correct test was whether :

   "on the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity for claiming asylum and to the asylum seeker's personal circumstances, could the asylum seeker reasonably have been expected to claim earlier than he or she did?" (paragraph [37])

2. Collins J was correct to conclude that, in deciding whether an asylum seeker claimed asylum as soon as reasonably practicable, it is right to have regard to the effect of anything that the asylum seeker may have been told by his or her facilitator. (paragraph [43])

3. Denial of support to an asylum seeker constitutes "treatment" for the purposes of Article 3 of the ECHR (paragraph [56])

4. "Destitution" as defined in the asylum support provisions does not necessarily amount to "inhumane and degrading" treatment. The level of degradation that has to be demonstrated before there is a breach of Article 3 is significantly more serious than merely having inadequate housing and less than a minimum amount of income (paragraph [59])

5. It is not enough that there is a "real risk" that an asylum seeker will not be able to receive any other support from an alternative source in order for there to be a breach of Article 3. It is not unlawful to refuse support unless it is clear that charitable support has not been provided and that the individual is incapable of fending for themselves (paragraphs [61][63])

6. Similar considerations apply to Article 8 but he Court did not find it necessary to consider Article 8 at any length (paragraph [64])

7. The Secretary of State had to operate a fair system in making Section 55 decisions. Fairness required that :

- the purpose of the interview was explained
- case-workers understood the proper tests with regard to "reasonably practicable" and Article 3
- regard must be had to the applicant's state of mind on arrival

- the interviewer must ascertain the precise reason that the asylum seeker did not claim asylum on arrival
- it was not sufficient to inflexibly complete a standard form questionnaire
- it was desirable that the interviewer and decision-maker were the same person
- where the decision maker thinks that the asylum seeker is not telling the truth, he or she should be given the opportunity of rebutting the suggestion of incredibility and of explaining himself if he can.

8. On the basis of the system operated by the Secretary of State, Article 6 was not satisfied by the right to claim judicial review and an appeal right would be necessary. However, if the Secretary of State remedied the defects in the system, judicial review would be a sufficient remedy to satisfy Article 6 taken together with a proper determination process (paragraphs [116][117])

After judgement in favour of the Claimants was given by Collins J in the Administrative Court, the Secretary of State suspended his use of Section 55. He has more recently started using the section again and the decision letters now reflect the issues raised by the Court of Appeal. Officers conducting the screening interview have now been provided with guidance, which follows the advice given by the Court of Appeal [6] Three levels of Screening Form are also being used.

In cases where a minor asylum seeker is refused support and is also age disputed additional difficulties arise if he or she cannot access social services support. In these cases it will be necessary to consider NASS Policy Bulletin No 33, *The Health of Refugee Children Guidelines for Paediatricians* (Royal College of Paediatricians and Child Health November

1999) and the *Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers* (Association of Directors of Social Services 2003)

Withdrawal of Support

Section 54 and Schedule 3 of the NIAA are designed to ensure that local authorities have no remaining powers to provide accommodation and support to, amongst others, failed asylum seekers who are still pursuing a claim for judicial review or a separate human rights appeal or to those unlawfully in the United Kingdom. These provisions will not apply to unaccompanied minors. They will also not apply where refusal would lead to a breach of the European Convention on Human Rights.

Schedule 3 also gave the Secretary of State the power to make regulations for the provision of travel and accommodation for some of those excluded from support by Section 54. These regulations are the *Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002*

The Immigration and Nationality Directorate has also issued Guidance to Local Authorities and Housing Authorities about the way in which Section 54 and Schedule 3 operate.

[6] NASS Policy Bulletin No 75 Version 3.0 11th April 2003

Provision of Information

Section 57 provides that regulations may be made to provide for an application for support "not to be entertained" if the Secretary of State is not satisfied that the information, provided by the asylum seeker, is complete or accurate or that the applicant is not co-operating with enquiries.

The relevant regulations, the *Asylum Support (Amendment) (No 3) Regulations 2002 SI No 3110,* came into force on 8th January 2003.

NASS Policy Bulletin No 79 (Version 1.0 – 10th March 2003) gives guidance as to the operation of these regulations.

UNACCOMPANIED MINORS

AGE DISPUTE

1. A number of unaccompanied minor asylum seekers do not receive the protection they are entitled to from either their local social services departments or the Immigration and Nationality Department as they are deemed to be over 18.

2. It is usually during the initial screening process that an immigration officer will decide that the child's appearance "strongly suggests that he or she is over 18". The advice given in the IDIs in this situation is that the child should be treated as an adult until such time as credible documentary or medical evidence is produced to demonstrate that he or she is the age claimed.[1] The same approach is adopted by the NASS[2].

3. The difficulty with this advice is that the IND is very loathe to accept the authenticity of any birth certificates or identity cards which the child may then produce and it is often difficult to obtain expert evidence on such documents. It may be possible to find a lawyer or ex teacher (who from their own professional experience may have had to verify the validity of such documents) from the appropriate country to authenticate them. Interpreters may also be able to help as the wording of such documents may often indicate whether or not the documents are genuine.

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[1] IDI Special Applications Children
[2] NASS Policy Bulletin 33 : Age Disputes

4. It may also be possible to contact the birth registry in the country concerned directly, the child's previous school or any doctor's surgery he or she may have been registered with. The ease with which this can be done will vary from country to country but you can now find information from the most unlikely sources on the internet.

5. The IND is also increasingly unwilling to accept medical evidence even if they accept that the doctor in question is an expert in this field. This is partly because the advice given by the Royal College of Paediatricians and Child Health is that age cannot be determined by a medical examination alone and that an assessment may be inaccurate by two years on either side. Nevertheless the type of holistic assessment it suggests which takes into account a child's physical, mental and social development and maturity is probably one of the most reliable ways of confirming age in the absence of proven documentary evidence. The Royal College most importantly also warns against making any cultural or other assumptions about the physical development of any child or their life experiences.[3]

6. Where a child is deemed by the IND to be over 18 but claims to be younger, the Secretary of State is still obliged as a matter of policy to refer him or her to the Refugee Council's Panel of Advisers for Unaccompanied Children. When it or the Refugee Council's Children's Team believe that the child is under 18, they will usually refer the child to a local social services department for support under Section 20 of the Children Act 1989.

[3] The Health of Refugee Children Guidelines for Paediatricians Royal College of Paediatricians and Child Health November 1999

7. Unfortunately, all too often the duty social workers in the Asylum Seekers Teams will give undue weight to the view already reached by the IND in relation to the child's age and will refuse to support the child. (This will be particularly detrimental where the IND has also decided that the child did not claim asylum as soon as reasonably practicable[4], as they will then be without any accommodation or financial support.)

8. Any decision by a local authority to merely accept the IND's view is also clearly unlawful as the Social Services Department can be said to have fettered its discretion. From 2nd May 2003, local authorities in London have been participating in a pilot project being run by the Association of Directors of Social Service testing draft guidelines and a pro forma for assessing age in this situation.[5] After 2nd May 2003, if these guidelines and pro forma are not used to assess a child's age it can also be said that a child's legitimate expectations have been breached and the local authority has unlawfully failed to follow its own proper procedures.

9. Judgement is also expected soon in the Adminstrative Court giving guidance as to how local authorities should approach age disputed cases.

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[4] Section 55 of the Nationality, Immigration and Asylum Act 2002

[5] Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers, Association of Directors of Social Services 2003

THE EFFECT OF THE CHILDREN (LEAVING CARE) ACT 2000

This Act is of particular relevance to unaccompanied minors who have been looked after by a local authority for at least 13 weeks after they reached the age of 14 and who reach the age of 18.

If they can show that they qualify as former "eligible children" they will be entitled to personal advisers and regular pathway plan reviews. They will also be entitled to assistance with the cost of travel, books and accommodation connected to their studies to the age of 24 and to the cost of accommodation in connection with obtaining employment.

If they are still asylum seekers, they will also be entitled to remain in the area in which they have been living as NASS will reimburse the local authority for their accommodation and support [1]

If they have been recognised as a refugee or granted exceptional leave to remain, they will be entitled to benefits including housing benefit but the local authority may be obliged to top up any additional housing costs necessitated by living close to college or provide additional funds for travel and books.

Children are looked after if they have been accommodated by a local authority under Sections 31 or 20 or had been provided with accommodation under Section 17 prior to the coming into force of the Children and Adoption Act

[1] NASS Policy Bulletin No 29 Transition at the age of 18

2002 on 7th November 2002. (Section 117 of the Children and Adoption Act 2002 amended Section 22 of the Children Act 1989 so that if a child is provided with accommodation under Section 17 he or she is not defined as being "looked after".)

However, it is the Department of Health's view that as a general rule a child for whom no one has parental responsibility should be accommodated under Section 20 unless he or she has been taken into care under Section 31[2] or is over 16 and does not consent to being looked after.

Nevertheless many local authorities remain unwilling to provide the additional support required by the Children (Leaving Care) Act to former asylum seeking children and young people. A test case is due to be heard by the Administrative Court in the vacation.

[2] `LAC (2003) 13