

## **Asylum Law and Practice – Hot Topics**

1. These notes accompany a discussion with members of Student Action for Refugees (STAR). Their purpose, and that of the discussion, is to highlight current and prospective topics of particular and new importance in relation to asylum and refugees in the UK.
2. Discrete topics are discussed under individual headings. Much background is assumed (though some background is provided with discrete topics); and necessarily the information provided here is not comprehensive, and some generalisations are made. ILPA information sheets<sup>1</sup>, which are relevant to topics discussed here, are listed at the end of these notes.

### **Screening:**

3. Screening is the initial part of the asylum process. It often takes place at the place at which an asylum claim is first made – e.g. at the port of entry to the UK or Asylum Screening Unit (in Croydon or London). Screening involves fingerprinting and a lengthy interview, covering several matters (personal details such as name, age, nationality, parents' personal details etc.; the journey to the UK and documentation used/held etc.; housing & support needs). Detailed enquiry as to the reasons for an asylum claim should not be made at screening. Generally, asylum-seekers are not represented at screening; and in many cases screening will take place before an asylum-seeker first meets a legal adviser. At screening, a decision will be taken as to whether an asylum-seeker should be permitted to enter the UK asylum system; and if so how his or her asylum claim will be dealt with. Essentially, there are three possibilities:
  - If it is considered that a safe third country should consider the asylum claim, the case will be passed to the Third Country Unit and the asylum-seeker may be excluded from the UK asylum system<sup>2</sup>;

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<sup>1</sup> These are available in the Info Service section of the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

<sup>2</sup> Arrangements between EU Member States determine responsibility for asylum claims according to criteria set out in Council Regulation EC 343/2003 (often referred to as Dublin II or the Dublin Regulations)

- If a safe third country is not considered responsible for the claim, the case may be referred to a New Asylum Model (NAM) team in one of the six UK Border Agency regions; or
  - Instead of referring the case to a NAM team, the case may be taken into the detained fast track (DFT) on the basis that it can be decided quickly.
4. The UK Border Agency is reviewing screening. However, this stage of the process has been under review for many months, and it is not clear when any review may be completed. Current problems or concerns which arise in relation to screening include:
- In relation to the DFT: *“UNHCR doubts whether the current screening process allows for the gathering of sufficient information to ensure that unsuitable cases are not routed to the DFT. In this regard, UNHCR notes the apparent tension between the quality of information required to reach a sustainable conclusion as to whether a case can be ‘decided quickly’ and the amount of information that could (and should) be collected at the asylum screening stage.”*<sup>3</sup>
  - There are only two Asylum Screening Units in the UK – in Croydon and Liverpool. An asylum-seeker who is in-country (as opposed to at port, on entry) must travel to one of these two locations in order to make a claim. Not all asylum-seekers have an opportunity to claim asylum at a port. Some asylum-seekers may be brought into the UK without passing through immigration controls. Others may not be seeking asylum when they come here, but because of changes in their country may need to claim asylum after they have arrived.
  - Asylum-seekers are usually without any legal representation at the point of screening. Although screening is not meant to make any detailed investigation of an asylum claim, questions may be asked which do relate to the claim or the answers to which will be relied upon in refusing asylum or which may lead to prosecution for illegal entry or document offences.

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<sup>3</sup> UNHCR Quality Initiative Project, Fifth Report to the Minister, March 2008, para. 2.3.85 available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/>

### **Nationality etc. disputes – language, DNA & isotopic testing:**

5. In some cases, the UK Border Agency refuses to believe someone's nationality or claimed origins. These disputes can begin as early as the point of screening. The UK Border Agency has introduced language, DNA and isotopic testing, which may be conducted at screening. As regards, DNA and isotopic testing, the UK Border Agency notified ILPA (and other stakeholders) on 11<sup>th</sup> September that it was to commence a pilot from Monday, 14<sup>th</sup> September.
  
6. Language testing involves a telephone conversation with an analyst commissioned by the UK Border Agency. On the basis of that conversation, a report is made giving an assessment of the language and dialect spoken in relation to the asylum-seeker's claimed nationality and origins. This testing has recently been used in some cases of Somalis and Eritreans. Criticisms have been levelled at the expertise of analysts, the quality of their reports and the conditions of the interviews (short length of conversation, quality of telephone connection, preparedness and ability of asylum-seeker to participate in a telephone interview); and of the use to which these reports are put (UK Border Agency merely accepting the conclusions in the report without evaluating the other evidence presented)<sup>4</sup>.
  
7. DNA and isotopic testing involves taking hair and nail samples, and mouth swabs, to be subjected to analysis to try and match results with records on international databases to provide an evaluation of a person's likely origins. The British Association for Adoption and Fostering and the British Society for Human Genetics have issued a joint statement casting serious doubt on the reliability of similar DNA testing<sup>5</sup>. There are similar concerns regarding the suitability of isotopic testing for the UK Border Agency's purposes. Moreover, the UK Border Agency says such testing

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<sup>4</sup> See, e.g., *FS (Treatment of Expert Evidence) (Somalia)* [2009] UKAIT 00004 available at: <http://www.bailii.org/uk/cases/UKIAT/2009/00004.rtf>

<sup>5</sup> <http://www.baaf.org.uk/info/lpp/adoption/ethnictesting.pdf>

will only be conducted with the individual's consent, but there are questions as to how informed consent will be obtained; and what consequences there may be if consent is refused.

**Age disputes and age assessment:**

8. There continue to be highly contentious or outstanding issues in relation to how the UK Border Agency deals with claims for asylum by separated children (unaccompanied asylum-seeking children). These start with disputes about whether a person is or is not a child, generally referred to as an age dispute; and the means that are used and relied upon in order to reach an assessment of a person's age.
  
9. In May 2007, ILPA published a report based on extensive research into age disputes and age assessment<sup>6</sup>. The findings of that report included:
  - Around 45% of those whose age was disputed and who were treated as adults by the Immigration and Nationality Directorate (predecessor of the UK Border Agency) were subsequently accepted to be children;
  - Age assessments undertaken by local authorities were of variable quality.
  - There was potential for conflict of interest on the part of a local authority in undertaking an age assessment and in having an obligation to provide services to a child in need.
  - Ports and screening units were not suitable places for an holistic and multi-agency assessment of age, which was an approach recommended by the report.
  - Cultures of disbelief on the part of immigration officers and some social workers, and an over-reliance on physical appearance and credibility as indicators of age, was a significant problem.
  - Being age disputed had substantial adverse consequences for children in relation to their asylum claims, their welfare and educational needs and general well-being.

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<sup>6</sup> *When is a child not a child?* The report remains available in the Publications section of the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

- There should be a focus on reducing the numbers of disputes and improving the quality of age assessments, and establishing a process for reviewing decisions.
10. The report recommended that the number of age disputes be reduced by a correct application of the benefit of the doubt, the establishment of independent regional age assessment centres to which all age disputes would be referred, the assessment of age should be improved to make this holistic and multi-agency and a review process should be available to reduce impact on the courts. Problems identified in the report and these recommendations remain outstanding. In the meantime, however, the UK Border Agency has reduced funding to the Refugee Council's Children's Panel, thereby reducing the independent scrutiny or capacity for independent scrutiny in relation to age disputes<sup>7</sup>. There is ongoing litigation in the courts as to the quality of age assessment by local authorities, and as to the lawfulness (on the grounds of lack of independence) of age assessments being conducted by local authorities.

**Children seeking asylum:**

11. A number of further critical issues arise in relation to children, whether separated or in families, in the asylum system. Several of these are very briefly highlighted in the paragraphs which follow.
12. Two key issues arise in relation to enforced removal of separated children:
- Separated children, whose asylum claims it is decided are the responsibility of another EU Member State, are referred to the Third Country Unit (TCU). TCU is responsible for arranging their return to the other State. In most cases of enforced removal, the UK Border Agency is required to give a minimum period of notice to the individual and his or her representative. In TCU cases, however, the UK Border Agency policy is that removal may proceed without any notice being given to the child, any legal representative or social

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<sup>7</sup> This particularly affects children who are detained because their age is disputed

services<sup>8</sup>. This is said to be in the best interests of the child so as to avoid the child coming to harm by absconding in order to avoid removal. However, it must be questioned whether this explanation offers any rational justification, since the child will know he or she is at risk of removal at any time and, if it happens, it may be that nobody will be able to advise or assist the child when it does.

- The UK Border Agency policy is that a separated child must not be removed from the UK to any country unless adequate reception arrangements have been put in place for the child's return to or arrival in that country. Except in the TCU cases (see previous), separated children are usually granted discretionary leave to remain while they remain a child<sup>9</sup>. The UK Border Agency, however, is exploring ways to remove separated children; and discussing with foreign governments what arrangements may be made.

13. The detention of children remains a highly controversial topic. Over the last year or so, the UK Border Agency has become increasingly vocal about its desire to find 'alternatives to detention'. It has run a pilot in Ashford, Kent; and has recently commenced another in Glasgow. However, both pilots entail disruption by moving families into designated accommodation in order for them to take part in the pilot. The UK Border Agency has to date insisted that this is necessary in order to make clear to the family that they will now be removed if they are not persuaded to make a voluntary departure within a controlled period of time.

14. The UK Border Agency, and its predecessors, have generally been resistant to applying to children (such as those claiming asylum), who are subject to immigration control, the same standards relating to children's safety and welfare that apply to other children in the UK. There have been recent positive developments, including the withdrawal of the UK's

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<sup>8</sup> One such case in 2007 prompted comment pieces in The Guardian and The Daily Telegraph: <http://www.guardian.co.uk/uk/2007/dec/20/iraq.immigration> and <http://www.telegraph.co.uk/comment/3644903/Teen-asylum-seekers-face-a-tough-Home-Office.html>

<sup>9</sup> The grant of discretionary leave is made to age 17½ years or for three years, whichever is the shorter period

immigration reservation to the 1989 UN Convention on the Rights of the Child and the inclusion in the Borders, Citizenship and Immigration Act 2009 of a duty in very similar terms to that which applies to other agencies in the UK under section 11 of the Children Act 2004. However, the Government's Child Poverty Bill does not apply to children subject to immigration controls equally as it does to other children; and the UK Border Agency is again missing from the list of relevant agencies to whom measures regarding the eradication of child poverty relate.

15. Guardianship continues to be a much-debated subject in relation to children seeking asylum. A particular concern, although not the only matter related to guardianship, is the need for a guardian to provide instructions to a lawyer in circumstances where a child is unwilling or unable to provide adequate or safe instructions<sup>10</sup>.

**Permission to work:**

16. The EC Reception Directive<sup>11</sup> requires Member States to consider granting permission to work to any asylum-seeker who has been waiting for 12 months or more for an initial decision on his or her asylum claim<sup>12</sup>. The UK Border Agency policy is that asylum-seekers are generally refused permission to work, but in accordance with the Immigration Rules permission may be granted if an asylum-seeker applies for permission to work having waited for 12 months for a decision from the UK Border Agency on his or her initial asylum claim.
17. In May 2009, the Court of Appeal decided that the Directive applies equally to fresh claims as it does to initial claims for asylum<sup>13</sup>. However, the UK Border Agency has declined to implement this decision. It is

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<sup>10</sup> This is more fully explained in the April 2008 letter of ILPA to the Lord Adonis, then Minister at the Department for Children, Schools and Families, see the Submissions section of the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

<sup>11</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

<sup>12</sup> see Article 11

<sup>13</sup> *R(ZO(Somalia) & Anor) v Secretary of State for the Home Department* [2009] EWCA Civ 442 available at: <http://www.bailii.org/ew/cases/EWCA/2009/442.rtf>

seeking to appeal to the Supreme Court (formerly the House of Lords); and in the meantime is simply sitting on (i.e. declining to decide) applications for permission to work from those who fall within the terms of the Court of Appeal decision.

18. Currently, the EU is reviewing and renegotiating the Directives, including the Reception Directive, which make up the EU Common Asylum System. The proposed new Reception Directive would reduce the period of 12 months to 6 months as regards when permission to work should be considered for asylum-seekers with asylum claims awaiting an initial decision. This is one of two key reasons why the UK has indicated that it intends to opt-out of the new Reception Directive.

**Asylum support:**

19. Asylum-seekers, with outstanding claims or appeals, are generally entitled to housing and financial support. The financial element has for some time been set at around 70% of income support. Those whose claims and appeals are ultimately refused (refused asylum-seekers) may be entitled to housing and financial support, provided by way of vouchers, but only if they satisfy restrictive criteria (e.g. they can show that they are taking steps to return home).
20. Previously, asylum support rates have been increased annually in line with the Consumer Price Index. The Government has recently announced that asylum support rates from October 2009 are not to be increased in this way across the board. Support rates for single parents will be frozen, as will support currently provided to adults over 25 years old who are already in receipt of support whereas from October 2009 adults over 25 years old coming onto support (or who then reach 25 years of age) will receive the current 18-24 years' rate. These represent real-term cuts for single adults of £9.03 per week and for single parent families of £2.19 per week.<sup>14</sup>

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<sup>14</sup> Further information is available at: <http://www.refugeecouncil.org.uk/news/news/2009/july/20090730.htm> and [http://www.refugee-action.org.uk/campaigns/destitution/jul09\\_s95cuts\\_action.aspx](http://www.refugee-action.org.uk/campaigns/destitution/jul09_s95cuts_action.aspx)



21. For those refused asylum-seekers who are entitled to support (many are simply left destitute), the UK Border Agency has long resisted providing financial support in cash rather than by way of vouchers. Vouchers can lead to stigma, but also constitute an additional deprivation because those who are forced to use them cannot receive change from their purchases and, since the vouchers can only be used at participating stores, cannot shop around so that their limited financial support goes as far as possible. The UK Border Agency is to pilot the use of pre-payment cards, but these will still be restricted to participating stores.

**Detention:**

22. The UK Border Agency is continuing to expand its detention estate<sup>15</sup>. This year, it has opened a new Immigration Removal Centre near Gatwick called Brook House (with 426 beds). It is currently engaged in building two new wings at Harmondsworth, near Heathrow; and has planning permission to build two further Immigration Removal Centres in Oxfordshire (approx. 800 beds) and Bedfordshire (approx. 500 beds). The UK Border Agency has been allocated money to develop one of these sites, and a decision is under consideration; but it still hopes to secure additional money in due course so as to develop both.
23. Concerns about the use of detention in the UK have been aggravated by the growing evidence that for a substantial number of foreign nationals who have completed prison sentences, indefinite detention (over periods of months and years) is becoming the norm<sup>16</sup>.
24. The use of the DFT is another ongoing example of an egregious use of detention in the UK. Asylum-seekers who are transferred to the DFT will generally have their claims considered and refused, and appeals considered and dismissed, in a matter of days. Although the formal criteria for

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<sup>15</sup> see

<http://www.bia.homeoffice.gov.uk/managingborders/immigrationremovalcentres/expansionofthedetention>

<sup>16</sup> see <http://www.detainedlives.org/>

transfer to the DFT is based on whether a quick decision can be made (and not on whether there is any reason to think a negative or positive decision is likely), decisions in the DFT are overwhelmingly to refuse asylum (out of all proportion to the rate of refusal and appeal dismissal outside of this process). Although asylum-seekers are offered free representation in all cases prior to a decision by the UK Border Agency, thereafter a greatly disproportionate number receive no further legal aid representation or advice. In practice, this means that an asylum-seeker in the DFT may have seen his or her lawyer for little more than a few hours, and been represented for little more than a couple of days.<sup>17</sup> The DFT is simply too fast for safe decision-making.

25. Relatively recently, the Asylum and Immigration Tribunal has introduced bail hearings by video link. Concerns about this practice include that the detainee is not able to clearly see and hear everything during the bail hearing, and that the legal representative (who will generally choose to be at the hearing rather than at the place of detention) is severely restricted in relation to taking instructions from the detainee, in particular in relation to reasons for maintaining detention advanced late in the day by the UK Border Agency.<sup>18</sup>

#### **Removals and judicial review:**

26. There are three controversies that are particularly current in relation to removals – i.e. when the UK Border Agency forcibly removes someone from the UK. These are described briefly:
  - The UK Border Agency policy is that generally a minimum period of notice must be given to an individual and any legal representative of an imminent removal. The minimum period is generally 72 hours.  
However, in certain cases the policy is that no notice may be given at

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<sup>17</sup> Reports by Bail for Immigration Detainees reveal profound problems with the DFT; and it is revealing that the ILPA best practice guide on DFT (sponsored by the Legal Services Commission) emphasises the need for lawyers to concentrate on getting clients out of the DFT. The ILPA guide is available in the Publications section of our website at [www.ilpa.org.uk](http://www.ilpa.org.uk) and the BID reports are available at: <http://www.biduk.org/library/publications.htm>

<sup>18</sup> In March 2008, Bail for Immigration Detainees and Refugee Council published a short report, available at: <http://www.biduk.org/pdf/Bail%20video%20report%20final%2010%2003%2008.pdf>

all. These cases include children in TCU cases (described above); and where someone is considered to be at risk of self-harm. The justification offered in the self-harm case is similar to that in the children's cases – that it is in the best interests of the individual not to risk his or her self-harming by giving any notice of the removal. Again, it is plainly questionable whether this justification is rational since the uncertainty that may be inspired by the knowledge that removal may happen at any time and without anyone knowing would seem to be a substantial risk factor in and of itself. Concerns about UK Border Agency policies not to give notice of removal have been accentuated by two further factors. In February 2009, a judgment of the High Court revealed that the UK Border Agency also operates undisclosed policies under which a person may be removed without notice<sup>19</sup>, which means it cannot be confidently predicted whether a person is within a group to whom notice is or is not required. That case also highlights the other factor, which is that in some cases the Secretary of State has had to be ordered by the courts to make arrangements to return people to the UK after they have been wrongfully removed. This happened in the same High Court case<sup>20</sup>, and in that case the individual has subsequently been found to be a refugee.

- When the UK Border Agency is taking steps to remove someone, it is often the case that the only means to legally challenge this decision is by judicial review. In the past, the Immigration and Nationality Directorate had agreed to suspend removals where legal representatives informed them of judicial review proceedings. The UK Border Agency has steadily restricted the circumstances in which removals will be suspended. This means that in order to prevent an unlawful removal (such as the one referred to above), legal representatives are under greater pressure to file full papers with the

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<sup>19</sup> *R(N) v Secretary of State for the Home Department* [2009] EWHC 873 (Admin), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2009/873.rtf>

<sup>20</sup> It also happened in the case referred to at fn. 7

High Court and seek an injunction in whatever time they may have between being informed of a removal and its taking place.

- A persistent complaint is that those who are removed are often given insufficient opportunity to collect or dispose of their personal possessions, sometimes including cash.

**Document-related prosecutions:**

27. There continue to be considerable concerns regarding the prosecution of asylum-seekers for having presented false documents or failed to produce valid documents when passing through UK immigration controls. The 1951 UN Convention relating to the Status of Refugees (the Refugee Convention) provides that refugees should not be penalised for such immigration offences where this has been necessary for them to escape persecution and where they have presented themselves to the authorities within a reasonable time<sup>21</sup>.
28. Asylum-seekers may be prosecuted for these offences before receiving any advice from an immigration lawyer. In some cases, criminal lawyers advise asylum-seekers to plead guilty; and one reason for this is that during any prosecution the individual will typically be held on remand and bail will not be granted. In many cases, pleading guilty is likely to result in the individual spending less time in prison even were he or she to be found not guilty. However, this has resulted in significant numbers of refugees being convicted of offences for which the Refugee Convention requires that they should not be penalised.

**Legal Aid:**

29. The Legal Services Commission (LSC) is in the midst of making radical changes to the way in which legal aid is provided in the UK. To date changes have generally restricted the time that legal representatives can give to cases that are funded by legal aid (unless the lawyer is prepared to do additional work for free), and have persuaded some lawyers to cease or

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<sup>21</sup> Article 31

reduce their legal aid work. There continue to be profound concerns that the changes, which are to be implemented, will exacerbate these problems, and that it will become increasingly difficult for asylum-seekers to obtain legal representation and, if they do, to be confident in the quality of that representation.

#### **Asylum and Immigration Tribunal and the Tribunals Service:**

30. Next year, the Asylum and Immigration Tribunal (AIT) is to be transferred into the new Tribunals Service. It is not as yet clear what consequences this may have for appeals by asylum-seekers. It is possible that it results in very little change. However, one of the key reasons behind this transfer is a desire to reduce the workload of the High Court and Court of Appeal judges<sup>22</sup>. Currently, asylum cases constitute a substantial proportion of that workload. However, this reflects the relative quality of decisions by the UK Border Agency and AIT in these cases; and there are, therefore, dangers in thinking that merely changing the form or structure of the appeal system will result in improvements that would justify any reduced oversight by the senior judiciary.

#### **Settlement and citizenship:**

31. Refugees in the UK have long had an opportunity to settle in the UK and to become British citizens (to naturalise) subject to their length of stay in the UK and meeting other requirements. The Government has recently embarked on a process of changing how naturalisation in the UK works<sup>23</sup>. The changes, which are intended to come into force in July 2011<sup>24</sup>, may have significant consequences for refugees, and other asylum-seekers who are granted permission to remain in the UK.

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<sup>22</sup> The judges currently have a supervisory role over the AIT in that the AIT's internal review process (reconsideration) is in part overseen by a last right of application for review to the High Court and in part overseen by a right of appeal (if a review is conducted) to the Court of Appeal.

<sup>23</sup> Power to introduce the changes has been given by the Borders, Citizenship and Immigration Act 2009

<sup>24</sup> When these are introduced there will be some transitional protection for people who are already in the UK and are on their way towards naturalisation – particularly those with outstanding applications for citizenship, those who have indefinite leave to remain and those who have outstanding applications for indefinite leave to remain at the time the changes are introduced

32. Under current policy, a refugee should expect to be granted 5 years' leave (permission) to remain, at the end of which he or she may apply for indefinite leave to remain. After a further one year, an application to naturalise may be made. In future, a refugee may be granted 5 years' leave to remain, but then be required to apply for a further period of time-limited leave to remain. This second period may last between 1 and 3 years before an application for citizenship can be made, or between 3 and 5 years before an application for permanent residence can be made. (Some refugees may not want to apply for another nationality, and others may be unwilling to do so because it would require them to abandon their original nationality.) The changes will, therefore, extend the length of time that refugees will need to spend in the UK before they are permitted to apply for some form of permanent status, and this extension of time may be of between 1 and 5 years. Other concerns that are yet to be worked out relate to fees. Currently, a refugee's application for indefinite leave to remain does not require a fee. However, it appears that in future refugees may have to pay a substantial fee before any permanent status will be granted.<sup>25</sup>

#### **Backlogs and delays:**

33. The UK asylum system has been bedevilled by backlogs and delays for many years. In 2006, John Reid MP, then Home Secretary, announced that the asylum backlog would be cleared within 5 years and that a new system would be introduced for new asylum claims so that these would be resolved within 6 months from the time of claim<sup>26</sup>. Resolved meant that the asylum-seeker would either have been granted status or removed from the UK within this timescale.

34. The 2006 backlog became known as the legacy. At the time, the Government estimate of its size was somewhere between 400,000 and 450,000 people. However, it appears that many of the records in the backlog were of people whose cases had been resolved (some had left the

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<sup>25</sup> There are two UK Border Agency consultations currently open, which relate to the changes; and these are available at: <http://www.bia.homeoffice.gov.uk/aboutus/consultations/current/>

<sup>26</sup> see, e.g., *Hansard* HC, 25 July 2008 : Columns 736-737 *per* John Reid MP

UK, some had been recognised as refugees – indeed some had by 2006 become British citizens). Now, the UK Border Agency has less than 2 years to clear the backlog (July 2011 is the target date). It has indicated that it is confident of achieving this. Some of those in the backlog will have been in the UK for many years. However, some people in the backlog have been removed, although others have been granted permission to remain in the UK.

35. The new system announced by John Reid was the New Asylum Model (NAM). NAM continues to be the system used for all new (not fresh, or second) asylum claims. However, the 6 months' targets only apply to a proportion of cases, and there are growing concerns that the NAM is merely developing its own backlog of unresolved cases.
36. Backlogs and delays have had serious consequences for those caught in them, but also evidence serious problems with the system beyond the mere fact of delay. Asylum-seekers caught in these backlogs generally remain without permission to work, and at risk of destitution and homelessness. Years of deprivation and uncertainty can lead to serious consequences for individuals' emotional and psychological well-being. The backlogs themselves speak of a lack of confidence in the asylum system, particularly among those who have been refused asylum; and there are many reasons that would justify such a lack of confidence including poor and inconsistent decision-making, lack of access to competent legal advice and representation and a refusal by the UK Border Agency and its predecessors to face up to the manifest threat to human rights and well-being entailed in removing people to some of the countries from which most asylum-seekers originate (e.g. Somalia, Sudan and Eritrea)<sup>27</sup>.
37. In 2003, the Immigration and Nationality Directorate withdrew all of its then current country policies, which had provided for exceptional leave to

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<sup>27</sup> ILPA provided written evidence to the Joint Committee on Human Rights explaining reasons that have contributed to lack of confidence – see ILPA submission of October 2007 available in the Submissions section at [www.ilpa.org.uk](http://www.ilpa.org.uk)

remain<sup>28</sup> to be granted in many or most cases of asylum claims from specified countries. These essentially reflected the widespread human rights abuses in these countries and the inhumanity and dangers in contemplating forced returns. To date, the UK Border Agency maintains a determination not to reintroduce any such similar policies.

**Conclusion:**

38. Many (not all) of the topics highlighted here, particularly some of the practices and policies of the UK Border Agency, are driven by assumptions on the part of that Agency that acting in a different way will have adverse consequences (e.g. that refused asylum-seekers will be less inclined to co-operate with removal or make a voluntary departure, or new asylum claims with increase).
  
39. Some of these assumptions appear to be irrational (e.g. that children who know they and those supporting and advising them will be given notice of any removal will be more likely to abscond than children who simply know they may be removed at any time and neither they nor others may receive any advance notice). Where assumptions appear on their face to be rational, the UK Border Agency sometimes appears unwilling or unconcerned to take steps to see whether the assumptions can be demonstrated in practice (e.g. the UK Border Agency has consistently opposed providing cash support to refused asylum-seekers, but having agreed that vouchers are not satisfactory refused to change the law despite having an early opportunity in the Borders, Citizenship and Immigration Act 2009 to allow it to pilot both cash and pre-payment cards). In some instances, evidence has seemed to disprove assumptions, yet the UK Border Agency has failed to change its practice or policy (e.g. the power to withdraw all support from families who have been refused asylum had been considered to be a means to persuading families that they must

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<sup>28</sup> At the same time, exceptional leave to remain was withdrawn and replaced by humanitarian protection and discretionary leave – in taking this step the Government greatly reduced the number of cases in which any form of status was granted to asylum-seekers, despite the fact that it was plainly no more safe or practicable to remove the many more people who were by these means to be left in limbo without status in the UK and at risk of destitution



consider making voluntary departures, but despite the evaluation of a pilot of this theory showing it to have been ineffective<sup>29</sup> the UK Border Agency has retained the power<sup>30</sup>).

40. The driving concern in relation to asylum policy appears to be a belief that being seen to treat asylum-seekers too favourably (to put this as neutrally as possible) will provide an encouragement for others to seek to come to the UK and claim asylum. The UK Border Agency often refers to 'pull factors' which is shorthand for the belief just described. However, it remains questionable whether pull factors exist or operate in the ways or to the extent the UK Border Agency fears. It is also questionable whether policies and practices that cause destitution, leave people in limbo and lead to real harm can be justified on the speculative assumption that these might have some impact upon the mind of a prospective asylum-seeker who may or may not seek to come to the UK in the future.

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24<sup>th</sup> September 2009

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<sup>29</sup> see

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf>

<sup>30</sup> Section 9 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

Related ILPA information sheets:

These are available in the Info Service section of the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

The list here is not intended as comprehensive; and the information contained in these information sheets must be treated with some caution, especially in relation to the passage of time, since developments in law and practice may in the area of asylum take place frequently and rapidly.

Age Disputes & Age Assessments  
Children's Asylum Claims  
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