The Immigration and Citizenship Bill and its impact upon refugee protection:

Workshop at Scottish Refugee Council Conference
Glasgow, 10th October 2008

Introduction:

1. This paper accompanies a workshop to be led by Steve Symonds, ILPA, at the Scottish Refugee Council Conference in October 2008.

2. The Immigration and Citizenship Bill is not with us yet. It is expected to be introduced to Parliament in the New Year. However, we currently have the draft (partial) Immigration and Citizenship Bill, which was published in July 2008. This draft Bill contains much of the content that is expected to be included in next year's Bill. However, it is partial – i.e. it is incomplete. Indeed, some 40% of what is expected to be included with next year's Bill is not available in the draft Bill.

3. It is important to recognise that the Bill is only one part of what is a colossal project. The intention is that the Bill, in itself of vast size, will replace all the current immigration Acts from the Immigration Act 1971 onwards – about ten Acts of Parliament. However, at the same time, it is intended to replace all the Immigration Rules, the immigration policy instructions and guidance, and much of the secondary legislation in immigration law (e.g. Regulations). The UK Border Agency has said that when the Bill is introduced to Parliament, all this other mass of immigration law and policy will be published in draft[1].

4. While this is going on, there are other important changes to note. In England and Wales, the legal aid system is going through a process of substantial change. Although the Scottish legal system and legal

[1] Information given to stakeholders at the National Asylum Stakeholders Forum on 25 September 2008

aid system are distinct, these changes south of the border may have significant implications in Scotland. Firstly, any review of legal aid in Scotland may have regard to developments in England and Wales. Secondly, there is the impact upon those whose dispersal or detention transfer crosses the border. The UK's tribunal system is also undergoing a radical overhaul following the Tribunal, Courts and Enforcement Act 2007. A working group chaired by Lin Homer has led to the UKBA consultation launched in August: *Immigration Appeals: fair decisions, faster justice*, which proposes to bring the Asylum and Immigration Tribunal within this new Tribunal Service[2]. It is also intended that the UK's immigration detention estate will be substantially enlarged.

5. This paper will highlight some of the key implications for refugees and asylum-seekers that are likely to arise out of the current proposals – especially those set out in the draft Bill or draft Immigration Rules on protection issues or referred to in the *Making Change Stick* document, which the UK Border Agency published at the same time as the draft Bill and which indicates matters to be included in next year's Bill which are not included in the draft[3].

6. This paper closes with some short information on lobbying.

The proposals:

7. Key proposals are discussed under distinct subheadings below. These include proposals which would:
   - increase barriers to refugees getting to the UK or making their claims

[2] A wider review of tribunals in Scotland has been undertaken by the Administrative Justice Steering Group. It is not clear that the working group considered this review, and the *Immigration Appeals* consultation document makes no reference to it. However, the steering group's September 2008 report *Options for the Future Administration and Supervision of Tribunals in Scotland* has significant implications for any change to the UK immigration appeals system.

[3] The draft Bill, draft Immigration Rules on protection and *Making Change Stick* are available on the UK Border Agency website; as is the current consultation on *Immigration Appeals*.

- extend the circumstances in which, places at which and the persons by whom asylum-seekers may be detained; and reduce the AIT's powers to supervise detention
- further reduce appeal rights against refusal of asylum
- extend the circumstances in which the UK excludes refugees from the benefit of the Refugee Convention
- increase the powers to withdraw a person's refugee status in the UK
- delay the time by which refugees may apply for British citizenship or permanent residence, and increase insecurity during the intervening period

increasing barriers to refugees

8. Clause 149 of the draft Bill would introduce an "authority-to-carry" scheme. Such a scheme would require a carrier (e.g. an airline) to confirm their passenger list with the UK Border Agency and obtain permission to bring those passengers before take-off to the UK. A carrier who failed to comply could be fined.

9. The UK has introduced substantial powers over carriers in recent years, while greatly extending the countries whose nationals must obtain a visa to travel. In addition, the UK has taken steps to export its border controls overseas – most infamously in the ***Roma Rights*** case where the UK had stationed immigration officers in Prague airport in 2001 to prevent Czech nationals from coming to the UK to claim asylum. Those Czech nationals who did so at that time were overwhelmingly Roma. Those stopped and subjected to lengthy questioning, and in some instances prevented from travelling, were overwhelmingly Roma. The House of Lords ruled that this practice was not contrary to the Refugee Convention. However, their Lordships ruled that the practice was unlawful as it constituted direct discrimination against Roma. Depending on how any authority-to-carry scheme is operated, there may be potential for

similar discrimination. In any case, such a scheme would be bound to drive more refugees into the hands of smugglers and traffickers as providing the only means by which they can escape countries in which they are at risk of persecution.

10. While it seems that even more refugees are to be forced to enter the UK illegally in order to make their asylum claims, the already extensive list of criminal offences for which they may be prosecuted also seems destined to grow. The current 'refugee defence' contained in section 31, Immigration and Asylum Act 1999 is inadequate and not compliant with the Refugee Convention. The draft Bill would replace this with clause 193, which makes some modest improvements (relating to how a refugee may establish his or her entitlement to rely on the defence in criminal proceedings) but remains less than the protection the Refugee Convention requires under Article 31. In particular, clause 193 continues to exclude a defence against prosecution for illegal entry or related offences, if the asylum-seeker passed through a third country unless he or she can prove that this third country would not have provided protection under the Refugee Convention. Where individuals pass through countries in the hands of smugglers, it may be especially unrealistic to expect that they either know whether a country they are passing through is safe or have any opportunity to make a claim there. Of course, the refugee defence only applies to refugees. Those seeking sanctuary from serious harms, not within the Refugee Convention, have no defence against prosecution.

11. If the Government do introduce an offence relating to the proposed new duty to seek immigration permission at clause 7, it is possible that an asylum-seeker who is smuggled into the UK may face prosecution for 3 separate offences on account of his or her illegal entry – (i) from the time of entry to the UK, he or she will be in breach of the clause 7 duty; (ii) at the moment of entry, he or she will likely have committed the clause 97 offence of entering without

permission; and (iii) from the time of entry, he or she will likely have committed the clause 98 offence of being in the UK without permission. This overloading of offences is compounded by the very general offence, which may well be used against asylum-seekers in all sorts of situations, of obstructing or resisting any person exercising any immigration function under the new Act – clause 121.

extending use of detention and reducing supervision of detention

12. The Government is in the process of building new immigration removal (or detention) centres and expanding several existing ones. Generally, this expansion of the detention estate is to be concentrated south of the border. However, the draft Bill indicates other avenues by which detention may be expanded – throughout the UK.

13. Captains of ships, planes or trains may be required to detain people on board under clauses 54 and 56.

14. More generally, clause 59 provides that people may be detained wherever the Home Office may decide.

15. These proposed powers (or obligations upon captains) pay no regard to the need to ensure that any place of detention is suitable and safe – whether for the detainee, or indeed for members of the public (e.g. passengers or crew on board with someone who is detained). Clause 59 does not improve matters by presuming the legality of any detention.

16. These provisions may affect refugees and asylum-seekers, and may affect others. Similarly, the powers to stop and demand the production of an identity card contained in clauses 25 and 28, may affect asylum-seekers, refugees and others including British citizens. These powers may be exercised anywhere in the UK, and

failure to co-operate or produce an identity card may result in a person's detention (clause 53).

17. Although the draft Bill does require written reasons to be provided to any person detained, no timescale is put on this. Moreover, the ability of the Asylum and Immigration Tribunal (AIT) to supervise detention is seriously curtailed. To grant bail in a case where the Home Office says removal is 'imminent'[4], the AIT may need permission from the Home Office (clause 62). In any case where the AIT grants bail, the Home Office may vary the terms on which bail has been granted – e.g. extending reporting conditions (clause 68); or introducing new conditions – e.g. requiring electronic tagging even though the AIT considered this unnecessary (clause 68).

18. In any case, access to bail will be very much more restricted if clause 64 is introduced. Currently sureties and those granted bail may offer a recognizance without the need to deposit any money. The intention is to remove this option and require that any recognizance be provided by way of a bail bond that must be deposited with the Home Office. Note that this may be a condition of anyone on immigration bail. However, immigration bail under the terms of the draft Bill includes anyone on what is now known as temporary admission. Potentially, every asylum-seeker could be required to deposit money with the Home Office on pain of being detained.

reducing appeal rights

19. As might have been expected, the draft Bill and other current proposals confirm a continued trend in reducing appeal rights. There is, however, an important exception to this trend, which particularly favours refugees. Currently, a person who is refused

[4] Recent litigation brought by Algerians detained for over 12 months before the England and Wales High Court has exposed that the UK Border Agency's concept of 'imminent removal' bears no relation to any ordinary understanding of what is or is not imminent.

refugee status, but granted some less favourably status (e.g. a period of discretionary leave) may only appeal against the refusal of refugee status if the total period of leave granted to him or her is for more than 12 months. This can particularly disadvantage unaccompanied children who may be granted discretionary leave until they are aged 17½ years old if refused asylum. If at the time of the grant, the child is already passed 16½ years, he or she may have no appeal right. The draft Bill proposes that any person refused refugee status may appeal this decision (unless their case is certified – see below) whether or not he or she has been granted some lesser status or for howsoever long that status is granted.

20. Of course, it must be remembered that some asylum-seekers can be excluded from any appeal. Two important occasions where this happens currently are, firstly, when the Home Office decides (certifies) that an asylum claim is clearly unfounded and, secondly, when the Home Office decides (certifies) that a fresh claim is based on evidence or matters that should and could have been raised in a previous claim or appeal. On the first of these occasions, the asylum-seeker is currently only allowed to appeal after he or she has been removed from the UK. The draft Bill proposes to change this so that the asylum-seeker cannot appeal at all – whether before or after his or her removal (clause 177). On the second of these occasions, the asylum-seeker has no right of appeal at all. The draft Bill would maintain that position (clause 176).

21. The appeals provisions in the draft Bill are also of concern to those who are granted refugee status. Under the draft Bill, a refugee who travelled abroad (e.g. on holiday, to visit family etc.) would have no right of appeal against a decision by the Home Office to withdraw his or her refugee status while he or she was outside the UK (clause 170). This is all the more extraordinary given the draft Bill would provide a wholly unconstrained power to cancel a person's

immigration permission (including that of refugee status) at any time (clause 14).

extending exclusion from refugee status

22. The Refugee Convention excludes certain asylum-seekers from the protection it gives. Two important exclusions are as follows. Firstly, Article 1F excludes someone from the Convention's protection if there is reason to believe he or she is guilty of serious internationally condemned acts, such as war crimes or crimes against humanity. Someone responsible for crimes of genocide would be excluded under Article 1F. Secondly, Article 33.2 excludes someone from the protection, under the Convention, against being returned to the place where he or she is at risk. Someone who has committed a particularly serious crime since arriving and claiming asylum might be caught by this provision if he or she continued to constitute a danger to society.

23. In recent years, the UK has adopted statutory interpretations of these provisions which are inaccurate and have the potential to exclude very many more refugees than the Convention allows[5]. The draft Immigration Rules on protection, published at the same time as the draft Bill, extend these faulty interpretations (paragraphs 39-40 & 45 of the draft Rules). The prospect that political refugees fleeing authoritarian regimes will find themselves excluded from refugee protection in the UK is growing.

increasing powers to withdraw refugee status

24. The draft Bill contains very wide powers to cancel immigration permission to be in the UK (clause 14). This may affect refugees and any other lawful immigrant in or holding permission to be in the UK. As discussed above, there is no limitation on the exercise of

[5] Included among those who have criticised the UK's statutory interpretations of Articles 1F and 33.2 are UNHCR and the Joint Committee on Human Rights. Currently, the lawfulness of the interpretation of Article 33.2 is being challenged before the Court of Appeal.

this power in the draft Bill; and there is no appeal for a refugee who is outside the UK when the power is exercised.

delaying opportunities for citizenship or permanent residence

25. The Green Paper on *Path to Citizenship* published in February 2008 proposed substantial delay to and hurdles along the route by which certain lawful immigrants to the UK could obtain British citizenship or permanent residence. The draft Bill includes some of the foundations for adopting these proposals (Part 3, clauses 31-36). The delay and hurdles proposed will affect refugees and others granted some protection status (e.g. humanitarian protection) in the UK.

26. In the past, refugees recognised in the UK were granted 4 years exceptional leave to remain (ELR). At the end of those 4 years, subject to background checks (i.e. checks on criminal records), a refugee could apply for and expect to be granted indefinite leave to remain (ILR). After one year with ILR, the refugee could apply to naturalise as a British citizen. At the end of the 1990's this approach was changed. On recognition, refugees were granted ILR. Subject to any illegality on entry to the UK, many refugees could apply to naturalise 5 years after entry to the UK provided they had spent at least one year with ILR. This changed again in 2005. Refugees now receive refugee leave for 5 years on recognition. At the end of these 5 years, they may have the same expectation of making a successful ILR application as did their predecessors on the 4 years' ELR regime; and may make applications to naturalise like those predecessors after one year with ILR.

27. It is proposed to continue to grant immigration permission to refugees for 5 years on recognition. The first significant change that is proposed is that a refugee's need for refugee protection would be reassessed before he or she was permitted to extend this period of permission beyond 5 years. The second significant

change is that, if permission were extended, it would not be by way of a grant of permanent residence but would be merely for a further period of temporary permission.

28. The third significant change is that this further period would be for an indefinite period. If a refugee undertakes voluntary or community work, and has no criminal record, he or she could expect to be able to apply to naturalise after one year on this further period of temporary permission. If he or she did not want to, or because of nationality laws excluding dual citizenship could not, apply for British citizenship, he or she could apply for permanent residence after 3 years on this period of temporary permission provided again that he or she undertakes voluntary or community work and has not engaged in any criminality.

29. Failure to undertake voluntary or community work or any criminal activity may extend these periods for several years; and depending on the type of criminality may permanently exclude a refugee from either citizenship or permanent residence. Anti-social behaviour or criminality by a refugee's children might also delay or preclude his or her obtaining citizenship or permanent residence.

30. Under these proposals, the earliest a refugee could obtain citizenship would be 6 years after recognition as a refugee. For a refugee who did not want to, or could not, take British citizenship, the earliest he or she could obtain permanent residence would be 8 years after recognition as a refugee. If recognition was delayed, the period in the UK before either of these steps could be taken might be very extensive. Nevertheless, the proposals introduce significant further hurdles and potential delays along the way. The prospect that marginalisation and isolation suffered by many refugees is increased by these proposals seems very real.

concluding thoughts on the proposals

31. There is very little indeed that asylum-seekers, refugees or those concerned for these groups could possibly welcome in the draft Bill or the proposals contained elsewhere. The trend of several years appears set to continue in that the barriers to those fleeing or wishing to flee persecution are to be extended and the welcome extended to those who manage to overcome these barriers is to be further diminished. Those who do overcome the barriers to seeking sanctuary in the UK can expect to face greater use of criminal prosecution on account of their method of arrival, greater use of immigration detention, further hurdles to their establishing their entitlement to sanctuary here and, for those few who are granted sanctuary, increased insecurity, marginalisation and isolation while they remain here.

The Parliamentary process and lobbying:

32. The draft Bill is currently receiving scrutiny by two Westminster select committees – the Home Affairs Committee and the Joint Committee on Human Rights. For those who wish to submit written evidence to the Joint Committee, that committee will be receiving written submissions (to a maximum 2,500 words) up to 31 October. The opportunity to submit written evidence to the Home Affairs Committee formally closed on 16 September.

33. The full Bill is expected to be introduced to Parliament next year. It had been intended to be introduced in January. It remains to be seen whether the Government's legislative agenda, ongoing and imminent consultations on asylum support and immigration appeals, and the recent reshuffle of the UK Government will allow for that intention to be met.

34. As with other Bills, the full Immigration and Citizenship Bill will need to pass through both Houses and will receive scrutiny in Committee and during debates – particularly Report and Third Reading stages.

35. For organisations that wish to be involved in influencing and lobbying on the Bill, ILPA facilitates a googlegroup for exchanging information and views on the simplification process. This is open to ILPA members and to NGOs and other organisations by contacting steve.symonds@ilpa.org.uk

36. Bite-size information on discrete provisions in the draft Bill is available from ILPA information sheets. These are available in the 'Info Service' section at www.ilpa.org.uk

37. What is critical in seeking to influence and lobbying on this Bill, is that efforts are so far as possible co-ordinated. This will be a very big Bill. Potentially, there is no end to the range or number of issues that may be raised. However, the Parliamentary timetable will be restricted; and hence the opportunities for influencing will also be limited. It is important, therefore, that unnecessary duplication or inconsistency is avoided, otherwise Parliamentary time may be wasted. Given that there may be little enough opportunity to obtain changes to the Bill, it is clear that we must all do what we can to avoid such waste. Moreover, even though opportunity to change the Bill may be limited, there may yet be scope to obtain important Ministerial commitments while the Bill is passing through Parliament. However, the fact of these opportunities also points to the need to co-ordinate our efforts.

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