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GOVERNMENT PROPOSALS ON ASYLUM-SEEKERS

Briefing for House of Lords second reading of Asylum Bill

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The government proposals for dealing with asylum-seekers are to be found in five documents:

1. The *Asylum Bill* (as amended at Report stage in the House of Commons)
2. Draft *immigration rules*, reissued by the Home Office in amended form on 21 January 1992
3. Draft *Asylum Appeals (Procedure) Rules*, reissued by the Lord Chancellor's Department in amended form on 21 January 1992
4. *Press statement*, issued by the Home Office on 1 November 1991
5. *Asylum Bill: Proposed Procedures*, issued by Home Office on 21 January, at the request of the Standing Committee

It is not possible to discuss the implications of the Bill without reference to the other documents. This briefing therefore relates the Bill's provisions to the proposed immigration and appeals procedure rules, proposed procedures and matters dealt with in the press statement. It does not deal with the housing provisions (clause 3 and Schedule 1 of the Bill) which fall outside JCWI and ILPA's remit and will be dealt with in briefings from other organisations.

The JCWI/ILPA briefing when these proposals were announced in November 1991 identified four main concerns in the asylum proposals:

*** unfair and unsafe appeal procedures**

Under the Bill and the procedure rules, asylum-seekers do not have the right of appeal. They have only a right to apply for leave to appeal, without an oral hearing, and may need to make this application within impossibly tight time limits: the much criticised 2-day deadline for applying for leave to appeal has still been retained, at the discretion of the Home Office, for some applicants, particularly those held in detention.

see section 4.1 of this briefing

*** unsafe determination procedures**

Applying for asylum will be more hazardous for some of those who apply on arrival and for all of those who apply while they are already in the UK. Under the immigration rules, people applying on entry can be refused without substantive consideration of their individual cases if the Home Secretary believes they can be returned to a third country, or if they are part of a group of people who are allegedly outside the criteria of the UN Convention. Under the Bill, people who apply while already legally in the UK, for example as students, will risk being unable to remain and complete their studies if they make an asylum application which is refused.

see sections 4.2 and 4.3 of this briefing

*** decision-making criteria**

The provisions of the Asylum Bill are retrospective, and can apply to people who, due to Home Office inefficiency, made their applications many years ago and have had their

applications determinied. The draft immigration rules lay down a series of criteria which the Home Secretary must take into account, some of which still contravene the UN Convention and guidelines. Adjudicators hearing appeals will also be bound by the provisions of the immigration rules. They do not include any criteria for decisions of exceptional leave to remain, which is the status at present granted to the majority of those who seek asylum in the UK.

see section 5 of this briefing

*** detention**

The Immigration Act 1971 gives a power of unlimited detention for people whose claims are under consideration or have been refused. The Home Secretary's press statement promises 300 extra detention places for asylum-seekers awaiting removal and the amended rules relating to "safe third country" cases give an incentive to detain. UN guidelines say that asylum-seekers should not routinely be detained; the dangers of doing so are evident from the fact that two asylum-seekers died in detention last year.

see section 8 of this briefing

*** fingerprinting**

The case for fingerprinting asylum-seekers has not been made by the Home Office. Asylum-seekers may have legitimate fears about the use to which this information will be put, especially as the Bill contains no provisions about to whom and for what purpose manually-held information can be revealed.

see section 2 of this briefing

*** legal aid and representation**

This is not part of the Bill; but the unsafe procedures and appeal rights raised above make it even more essential that free and independent legal advice is available to asylum-seekers to ensure that they can properly present their cases within the rigid time limits and the restrictive immigration rules proposed. It is evident that the original proposal, that UKIAS should undertake all this work, was ill thought out and unworkable. Children's organisations have argued for the appointment of a special advocate to represent unaccompanied children.

see section 9 of this briefing and attached leaflet

All these concerns were raised during the Asylum Bill's Commons stages. There has been only one substantive amendment to the Bill itself, though the two sets of rules (immigration and immigration appeals procedure) have been revised to meet some of the criticisms. However, we believe that these amendments still fall short of providing the safeguards which asylum-seekers need. This briefing indicates the further amendments and revisions which JCWI and ILPA believe are still necessary.

THE ASYLUM BILL

1. Clause 1

...defines a "claim for asylum" as a claim for protection under the UN Convention made before or after the coming into force of the Act (1(1)(b))

...defines an asylum-seeker as someone whose "claim is recorded by the Secretary of State as having been made", either before or after the Act comes into force (1(2)(a))

...has been amended at Report stage as follows "nothing in the immigration rules...shall lay down any practice which would be contrary to the (UN Refugee) Convention" (new clause 1A)

1.1 This clause is retrospective, so that the Bill's provisions can affect people whose claims have still not been decided, having been delayed for months or years by the Home Office.

1.2 It is helpful that the Bill and the immigration rules have been amended to ensure that the definition of "asylum-seeker" in clause 1(2)(a) applies only to the housing provisions in Clause 3 and does not have wider implications for protection under the UN Convention or claims to benefit.

1.3 New clause 1A is a very welcome amendment. It means that the immigration rules and the way they are enforced will be justiciable in the courts in the light of the Convention and the UN's own guidelines for its implementation. However, it is therefore somewhat perverse to retain, in the revised immigration rules, a paragraph (para. 9) which is clearly in breach of the UN guidelines. Para. 9 says that if an applicant is "part of a group whose claims are clearly not related to the criteria for refugee status in the Convention and Protocol he may be refused without examination of his individual claim". The UN Convention requires each case to be assessed individually and the guidelines make it clear that it is only by so doing that it can be determined whether the criteria in the Convention are satisfied. Certainly, the United Nations High Commision for Refugees, in it's commentary on the proposed changes were extremely concerned about the effect of para. 9. It is likely that, as presently drafted, para. 9 is *ultra vires* the Bill. It should therefore be removed.

Clause 2

...provides for fingerprinting of anyone who has made an asylum claim (which, under clause 1, includes those who made claims before the coming into force of the Act) (2(1))

...gives immigration and police officers the power to arrest without warrant anyone who fails to comply with the fingerprinting requirement in order to ensure compliance (2(4))

...says that fingerprints are to be destroyed either within a month of the person being granted settlement or after ten years; and that at that time the Home Secretary shall also take steps to prevent access to any computer-held information relating to fingerprints.

2.1 At present, the only people who can be required to be fingerprinted are people who

have been charged with a criminal offence. It is not a criminal offence to apply for asylum. The Home Office claims that this measure is necessary to prevent multiple applications and alleged social security fraud, but is unable to provide evidence of the scale of such activities. The need for it is therefore unproven, and rests on unsubstantiated allegations which appear to link all asylum-seekers to abuse and fraud. In Committee, the Minister appeared unclear about how in practice the alleged fraud would be detected.

2.2 This clause contains no right of subject access to manually held information, no requirement that the applicant give consent for the release of such information and no restrictions on the purposes for which, or the individuals or organisations to whom, this information may be made available. Those could include, for example, the authorities of the country from which the asylum-seeker is fleeing, which in many cases keep fingerprint information on passports and identity cards. They could also include officials from other foreign governments, officials from other UK government departments, police officers investigating unrelated matters, or relatives, acquaintances or members of the same community as the applicant. Computer-held data is subject to the Data Protection Act, with requirements for subject access (unless information is held in connection with a criminal investigation) and the requirement that other data users be registered. Even the Schengen Convention requires that information about an asylum applicant be made only with his or her consent and solely for purposes and to authorities connected with determining the asylum application. The Minister indicated in Committee that access to fingerprint records would only be granted "when specific permission has been given for a specific purpose". If that is so, the purposes and the potential users should be specified in legislation or delegated legislation.

2.3 If asylum-seekers refuse to, or are afraid to, have their fingerprints taken, they can be arrested without warrant by a police or immigration officer in order to comply with the requirement. Under the draft immigration rules (para. 5) refusal to report for fingerprinting is a matter which may be taken into account in making a decision on the applicant's asylum application, even though it bears no relation to the substance of the claim and could indeed reflect a legitimate fear of authority and systems of control. This provision should therefore be removed, particularly as the Bill already includes sanctions on those who do not report for fingerprinting.

2.4 Uncontrolled finger-printing of children gives rise to particular concern. In Committee and in the reports stage in the Commons, the Minister gave undertakings that this would not be done in the case of "babies and very young children" but refused to specify at what age it was considered appropriate. This is at odds with the UN Convention on the Rights of the Child, which requires states to act positively towards vulnerable refugee children.

3. Clause 4

...allows the Home Secretary to curtail the leave of anyone who applies for asylum while s/he has limited leave to remain in the UK and whose asylum application is refused

...provides for the detention of such a person.

3.1 This means that people who apply for asylum while legally in the UK (for example as visitors or students) risk being deported without being able to complete their visit or

studies if they apply for asylum and this is rejected.

3.2 The revised immigration rules appear to have limited the grounds on which leave may be curtailed. The original draft said that leave could be curtailed if the asylum application "throws doubt on the basis on which leave was granted or on the applicant's future intentions". There was much criticism of the hypothetical and subjective nature of such tests. The new rule is on the face of it more objective: leave may be curtailed if the applicant "does not meet the requirements of the rules under which leave was granted". However, those requirements are themselves subjective: students and visitors have to "intend" to leave the UK at the end of studies or visits and it could well be held that an asylum application cast doubt upon that intention and therefore upon the requirement of the rule.

3.3 The curtailment provisions mean, for example, that a Yugoslavian student one year into a university course who applies for asylum because it is unsafe to return to Croatia at present is likely to have the application refused (because civil war is not one of the asylum grounds in the UN Convention) and will risk having her leave curtailed and being deported in the middle of her studies.

3.4 In Committee in the Commons, the Minister stated that the Home secretary would not wish to use the curtailment power in all cases, for example "a bona fide student who has made an unsuccessful application (for asylum) before the end of his course because of events at home" (Standing Committee B, 5 December 1991). At Report stage, therefore, Sir Timothy Raison, supported by Jim Lester and the Labour and Liberal Democrat spokespersons, proposed an amendment that the curtailment provisions should not apply to students "on a recognised course". This was rejected by the Minister. As a former immigration Minister, Sir Timothy felt that the arguments against his amendment were invalid and that "it would be desirable if the matter were pursued in the other place" (col. 272, 21 January 1992).

4. **Clause 5 and Schedule 2**

deal with rights of appeal for asylum-seekers. They need to be read with the draft Asylum Appeals (Procedure) Rules and the draft immigration rules. The key provisions in those instruments are:

...asylum-seekers do not have a right of appeal. They have a right to apply to a special adjudicator for leave to appeal (Schedule 2 (3(1))

...applications for leave to appeal must be made within 10 days of receipt of a refusal decision (revised draft procedure rules, para. 5(1)); but this time limit will be 2 days if the asylum application is made on arrival in the UK and if the Home Office serves the refusal notice personally on the applicant (para.5(2)); there is no provision, under any circumstances, for extending those periods; leave applications will be decided within 5 days of receipt of Home Office evidence (s.para 5(6)); there will be no oral hearing of leave applications (s. 5(7)); there is no appeal against refusal to grant leave (Schedule 2, 3(2))

...within 5 days of granting leave, an oral appeal hearing will be set (draft procedure rules, para. 6(2)); the special adjudicator will decide the appeal within 42 days of leave being granted (para. 9(1); if the appellant fails to turn up the appeal may be dismissed (para. 12(1)); the 42-day period can be extended to ensure fairness (para. 23)

...there are no transitional provisions, implying that the accelerated appeals procedures will be retrospective, and apply to those who made claims before the Act came into effect

...if asylum-seekers contest a refusal of asylum, they will also lose full rights of appeal on any other matter (for example against a refusal to remain on grounds of marriage, or against a deportation decision); they will all be dealt with by the special adjudicator and will require leave to appeal under the fast-track procedure described above (Schedule 2 (2))

Some of the criticisms in the first JCWI/ILPA briefing have been dealt with by way of amendments to the rules. Appeals from the adjudicator to the Tribunal are no longer restricted to points of law. The immigration rules make clear that all relevant documents will be provided to the appellant, as well as the adjudicator, before any hearing. However, the two major concerns remain: the absence of a right to a full oral appeal hearing, and the retention of the 2-day time limit in an unspecified number of cases.

4.1 Accelerated appeals procedures

4.1.1 At present, people who apply for asylum on arrival in the UK have no right of appeal against refusal until after they have been removed from the country. People who apply for asylum while they are legally here have a full right of appeal against refusal and may remain here legally until the appeal is decided.

4.1.2 Under the provisions of the Bill and the draft procedure rules, no asylum-seeker will have a right of appeal. He or she will have a right to apply to a special adjudicator for leave to appeal. In the first draft of the Appeals (Procedure) Rules, it was stated that an adjudicator should grant such leave unless he or she was satisfied that there was "no arguable case" for asylum. The Minister gave as an example of such a case one in which a woman had applied for asylum on the grounds that she could not get on with her inlaws. The clause has been deleted from the new Procedure Rules, and an undertaking has been given that the government will lay an amendment to the Bill in the House of Lords to indicate the grounds on which leave will not be granted. The wording of this amendment is crucial in determining the level of protection available to asylum-sekers at this crucial stage. However, if it does ensure that leave to appeal is granted, and full oral hearings are held, in the vast majority of cases other than the kind the Minister specified, this does raise the question of whether it is necessary to construct the additional process of a system of leave hearings at all. Such cases would in any case be speedily dealt with in an oral hearing.

4.1.3 An application for leave to appeal must be lodged in some cases within 10 working days of receipt of the refusal decision; in others, within 2 working days. Refusal decisions are deemed to have been received on the second day after posting (rather than the next day, as in the original draft). There is no possibility of extending the time limits, no oral hearing and no right of appeal against an adjudicator's decision to refuse leave to appeal.

4.1.4 There was widespread criticism of the 2-day time limit in the original rules. It was pointed out that, at best, an asylum-seeker and his or her representative will have two working days to arrange to meet (with interpretation if necessary), try to identify on what evidence the Home Office has based its refusal decision, produce all the evidence necessary to convince an adjudicator to allow the appeal to go ahead, collect supporting

documentary or medical evidence and ensure that the application reaches the Home Office. It was also pointed out that the postal service could not be relied on to ensure delivery within the period specified.

4.1.5 Para. 5(1) of the revised rules provides for a 10-day period between receipt of the refusal notice (now deemed to be two days, rather than one day, after posting) and the lodging of an application for leave to appeal. This is the minimum possible period within which full grounds can be prepared, given that there will be no oral hearing to clarify or supplement the written application.

4.1.6 However, the revised rules retain the original 2-day limit for applications "under section 5(1) of the 1992 Act" (i.e. applications for asylum made on entry to the UK), if the refusal notice has been personally served on the applicant. No other criteria are set out for invoking this reduced time limit. However, the Home Office has produced a document: "Proposed procedures" (for dealing with asylum applications), which indicates (para. 11) that service is person "is appropriate in some port cases or where the person is detained". This indicates that the 2-day accelerated time limit will be the norm for detainees. This is quite unacceptable: it may be easier for the Home Office to serve refusal notices on those who are detained but it is a great deal harder for their legal advisers to reach them, as they may be detained some distance away (one of the main immigration detention centres is at Haslar, near Gosport, three hours travel from London, and asylum-seekers have also been held at prisons all over the south of England).

4.1.7 In addition to detainees, the rule as drafted gives the Home Office absolute discretion to operate the 2-day time limit in the case of any other person who claimed asylum at a port of entry, provided that the refusal notice is served personally on him or her. It is quite unacceptable that an official in the Home Office should be able to decide at will whether a person is to have the benefit of proper time to consult a representative and prepare a case, or not. If the 2-day limit is unacceptable in any case, it is unacceptable in every case. It should be remembered that the Bill's provisions may be retrospective, and that therefore people who have waited 2 years or more for the Home Office to make a decision may be required to respond to this in 2 days. There are no time limits set on the Home Office's decision-making procedures. Though Ministers have promised that an increase in staff will lead to swifter decisions, there is nothing in the Bill or the draft rules to bind them to this; yet *applicants may still be given a timescale which is so fast as to be contrary to any concepts of fairness.*

4.2 People who apply for asylum on arrival

4.2.1 If people apply for asylum on arrival in the UK, their asylum claims may not be looked into if they have come via a third country (draft immigration rules, para. 10),; they can be removed if the Home Secretary is satisfied that that country is "safe", without reference to the country itself.

4.2.2 Most asylum-seekers come from countries whose nationals are required to obtain visas before coming to the UK - indeed, once a country begins to produce refugees, a visa requirement is swiftly imposed (eg Turkey in 1989, Uganda in 1991). The draft immigration rules (para. 2) make it clear that asylum applications will not be granted unless the person reaches the UK. Asylum-seekers who are overseas therefore cannot get visas as refugees, and airlines carrying them direct to the UK will face fines under the Immigration (Carriers' Liability) Act. They are usually forced to flee via a third country. The decision on whether that country is "safe" for them as individuals or at a particular time is not one which can or should be taken summarily or arbitrarily. The UK's responsibilities under the UN Convention to provide safety to people fleeing persecution cannot simply be passed on to other countries which may not even have signed the Convention; and even to some of those which have (for example Turkey and Iran are unsafe for

freely about such experiences. In other cases, people may legitimately hesitate before putting in an asylum application once they have escaped from immediate danger. Applying for asylum is a drastic step: it means cutting off all possibility of return to one's home country and may put relatives and friends in danger. People are often reluctant to do this and need time to think through the consequences with advisers and others from the same community. Asylum-seekers without access to legal advice will not know what is a "material factor" relevant to their case.

* *that the applicant has "made false representations..... destroyed, damaged or disposed of a passport".*

This contravenes Article 31 of the UN Convention, which accepts that asylum-seekers may need to disguise their intentions or their identity in order to flee to safety. UNHCR has indicated it's opposition to this paragraph. It is wholly irrelevant to the strength and genuineness of their asylum claim.

Though these factors are now modified by an amendment that they will only be taken into account if "no reasonable explanation is adduced", they are in fact largely irrelevant to the asylum claim and should play no part in decision-making.

5.3 One of the credibility factors in the original rules was the fact that someone could have fled to another part of their own country which "might be safer". This has now been redrafted to read *"a part of the country...in which he would not have a well-founded fear of persecution and to which it would be reasonable to expect him to go"*. However, it has now become a reason for refusal in itself, rather than simply a factor which goes towards credibility. This is a new development in UK asylum law, and appears to be am attempt to limit liability under the Convention.

5.4 The ability to take into account the actions of third parties is limited in the revised rules to a person *"acting as an agent of the asylum applicant"*: however, the rule still does not require those actions to have been taken with the applicant's consent and knowledge. An asylum case can therefore be prejudiced by so-called "agents" in the country of origin or incompetent advisers in the UK.

5.5 If an applicant *"is part of a group whose claims are clearly not related to the criteria for refugee status in the Convention and Protocol he may be refused without examination of his individual case"*.

This is a further provision which allows for accelerated and unsafe decision-making. It is in contravention of the UN Convention, which insists that each case be dealt with individually. It begs the question of what is a group and what or who is "clearly" outside the Convention. It allows for the kind of stereotyped, cursory decision-making which has allowed Tamils and Kurds later granted full refugee status to be initially labelled "manifestly bogus" by Ministers and officials. (see para. 1.3 of this briefing, which argues that it is *ultra vires* the Bill).

5.6 Currently the majority of people who apply for asylum are not granted full refugee status but a second class status, outside the immigration rules, known as exceptional leave to enter or remain. Exceptional leave is normally granted to people who fall outside the protection of the UN Convention definition of a refugee but whom the Home Office

accept it would be unsafe or otherwise inhumane to retun to their country of origin. During the Commons second reading the Minister confirmed that exceptional leave would continue where there were compelling humanitarian circumstances. However, the situation remains unsatisfactory as it is innapropriate that this status should remain entirely within the discretion of the Minister. Given that the majority of asylum seekers are granted exceptional leave it should be made a status within the rules, with an accepted defintion and clear appeal rights.

6. **clause 6**

...makes provision for appeals on a point of law to pass from the Immigration Appeal Tribunal directly to the Court of Appeal or the Court of Session in Scotland.

6.1 This appears to be an attempt to cut out judicial review, in spite of Ministers' assurances that they would not seek to do so. At present, judicial review of Tribunal decisions can be sought in the divisional court. The existence of a right of appeal direct to the Court of Appeal looks superficially attractive; but in fact it will have a restrictive effect as appeals are only possible on points of law and once the Court of Appeal has declined to grant leave (and it grants such leave very rarely in appeals from other Tribunals) it will be virtually impossible to persuade a lower court to grant leave for judicial review.

6.2 Judicial review will continue to be available through the divisional court as a remedy against an adjudicator's refusal to grant leave to appeal.

7. **clause 7**

...provides for carriers' liability to be extended to transit passengers and for the Home Office to decide, by order, which transit passengers shall be required to have visas in order to pass through the UK.

Amnesty International's earlier briefing, *A duty dodged*, sets out the dangers of the Carriers' Liability Act in preventing asylum-seekers from gaining access to the determination process. These provisions are now to be extended to transit passengers from selected countries: in the past, these have been solely countries from which people are seeking to flee, such as Somalia and Sri Lanka.

8. **Detention**

8.1 The Bill contains no additional powers to detain. However, the Immigration Act 1971 already gives a power to detain indefinitely, and without bringing before a court, anyone whose application for entry is being considered or whose application has been refused by the Home Office. This includes those seeking, or who have been refused, asylum. The Home Secretary has announced that 300 extra detention places will be made available for asylum-seekers "considered likely to abscond.....and to enable those refused asylum to be detained while awaiting removal". Detainees are among those to whom the 2-day time limit for applying for leave to appeal against refusal may apply; it is of concern that the Home Office may therefore choose to detain people whom it wishes to remove quickly after refusal.

8.2 Asylum-seekers are particularly vulnerable if detained. In some cases, they will have fled from places of imprisonment, where torture and ill-treatment were routine. In all cases, they will be extremely anxious about their future and in need of support from

refugee communities and legal advisers. There have been many suicide attempts by detained asylum-seekers. This year alone, two asylum-seekers have died in detention, one by suicide, the other while under prison officers' control and restraint procedures. Immigration staff have spoken publicly about the need for "humane detention". There is no such thing; it cannot be humane to imprison people simply because they have come to seek asylum in the UK. There is an urgent need for Immigration Act detention, particularly as it applies to asylum-seekers, to be regulated through the courts.

9. **Legal aid**

9.1 The government proposal to remove green form legal aid for asylum and immigration cases does not appear in the Bill. However, the accelerated procedures and new immigration rules make it essential that asylum applicants should have access to free, independent advice from specialised lawyers as well as from the UK Immigrants Advisory Service (or the body which replaces its Refugee Unit). It will be impossible for one agency alone to deal with all cases within the rigid time limits imposed under the rules. It will be essential for advisers and applicants to continue to be able to rely on specialised legal advice at an early stage if the rules and procedures prove unsafe.

9.2 Both the Lord Chancellor and the Home Secretary have argued that it is impossible to sustain the present system, whereby public funds are available both to UKIAS (for appeals representation, for which legal aid has never been available) and through the green form legal aid system. Yet these sources of help do not duplicate one another: they are complementary. No figures have been produced to show what, if any, cost savings would accrue from giving a monopoly to one organisation (which would then have to open local offices throughout the country); nor do these appear to be any plans or criteria for the service to be offered. This is a wholly unsatisfactory way to develop public policy in an area that affects fundamental human rights.

9.3 It is now clear that the proposal to devolve this service in its entirety to UKIAS was unwise and unworkable. There is therefore the opportunity for full consultation, taking into account the results of the franchising experiment already started by the Lord Chancellor, before any further hurried attempts are made to reduce the extent of the quality of the advice and assistance available to asylum-seekers (and to others with immigration problems). Such consultation should take the form of a discussion document, with costed options and quality thresholds; the Lord Chancellor should then take into account the responses of those groups and agencies which have long experience in the providing of advice and assistance in these matters.

9.4 In addition, it has been proposed that there should be an advocate appointed to represent the interests of unaccompanied child asylum-seekers. This would ensure that the UK was able to meet some of its obligations under the UN Convention on the Rights of the Child.

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