

Asylum law and policy – an update:

1. These notes are to accompany a workshop on 5th June 2010 at the Churches' Refugee Network annual conference.
2. The aim of the notes is to provide a broad update on asylum law and policy – new developments and current reviews. Discrete items are briefly discussed under distinct subheadings. The notes are not intended to provide a comprehensive explanation of any one topic. They may be useful in highlighting important matters about which more detail may be available elsewhere. Alternatively, they may highlight matters on which developments or announcements may be expected in the months ahead.

Legal aid

3. There is currently a great deal of uncertainty. For some considerable time there have been concerns that legal aid provision is inadequate, and that some good quality representatives are choosing to reduce their legal aid work or cease altogether. This trend appears set to continue.
4. One major concern (certainly not the only concern) relates to what lawyers refer to as 'stage billing'. Legal aid is paid after the work is done. Changes made in 2004 are causing lawyers considerable problems because there is no longer scope for paying legal aid except at the conclusion of two distinct stages of the asylum process – consideration of the claim by the UK Border Agency and the appeals process. It is understood that there are currently around 5,000 cases where the UK Border Agency has not made a decision within 6 months of the claim having been made (see below). The work done in such cases will (certainly in many, perhaps most of these) not yet be paid for, and the lawyers cannot claim for it yet. Lawyers may have to wait, not merely months, but years to be able to claim significant payments in some cases.

Essentially, the Legal Services Commission has a running debt and the arrangements for payment force lawyers to carry that. This is one cause of the problems facing Refugee and Migrant Justice¹ (formerly the Refugee Legal Centre), and is a serious financial problem for many others – particularly those who take on complex cases, and do good quality work, because it is these cases which are most likely to be subject to delays or just take longer in the asylum process or at appeal.

5. A cause of considerable uncertainty is the delaying by the Legal Services Commission of any announcement of decisions following the tender process conducted earlier this year. Lawyers have had to bid for contracts to be permitted to do legal aid work – they have had to bid for certain quantities of work (i.e. for permission to be able to do X number of legal aid cases). Originally an announcement was to be made at the end of March. It has been put back more than once. Lawyers still do not know whether they are to be offered any future legal aid work, and if so how much they may be offered. Meantime, they are expected to make decisions about such things as recruitment and renewing leases in the expectation that they may be offered work.
6. The Government's coalition agreement also indicates their intention to review legal aid. This indication is not specific to immigration and asylum, but it is an added source of uncertainty.

Asylum process

7. The Government's coalition agreement includes the commitment that:

We will explore new ways to improve the current asylum system to speed up the processing of applications.

¹ See <http://www.guardian.co.uk/uk/2010/may/30/asylum-refugee-migrant-justice>

8. There is as yet no more information as to what is being considered. The UK Border Agency is conducting an asylum review, but this may be little more than confirmation of their ongoing review of various aspects of the New Asylum Model². One aspect that is planned to be subject to detailed scrutiny is the screening process. Doubtless, another aspect that can be expected to be pressed with new Ministers is how and what to take forward from the Solihull early access (to legal representation) pilot³. However, any consideration of this matter needs to take place in conjunction with any developments in respect of legal aid.

Active review

9. In August 2005, the Home Office changed its policy on grants of leave to refugees. Previously, refugees had been granted indefinite leave to remain (ILR) on their status being recognised by the UK (though a few years prior to this, refugees had received 4 years exception leave to remain (ELR)). From August 2005, refugees were granted 5 years refugee leave. At the same time, those asylum-seekers granted humanitarian protection were granted this for a 5 years period. August 2010, therefore, is when the first of these refugees will reach the point of expiry of their leave to remain.
10. The UK Border Agency is yet to decide how it will consider applications for ILR made by those whose leave is about to expire. It is important that the criteria by which such applications are assessed is not made more strict than the policy position that was set out in 2005 in the relevant asylum policy instructions. If that were done, it might require many more refugees to re-establish their need for protection – and if that was the result, it would be likely to produce a whole new tranche of cases, for which legal representation and legal aid would be needed, for which UK Border

² see see ILPA's April 2009 response to UK Border Agency 19 March 2009 presentation on future priorities for New Asylum Model available in the Submissions section at <http://www.ilpa.org.uk/>

³ this pilot has long finished and was evaluated in 2008, see <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-1107.pdf>

Agency caseowners were needed and for which the tribunal system was needed to hear appeals. In any case, legal representatives and others (and to some extent, the content of Home Office letters) will have advised refugees of the criteria in the relevant asylum policy instructions at the time they were first granted leave to remain. Changing this now would be to change the basis on which they had clearly been led to expect their cases to be considered.

11. There may, therefore, be good reason to hope that the UK Border Agency will not make the criteria more strict. However, whatever is or is not done, it is very important that refugees and those granted humanitarian protection do not wait for the leave to expire before making applications for ILR. It is usual practice to make such applications for further leave (including ILR) around a month before someone's leave expires. If someone does not apply before their leave expires, he or she becomes an overstayer with damaging results – strictly speaking, overstaying is a criminal offence; overstayers have difficulty exercising rights of appeal; overstayers may be expected to fully establish a claim for leave to remain (e.g. having to re-establish a need for protection); overstayers lose their entitlement to work or claim benefits; overstayers, if ultimately removed, may be subject to ongoing bans on their applying to return. However the matter is looked at, it is not good to become an overstayer. It is very important that refugees are aware of when their current leave expires and of the need to take advice so as to be able to make an application for ILR in good time.

Naturalisation

12. The previous Government introduced a new system of naturalisation in the Borders, Citizenship and Immigration Act 2009. This has not yet, however, been implemented; and the previous Government made a commitment not to implement the changes before summer 2011 and to then make transitional arrangements so that some people were protected from the changes up to

summer 2013. It is yet to be seen whether the new Government will seek to implement the previous Government's changes – or, if so, whether to implement all of them or only some and whether to honour the commitments about when these changes will take effect.

13. Meantime, it is important that changes have been made to the Nationality Instructions (the UK Border Agency guidance on matters of nationality), which allow for those who have ILR for one year to count the time between making their original asylum claim and being granted status as a time of lawful residence for the purpose of any naturalisation application⁴. This should prove particularly helpful for many asylum-seekers whose cases are positively resolved in the legacy process (by a grant of ILR) to be able to apply for British citizenship without the changes to be introduced under the 2009 Act affecting them – assuming that the previous Government's commitments are maintained.

Family reunion

14. An important judgment of the Supreme Court in May⁵ has made clear that, under UK domestic law, family members of a refugee who becomes a British citizen (by naturalisation) can still apply to join him or her under the special provisions of the Immigration Rules relating to asylum. This is important in that, amongst other things, it will not be necessary to demonstrate that the British citizen is able to financially maintain and accommodate his or her family without recourse to public funds. This decision reverses the previous decision of the Court of Appeal, and earlier decisions of the Asylum and Immigration Tribunal (what has become the Upper Tribunal Immigration and Asylum Chamber).

⁴ see paragraph 8.10 of Annex B to Chapter 18 of the Nationality Instructions at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter18/ch18annexb?view=Binary>

⁵ see http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0126_PressSummary.pdf

Legacy

15. The previous Government had made a commitment to clear the legacy backlog by summer 2011. The new Government has not made any announcement, suggesting that there is (at least for now) no change to this commitment. The Case Resolution Directorate is the part of the UK Border Agency responsible for resolving these cases – deciding whether to grant status or remove those who have been in the UK asylum system for many years, and implementing those decisions.

16. In February 2010, the Chief Inspector of the UK Border Agency expressed concerns as to whether the Case Resolution Directorate was on track to meet this commitment⁶. However, the Case Resolution Directorate have made significant changes to their working practices – which aim to free up the time of caseworkers to make decisions, while other administrative work both before and after decisions are made is dealt with by administrative staff. It remains to be seen whether these changes will prove adequate to meet the task. However, generally it is likely to be best that the original commitment is maintained and that the Case Resolution Directorate meets this target. That would mean that some people in this backlog will be removed; but it may mean that a number of others ultimately have their status regularised by a grant of ILR.

17. An important matter which the Case Resolution Directorate has agreed, but does not seem to be consistently implemented by caseworkers, is that where a decision is made to grant ILR in a case where the person has an outstanding asylum claim (whether original or fresh claim) he or she should be invited to say whether he or she wishes a decision on that asylum claim. This should not mean that the grant of ILR is interfered with. For those who have family overseas, this may be important because recognition of the

⁶ see <http://www.ociukba.homeoffice.gov.uk/news/Asylum-inspection-report-news.asp>

person as a refugee (or as entitled to humanitarian protection) will have important family reunion benefits – e.g. see that referred to above.

Out of service standards teams

18. In the same report (see above), the Chief Inspector revealed that the UK Border Agency has established what are called out of service standards teams. New Asylum Model cases, which remain unresolved after 6 months, are being passed to these teams. ILPA has raised concerns with the UK Border Agency that this appears to be treating these cases as less important than newer asylum claims – presumably in order to meet Home Office targets which focus on newer cases. It is still not clear how these teams work, and in some cases it may not be clear to the individual that his or her NAM caseowner is no longer dealing with the case.
19. The backlog of NAM cases (measured by the number of cases outstanding for more than 6 months) is around 35,000⁷, and is growing – the UK Border Agency say, slowly. As mentioned above around 5,000 of these are estimated to be still awaiting an initial decision. 35,000 is considerably more than the number of new asylum claims in e.g. 2009 or 2008.
20. There continue to be serious questions as to whether this backlog is merely attracting ‘difficult’ cases that the UK Border Agency doesn’t want to grant status when it is clear that the individual cannot be removed, including cases where there are general concerns about the safety of the particular country. In the past, similar situations were dealt with by grants of exceptional leave to remain (ELR); but the previous Government changed this policy in 2003. At the time, it introduced two statuses – discretionary leave and humanitarian protection. However, comparison of the proportion of claims

⁷ Information can be found in the immigration and asylum statistics, see <http://rds.homeoffice.gov.uk/rds/immigration-asylum-stats.html> and in the Chief Inspector’s report.

resulting in grants of these new statuses as compared to previous grants of ELR show that the new statuses were used very much less frequently.

21. The UK Border Agency currently has a secret 'general legal barriers' list. This is a list of countries, in respect of which it has difficulty enforcing removals. Cases, from countries on this list, which the UK Border Agency cannot resolve within 6 months are excluded from their targets under an agreement with the Treasury⁸.

Further submissions

22. In October 2009, the UK Border Agency introduced a new policy to require asylum-seekers making further submissions (including fresh asylum claims) to make these in person – previously, these could be sent by post. For legacy cases, an appointment must be made for the person to travel to Liverpool. This has caused considerable disruption and confusion, and has introduced substantial hurdles in the way of people being able to make further submissions.
23. It has come to be widely believed that going to Liverpool is a way to get your legacy case resolved more quickly. However, this is not correct. Some people have made appointments even though they have no further submissions to make – simply because they hope that this may get them to the front of the queue, and hope they may be given ILR. The only people whose claims may be prioritised by this process are those who have made or are making a claim for section 4 support⁹ on the strength of their further submissions. These cases are prioritised so that the UK Border Agency can aim to make a decision on the case before considering the section 4 claim – thus avoiding providing support.

⁸ See PSA Delivery Agreement 3 (priority action 2) at http://www.hm-treasury.gov.uk/d/pbr_csr07_psa3.pdf

⁹ Housing and financial support (vouchers or pre-payment cards) provided under section 4, Immigration and Asylum Act 1999

24. Problems with this process include that some people cannot get through on the telephone to make an appointment (there are limited appointments, and limited opening times for the telephone line – which is often engaged), and some people cannot afford to travel to Liverpool (the UK Border Agency will not fund this travel). However, if someone does not submit his or her fresh claim, he or she may be at greater risk of detention or removal.
25. There are legal challenges to this policy before the High Court. It is expected that these will be heard later in the year.

Asylum support

26. This continues to be a key concern of the UK Border Agency because, it says, somewhere between one-fifth and one-quarter of its entire budget is spent on asylum support. Meantime, there continue to be profound concerns at the levels of destitution that the UK asylum system has and continues to produce¹⁰.

Permission to work

27. The Supreme Court heard an important case in May, and its judgment is awaited. This concerns an appeal by the Home Office against the decision of the Court of Appeal that, where someone has made a fresh claim for asylum (whether or not the UK Border Agency has considered that claim, and decided whether it contains anything new) and has then been waiting for 12 months, he or she may apply for permission to work under the Immigration Rules.
28. In practice, this case seems to have led to the Case Resolution Directorate prioritising some cases rather than granting permission to work.

¹⁰ see <http://stillhumanstillhere.wordpress.com/>

Removals and judicial review

29. The UK Border Agency policy is that a person facing removal (including deportation) should be given at least 72 hours notice of his or her removal. There should be at least 2 working days during this period and the last 24 hours should include one working day. This may be vital because in many cases the UK Border Agency decides that someone is to be removed when to do so would be unlawful – perhaps because there is an outstanding claim or appeal, perhaps because proper consideration of the person’s case reveals that he or she is a refugee or has some other entitlement to remain in the UK. This limited time may give the person an opportunity to take legal advice and challenge the legality of his or her removal by judicial review.
30. However, the UK Border Agency policy contains several exceptions to this minimum notice period of 72 hours. These exceptions are currently being challenged. The High Court is expected to hear the case on 15 and 16 June. Meanwhile, the High Court has ordered that the exceptions are not to be used. For the time being, nobody should be removed without at least 72 hours notice.
31. Meanwhile, the UK Border Agency is reviewing its procedures in respect of removals of unaccompanied children. Currently, removals are usually only undertaken to other EU Member States in circumstances where it is said that a previous asylum claim has been made in the other Member State and the child’s claim is the responsibility of that State. The UK Border Agency has been criticised for its practices in conducting these removals, and this matter is currently subject to a challenge before the High Court¹¹. Nonetheless, the UK Border Agency continues to investigate options for removals further afield. This has been a matter of considerable controversy in the past, and may prove to be so again.

¹¹ see <http://www.communitycare.co.uk/Articles/2010/02/22/113868/high-court-ruling-on-asylum-seeking-children-welcomed.htm>

Detention

32. This continues to be a matter of considerable controversy. Most recently, there have been two critical reports on Harmondsworth Immigration Removal Centre – one by HM Chief Inspector of Prisons and another by the Independent Monitoring Board¹². Both raise grave concerns about the current expansion of Harmondsworth.
33. Meanwhile the Government's coalition agreement includes a commitment to end the detention of children. It is, as yet, unclear when and how this will happen. On 2 June, in debate in the House of Lords, a Home Office Minister sought to allay some fears:

We certainly aim not to separate families from children or children from families.

34. The Refugee Children's Consortium, which brings together several refugee and children's charities and NGOs and has been working to end the detention of children for several years, will be meeting shortly to assist its members (and others) with some guidance as to clear principles that may help avoid any accidental encouragement to the UK Border Agency to adopt unsafe or damaging proposals as alternatives to their current use of detention.
35. Detention of children is a matter being discussed in a separate workshop at this conference.

Nationality disputes

36. In recent years, the UK Border Agency has developed its use of linguistic analysis as a means for assessing whether a person is from the country he or she claims. It has used a company called

¹² see http://www.justice.gov.uk/inspectors/hmi-prisons/docs/Harmondsworth_2010_rps.pdf and the other is expected to be available shortly at <http://www.imb.gov.uk/reports/annual-reports.htm>

Sprakab, which provides someone to conduct a short (perhaps, 30 minutes) telephone interview on the basis of which a report is made as to whether in the opinion of the interviewer/analyst the person is from the claimed country. Sprakab reports have been subject of serious criticism relating to the quality of the method of assessment that is used, the expertise of the analysts used, the quality of reports produced and the use made of these reports by UK Border Agency caseowners¹³.

37. More recently, the UK Border Agency has piloted DNA sampling and isotopic sampling as a way of making an assessment of where a person is from. This has been subject to severe criticism by experts in these fields because the science that is used is not reliable for this purpose¹⁴. The pilot has finished and is currently being evaluated. It is to be hoped that the idea is buried.

Sexual orientation and gender identification

38. The Government's coalition agreement includes the following commitment:

We will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution.

39. This builds on a similar commitment in the Conservative Contract for Equality (of Equalities Manifesto) published before the election, and the Home Secretary, also the Minister for Equalities, expressly restated this commitment when she appeared on Question Time on 20th May. It is unclear how this commitment will be met in practice. Currently, there is an important case before the Supreme Court concerning gay and lesbian asylum-seekers. It was heard in May

¹³ see ILPA's April 2009 response to UK Border Agency 19 March 2009 presentation on future priorities for New Asylum Model available in the Submissions section at <http://www.ilpa.org.uk/>

¹⁴ see <http://news.bbc.co.uk/1/hi/uk/8282654.stm> and <http://news.sciencemag.org/scienceinsider/2009/09/border-agencys.html>

and judgment is awaited. In that case, the Home Office have argued that a gay or lesbian asylum-seeker can be returned to their home country in circumstances where he or she can be expected to avoid persecution by being discreet. This issue and several others related to claims on grounds of sexual orientation or gender identification are addressed in two recent reports – one from the UK Lesbian and Gay Immigration Group and the other from Stonewall¹⁵.

Final comments

40. There is much more that might be said about many of these subjects, and indeed much that might be said about subjects not addressed in these notes. For those that want further information on immigration matters, including asylum matters, the information service run by ILPA may be of interest. Short information sheets on a range of discrete subjects can be viewed in the Info service section of the ILPA website at www.ilpa.org.uk and please contact steve.symonds@ilpa.org.uk if you wish to receive these information sheets by email (generally no more than one email per month, with about 3 or 4 information sheets).

41. Please note that ILPA (which, necessarily therefore, includes me) cannot provide immigration advice on individual cases. If you or someone you know needs immigration advice, you may see if someone in the Directory at www.ilpa.org.uk can assist.

Steve Symonds
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¹⁵ see <http://www.uklgig.org.uk/> and http://www.stonewall.org.uk/media/current_releases/3927.asp

Appendix:

The Government's coalition agreement is available at:

<http://www.scribd.com/doc/31665532/Coalition-programme>

It includes the following statements under the heading Immigration.

However, various other statements made elsewhere in the document may have relevance for asylum-seekers and/or other migrants.

The Government believes that immigration has enriched our culture and strengthened our economy, but that it must be controlled so that people have confidence in the system. We also recognise that to ensure cohesion and protect our public services, we need to introduce a cap on immigration and reduce the number of non-EU immigrants.

- We will introduce an annual limit on the number of non-EU economic migrants admitted into the UK to live and work. We will consider jointly the mechanism for implementing the limit.
- We will end the detention of children for immigration purposes.
- We will create a dedicated Border Police Force, as part of a refocused Serious Organised Crime Agency, to enhance national security, improve immigration controls and crack down on the trafficking of people, weapons and drugs. We will work with police forces to strengthen arrangements to deal with serious crime and other cross-boundary policing challenges, and extend collaboration between forces to deliver better value for money.
- We support E-borders and will reintroduce exit checks.
- We will apply transitional controls as a matter of course in the future for all new EU Member
- States.
- We will introduce new measures to minimise abuse of the immigration system, for example via student routes, and will tackle human trafficking as a priority.
- We will explore new ways to improve the current asylum system to speed up the processing of applications.