

Asylum in the UK: a parliamentary and policy perspective

1. This paper accompanies a short presentation to be provided at the Churches Refugee Network conference on Saturday, 6th June. The presentation and this paper will highlight current key policy areas in relation to asylum in the UK; and provide an overview of the political and policy opportunities for influencing those areas in the months ahead. It is not intended as a digest of all relevant policy issues, and those highlighted are not considered in detail.

Current legislative programme:

2. The regularity of immigration Bills has become increasingly frequent. Each of the last four parliamentary sessions has seen the Government introduce an immigration Bill¹. The Borders, Citizenship and Immigration Bill remains before Parliament². The House of Commons are currently considering the Bill, it having (somewhat unusually) been considered first by the House of Lords. The Government intends that the Bill should receive Royal Assent before the summer recess (22nd July).
3. In addition, the Government published a draft (partial) Immigration and Citizenship Bill in July 2008³. This was originally intended to be a step towards introducing a consolidating immigration Bill in the current session. However, the Government decided that it was not ready to introduce such a Bill and postponed its plans. Instead, Parliament was presented with the Borders, Citizenship and Immigration Bill. It will become the eleventh immigration Act on the statute book⁴ when it receives Royal Assent.

¹ The Criminal Justice and Immigration Bill was introduced during the 2007-08 session, and was overwhelmingly a criminal justice measure – nonetheless, it included significant immigration measures. The 2005-06 and 2006-07 sessions respectively saw the introduction of the Immigration, Asylum and Nationality Bill and the UK Borders Bill. The current session has seen the introduction of the Borders, Citizenship and Immigration Bill which is still under consideration.

² Second Reading in the House of Commons is today (2nd June). Progress of the Bill, and all the debates on it are available at: <http://services.parliament.uk/bills/2008-09/borderscitizenshipandimmigration.html>

³ This draft Bill is no longer available on the UK Border Agency website. The Joint Committee on Human Rights and the Home Affairs Committee each conducted limited enquiries on the draft Bill and have published reports, which include the full submissions and oral evidence from those who gave evidence, see: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/425/425.pdf> and <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/62/62.pdf>

⁴ The others are the Immigration Act 1971, Immigration Act 1988, Asylum and Immigration Act 1993, Special Immigration Appeals Commission Act 1997, Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,

4. The Government now intends to publish a draft Immigration Simplification Bill in the autumn⁵. While this is the Bill that is now intended to consolidate the immigration Acts, since it will only be in draft it is clear that we must wait until after the next general election before there is any opportunity for a consolidating Bill to be introduced to Parliament.

Borders, Citizenship and Immigration Bill

5. None of the provisions in this Bill are directed exclusively at asylum-seekers, however several of the provisions have significant implications for asylum-seekers. Some of the provisions and these implications are briefly highlighted here.

6. The Bill will make changes to naturalisation (how a migrant to the UK can become a British citizen)⁶. Refugees (and others) will no longer be able to apply for indefinite leave to remain after 5 years of limited (temporary) leave. Instead they will have to apply for 'probationary citizenship' – which will simply be more limited leave. For those who do not want to (or cannot, e.g. because their nationality precludes dual citizenship) become British, they must spend a minimum of 3 years as probationary citizens before applying for permanent residence (compared to a minimum one year for those who can and want to apply for British citizenship). They will be required to undertake specified community work, otherwise these minimum periods may be extended by a further 2 years. Those who have been convicted of criminal offences, including immigration offences, may also face delays before being allowed to apply; or may be excluded from citizenship altogether⁷.

Immigration, Asylum and Nationality Act 2006, UK Borders Act 2007 and Criminal Justice and Immigration Act 2008.

⁵ *Hansard* HL, Second Reading 11 Feb 2009 : Column 1128 (*per* Lord West of Spithead)

⁶ Part 2, clauses 39 *et seq* (Bill 86)

⁷ Further details of the Government's intentions are set out in the Government's response to the *Path to Citizenship* consultation of last year. The consultation document and the Government's response are available at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pahtocitizenship/>

7. The Government is making changes to the immigration appeals system⁸. The Bill relates to these changes in two respects, which concern access to judges of the High Court or to the Court of Appeal. In future, cases that are currently decided by a judge of the High Court may instead be decided by the immigration judiciary (judges of the current Asylum and Immigration Tribunal)⁹. Appeals against final decisions of the AIT, where the decision is in error of law, may no longer be considered by the Court of Appeal unless the case also raises an important point of principle or practice or some other compelling reason for the appeal¹⁰.
8. The debates on the Bill have also highlighted concerns around the degree of supervision and guidance on the exercise of powers (including policing powers) by the UK Border Agency¹¹, and the treatment of children seeking asylum (including detention)¹².

Immigration Simplification Bill

9. The Government's intention is merely to publish this Bill in draft form in the autumn of this year. Ultimately, this Bill may replace all the current immigration Acts (and the Borders, Citizenship and Immigration Bill). If and when that may happen must be a matter of speculation. It will not happen before the next general election.
10. If such a Bill is introduced to Parliament, it will provide an opportunity to review all or most aspects of policy and legislation in relation to immigration (including asylum).

⁸ Further details of the Government's intentions are set out in the Government's response to the *Immigration Appeals* consultation of last year. The consultation document and the Government's response are available at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/>

⁹ Clause 50 as originally included in the Bill (HL Bill 15) was designed to allow for this, by enabling the transfer of judicial review applications from the High Court to the new Tribunal Service (including by mandatory order of a whole class of application). Following a defeat for the Government in the House of Lords, clause 55 (Bill 86) would restrict this to only certain types of cases (fresh claims), but it is expected that the Government will come back to this clause in the House of Commons.

¹⁰ Clause 55(4) (Bill 86) as inserted by the House of Lords would preclude this, but it is expected that the Government will come back to this clause in the House of Lords.

¹¹ The *Outsourcing Abuse* report by Birnberg Pierce & Partners, Medical Justice and NCADC received significant attention in debates. The report is available at:

<http://www.medicaljustice.org.uk/content/view/411/88/>

¹² Debates drew attention to issues including inadequate statistical information on detention, the process of Ministerial authorisation of detention, the withdrawal of funding to the Refugee Council Children's Panel, missing children, trafficking and powers to withdraw support from families.

UK Border Agency Simplification Project

11. These ongoing developments in legislation are an important part, but nonetheless only a part, of the ongoing simplification project¹³. Currently, all of immigration law is (at least notionally) up for review; and significant changes are being made, and can be expected to continue, in relation to the Immigration Rules and UK Border Agency policies and guidance.
12. The stated aims of this project are to maximise transparency, efficiency, clarity and predictability, use of plain English and public confidence; and to minimise the need for further legislation, reliance on concessions, need for the exercise of discretion, inconsistency, duplication and gaps in powers¹⁴.

Significant current policy issues viz. asylum:

13. The issues that are highlighted in what follows are not exhaustive. A case could be made for inclusion of other issues, or indeed prioritisation ahead of some of those included here. Most of these issues, while current, are not new.

Destitution and permission to work

14. Destitution among asylum-seekers and refused asylum-seekers has been highlighted by several reports over the past couple of years¹⁵. The continued use of vouchers for those refused asylum-seekers who are accepted onto section 4 support, and the refusal of permission to work to asylum-seekers and refused asylum-seekers have also been the subject of criticism and discussion.
15. Nonetheless, the Government did not consider that destitution, the asylum support system and section 4 were sufficiently urgent matters for

¹³ This project was initially introduced by *Simplifying Immigration Law: an initial consultation* which is available at:

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/>

¹⁴ These aims were set in *Simplifying Immigration Law: an initial consultation (op cit)*

¹⁵ The Joint Committee on Human Rights highlighted concerns in its *Treatment of Asylum Seekers* report (Tenth Report, Session 2006-07). The Still Human Still Here campaign (www.stillhuman.org.uk) continues to highlight destitution among refused asylum-seekers, and several reports are available in the Resources section on its website.

legislative reform to merit inclusion in the Borders, Citizenship and Immigration Bill. While the UK Border Agency is to run a pilot to trial whether use of a payment card addresses accepted concerns (including attendant stigma) regarding the provision of section 4¹⁶, it cannot (because of legislation, which it has been ignored in the Bill) trial the provision of cash¹⁷.

16. The Government remains steadfastly opposed to granting asylum-seekers or refused asylum-seekers permission to work¹⁸. The Government has also opposed, in litigation, the argument that those who make fresh claims for asylum should be entitled to permission to work on the same basis as those who have made an initial asylum claim (i.e. if the claim remains without a decision for 12 months). The Government has recently lost this argument in the Court of Appeal¹⁹, though it remains possible that it will seek to appeal the decision.

Access to justice and legal aid

17. The Government intends that the immigration appeals system (the Asylum and Immigration Tribunal) will be moved into the new Tribunal Service, First-tier and Upper Tribunal, established in November 2008²⁰. As part of this restructuring, the Government has indicated its desire that the role of the High Court and Court of Appeal should be reduced²¹. The Government has publicly sought to suggest that judicial reviews are frequently brought without merit²² – yet, while it highlights the low number

¹⁶ See minutes of the March 2009 National Asylum Stakeholders Meeting, paragraphs 3.2, 3.17 & 3.18, which are available at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/stakeholders/209086/nasfminutes/nasfminutes19mar09/minutes19mar09?view=Binary>

¹⁷ Section 4(11), Immigration and Asylum Act 1999 precludes this. Subsection (11) was inserted in June 2006 by the Immigration, Asylum and Nationality Act 2006.

¹⁸ The Government made this clear in its response to the Joint Committee on Human Rights report on the *Treatment of Asylum Seekers* (*op cit*), which the Committee published as its Seventeenth Report, Session 2006-07. The policy position was recently reiterated by Lord West of Spithead in response to a question from the Earl of Sandwich (*Hansard* HL 2 Feb 2009 : Column WA99-100).

¹⁹ *ZO (Somalia) & Ors v SSHD* [2009] EWCA Civ 442

²⁰ See Government response to *Immigration Appeals* consultation (*op cit*)

²¹ The Introduction to the Government response to *Immigration Appeals* (*op cit*) states: 'As the Upper Tribunal is a superior court of record, the higher courts will no longer need to be an integral part of the immigration appeals system, and the burden on the courts will be reduced substantially.' Contrary to this statement, the need for the higher courts to play a greater or lesser role in immigration decisions is, and will continued to be determined, by the quality of decisions made by the UK Border Agency and within the appeals system.

²² See <http://www.guardian.co.uk/politics/2008/nov/21/phil-woolas-high-court-immigration>

of judicial reviews that are ultimately decided by a judge in favour of the applicant, it continues to fail to disclose the frequency with which it concedes or reconsiders its decision before a judge makes a decision on the judicial review.

18. While the appeals system is being restructured and further restrictions on access to the higher courts are under consideration, the Legal Services Commission remains committed to changes to legal aid, which began to be introduced from 2007, and which continue to restrict the capacity of legal representatives to provide advice and representation to asylum-seekers²³.

Detention

19. The detention of asylum-seekers and refused asylum-seekers continues to be a central plank of Government policy. The UK Border Agency intends to significantly expand the use of detained fast-track processes²⁴; and the detention estate is in the process of being considerably expanded²⁵. The detained fast-track continues to be too fast and provide inadequate safeguards to ensure safe decisions and effective legal representation for many asylum-seekers subjected to it²⁶. Meantime, the prevalence of long-term or indefinite detention under immigration powers has significantly increased in recent years²⁷. The detention of children and families also continues to be a matter of concern, and the UK Border Agency's stated commitment to finding alternatives to detention is open to question in view of the way in which it has structured pilots for trailing

²³ The Constitutional Affairs Committee (now renamed the Justice Committee) provided a highly critical report on the proposals for change across all areas of civil legal aid (including immigration) in its Third Report, Session 2006-07. Nonetheless, the LSC introduced fixed fees for immigration cases from 2007, and continues to plan for further changes in 2010 despite ongoing uncertainties including as to how fixed fees are working, how quality and competence is or will be monitored and maintained, when and how an expected further (and wider) pilot of early access to legal aid representation will be introduced (the original pilot is often referred to as the Solihull pilot), and UK Border Agency plans for changes affecting separated children (unaccompanied asylum-seeking children).

²⁴ The National Audit Office noted that the UK Border Agency's strategic aim of having 800 bedspaces available for the detained fast track, against only 473 bedspaces currently available, see (page 32, paragraph 4.6) at: <http://www.official-documents.gov.uk/document/hc0809/hc01/0124/0124.pdf>

²⁵ See page 32, paragraph 4.7 of the NAO report (*op cit*); and also <http://www.ukba.homeoffice.gov.uk/managingborders/immigrationremovalcentres/expansionofthedetention>

²⁶ See, e.g., the recent briefing note by Bail for Immigration Detainees available at: <http://www.biduk.org/library/BID%20briefing%20paper%20on%20DFT%20Feb%202009.pdf>

²⁷ For more information, see the London Detainee Support Group's January 2009 report *Detained Lives*, which is available at: <http://www.detainedlives.org/wp-content/uploads/detainedlives.pdf>

alternatives and lack of transparency surrounding effective means to evaluate such pilots²⁸.

Separated children (unaccompanied asylum-seeking children)

20. The UK Border Agency consulted on its UASC Reform project on February 2007²⁹, but changes that it intends to make (including contracting with particular local authorities to provide support and services for separated children) remain outstanding. Meantime, the Government has removed funding from the Refugee Council Children's Panel so that the panel may no longer be able to assist in cases of age disputes³⁰. Further concerns arise about the safety of the UK Border Agency's current intentions as to returns of children, and lack of transparency in relation to its policies and guidance in this area³¹.
21. While the higher courts have recently highlighted the inadequacy of the current means for handling disputes as to age³², progress towards an independent and holistic method of age assessment³³ continues to be lacking.

Settlement and naturalisation

22. In August 2005, the Government changed the policy under which refugees had (on recognition of refugee status) been granted indefinite

²⁸ In May 2009, the UK Border Agency published an evaluation of a pilot, which had ended in 2008. That evaluation is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/alternative-to-detention/alternative-to-detention.pdf?view=Binary> It indicates that the pilot and its evaluation were not adequately coordinated, in that the pilot was ended before the evaluation was complete. Moreover, the dearth of specific information as to the methodology of the evaluation – including when it was commissioned and what criteria were set for the evaluation – does not inspire confidence. Also in May, the UK Border Agency announced a new pilot (with a stated aim of reducing the need for detention and enforced removals of families), see

http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/voluntary_returns_project

²⁹ See the *Planning Better Outcomes* document and the the Government response *Better Outcomes: the way forward* which are available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/uasc/>

³⁰ See the recent report in *The Guardian* at: <http://www.guardian.co.uk/world/2009/jun/01/child-refugee-charity-fund-cut>

³¹ See ILPA submission to the Joint Committee on Human Rights' inquiry on children's rights, February 2009 (in Submissions section of ILPA website, www.ilpa.org.uk).

³² In giving the lead judgment of the Court of Appeal in *A & Anor v LB Croydon & Anor* [2008] EWCA Civ 1445, Ward LJ said that 'a better system could and in my judgment urgently should be provided', with which statement Maurice Kay LJ expressly associated himself.

³³ As recommended by the ILPA report *When is a child not a child?* May 2007 (in Publications section of ILPA website, www.ilpa.org.uk).

leave to remain. From that time, refugees were granted refugee leave for 5 years. What with the changes in the Borders, Citizenship and Immigration Bill, it appears that the policy position whereby those granted 5 years refugee leave could normally expect to be granted indefinite leave to remain³⁴ will be changed before anyone reaches the end of his or her 5 years. What will be the position for refugees at the end of 5 years is now unclear.

23. Meanwhile the impact of delays, inconsistencies and inadequacies in the asylum decision-making process remains a source of substantial problem for asylum-seekers whose claims remain unresolved and who remain socially excluded (including by denial of permission to work)³⁵. The prosecution of asylum-seekers for immigration offences that they could not reasonably have avoided remains a concern³⁶, and one which has a potential long-term impact upon any prospect of settlement or naturalisation for those who are accepted to have protection needs.

EU Common Asylum System

24. In 1999, the European Union agreed to work towards a common EU asylum system³⁷. The Government negotiated an option to opt-out of any measures agreed through that work. To date, the UK has not exercised its option and has signed-up to the Directives that have been introduced³⁸. However, these Directives are currently going through a process of review and renegotiation. The Reception Directive will be the first of these to come up for revision, and the Government has already indicated its

³⁴ This is currently set out in the asylum policy instruction on refugee leave (see also the asylum policy instruction on humanitarian protection), available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>

³⁵ See paragraph 5 *et seq*, September 2007, ILPA Memorandum to the Joint Committee on Human Rights in response to the Government's response to the Committee's Tenth Report, Session 2006-07 (*op cit*) (ILPA Memorandum available in Submissions section of ILPA website, www.ilpa.org.uk).

These concerns have been particularly acute in relation to those asylum-seekers and refused asylum-seekers in the legacy backlog (where original asylum claims were made prior to March 2007). However, the New Asylum Model (dealing with original asylum claims from March 2007) is developing its own backlog; and there are reasons to fear that similar concerns have become relevant in relation to substantial numbers whose claims have been dealt with in this new process.

³⁶ The House of Lords judgment in *R v Asfaw* [2008] UKHL 31 provides an example of where asylum-seekers have been prosecuted for immigration offences contrary to domestic law; and there continue to be concerns that domestic law (even if properly applied) does not adequately protect refugees' rights.

³⁷ This agreement was reached at a meeting of the European Council in Tampere in October 1999.

³⁸ There are three Directives setting down minimum standards for the treatment of asylum-seekers: the Reception Directive (2003/9/EC), the Qualification Directive (2004/83/EC) and the Procedures Directive (2005/85/EC).

intention not to opt-in to the revised Directive³⁹. The UK Border Agency has indicated that key reasons for this are that it does not wish to be bound by proposed improved standards in relation to detention and permission to work; and that it considers when the revised Directive is implemented it will no longer be bound by the current Directive.

Conclusions:

25. There are significant ongoing programmes reviewing law and policy, including as these affect asylum-seekers. These include review at the EU level of minimum standards for the treatment of asylum-seekers; and domestically the wide-ranging review of all immigration law and policy by the UK Border Agency simplification project. The months and years ahead, therefore, provide both opportunities and risks – particularly since there may be reluctance to revisit changes that come out of these reviews for some considerable time into the future. The underlying preoccupation of the UK Border Agency with perceived ‘pull factors’ coupled with the absence of any or any adequate evidence-base for this perception and much of its policy-making substantially accentuates the risks.

Further information:

26. Further information on the matters addressed in this paper may be obtained from the following on the ILPA website (www.ilpa.org.uk):
 - The **Info service** section. This includes concise information sheets on discrete topics, and various notes and papers that have been made available at conferences, workshops and meetings.
 - The **Submissions** section. This includes responses to consultations and submissions to parliamentary committees.
 - The **Briefings** section. This contains ILPA’s briefings on the Borders, Citizenship and Immigration Bill, and earlier Bills.
27. Information sheets, responses and briefings (and other materials) contained on the website are not exclusively about asylum.

³⁹ Lin Homer, Chief Executive of the UK Border Agency, wrote to UNHCR in March 2009 (and made her letter available to other stakeholders).

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