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The *Nationality, Immigration and Asylum Bill*: Immigration and Asylum

Bill 119 of 2001/02

The *Nationality, Immigration and Asylum Bill* was introduced in the House of Commons on 12 April 2002. It is to be debated on second reading on 24 April 2002. The Bill will implement the proposals for nationality, immigration and asylum reform contained in the Government's White Paper *Secure Borders, Safe Haven.*

This paper considers Parts 2 to 7 of the Bill, which are concerned with immigration and asylum. Part 1 of the Bill, which is concerned with nationality and citizenship, is discussed in Library Research Paper RP 02/25

The provisions of Parts 2 to 7 are summarised and compared to the current law. Where relevant, the policy context set out in the White Paper is discussed. Some of the reactions to the more controversial aspects of the White Paper are also considered.

Madeleine Shaw

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Summary of main points

On 29 October 2001 the Home Secretary made a statement in the House of Commons announcing a package of measures to reform nationality, immigration and asylum law.[1] This was followed by the publication of the Government's policy in the White Paper, *Secure Borders Safe Haven: Integration with Diversity in Modern Britain*, on 7th February 2002.[2]

The *Nationality, Immigration and Asylum Bill* was introduced in the House of Commons on 12 April 2002 to implement the proposals in the White Paper.[3]

Explanatory notes to the Bill are published separately by the Home Office.[4]

Most of the Bill will apply to the whole of the UK. **Clauses 113** and **114** (regarding the offence of trafficking in prostitution) will not apply to Scotland. Provisions of the Bill that amend or repeal a previous Act will apply to the extent of the amended or repealed provision.

The Home Secretary has stated that, in his view, the provisions of the *Nationality, Immigration and Asylum Bill* are compatible with the rights contained in the European Convention on Human Rights.[5]

The Bill is in eight parts.

Part 1 is concerned with nationality. It will amend the current British Nationality legislation. The provisions include controversial changes to the requirements for those who wish to naturalise as a British citizen.

Part 2 will implement the Government's plans to house and support asylum seekers in purpose built accommodation centres.

Part 3 will make further changes to the current system of support for asylum seekers. The changes are mostly incidental to the introduction of the new purpose built accommodation centres.

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1 HC Deb 29th October 2002 Col 627

2 Cm 5387. Available on-line at: www.official-documents.co.uk/document/cm53/5387/cm5387.htm

3 The Bill is available online at: www.publications.parliament.uk/pa/cm200102/cmbills/119/2002119.htm

4 Bill 119-EN These are available at: www.publications.parliament.uk/pa/cm200102/cmbills/119/en/02119x--.htm

5 In compliance with section 19(1)(a) of the *Human Rights Act 1998*

Part 4 contains provisions for the detention, temporary release and removal of asylum seekers.

Part 5 is concerned with reforming the current system for immigration and asylum appeals.

Part 6 will introduce changes to current immigration procedure. Notably, charges for work permits will be introduced, and provision is made for the disclosure of information connected with immigration and asylum offences.

Part 7 introduces new immigration offences. It will also provides a constable or immigration officer with the power to enter and search any business premises for the purpose of arresting a person who has committed a specified immigration offence.

Part 8 contains general provisions that deal with the commencement, extent and interpretation of the Bill.

This Research Paper analyses the nationality provisions that are contained in Parts 2 to 7 of the Bill. Part 1 of the Bill which deals with nationality and citizenship are discussed in a separate Library Research Paper RP 02/25

The analysis examines the background to the provisions, and the policy put forward by the White Paper where appropriate. Some reactions to the issues raised are discussed in the course of this paper as they arise in relation to the different aspects of the White Paper. The most recent reactions to the Bill are set out in the final section of this Research Paper.

CONTENTS

I Accommodation and Support for Asylum Seekers

A. Introduction

This section of the Research Paper examines the provisions contained in Part 2 and Part 3 of the *Nationality, Immigration and Asylum Bill* that relate to accommodation and support for asylum seekers.

The *Nationality Immigration and Asylum Bill* will reform the current system for providing accommodation and support for destitute asylum seekers by introducing new "accommodation centres." Part 2 will enable the Secretary of State to establish and operate accommodation centres for asylum seekers and their dependants. The idea behind the policy is for asylum seekers to be housed in self-contained centres which meet their needs for financial support, and which also provide educational and other facilities. Asylum seekers will reside in these centres throughout the processing of their asylum claim. Those who do not want to receive support through the accommodation centres will eventually not be eligible for any other support. Initially, the centres will be operated on a trial basis to assess how well they work in practice.

Part 3 contains provisions which will regulate the provision of support to asylum seekers. This part of the Bill will enable reporting and residence requirements to be imposed on all asylum seekers. It will allow for the discontinuation of support to asylum seekers who fail to report without reasonable cause. It will make various changes to how asylum seekers are supported, particularly in the context of unaccompanied children.

Part 3 also contains funding provisions for the "voluntary assisted return programme." This programme provides financial assistance to those asylum seekers who want to return home. It will also enable funding for international projects. Examples of international projects which may be funded under the power include resettlement and the "inception assisted return programme."

The new provisions for accommodation and support in the *Nationality Immigration and Asylum Bill* are examined below under the following headings:

- Current provision for accommodation and support
- The White Paper proposals
- Reactions to the White Paper
- Part 2 of the *Nationality Immigration and Asylum Bill*
- Part 3 of the *Nationality Immigration and Asylum Bill*
- Compatibility of Parts 2 and 3 with the *Human Rights Act 1998*

B. Current provision for accommodation and support

1. Introduction

Multiple parallel systems currently exist for the provision of accommodation and support for asylum seekers. Which system applies in any given case is determined by factors such as where the person claimed asylum, when he[6] claimed asylum, whether he is an unaccompanied child, and whether a initial decision has been made on his claim. An overview of each system is presented below.

2. The new system

Part VI of the *Immigration and Asylum Act 1999* came into force on 3 April 2002. It established a new system for the provision of welfare support to those seeking asylum in the UK. Before the 1999 Act was implemented, the Benefits Agency or local authorities provided support to asylum seekers.[7]

The system under the 1999 Act has three main features. Firstly, persons who claim asylum after 3 April 2002 are not entitled to claim mainstream non-contributory benefits including income-based jobseekers allowance, income support and housing benefit amongst others.[8] Secondly, those asylum seekers who are granted full support are dispersed to approximately 70 areas outside London and the South East. Thirdly, until recently, the subsistence support had been provided in the form of vouchers with only a small cash element. However, since 8 April 2002, the widely criticised voucher system has been abolished and payments will be made in cash.[9]

A new division within the Home Office was established by the 1999 Act to run the new support system – the National Asylum Support System (NASS). By October 2001, NASS was supporting nearly 53,000 asylum seekers and their dependants.[10] An overview of how the NASS system works can be found in the recent report by the National Association of Citizens Advice Bureaux ("NACAB") entitled "Process Error."[11]

To qualify for NASS support, applicants must demonstrate that they are "destitute." In other words, they must have no means of supporting themselves. They may choose a

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6 For the purposes of this Paper, the pronoun "he" will be used to refer to the third person singular rather than the "he or she" or "they" formula. This formula is preferred in the interests of clarity, and it is hoped that no offence is caused.

7 And continues to do so in some cases. See below for discussion of the transitional provisions.

8 Sections 115(1) 115(2) and 115(9) of the 1999 Act.

9 HC Deb 11 April 2002 Col 572W
Further discussion on this topic can be found in the Library's standard note entitled "Asylum: the review of the voucher system." SN/HA/1131

10 Asylum Statistics: 3rd Quarter 2001, Home Office November 2001 cited in *Process Error*, NACAB, 2002.

11 Page 7 February 2002

package of furnished accommodation and subsistence support. Alternatively, they may choose to receive subsistence support only. Accommodation is offered on a no choice basis. This means that successful applicants must accept the accommodation offered, regardless of location, or receive subsistence support only.

The accommodation may be provided by a local authority, housing associations, or by private sector companies who are contracted to NASS. Where an asylum seeker is accommodated by NASS, the cost of all utilities and of Council Tax is met by the accommodation provider. On this basis (and also because the support package is intended to be of short duration only) the level of subsistence support is set at about 70 per cent of Basic Income Support rates. Currently, a single adult aged 25 or over receives £37.77 per week.[12]

3. The transitional provisions

Those who claimed asylum prior to 3 April 2000, and whose claims have yet to be determined, continue to be supported by the system which was in place before the 1999 Act came into force. Some asylum seekers continue to be supported by the mainstream welfare benefits system. Others are supported by a local authority under the interim arrangements which were introduced by the Government in 1999.[13] The interim arrangements were due to end on 1 April 2002. They have been extended until 5 April 2004 by the *Asylum Support (Interim Provisions) Amendment Regulations 2002*.[14] The number of asylum seekers being dealt with under the old system is gradually decreasing because if their initial claim is rejected and an appeal is lodged, NASS becomes responsible for the provision of support.

4. Unaccompanied children

Unaccompanied children who are asylum seekers are supported by local authorities under the *Children Act 1989*, the *Children (Scotland) Act 1995* and the *Children (Northern Ireland) Order 1995*. For children under 18, the local authority is able to claim grant funding from the Home Office to meet the costs of support. Further information on unaccompanied asylum seeking children can be found in the Library's Standard Note on the subject.[15]

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12 HC Deb 25 March 2002 Col 597W

13 *Asylum Support (Interim Provisions) Regulations* 1999 SI 1999/3056, *Immigration (Eligibility for Assistance)(Scotland and Northern Ireland) Regulations* 2000 SI 2000/705.

14 SI 2002/471

15 SN/HA/1152

5. Further information

Further information on support for asylum seekers can be found in the Library's standard note entitled *Support for Asylum Seekers 2002*.[16] This note contains information on the comparative value of support which is available for asylum seekers in other European countries. In addition, the Legal Services Commission publishes a leaflet on its web-site which explains what support is available for asylum seekers.[17] Finally, the NACAB report evaluates how the NASS system works in practice. It examines the administrative problems which have arisen.[18]

C. The White Paper

1. Introduction

The White Paper's proposals for accommodating and supporting asylum seekers are put forward in the context of what it terms "a holistic approach to the handling of asylum seekers' applications."[19] This approach will be implemented through the introduction of several different centres designed to handle each stage of the asylum process from induction to integration or removal, depending on the success of the claim. In order to understand the accommodation and support provisions of the *Nationality Immigration and Asylum Bill*, it is useful to consider, briefly, what the White Paper's "holistic approach" entails.

2. Induction, Accommodation, Reporting and Removal Centres

Induction centres will initiate asylum seekers into the IND procedures. Information on where the person is to be dispersed to will be provided, as well as information on voluntary departure. An asylum seeker will remain in such a centre for 1 to 7 days. Each induction centre will house between 200 to 400 asylum seekers, and will provide full board. They will be located close to major asylum intake areas.[20]

Oakington Reception Centre (which intends to determine initial entitlement to asylum within 7 to 10 days) will continue as a "key element within the Government's overall strategy for processing asylum applications as speedily as possible."[21]

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16 SN/HA/1615

17 www.legalservices.gov.uk/leaflets/cls/asylum-edited-8.pdf

18 *Process Error* NACAB February 2002

19 Page 53 *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain.* Cm 5387. Available from: www.official-documents.co.uk/document/cm53/5387/cm5387.pdf

20 Page 53 Ibid.

21 Further explanation on Oakington Detention Centre, and the recent challenge to its legality can be found in this Research Paper below at:
II:B:4 Oakington Detention Centre

Accommodation centres are intended eventually to provide support and accommodation for all asylum seekers while their claim is being processed. They will be operated on a trial basis initially. Full board accommodation will be provided. The centres will offer facilities, for example for health care and education. This will include the education of the children of asylum seekers who will no longer have a right to mainstream education.[22] Eventually, asylum seekers will only be entitled to support via the accommodation centres, and not subsistence-only support.[23]

Asylum seekers will be required to report at new **reporting centres** as an alternative to police stations, the National Asylum Support Service (NASS) centres, or accommodation centres which will also be used for this purpose.[24]

Detention centres will be renamed "removal centres." **Removal centres** will complete the "holistic approach" so that those who are found not to be refugees can be detained in such centres until they are removed. The White Paper states that there will be a need to detain some people at other stages of the process apart from removal, and sets out the detention criteria.[25]

Those who are successful in their asylum claim will be able to avail themselves of the Government's strategy for refugee integration which is explained in the White Paper.[26]

This Research Paper will now evaluate the White Paper's proposals for accommodation centres in greater detail.

3. Accommodation Centres

In *Secure Borders, Safe Haven*, the Government introduces the idea of accommodation centres and explains how it intends the centres to work in practice.[27] It proposes that, initially, 3,000 places would be available in the new centres to accommodate a proportion of new asylum seekers. Residents will stay at the centres for the whole period while their claim is processed, including during any appeal. At first, the centres will be operated on a trial basis.

The White Paper states that the centres will provide full-board accommodation. Services, including health care, education, interpretation and opportunities for "purposeful activities" will be provided for. "Purposeful activities" may include training in the English language and IT skills, and volunteering in the local community.

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22 Except in certain circumstances for Special Educational Needs children. See below for discussion at: **I:E:11 Duties of Educational Authorities**

23 Page 55 *Secure Borders, Safe Haven*

24 Page 58 Ibid.

25 Page 65 *et seq.* Ibid.

26 Page 70 *Secure Borders, Safe Haven*

27 Page 55 *et seq.*

During the course of the trial, the Government intends to assess whether the provision of a broad range of facilities within the accommodation centres provides a more supportive environment for asylum seekers than under the current dispersal arrangements.[28] It also wants to evaluate what effect the centres have on speeding up the processing of cases. The White Paper observes that accommodation centres are already widely used across Europe.

Initially, a proportion of new asylum seekers who are eligible for NASS support will be allocated places in the centres. Those who request support, and who are eligible for it will be expected to accept the offer of a place. Those who refuse the offer will not be offered any alternative form of support. According to the White Paper, once the new arrangements are up and running, the option of receiving cash only support will no longer be available.

The White Paper lists a number of criteria which immigration staff will apply in deciding whether to allocate a person a place in an accommodation centre. These include whether there is a suitable place, what language is spoken by the applicant, what the family circumstances of the applicant are and, initially, what port of entry a person came into. Immigration staff will retain the discretion whether to allocate a person to a particular centre if there are exceptional circumstances.

The White Paper states that asylum seekers will not be detained in accommodation centres, and they will be allowed to receive visitors. However, they will be subject to a residence requirement. They will be required to report regularly to ensure that they are continuing to reside at the accommodation centre. The Paper states that those who do not comply with the requirement may affect the outcome of their asylum claim where the non-compliance damages their credibility.

The Government intends to provide access to legal advice at all accommodation centres. The arrangements on each site will be decided and funded by the Legal Services Commission.

In evaluating the trial, the Government states that it will assess whether the centres facilitate improvements in the asylum process. The White Paper makes some suggestions as to what these improvements might be:[29]

- Closer contact between asylum seekers and the relevant authorities
- Reduced decision times by tighter management of the interview and decision making process

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[28] For the Governments view on the current dispersal system, see the Home Office report of the voucher and dispersal schemes available from: www.refugeecouncil.org.uk/downloads/voucher_dispersal_review.pdf

[29] Page 57

- Fewer opportunities for illegal working during the application process
- Minimal opportunities for financial or housing fraud
- Reduction in community tensions
- Facilitation of integration for those granted refugee status in the UK, and voluntary return packages for those who are refused.

While the trial of the accommodation centres takes place, those asylum seekers in need of support who are not housed in the new centres will continue to be dispersed throughout the UK under the existing NASS system. Asylum seekers who remain supported under the old system (either by mainstream benefits or by local authority interim arrangements) will continue to be supported in this way. David Blunkett confirmed in his announcement to the House on 29 October 2001, that the multiple support systems would continue for some time yet.[30]

D. Reactions to the White Paper

1. Local Government Association

The LGA represents all local authorities in England and Wales – a total of just under 5000. They also represent police authorities, through the Association of Police Authorities, fire authorities and passenger transport authorities.[31]

In their response to the White Paper, the LGA say that they welcome its attempt to deal with the issues.[32] They welcome the Government's commitment to "developing a more co-ordinated and better managed asylum process." The LGA support the proposal for integrated induction centres. However they state that they remain to be persuaded that accommodation centres are an appropriate method of supporting asylum seekers, particularly those with children:[33]

> Experience with accommodation centres in Europe shows that they can serve to make asylum seekers more conspicuous and thus more vulnerable to racist abuse.

The LGA go on to say that local authorities, regional consortia and other stakeholders must be consulted on both the location and operation of accommodation centres. They suggest that the implications must be thought through:[34]

> For example, what will be expected of local authorities in terms of providing "move on" accommodation for successful asylum seekers emerging from

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30 HC Deb 29th October 2001 Col 636
31 www.lga.gov.uk/about.asp?lsection=456
32 See response to the White Paper. Available online at: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94
33 Paragraph 7 Ibid.
34 Paragraph 8 Ibid.

> accommodation centres? We are concerned that disproportionate requirements could be placed on few authorities.

The LGA say that they find it difficult to reconcile accommodation centres with the aim of refugee integration. They are concerned that the Paper's emphasis on accommodation centres may mean insufficient attention is given to the needs of the majority of asylum seekers who continue to be supported through the existing dispersal arrangements.

2. Immigration Law Practitioners' Association

ILPA is the UK's professional association of lawyers and academics practising, or concerned with, immigration, asylum and nationality law.

ILPA welcome accommodation centres as an alternative to detention, but oppose them insofar as they represent an alternative to living in the community. They state:[35]

> Given the successful number of asylum applications, we believe that the process of integration should begin on arrival in the UK. ILPA does not believe that the introduction of segregation in remote accommodation centres facilitates integration. This is particularly important for families. ILPA believes that the children in accommodation centres should be attending local schools, which should accordingly receive adequate financial and other support.

ILPA suggest that accommodation centres will work best where the local community and Non Governmental Organisations (NGOs) are closely involved. ILPA say that they "deplore" the statement in the White Paper which says segregation will reduce community tensions. They say that this statement "panders to the racists elements in the community in the most unproductive way."

Furthermore, ILPA say that interpreters and counsellors should be made available to all persons in accommodation centres. Accommodation centres should ensure that additional help is available to children who have been traumatised by their own experiences of persecution and dislocation from their countries.

3. The Refugee Council

The Refugee Council is a voluntary refugee agency. They offer direct services to refugees and asylum seekers, and are concerned with promoting their rights in the UK and abroad.

The Refugee Council set out their response in the proposed accommodation centres in the following terms:[36]

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[35] Page 8, ILPA's Response to the White Paper. Available at www.ilpa.org.uk under "Latest News."

[36] Para 4.28 *et seq*., Chapter 4, Responses to the White Paper available from:

> **4.28-4.29** We note that the accommodation centre proposals are based on looking for ways of increasing efficiency in the asylum system whilst simultaneously providing a more supportive environment than has at times been the case hitherto. Whilst we would welcome more supportive accommodation arrangements, we do not believe that support arrangements can themselves create a more managed and efficient asylum system. Nor should this be the basis upon which support is provided. It is important that whilst people seek asylum they are supported in a manner that guarantees dignity and humanity.

They go on to question whether the centres are an "appropriate or even cost-effective means of support for destitute asylum-seekers." The Council's main concern is the large size of the centres, containing up to 750 beds. They note that in their own experience of running successful reception centres, the maximum capacity should be 100 places. They note further that healthcare provision at the centres should provide the full range of services available to the general population at the same standard, including dentistry, for example.

Broadly speaking, the Refugee Council welcome the education and training facilities which would be made available on site. They suggest that such activities should include access to "information, advice and guidance, labour market orientation and further education provision in colleges." The Council state that asylum seekers should be able to seek voluntary work with employers to enable integration into the local community. They recommend that asylum seekers have access, through the centres, to government funded training programmes such as the New Deal to ensure their employability. They suggest that this will also enable them to contribute to the UK economy pending a decision on their appeal.

The Refugee Council welcome the fact that the accommodation centres will be introduced on a pilot basis to assess their impact. However, rather than the "full board" arrangements proposed by the White Paper, they advocate self-catering arrangements which, they say, will preserve independence and prevent institutionalisation. In their view, any language "clustering" in the centres should be sensitive to differences within nationalities and language groups.

The Council go on to advocate a statutory time limit on the length of time which a person will spend in an accommodation centre:[37]

> As the Home Secretary himself said in the House of Commons on 7th February: "God forbid that anyone should be in an accommodation centre for six months." This must be enshrined in legislation. Otherwise, long periods in such centres will lead to institutionalisation, dependency and marginalisation. This is evident in several European countries where reception centres are used to accommodate asylum seekers.

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www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

[37] Paragraph 4.35 Ibid.

The Council also calls for an independent evaluation of the pilot scheme.

4. Oxfam

Oxfam describe themselves as "a development, relief, and campaigning organisation dedicated to finding lasting solutions to poverty and suffering around the world."[38]

In their summary response to the White Paper, Oxfam say that they believe the proposed accommodation centres will be too big. They say that, in their view, the centres will isolate asylum seekers from mainstream society and prevent integration. They may attract hostility from local communities. Oxfam believe that, as an alternative, resources could contribute more constructively to improving the dispersal system through which the majority of asylum seekers continue to be accommodated.

5. The Scottish Asylum Seekers Consortium

According to their web-site, the Scottish Asylum Seekers Consortium manages and monitors the commissioning and provision of accommodation and other services for asylum seekers in Scotland.

The Consortium's response to the White Paper's proposals on accommodation centres is as follows:[39]

> **12.** SASC welcome the Government's commitment to ensuring proper support and accommodation whilst claims are being considered for asylum seekers. However we would raise concerns about the size and location of these centres. Partner groups who are members of the Consortium will have invaluable experience to offer regarding the successful setting up of these centres in relation to amount of bed spaces. SASC are apprehensive about suggestions regarding the locations for these centres i.e. Turnhouse in Edinburgh as this could lead to marginalisation through the lack of integration into mainstream society.
>
> […]
>
> **14.** We welcome the fact that the Government has recognised the need to keep families together and it is important that the allocation process ensures that the appropriate support and services are provided. A more welcome environment could be created by introducing self catering and shopping which would assist in their integration to every day living within our society.
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> […]

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38 www.oxfam.org.uk/about.htm

39 Response to the White Paper. Available from: www.asylumscotland.org.uk/secureborders/index.html

> **16.** SASC believes the Governments commitment to the principle of dispersal away from London and the South East is a positive aspect of the White Paper and is pleased it is committed to developing a better mechanism for consultation with Local Authorities.

6. The Immigration Advisory Service

The IAS is a national charity giving a free legal advice and representation service to immigrants and asylum seekers.

IAS accept that a properly managed system of centres for asylum seekers, with safeguards to ensure that justice is not compromised, can result in speedy and effective decisions. They go on to express concern that the procedure for maintaining a higher level of monitoring and surveillance of asylum seekers might degenerate into measures principally for enforcing negative asylum decisions.

The IAS note that the Government wants to promote integration, but contest the view that this should begin only once the status of refugee has been conferred:[40]

> Integration through access to education and skills, learning English and familiarisation with the way of life in the UK should be available from the beginning both for those who are unsuccessful as a way of occupying them while awaiting decisions and enhancing their skills which are portable and, for those allowed to remain, as the commencement of habilitating themselves in the UK.

The IAS express concern that effective integration will be hampered if asylum seekers are located in isolated accommodation centres away from existing communities. A further concern is that the remoteness of the location of accommodation centres would make it difficult for legal representatives to reach them. They also suggest that long periods of time spent in such centres could result in the inhabitants becoming institutionalised.[41]

IAS comment that there is no evidence why 3,000 places is an appropriate number for a pilot project, or why the projected number of occupants should be 750:[42]

> In view of the disturbance at Yarl's Wood IAS urges the Government to consider whether such numbers in themselves could contribute to further disturbances in accommodation centres. IAS considers that, in line with the experience of reception centres in other European Union countries, a size of no more than 200-300 residents is desirable. Such smaller centres than those proposed could also be

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40 Response to the White Paper. Available from: www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

41 Paragraph 10 Ibid

42 Paragraph 11 Ibid.

> sited more easily and less obtrusively in urban areas with greater community facilities.

7. Media reports on reactions by some members of the public

An article in the *Liverpool Daily Post* indicated that there would be local opposition to the building of an asylum centre in Liverpool.[43] Business leaders are reported to have expressed their opposition to the proposed site. One representative of the business community is reported as saying:[44]

> The Government has been working with the local authority over the past six years on a successful programme for regenerating the area which would be jeopardised by the asylum centre.

The article goes on to report that the Government will be looking to select sites away from residential and regeneration areas following the fire at the Yarl's Wood detention centre.

The *Observer* also reported that the plans to create "asylum villages" in the countryside had provoked "outrage amongst local residents, rural campaigners and asylum groups who believed that the centres would be more suited to urban locations:[45]

> The most controversial scheme is planned for the Worcestershire village of Throckmorton where a disused RAF bomber base has been chosen by the Home Office. Local council officials believe that the self-contained centre for 750 people will be built between a landfill site for refuse and a burial site for more than 100,000 animals destroyed during the foot and mouth crisis. Locals say they are only just recovering from the crisis and they should not be expected to integrate hundred of refugees into their tiny Midlands farming community.
>
> […]
>
> Asylum charities last night joined in condemning the plans: "Placing people in such isolated rural communities is at odds with the Government's policy of integration and inclusion" said a spokeswoman for Refugee Action.
>
> […]
>
> At the other sites around the country, campaigns have begun to fight the Government's plans…

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43 *Asylum Centre 'will be bad for business'* Liverpool Daily Post, 15 April 2002
44 Ibid.
45 *Asylum Centre Plans Spark Protest*, The Observer, 10 February 2002

E. Part 2 of the *Nationality, Immigration and Asylum Bill*

This section of the Research Paper examines the provisions of Part 2 of the *Nationality Immigration and Asylum Bill* which introduce and regulate the new accommodation centres.

The provisions of the Bill will be examined under the following headings:

- How the accommodation centres will be established
- Who will be eligible for a place
- How the places will be allocated
- Definitions of terms in Part 2
- The residency restriction
- How the Centres will be operated and managed
- The imposition of conditions of residence
- The financial contributions of residents to the cost of their support
- No security of tenure for residents of an accommodation centre
- Criminal offences in respect of accommodation centres
- Duties of Educational Authorities to children housed in accommodation centres
- The procedure to be followed for Regulations made under Part 2

1. How the accommodation centres will be established

The **Clause 14** of the *Nationality Immigration and Asylum Bill* will enable the Secretary of State to establish accommodation centres.[46] According to the Explanatory Notes, this may be through another party, such as a local authority or private sector contractor.[47]

2. Who will be eligible for a place

Following the enactment of the *Nationality Immigration and Asylum Bill*, there will be four routes by which an asylum seeker may be housed in an accommodation centre.

Firstly, **Clause 15** provides that a person may be allocated a place at an accommodation centre if he is an asylum seeker, or the dependant of an asylum seeker.[48] However, only those who the Secretary of State thinks are destitute, or likely to become destitute within a prescribed period, will be eligible.[49]

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[46] Clause 14
[47] Paragraph 49 Bill 119-EN
[48] Clause 15(1)
[49] Ibid.

Secondly, the existing power for the Secretary of State to support destitute asylum seekers and their dependants is contained in section 95 of the *Immigration and Asylum Act 1999*. Section 96 of the 1999 Act sets out the ways in which support may be provided. **Clause 20** of the *Nationality Immigration and Asylum Bill* provides that one of the ways in which the Secretary of State may provide support under section 95 of the 1999 Act is by arranging for a place in an accommodation centre. There is an overlap between the first route to a place in an accommodation centre under **Clause 15** and this second route because both aim to provide support for destitute asylum seekers. The second route enables NASS support under the current system to be provided through the accommodation centres, while the trial of the centres as a new separate system is evaluated.[50]

Thirdly, the Secretary of State currently has the power to provide facilities for the accommodation of certain people including those granted temporary admission to the UK, or those released from detention on bail.[51] The *Nationality Immigration and Asylum Bill* will enable the Secretary of State to provide support under section 4 of the *Immigration and Asylum Act 1999* by a place in an accommodation centre.[52] The Secretary of State may not make arrangements for establishing accommodation centres in Scotland unless he has consulted the Scottish ministers. This third route differs from the first and second because it will enable an asylum seeker to obtain a place in an accommodation centre, even when he is not destitute. This may be used, for example, if there is spare capacity in an accommodation centre which could be used to house a "non-destitute" asylum seeker.[53]

Fourthly, under **Clause 22**, while a person is waiting for a decision to be made as to whether he is eligible for a place in an accommodation centre under **Clause 15**, he may be able to stay at the centre in the meantime. This is provided that the Secretary of State thinks that person might be eligible for such accommodation, or to be provided with other support or assistance.[54] This would encompass, for example, an emergency situation where an individual required accommodation late at night, and would provide him with a place until the full determination of his eligibility. However, its application will also ensure that a person is not left without accommodation for the time it takes to process the full application.[55]

3. How the places will be allocated

The *Nationality Immigration and Asylum Bill* will give the Secretary of State the power to make regulations about the procedure to be followed in allocating a place at a centre.[56]

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50 Telephone Call to Home Office Source 22 April 2002
51 Under section 4 of the *Immigration and Asylum Act 1999*
52 Clause 21(4)
53 Telephone Call to Home Office source – 22 April 2002.
54 Clause 22
55 Telephone call to Home Office Source – 22 April 2002
56 Clause 15(2)

The Bill then lists what the regulations may make provision for in particular.[57] The regulations may specify the procedure to be followed in applying for accommodation at a centre. They may provide that the application for accommodation be combined with another application which the asylum seeker has to make. The regulations may require an applicant to provide information, and will enable the Secretary of State to make enquiries. The regulations may specify circumstances in which an application may not be considered. They may require a person to notify the Secretary of State of a change in circumstances. In addition, the Secretary of State will have the power to enquire into and determine a person's age for the purpose of making provision for accommodation.[58]

4. Definitions of terms used in Part 2

The Bill then defines some of the terms used in this part of the Bill.

An asylum seeker is defined as a person of at least 18 years of age, who has made a recognised claim for asylum which has been recorded by the Secretary of State.[59] The claim for asylum must not have been determined. Once a person is no longer classed as an asylum seeker, he will be no longer eligible for accommodation in the centre, and will be expected to leave.[60] However, a person will continue to be classed as an asylum seeker even after his claim has been determined if his household contains a dependant child under 18, and he does not have leave to enter or remain in the UK.[61]

A claim for asylum is treated as having been determined at the end of a period which may be prescribed. The earliest date that a claim can be treated as determined is the date on which the Secretary of State notifies the claimant of the decision which has been made on the claim.[62] If the claimant appeals that decision, the earliest date that a claim can be treated as determined is when the appeal has been disposed of.[63]

A claim for asylum is defined as a claim by a person that removal from the UK would be contrary to the UK's international obligations under the UN Convention Relating to the Status of Refugees 1951 ("the Refugee Convention").[64] It is also a claim that removal would be contrary to article 3 of the European Convention on Human Rights ("ECHR") which prohibits torture, inhumane or degrading treatment or punishment.[65]

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57 Clause 15(3)
58 Clause 19(2)
59 Clause 16
60 Paragraph 50 Explanatory notes Bill 119-EN
61 Clause 16(2)
62 The notice must be in writing, and is treated as served on the second day after posting if it is sent by First Class post – Clause 19(4)
63 Clause 19(3). An appeal is treated as disposed of when it is no longer pending for the purposes of Part 5 of the *Nationality Immigration and Asylum Bill,* or under the *Special Immigration Appeals Commission Act 1997* – Clause 19(5)
64 As amended by 1967 Protocol.
65 Clause 16(3)

Destitution is defined (by **Clause 17)** as when a person and any dependants do not have, and cannot obtain, adequate accommodation, food and other essential items.[66] The Bill goes on to expand on what adequate accommodation means. It provides that in determining whether accommodation is adequate, the Secretary of State must have regard to any prescribed matter.[67] However, the Secretary of State **may not** have regard to: [68]

- whether a person has an enforceable right to occupy accommodation;
- whether a person shares all or part of accommodation;
- whether the accommodation is temporary or permanent;
- the location of the accommodation; or any other matter prescribed for the purposes of the subsection.

Under the Bill, the Secretary of State will be given the power to make regulations that specify what can and cannot be classed as an essential items.[69] He may also make further regulations concerning the definition of destitution. The Bill then lists what the regulations may make provision for in particular.[70] They may provide that a person is not to be treated as destitute in certain specified circumstances. They may enable or require the Secretary of State to have regard to any income which a person or any dependant may reasonably be expected to have. They may enable or require the Secretary of State to have regard to support or assets which are available to the person or any dependant, or which might reasonably be expected to available. Finally, they may make provision for the valuation of a person's assets.

A dependant of an asylum seeker is defined as a person who is *in the UK*, and who falls within a prescribed class.[71]

5. The residency restriction

The White Paper states that asylum seekers will not be detained in Accommodation Centres.[72] However, they will be subject to a residence requirement. This means that they will be required to reside at the allotted centre throughout the processing of their application. They will also be required to report to confirm that they are complying with this requirement.

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66 Clause 17(1) and (2)
67 Clause 17(3)
68 Clause 17(4)
69 Clause 17(5)
70 Clause 17(6)
71 Clause 18
72 Page 57 *Secure Borders, Safe Haven*

The current power enabling immigration officers to impose restrictions is contained in the *Immigration Act 1971*.[73] Under this, immigration officers can impose restrictions on those people who are liable to detention under the 1971 Act. The restrictions may include a residence restriction, and also an obligation to report. Those persons liable to detention include all persons given temporary admission pending the determination of their claim (including asylum seekers).[74] Where a person has breached a condition of temporary admission (e.g. residence), they may be detained, refused leave or summarily removed.[75]

Clause 21(1) of the *Nationality Immigration and Asylum Bill* provides that an immigration officer may impose a residence restriction under the 1971 Act that requires a person to reside at an accommodation centre.[76] If a person is required to leave an accommodation centre because he, or some other person, has breached of "one of the conditions of residence" of the accommodation centre, he shall be treated as having broken the residence restriction imposed by the 1971 Act. The term "conditions of residence" should not be confused with "residency restriction" under the 1971 Act. "Conditions of residence" means the rules by which an accommodation centre is run. The power to make these rules is contained in **Clause 26** and is discussed further below.[77] **Clause 26** provides that a person may have to leave an accommodation centre if they breach on of its rules.

It follows that a person (or his dependant) who breaches one of the accommodation centre rules, so that he has to leave the centre, may be detained, refused leave or summarily removed. This is suggested by the White Paper which states:[78]

> Residents of accommodation centres who breach these [residency or reporting] requirements will be left in no doubt that their actions may affect the outcome of their asylum claim, where the non-compliance damages their credibility.

The Immigration Law Practitioners' Association has commented that the suggestion in the White Paper that a breach of a accommodation centre rules may affect the outcome of an individual's asylum claim is "totally unacceptable."[79] ILPA's view is that "these are unrelated matters and are not relevant to a proper consideration of an applicant's entitlement to asylum."

The Refugee Council similarly indicates:[80]

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73 Paragraph 21(2) of Schedule 2
74 By Paragraph 16 and 21 Schedule 2 *Immigration Act 1971*
75 Macdonald's Immigration Law and Practice (2001) Page 751
76 Clause 21(1)
77 **I:E:7**
78 Page 57 *Secure Borders Safe Haven*
79 Page 8, ILPA's Response to the White Paper. Available from www.ilpa.org.uk under "Latest News."
80 Responses to the White Paper available from: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

> **4.37** We would oppose plans to link any aspects of an individual's behaviour within an accommodation centre to their asylum claim. Not only would this be contrary to the spirit of the 1951 Convention, attempts to do this would no doubt lead to legal challenges and thereby place even further pressure on the Immigration Appellate Authority.

The Immigration Advisory Service express a similar view.[81]

6. How the Centres will be operated and managed

The *Nationality Immigration and Asylum Bill* provides in greater detail how the accommodation centres will operate in practice.[82]

Clause 24 envisages that there will be a manager of each centre who has agreed with the Secretary of State to be wholly or partly responsible for the management of the centre.

Clause 25 deals with what facilities may be available. The Secretary of State may arrange for any of the following to be provided to a resident of an accommodation centre:

- food and other essential items;
- money;
- assistance with transport for the purpose of proceedings under the Immigration Acts;
- transport to and from the centre;
- assistance with expenses;
- education and training;
- medical facilities
- facilities for religious observance;
- anything which the Secretary of State thinks ought to be provided for a person because of his exceptional circumstances.

The Bill provides that this list can be amended to add any further facilities that may be provided.[83]

In this context, the Immigration Law Practitioners' Association has observed that interpreters and counsellors should be made available to all persons in accommodation centres. They say that accommodation centres should ensure that additional help is

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81 IAS Response to the White Paper. Available from: www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

82 Clauses 23 to 28

83 Clause 25(3) – orders and resolutions under this clause are subject to the negative resolution procedure.

available to children who have been traumatised by their own experiences of persecution and dislocation from their countries.[84]

Services which the Refugee Council suggests should be available include access to "information, advice and guidance, labour market orientation and further education provision in colleges."[85]

Under the Bill, the Secretary of State will have the power to make regulations which specify how much money a resident can receive. Alternatively, the regulations may require the manager of the accommodation centre to determine the amount of money to be provided to a resident. The White Paper indicates that this amount of money will be a small allowance for incidental expenses.[86]

7. The imposition of conditions of residence

Clause 26 will give the Secretary of State the power to make regulations which impose conditions of residence on the residents.[87] The regulations may enable a condition to be imposed by the Secretary of State, but also by the manager of a centre, provided it is in accordance with the regulations. Such a condition may prohibit a person from being absent from the centre during specified hours without permission. It may also require a person to report to an immigration officer or the Secretary of State.[88] The regulations must provide that any person who is subject to a condition is notified about it in writing.[89]

A condition imposed under **Clause 26** is in addition to any of condition which has been imposed under Paragraph 21 of Schedule 2 to the *Immigration Act 1971*.[90] Under the 1971 Act, an immigration officer can also impose restrictions of residence, employment, and reporting to control a person's entry within the UK. These conditions remain unaffected by the *Nationality Immigration and Asylum Bill*.

If a condition of residence is breached by a person, or by any of his dependants, they may be required to leave the centre.[91] Furthermore, in determining whether to grant a person a place in an accommodation centre, the Secretary of State may take into account the fact that a person or a dependant of his has breached one of the conditions imposed by **Clause 26.**[92] If a person is required to leave the centre because he (or his dependant) has

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84 Page 8, Response to the White Paper. Available from www.ilpa.org.uk under "Latest News."
85 Paragraph 4.31 Response to the White Paper available on line at: http://www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm
86 Page 57 *Secure Borders, Safe Haven*
87 The Explanatory Note states that regulations under clause 26 are subject to the affirmative resolution procedure (paragraph 67).
88 Clause 26(3)
89 Clause 26(6)
90 Clause 26(7)
91 Clause 26(4) and (5)
92 Clause 26(9)

breached a condition, this will mean he has breached any residence restriction which requires him to live at the accommodation centre. This may affect the outcome of his asylum claim.[93]

8. Financial contributions of residents to the cost of their support

Clause 27 of the Bill specifies that a condition of residence may require a resident to make payments to contribute to the cost of the accommodation and facilities in a centre.

9. No security of tenure for residents of an accommodation centre

The Bill provides that a resident of an accommodation centre does not acquire a tenancy or any other interest in any part of the centre. This will allow the Secretary of State, or the manager of the centre, to recover possession of the premises occupied by the resident.

10. Criminal offences in respect of accommodation centres

By **Clause 29**, the Bill provides that specified criminal offences which apply to the provision of support under the *Immigration and Asylum Act 1999*, are also criminal offences in the context of the provision of support through accommodation centres.

Under the 1999 Act it is a criminal offence for a person to make false or dishonest representations with a view to obtaining support for himself or any other person.[94] This includes making a statement which a person knows is false in a material particular. It also includes failing to notify a change of circumstances, when required to do so by the Act. It is an offence to intentionally delay or obstruct a person exercising their functions in respect of the provision of support.[95] This obstruction includes refusing to answer a question, give required information, or produce a document when required to do so by the Act.

Section 109 of the 1999 Act provides that these offences may be committed by a corporate body. Section 112 of the 1999 Act provides for the Secretary of State to recover the cost of any support which was obtained through the misrepresentation or non-disclosure of a material fact.

Under the *Nationality Immigration and Asylum Bill* these offences may be committed in respect of the provision of support under the Bill.[96]

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93 See above for further discussion at **I:E:5**
94 Sections 105 and 106 of the 1999 Act
95 Section 107 of the 1999 Act
96 Clause 29

11. Duties of Educational Authorities to children housed in accommodation centres[97]

Currently asylum seeker children are treated in exactly the same way as other children under education legislation. LEAs have a legal duty to ensure that education is available for all children of compulsory school age in their area, appropriate to age, abilities and aptitudes and any special educational needs they may have. Where no school places are immediately available the LEA is required to make arrangements for the asylum seeker children to receive suitable education until a school place can be found.[98]

Additional funding is available to support the education costs of asylum seekers dispersed to cluster areas under the *Immigration and Asylum Act 1999.*[99] The money is available to schools to help with English language lessons and ensure children settle into school quickly. There is also funding for all LEAs through the Ethnic Minority Achievement Grant to support the education of children for whom English is an additional language.

The Government cites the Refugee Council estimate of approximately 70,000 children of asylum seekers and refugees in UK schools.[100] There are no Government figures available for the number of children without a school place.[101]

Under the *Nationality Immigration and Asylum Bill*, the Secretary of State may arrange for education and training to be provided for asylum seekers and their dependants in accommodation centres.[102] It has been announced that such education will be funded by the Home Office.[103] The Home Office is working with key stakeholders to establish the range of facilities that will be available to children on-site and what, if any, role local school, colleges and other educational institutions will be expected to take.[104] It is expected that the educational provision will follow a full and varied curriculum mirroring that provided in mainstream schools while being specially tailored to the needs of the children in the centres.

Clause 30 will remove the duties on LEAs, in relation to residents of an accommodation centre, to provide education or to enable parents to express a preference for a school. Their children can only be admitted to a maintained school or a maintained nursery if that institution is named in the child's statement of special educational needs. Children with special educational needs will normally be educated in the provision provided within the

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97 **Contributed by Gillian Allen of the Social Policy Section of the Library**
98 HL Deb 24 January 2002 *WA 220*
99 http://www.dfes.gov.uk/a-z/REFUGEE%5FAND%5FASYLUM%5FSEEKER%5FCHILDREN.html
100 HC Deb 23 November 2001 c524W
101 HL Deb 24 January 2002 *WA 220*
102 Clause 25(1)f
103 HC Deb 25 February 2002 c 9000W
104 HC Deb 20 March 2002 c412W

accommodation centre.[105] **Clause 31** makes provision for an LEA to provide education for a child resident in an accommodation centre in certain circumstances. The provider of education in the centre will have to make a written recommendation to this effect. The DfES envisage this happening in cases of children at both ends of the education spectrum whose needs cannot be met within the provision in the centre. **Clause 33** provides that the Secretary of State may not make arrangements for establishing an accommodation centre in Scotland unless he has consulted the Scottish Ministers. It also provides for the Secretary of State to make provision by order for the education of residents of accommodation centres in Scotland.

The Refugee Council, Amnesty International UK and Oxfam have expressed concern about the removal of an increased number of child asylum-seekers from mainstream provision.[106] A similar reaction was expressed by Keith Best, chief executive of the Immigration Advisory Service.[107] The Local Government Association (LGA) also urged the Government to reconsider the proposal on education as it considered it vital in terms of their personal and social development that the children learned to interact with others from the local community.[108]

The Refugee Council's response to the White Paper commented on the proposals in this way:

> **4.31** The White Paper states that the accommodation centres will provide education for children. We feel that this sets a dangerous precedent. It is normal practice not to withdraw children from mainstream education provision and it can be deemed discriminatory to do so. […]
>
> Children learn best in the mainstream system and they need to learn more than just English to advance their education suitable to their age. They learn much more from interaction with peers at school than they would in an isolated environment. The long-term implications for children are worrying in terms of their development and ability to integrate. Although asylum-seeking children may initially face difficulties in schools, they are nevertheless probably the best ambassadors for building links with their community. Going to school is a vital and integral part of helping refugees integrate from the day they arrive even if it is only for a short period.
>
> The Refugee Council therefore strongly advises that provision of education for asylum-seeking children should continue to be in schools rather than in accommodation centres, removal centres or detention centres.

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[105] Clause 30(6). N.B. This Clause contains a misprint. The reference to section 25(1)(g) in this section should be to section 25(1)(f)

[106] Refugee Council PN 12 April 2002

[107] *Asylum seekers' children may lose right to schooling* Daily Telegraph 13 April 2002 p 14

[108] LGA response to the White Paper paragraph 9

12. The procedure to be followed for Regulations made under Part 2

Clause 32 sets out the procedure to be followed for the making of orders or regulations under Part 2 of the Bill. An order must be made by statutory instrument. Most of the regulations specified in the provisions of Part 2 can be passed by negative procedure. However those made under **Clause 26** (regarding conditions of residence) must be laid before and approved by resolution of each House of Parliament.

F. Part 3 of the *Nationality, Immigration and Asylum Bill*

This section of the Research Paper examines the additional changes to the support system which are introduced by the *Nationality Immigration and Asylum Bill*. The changes are largely incidental to the provisions on the new accommodation centres which are introduced by Part 2 of the Bill. Voluntary departure and resettlement schemes also fall under Part 3.

The different aspects of Part 3 of the Bill are considered below under the following headings:

- Restrictions on the availability of support
- Support for young asylum seekers
- Support for failed asylum seekers
- Conditions of support
- Choice of form of support
- Backdating of benefit
- Appeal against refusal to support
- Voluntary departure
- International Projects and resettlement schemes

1. Restrictions on the availability of support

The current power for the Secretary of State to support destitute asylum seekers and their dependants is contained in section 95 of the *Immigration and Asylum Act 1999*. Section 96 of the 1999 Act sets out the ways in which support may be provided. As considered above, the *Nationality Immigration and Asylum Bill* provides that one of the ways in which the Secretary of State may provide support under section 95 of the 1999 Act is by arranging for accommodation in an accommodation centre.[109]

Clause 34 provides that the Secretary of State has the power to restrict support to meet the essential living needs of asylum seekers to those who also have accommodation provided for them. In other words, those who have their own accommodation, may not be eligible for support to meet their essential living needs. This implements the

[109] Clause 20

Government's proposal in the White Paper that when the new support system is up and running, the option of receiving voucher or cash only support will not be available.[110] Regulations made under this power can apply generally or in specific circumstances to enable the restrictions to be phased in.

Clause 35 is also in accord with the Government's long term intention to restrict cash support for living essentials to those who are not in need of accommodation or who refuse to live in the new accommodation centres. **Clause 35** substitutes a new definition of "destitute" for the purposes of support under the 1999 Act. The current definition states:

> **Section 95**…
>
> (3) For the purposes of this section, a person is destitute if –
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); **or**
>
> (b) he has adequate accommodation… but cannot meet his essential living needs

The new definition is identical to that discussed previously in relation to accommodation centres contained in **clause 17**. Destitution will be defined as when a person is unable to obtain both accommodation **and** food and essential items. The effect of this will be that when a person has accommodation but does not have food or other essential items, he will not be considered destitute, and presumably therefore, not entitled to support. **Clause 35** also mirrors **clause 17** by providing what factors the Secretary of State can have regard to when determining when accommodation is adequate. The Secretary of State will also have the power to provide for when a person is not destitute, and may make regulations specifying what can and cannot be regarded as essential items.

ILPA and the Refugee Council have both criticised the phasing out of subsistence support. ILPA observe that the latest statistics show that 20% of applicants can be accommodated with their families or in the community, and so receive only cash support for food and essentials. ILPA say that removing this option would be more costly, and it would also hinder the integration of asylum seekers into communities who are prepared to offer them accommodation.[111]

Similarly, the Immigration Advisory Service state:[112]

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[110] Page 56

[111] Page 9, ILPA Response to the White Paper. Available from www.ilpa.org.uk under "Latest News" Press Release, Refugee Council, 25th February 2002. Available from: www.refugeecouncil.org.uk/news/february2002/relea050.htm

[112] IAS Response to the White Paper http://www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

> We deprecate the proposal that asylum seekers should not be allowed to receive NASS support only rather than both support and accommodation as well. This will prevent asylum seekers remaining within their communities, create additional tensions, add considerable cost to the system, make integration of refugees more difficult and lead to social exclusion.

2. Support for young asylum seekers

Clause 36 is concerned with the powers of the Secretary of State to reimburse local authorities for money spent on unaccompanied asylum seeking children who they have a duty to maintain.

Clause 36(a) provides a power for the Secretary of State to make payments to local authorities under section 110 of the 1999 Act to reimburse them for the support they have provided for unaccompanied asylum seeking children. The Secretary of State already makes these payments but requires a special grant report under the *Local Government Finance Act 1988*. The definition of asylum-seeker in section 94(1) of the 1999 Act excludes those who are under the age of 18. Therefore, payments under section 110 of the 1999 Act cannot currently be made to those who are under the age of 18. **Clause 36** will enable payments under section 110 to be made in respect of asylum-seekers that are under the age of 18. The new power will not affect the amounts to be paid to local authorities or the requirements for auditing claims and ensuring payments only relate to those entitled.

Clause 33(b) provides a similar power for the Secretary of State to make payments to voluntary organisations under section 111 of the 1999 Act in respect of unaccompanied asylum seeking children. Further information on the support available for unaccompanied asylum seeking children can be found in the Library's standard note.[113]

3. Support for failed asylum seekers

Clause 37 will give the Secretary of State additional powers to support failed asylum seekers.

Under section 4 of the *Immigration and Asylum Act 1999*, the Secretary of State has the power to provide facilities for the accommodation of certain people including those granted temporary admission to the UK, or those released from detention on bail. As discussed above, the *Nationality Immigration and Asylum Bill* will enable the Secretary of State to provide support under section 4 by arranging for accommodation in an accommodation centre.[114]

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[113] Further information on unaccompanied asylum seeking children can be found in the Library's Standard Note: SN/HA/1152

[114] **I:E:2**

However, the existing power does not allow the provision of accommodation to asylum seekers whose claims for asylum have been rejected. **Clause 37** provides that the Secretary of State may provide or arrange for the provision of accommodation for failed asylum seekers and their dependants.

4. Conditions of Support

Under section 95(9) of the *Immigration and Asylum Act 1999* the provision of support for asylum seekers may be subject to conditions.

Under the separate provisions of the *Immigration Act 1971*, an immigration officer may impose restrictions on a person who is temporarily admitted to the UK.[115] For example, the person may be subject to residence, employment or reporting restrictions. Similar restrictions may be imposed on a person pending their deportation by a court under the 1971 Act.[116]

Clause 38 of the Bill will insert a new section 95(9A) into the *Immigration and Asylum Act 1999* which links the conditions under the 1999 Act to the restrictions imposed under the 1971 Act. This will means that the Secretary of State may make the provision of support under the 1999 Act conditional on compliance with the restrictions imposed by an immigration officer under the 1971 Act. Thus, for example, a person who fails to report, contrary to a restriction imposed under the 1971 Act, may not be entitled to support under the 1999 Act. Equally, a person who fails to abide by the rules of a particular accommodation centre may also lose their entitlement to support.[117]

5. Choice of form of support

As discussed above, the *Nationality Immigration and Asylum Bill* will mean that an asylum seeker may receive support under one of four provisions.[118] Under **Clause 15**, support will be available for destitute asylum seekers through an accommodation centre. Section 95 of the 1999 Act empowers the Secretary of State to provide support to destitute asylum seekers under the existing NASS system. Section 4 of the *Immigration and Asylum Act 1999* permits the Secretary of State to provide accommodation to those temporarily admitted to the UK, or released from detention (this includes asylum seekers, and in the light of the Bill, failed asylum seekers). **Clause 22** provides for interim support in an accommodation centre pending a decision as to whether the asylum seeker is eligible for such accommodation under **Clause 15**.

Clause 39 will give the Secretary of State the discretion to choose the provision by which an asylum seeker is offered support. Where a person has been offered support under one

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[115] Paragraph 21 Schedule 2
[116] Paragraph 5 Schedule 2
[117] See above for further discussion on restrictions and conditions at **I:E:5 and 7**
[118] **I:E:2**

of the provisions, the Secretary of State may refuse to offer support under any of the other provisions. In effect this will restrict the asylum seeker to the choice of support offered by the Secretary of State, or no support.

In choosing by which provision a person is to be offered support, the Secretary of State may have regard to administrative or other matters which do not concern the person's personal circumstances. He may regard one of these matters as conclusive.[119] This part of the Bill is intended to implement the proposals in the White Paper which state that during the initial trial period, provision may be restricted, for example, by reference to which port a person has come into.[120]

6. Backdating of benefit

Under the current law, a person who is found to be a refugee within the meaning of the Refugee Convention is entitled to claim mainstream benefits.[121] In contrast, an asylum seeker is generally not entitled to mainstream benefits, as discussed above.[122] Once the claim of a person to be a refugee has been approved, they can make a back-dated claim for the period when they were classed as an asylum seeker. Under section 123(7) of the *Immigration and Asylum Act 1999*, when a person who was supported as an asylum seeker under Part VI of the Act makes a claim for back-dated benefits, regulations may enable the value of that support to be offset against the backdated payment of any benefit.

In other words, a person who can claim back-dated benefits because he is a refugee will receive the value of those benefits offset against the cost of supporting him as an asylum seeker.

Clause 40 will extend the provisions of section 123(7) of the 1999 Act to persons provided with support under Part 2 of the Bill.

7. Appeal against refusal to support

Clause 41 makes provision for appeals against the refusal of asylum support, or the ending of support.[123] The effect of the clause will be to extend existing rights of appeal against the refusal or termination of support under section 95 the 1999 Act to refusal or termination of support under **Clause 15** (support via accommodation centres). The current provisions in the 1999 Act relating to appeals to the asylum support adjudicators will be extended to cover support under **Clause 15**. The provisions of the 1999 Act which allow for the payment of reasonable travelling expenses to a appellant attending a support appeal will be extended to **Clause 15**.

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[119] Clause 39(3)
[120] Page 56, *Secure Borders, Safe Haven*
[121] Page 211 JCWI Immigration, Nationality and Refugee Handbook (1999)
[122] See **I:B**
[123] It substitutes a new section 103, 103A and 103B for the existing section 103 of the 1999 Act.

8. Voluntary departure and Resettlement Schemes

The Government explains its policy on the voluntary return of asylum seekers in the White Paper.[124] It intends to develop the current scheme by which asylum seekers can return to their own country, if they wish to do so.

> **VOLUNTARY ASSISTED RETURNS**
>
> **4.85** The voluntary assisted returns programme is a means by which we assist asylum seekers who wish to return home to do so. Asylum seekers are eligible for the programme at any stage of their claim unless they are to be deported or have been granted indefinite leave to enter or remain.
>
> 4.86 The programme, which is operated for the Home Office by the International Organisation for Migration (IOM) and Refugee Action, returns people in an orderly, sustainable, and cost effective manner. Through its non-political nature and extensive network of humanitarian NGOs, it has the ability to return people to nearly all countries where it is safe to do so. In the longer term, this establishment of routes to countries where, currently, few exist will assist in removal by the Home Office of those people who are not in need of protection.
>
> **4.87** We propose to build on the programme's success using forthcoming legislation to increase its return capability, and also to facilitate early access to the programme through the new Induction and Accommodation Centres.
>
> Currently, 43% of those applying under this programme seek assistance from IOM before their claim for asylum has been determined. We will enable those who would access it to do so early in the asylum process, thereby further increasing its cost effectiveness.
>
> **4.89** We will also continue to work in close partnership with the NGO community and IOM to ensure that the returns are sustainable. Reintegration assistance will be provided to returnees in the form of skills training, employment advice, tools, or the availability of micro-credit schemes. Such assistance will enable our tracking of returnees to ensure their safety and the integrity of the programme.

Clause 42 of the *Nationality Bill* defines a "voluntary leaver" as a person who leaves the UK for a place where he hopes to take up permanent residence. The person cannot be a British or EEA citizen. In addition, the Secretary of State must think that it is in the person's best interests to leave the UK, and the person must wish to leave.

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[124] Page 69 *Secure borders, Safe Haven*

Clause 42 will empower the Secretary of State to make arrangements to assist voluntary leavers, and to help potential voluntary leavers decide whether to become voluntary leavers.

Clause 42 provides that the Secretary of State can make payments, either to voluntary leavers or to organisations which provide services for them. These payments may relate to travelling and other expenses incurred by or on behalf of the voluntary leaver or a member of his family in leaving the UK. The payments may cover expenses incurred by the voluntary leaver or his family shortly after arrival in the new country of residence. The cost of the provision of services to enable the voluntary leaver and his family to settle in the new country may be paid. Finally, the travelling expenses of a person to undertake a journey to prepare for, or assess the possibility of, his voluntary return may be covered by payments from the Secretary of State under this clause.

The clause supersedes section 29 of the *Immigration Act 1971* which, under the Bill, will cease to have effect. Section 29 enabled the Secretary of State, with the Treasury's approval, to pay for the travel expenses of a voluntary leaver and their family, if it was in the interests of the person, and he wished to do so. Under the new provisions, the same category of person are entitled to assistance. However, the new Bill expands the type of financial help which can be given to voluntary leavers. The Explanatory Notes to the Bill state:[125]

> In addition to meeting travel expenses of voluntary leavers and their families, the Home Office is now able to meet costs associated with their immediate arrival and reception and longer term support to facilitate successful re-integration. It is also able to fund "explore and prepare" visits by persons who wish to assess the possibility of becoming voluntary leavers.
>
> The Home Office is currently responsible for a number of schemes to assist "voluntary return". The existing schemes are being run for the Home Office by the International Organisation for Migration in partnership with Refugee Action. Clause 42 enables the Secretary of State to make payments directly to these organisations.

In response to the question of voluntary returns, ILPA have stated that it is important that those withdrawing their asylum claims have had the chance to seek independent legal advice.[126]

The *Nationality Immigration and Asylum Bill* will further the Government's intention to aid voluntary returns by enabling the Secretary of State to participate in international projects to achieve that objective. This will include the provision of funding.

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[125] Paragraph 92 Bill 119-EN

[126] Page 12 Responses to the White Paper, available from www.ilpa.org.uk under "Latest News"

Clause 43 of the *Nationality Immigration and Asylum Bill* sets out the type of project which the Secretary of State can participate in. The project must be designed to:[127]

(a) reduce migration;
(b) assist or ensure the return of migrant;
(c) facilitate co-operation between States in matter relating to migration;
(d) conduct or consider research about migration;
(e) arrange or assist the settlement of migrants, whether in the UK or elsewhere.

In particular, the Bill will empower the Secretary of State to provide financial support to an international organisation, or an organisation in the UK, which arranges or participates in such a project. Financial support may be given to a migrant who participates in such a project.

Clause 43 makes provision for "migrants" which is a wider concept that an asylum seeker or a refugee. A migrant is defined in the Bill as a person who leaves the country where he lives hoping to settle in another country.[128]

The Explanatory Notes to the Bill expand on the purpose of this section.[129] The power will enable the Secretary of State to participate in projects with other Governments, the EU or other NGOs. The NGOs may be international or domestic. Such projects may have as their aim, for example, the return of migrants both inside and outside the UK to their country of origin, by voluntary or compulsory means. The Explanatory Notes indicate that pilot projects have already been undertaken and that Parliamentary approval for the pilots was obtained under the annual Appropriation Act.[130] Examples of international projects which may be funded include resettlement and "interception assisted return programmes."[131]

The Government's policy on resettlement schemes is explained in the White Paper.[132] It is a means for refugees to have their claim considered before they leave for the UK. Once their claim has been approved, their resettlement in the UK is facilitated. The resettlement programmes will be undertaken in tandem with NGOs such as UNHCR and the Red Cross. The Government intends that the resettlement programme will provide refugees with an alternative to coming to the UK via "people smugglers" or traffickers. Similar schemes exist in other European countries. The White Paper states that a

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127 Clause 43(1)
128 Clause 43(3)
129 Paragraph 94 Bill 119-EN
130 The Bill which becomes the Appropriation Act is the last of the three annual Consolidated Fund Bills. For an explanation of financial procedure see House of Commons Factsheet Series P No. 6, available at: www.parliament.uk/commons/lib/fact.htm
131 Paragraph 7 Bill 119-EN
132 Page 52

feasibility study for a Europe wide scheme is currently being studied by the European Commission.

Clause 43(4) confirms that this subsection will not affect the current rights of individuals to enter or remain in the UK. Nor will there be any new power of removal created by the clause.

The Refugee Council and the Local Government Association expressly welcome the announcement of a resettlement programme.[133] The Immigration Advisory Service state:[134]

> **20.** While welcoming the proposed resettlement programme [paras 4.16-4.19] we are opposed to a quota being set [para 4.18] rather than this operating against objective criteria which would fluctuate and reflect the global situation at any one moment in time. The history of quotas in immigration control has been unfortunate and led to injustice.

G. Compatibility of Parts 2 and 3 with the Human Rights Act

The Explanatory Notes to the Bill set out the issues about the compatibility of the provisions on accommodation centres with the *Human Rights Act 1998*:

> **238.** Part 2 of the Bill contains provisions on accommodation centres for providing support to destitute asylum-seekers and their dependants, the regime at which will not amount to detention within the meaning of Article 5. It includes provisions allowing the Secretary of State to set out in secondary legislation conditions of residence, including a requirement to reside at an accommodation centre during certain hours. Breach of the residence conditions may lead to the person and his dependants being required to leave the accommodation centre. Although destitution alone will not lead to a breach of Article 3, the asylum-seeker and any dependants of his (if destitute) will remain able to apply again for accommodation in an accommodation centre and the Secretary of State will have a discretion to provide support either in an accommodation centre or under Part VI of the 1999 Act, where failure to provide support would lead to a breach of Article 3.
>
> 239. The requirement for a person to reside in a particular accommodation centre may raise issues under Article 8; for example, because they cannot reside with or near other family members. Imposition of a requirement to reside at an accommodation centre as a condition of support in an accommodation centre will

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[133] Response to the White Paper, Executive Summary. Available from: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm
LGA response to the White paper. Available from: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94

[134] Response to the White Paper. Available from: www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

be done with careful consideration to human rights, in particular Article 8. But proportionate interference with Article 8 rights is, in the context of accommodation centres, likely to be considered necessary in the interests of the economic well being of the country, including managing the asylum support budget and operating an effective immigration control.

II Detention and Removal

A. Introduction

The *Nationality Immigration and Asylum Bill* contains a number of measures which, according to the Explanatory Notes, are intended to simplify the process of removing from the UK those who have no right to remain.[135]

The provision will extend the powers of the Secretary of State to detain. They will also extend the powers of custody officers, who accompany detained persons.

Detention centres will be re-named "removal centres" although there will be no change in their function. Part III of the *Immigration and Asylum Act 1999* which contains provisions for the automatic review of detention and the presumption of a right to bail, will be repealed. Requirements for asylum seekers to reside in induction centres for an initial period may be imposed. Provision is made for the removal of families of illegal entrants. The Secretary of State is given powers to revoke the grant of indefinite leave to remain.

The new provisions in the *Nationality Immigration and Asylum Bill* which deal with removal and deportation will be considered under the following headings:

- The Current Law
- The White Paper
- The Fire at Yarl's Wood
- Reactions to the White Paper and Yarl's Wood
- Part 4 of the *Nationality Immigration and Asylum Bill*

B. The Current Law

Both immigration officers and the Secretary of State have the power to detain non-nationals in different circumstances.

[135] Bill 119-EN Paragraph 4

1. Powers of Immigration Officers

For Immigration Officers, the power to detain is incidental to their power to question or remove a non-national. Under paragraph 16 of Schedule 2 to the *Immigration Act 1971*, immigration officers are authorised to detain the various categories of people. The main powers are as follows:[136]

- Persons arriving in the UK may be detained pending examination by an immigration officer to establish whether they need leave to enter, and whether they should be granted leave to enter
- Those who, on arrival in the UK have had their leave to enter suspended may be detained pending completion of an examination and a decision as to whether leave should be cancelled.
- Those who have been refused leave to enter, or who are suspected as having been refused leave to enter, may be detained pending the decision whether to remove them from the UK.
- Illegal entrants, or suspected illegal entrants may be detained pending a decision whether to remove them from the UK.
- Those who have broken a condition of their leave may be detained. Similarly, those who overstay or who have obtained leave by deception may be detained pending a decision on whether to remove them from the UK.
- In some cases, the families of a person whose removal has been directed may also be detained.

Under the foregoing provisions a person may be detained anywhere that the Secretary of State directs.[137]

In the case of a person who claims asylum at a port, or who has entered illegally and then claims asylum, the effect of the 1971 Act is the person can be detained for the whole of the time it takes to determine the claim for asylum. This may take months, or in some cases, years.[138]

However, Article 5 of the European Convention on Human Rights (the right to liberty) places limits on detention for excessive periods of time. Detention for the purposes of immigration is a lawful purpose under Article 5 if used to prevent someone from effecting an unauthorised entry into the country, or with a view to removal. However, excessive delay, or detention pending removal when there is no practical prospect of removal, will

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[136] See Page 779 *Macdonald's Immigration Law and Practice (2001)* Butterworths London, for further details.

[137] Immigration Act 1971 Schedule 2 Paragraph 18(1)

[138] Page 780 Macdonald's Immigration Law and Practice (2001) Butterworths London

render the use of the power unlawful.[139] Article 5 is further discussed below, in the context of the lawfulness of the Oakington Reception Centre.[140]

As an alternative to detention, asylum seekers may be granted **temporary admission** which is a lesser status than **leave to enter**. Technically speaking, those with temporary admission have not been granted official leave to enter the country. Those who are temporarily admitted may be subject to conditions of residence, reporting and such like.

2. Powers of the Secretary of State

In addition to the powers of immigration officers, the Secretary of State has powers to detain persons liable to deportation.[141] This may occur:

- after a court recommendation for deportation
- after the decision to deport a person is made, pending the actual making of the deportation order
- after a deportation order is made

As an alternative to detention, the Secretary of State may subject a person to a restriction order that imposes conditions of residence, reporting and such like.

3. Criteria for detention

The stated Home Office policy in respect of detention has been to "grant temporary admission/release whenever possible and to authorise detention only where there is no alternative. The aim is to free detention space for all those who have shown a real disregard for the immigration laws and whom we expect to remove within a realistic timetable."[142]

Macdonald's Immigration Law and Practice lists the factors which are taken into account when deciding whether to detain. These factors are determined as a matter of Home Office policy:[143]

- previous absconding from detention
- previous breach of conditions of bail and/or temporary admission
- evidence of previous disregard for the immigration laws
- previous attempts to gain entry using false documents
- history of compliance with immigration controls

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139 R v Governor of Durham Prison ex parte Singh [1983] Imm AR 198

140 **II:B:4**

141 Page 785 Macdonald's Immigration Law and Practice (2001) Butterworths London

142 According to Macdonald's Immigration Law and Practice (2001) Page 781, confirmed in the previous White Paper on immigration *Fairer Faster Firmer* Cm 4018 July 1998

143 Ibid.

- the likelihood of removal and its timescale
- ties with the UK
- the individual's expectations about the outcome of the case
- compassionate factors
- the duration of the detention

The previous White Paper, *Fairer, Firmer, Faster,* set out the detention criteria as follows:[144]

> **Detention criteria**
>
> **12.3** It is regrettable that detention is necessary to ensure the integrity of our immigration control. The Government has decided that, whilst there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances:
>
> • where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release;
> • initially, to clarify a person's identity and the basis of their claim; or
> • where removal is imminent.
>
> In particular, where there is a systematic attempt to breach the immigration control, detention is justified wherever one or more of these criteria is satisfied.
>
> **12.4** The Government also recognises the need to exercise particular care in the consideration of physical and mental health when deciding to detain. Evidence of a history of torture should weigh strongly in favour of temporary admission or temporary release whilst an individual's asylum claim is being considered.
>
> **12.5** The detention of families and children is particularly regrettable, but is also sometimes necessary to effect the removal of those who have no authority to remain in the UK, and who refuse to leave voluntarily. Such detention should be planned to be effected as close to removal as possible so as to ensure that families are not normally detained for more than a few days.
>
> **12.6** Unaccompanied minors should never be detained other than in the most exceptional circumstances and then only overnight with appropriate care if they, for example, arrive unaccompanied at an airport. Where they cannot be cared for by responsible family or friends in the community, they should be placed in the care of the local authority whilst the circumstances of their case are determined. But the age of a person is not easily determined in every case. This is especially so where individuals enter the country with documents which suggest that they are an adult and later claim to be a minor. Sometimes people over 18 claim to be minors in order to be released from detention. In all cases, people who claim to be

[144] Cm 4018 July 1998

> under the age of 18 are referred to the Refugee Council Children's Panel. Where reliable medical evidence indicates that a person is under 18 years of age they will be treated as minors and will therefore not normally be detained.

These criteria were modified in March 2000 to accommodate detention at Oakington Reception Centre.[145]

4. Oakington Reception Centre

In March 2000, a Reception Centre was set up on the site of a former RAF barracks in Oakington, Cambridgeshire. People who are sent there are detained while they are given initial decisions on their asylum applications. The Centre is intended for asylum seekers whose applications are deemed to be straightforward because they are considered to be unfounded by the Immigration Service. The applications are supposed to be determined within 7 to 10 days. According to Government figures, up to 250 applications can be processed at the Centre each week.[146]

Then, in 2001, the lawfulness of such detention in Oakington was challenged in the Administrative Court, by four Kurds who had been detained in Oakington upon their arrival into the UK. On 7 September Mr Justice Collins gave judgement in favour of the asylum seekers.[147] They had been detained for a period not exceeding ten days in Oakington Reception Centre. Mr Justice Collins held that this detention was unlawful because it violated the right to liberty enshrined in Article 5 of the European Convention on Human Rights.

That judgement was overturned on appeal in October 2001.[148] The Court of Appeal held that:[149]

> **67.** The Secretary of State has determined that, in the absence of special circumstances, it is not reasonable to detain an asylum seeker for longer than about a week, but that a short period of detention can be justified where this will enable speedy determination of his or her application for leave to enter. In restricting detention to such circumstances he may well have gone beyond what the European Court would require. We are content that he should have done so. The vast majority of those seeking asylum are aliens who are not in a position to make good their entitlement to be treated as refugees. We believe, nonetheless that most right thinking people would find it objectionable that such persons

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145 Page 66, *Secure Borders Safe Haven*, The detention criteria are a matter of Home Office policy

146 *Secure Borders, Safe Haven* page 65

147 Source: Lawtel 7 September 2001 (unreported elsewhere)

148 R v Secretary of State for the Home Department ex parte Shayan Baram Saadi, Zhenar Fazi Maged, Dilshad Hassan Osman and Rizgan Mohammed [2001*]* 4 All ER 961

149 Full text of the judgement is available from the Court Service web-site at http://porch.ccta.gov.uk/courtser/judgements.nsf/5cbcc578c01a9c02802567170061b8c6/77c2f8b7fd6dd62580256aea0034b57f/$FILE/Saadi_%26_Ors_v_SSHD_appeal.htm

> should be detained for a period of any significant length of time while their applications are considered, unless there is a risk of their absconding or committing other misbehaviour.
>
> **68.** We started this judgement by remarking that it was artificial to consider English domestic law and the Human Rights Convention separately. The Human Rights Act has made the Convention part of the constitution of the United Kingdom, but the Convention sets out values which our laws have reflected over centuries. The need, so far as possible, to interpret and give effect to statutory provisions in a matter which is compatible with Convention rights is now a mandatory discipline, but it is not a novel approach.
>
> **69.** The policies that have constrained, and still constrain, the exercise of the statutory power to detain aliens who arrive on our shores do not result from any conscious application of Article 5 of the Convention. They result from a recognition, that is part of our heritage, of the fundamental importance of liberty. The deprivation of liberty with which this appeal is concerned falls at the bottom end of the scale of interference with that right. It is right, nonetheless, that its legitimacy should have received strict scrutiny. Our conclusion is that it is lawful. This appeal is, accordingly, allowed.

Thus the short-term detention of asylum seekers was held to be reasonable and not unlawful. The case is now being taken to the House of Lords.

In a statement issued following the handing down of the Court of Appeal's judgement, the asylum seekers' solicitor said:[150]

> The decision of the Court of Appeal is very disappointing. We believe that the decision is contrary to the European Convention on Human Rights.

5. The current location of the detention centres

Until recently, all the United Kingdom's dedicated immigration detention centres were in England.[151] In February 2001, Barbara Roche – at that time Minister of State for immigration - confirmed that the Government intended to open a detention centre for asylum seekers on the site of the former Dungavel House prison in Lanarkshire:[152]

> We are taking additional measures, including expanding the number of detention places, to increase and speed up the removal of failed asylum seekers. The programme of works to deliver around 2,000 new detention places by the end of 2001 is well on track. In addition to the current facilities at Tinsley House, Gatwick, Campsfield House, Oxford and Harmondsworth, near Heathrow, we have successfully let contracts to deliver 900 places at Yarl's Wood in

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[150] *Statement For ILPA Members Following Decision Of Court Of Appeal On The Oakington Cases* 19 October 2001

[151] Although some immigration detainees are held in prison establishments

[152] HC Deb. 15 February 2001 Col 250W

> Bedfordshire by May 2001 and 550 places at Harmondsworth, to replace the current facility by the end of June 2001. We are also tendering a contract to deliver up to 150 places on the old Dungavel House prison site in Lanarkshire, Scotland by the autumn of 2001 and progressing plans to deliver 300 places at Aldington in Kent. An agreement is also in place with the Prison Service to allow us to use 112 places at Her Majesty's Prison Lindholme and up to a further 500 prison places throughout England for Immigration Act detainees, while the new facilities are under construction.

The contract to run the Dungavel detention centre was awarded to Premier Custodial Group, which runs Scotland's only contracted prison:[153]

> Premier's parent company, the American firm Wackenhut Corrections Corporation, announced yesterday that Premier had been selected to run the detention centre at Dungavel, Strathaven, South Lanarkshire, through its subsidiary company Premier Detention Services.
>
> […]
>
> The centre is to open in two stages, the first in September which will house up to 90 adults and the second later in the year to accommodate 60 detainees in the so-called "family centre".
>
> […]

In October 2001, a new purpose-built detention centre for immigration detainees and failed asylum seekers was opened at Harmondsworth near Heathrow Airport.[154] The Yarl's Wood detention centre at Clapham, Bedfordshire opened in November 2001.

6. Detention in Prison

Until January 2002, Prison Service accommodation had been used to accommodate asylum seekers, instead of immigration detention centres. Asylum seekers (who were not accused/convicted of any crime) were held in the same conditions as remand prisoners.

At the Labour Party conference in October 2001, David Blunkett announced that the Government would end the practice of detaining asylum seekers in prison. This was reiterated by Angela Eagle (Home Office Parliamentary Under Secretary of State for Europe, Community and Race Equality) later that month:[155]

> I should also like to confirm that we fully expect to be able to end detention on remand in remand wings of prisons, at Cardiff by Christmas and elsewhere in the

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[153] *Private Prison Company Wins Detention Centre Contract* (Glasgow) Herald 25 May 2001

[154] See *Harmondsworth Immigration Detention Centre Opens* Home Office Press Notice 237/2001 4 October 2001

[155] HC Deb 24 October 2001 Co109WH

> prison estate by the end of January, as my right hon. Friend the Home Secretary announced.

However, a number of prisons have been formally re-designated as immigration removal centres on 8th February 2002 and continue to house asylum seekers. They are required to operate under immigration detention rules rather than prison rules.[156]

There is some suggestion that following the fire at Yarl's Wood (discussed below) some detainees are being detained in prisons.[157]

In addition, the Refugee Council have criticised the absence of operating standards for those prisons which have been re-designated as detention centres, despite the contracts for these centres having been agreed. They observed that the drafts which the Council has seen are "conspicuous for their lack of clearly auditable criteria."[158]

7. Bail

Almost all those who have been detained under the *Immigration Act 1971* may seek bail under paragraph 22 of Schedule 2 of that Act.[159] This includes those detained pending examination by an immigration officer, and also those detained pending an appeal. Bail may be granted by an immigration officer, a police officer, or by an adjudicator in the Immigration Appellate Authority. In certain cases, bail may be granted by the Special Immigration Appeals Commission.[160] Conditions may be imposed. Those who breach the conditions may be arrested.

Under Part III of the *Immigration and Asylum Act 1999*, a system of automatic bail hearings, and a statutory presumption in favour of bail were to be introduced. However, Part III has never been brought into force. Further discussion on the proposed repeal of Part III and reaction to this proposal can be found below at **II:C:6 II:E** and **II:F:4**.

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156 HC Deb 20th March 2002 Col 410W

157 Immigration Law Practitioners' Association response to the Government's White Paper, page 12. Available from: www.ilpa.org.uk under "Latest news."

158 Paragraph 4.78, Response to the White Paper. Available from: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

159 As amended by the *Asylum and Immigration Act 1996* and the *Immigration and Asylum Act 1999*. Further information on precisely whom is entitled to bail can be found on Page 796 of *Macdonald's Immigration Law and Practice* (2001) Butterworths London

160 Further information on the Commission can be found in the Library's standard note entitled: Asylum and Immigration: the Special Immigration Appeals Commission SN/HA/1083

C. The White Paper

1. Introduction

In *Secure Borders, Safe Haven*, the Government introduces its proposals in respect of asylum seekers by confirming that it intends to continue to honour its international obligations not to remove refugees who have arrived in the UK, and to integrate those who are recognised as refugees.[161] The Government go on to make a distinction between genuine refugees and those asylum seekers who want to stay in the UK simply as a matter of preference or for those people who come for economic reasons.[162] The former are expected to seek protection at an earlier stage. The latter are expected to use one of the economic routes available to them rather than claim asylum.

The White Paper confirms that in June 2001 the Government set a target of removing 2,500 failed asylum seekers per month, leading to the removal of 30,000 by spring 2003. The White Paper states that to achieve this aim the Government will:[163]

- Launch a joint protocol with the police so that the police can assist and support the Immigration Service in the removal of immigration offenders
- Use charter flights to remove large numbers of asylum seekers
- Increase resources to handle the difficulties of removing people who do not have a travel document
- Establish the "National Intelligence Model" across the Immigration and Nationality Directorate so that intelligence can be shared within the IND and outside.
- Set up a confidential immigration hotline to enable members of the public to report immigration abuse.

It is the Government's view that detention has a key role to play in the removal of failed asylum seekers and other immigration offenders. The White Paper states that "detention remains an unfortunate but essential element in the effective enforcement of immigration control. The primary focus of detention will continue to be its use in support of our removals strategy."[164]

2. Increased use of detention

The Paper then puts forward the figures that show the increased use of detention:[165]

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[161] Page 48, Chapter 4, *Secure Borders, Safe Haven*
[162] New economic routes into the UK are explained by Chapter 3 of the White Paper.
[163] Page 65
[164] Page 66
[165] Page 66

> **4.75** We have expanded the number of immigration detention places from about 900 in 1997 to just under 2,800 by the end of 2001. The new Removal Centres at Harmondsworth, Yarl's Wood and Dungavel which opened during 2001 accounted for 1,500 of these additional places. We have decided to increase detention capacity by a further 40%, to 4,000 places, in order to facilitate an increased rate of removals of failed asylum seekers and others with no basis of stay in the UK. Work to identify suitable sites is underway and we expect to have all the additional places in operation by Spring 2003.

3. Detention criteria

The White Paper confirms that the detention criteria set out in the previous White Paper *Fairer, Faster, Firmer*, will continue to apply but with one change.[166] Previously, the families of those to be removed were only detained for short periods immediately prior to their removal. The White Paper states that it will now be Government policy to detain families in other circumstances. This may be for longer periods of time, and will not be limited to immediately prior to removal. The Paper suggests that this might be whilst the identities of the individuals and the basis of their claim are established, or because there is a reasonable belief that they will abscond. The Paper states that no family is detained simply because there is no other suitable accommodation available.[167]

4. Oakington Reception Centre

The Government confirms that Oakington Reception Centre will continue to be a key element in its asylum strategy.[168] It also confirms that asylum seekers will no longer be held in prisons which have not been formally re-designated as removal centres, operating under Immigration Service rules.[169]

5. Increased powers for detainee escorts

The White Paper proposes that the powers of those officers who escort detainees will be increased to enter private property and search persons who are to be detained.[170] The Paper explains that search prior to detention is necessary for safety purposes. It explains that without the express right to enter premises in order to search a person, often a person has to be taken to a police station to be detained. This causes delay, burdens the police and often distresses the person detained. The Paper proposes that detainee escorts will have the limited right to enter private premises to search detainees in the company of immigration or police officers.[171]

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[166] Set out above under **II:B:3**
[167] Page 67
[168] Page 64. See also HC Deb 29th October 2001 Col 635-6. See discussion above **II:B:4**
[169] Page 67
[170] Page 68
[171] See discussion in this Research Paper in relation to **Clauses 119** and **120** below under **V:G**

The White Paper states that it will restore former powers of staff other than immigration officers to detain overstayers and to require them to report. The Government intends this to speed up the process of removal.[172]

6. Bail

In respect of bail, the Paper states the Government's intention to repeal Part III of the *Immigration and Asylum Act 1999*:[173]

> **4.83** Part III of the Immigration and Asylum Act 1999 created a complex system of automatic bail hearings at specified points in a person's detention. It has never been brought into force. As part of our revision of immigration and asylum processes we propose to repeal most of Part III. We will implement section 53, which allows for regulations to be made in respect of the existing arrangements for seeking bail, and section 54, which removes an anomaly from those arrangements that prevented certain people from applying for bail.

The Government states that the remainder of Part III is now inconsistent with the need to ensure that we can streamline the removal process in particular, and immigration and asylum processes more generally. The Paper goes on to say:

> The significant and continuing expansion of the detention estate since the proposals were first put forward would make the system unworkable in practice. But the existing bail arrangements, which enable detainees to apply to an adjudicator or chief immigration officer for bail, will remain in place and will continue to ensure that asylum seekers and others who are detained have effective opportunities to seek and, where appropriate, be granted bail.

It is proposed that staff other than immigration officers should have the power to grant bail.

D. The Fire at Yarl's Wood Detention Centre

On 14 February 2002, there was a major fire at Yarl's Wood. A full description of events will depend on the outcome of investigations by the police and fire services and by the Home Office, but the Home Secretary, David Blunkett gave an initial assessment to the House on 25 February 2002:[174]

> […] However, it has been established that during the disturbance control of the centre was wrested from the staff, allowing detainees to gain keys providing access to restricted areas, including a property store. At the same time, damage was being caused inside the centre, including to the operation of CCTV. The

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[172] Page 68
[173] Discussed in this Research Paper above at: **II:B:7**
[174] HC Deb 25 February 2002 Col 441

> detention contractors, Group 4, faced with substantial disorder, called for assistance from public services.
>
> A number of detainees moved outside the accommodation blocks and a smaller number of these breached the perimeter security round the site. The earliest police units to arrive worked to restore perimeter security, and a number of detainees were apprehended at this stage. Further detainees were taken into custody later in the night in the Bedford area. Our latest estimate is that 22 remain at large.
>
> An initial fire in the reception area was extinguished, but fires were started in separate blocks and in more than one location. The fire service was unable to tackle these blazes because detainees prevented it from gaining access to the buildings. By the time order had been restored on the compound, the fire had taken significant hold in one part of the centre and it proved impossible to save those buildings. I am pleased to tell the House that despite speculation to the contrary, we do not believe that there were any fatalities.

Although there had been some speculation in the media that the fire might (directly or indirectly) lead to a relaxation of the policy on detention, the Home Secretary asserted that the regime would be toughened:[175]

> It is now clear that a small number of people will take any step to prevent their removal from this country. We therefore have no option but to toughen the regime and instruct the immigration and nationality directorate further to speed up removal of those in the centres to their country of origin.
>
> It would be unthinkable to allow violent and disruptive behaviour to put the safety of staff, other detainees or the public at risk. I shall also consider the criteria for allocating particular individuals to specific removal centres. That will entail considering different levels of security appropriate to the individuals who are held.
>
> […]
>
> The lessons of 14 February will be learned, but the message must also be clear. No one will be permitted to engage in behaviour that puts lives at risk and destroys first-class facilities, built at public expense and created as an alternative to prison. That is the message that I intend to convey this afternoon. I know that the House will back that stance.

The Home Secretary went on to suggest that detainees who might be violent should continue to be held in prisons.[176] Twenty-five of the detainees who attempted to abscond from Yarl's Wood had been transferred to prison.[177]

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[175] HC Deb 25 February 2002 Col 442
[176] HC Deb 25 February 2002 Col 444
[177] HC Deb 25 February 2002 Col 446

E. Reactions to the White Paper and Yarl's Wood

1. Local Government Association

The LGA state that "lengthy detention for administrative reasons appears to be in conflict with respect for human rights." They go on to say that, in their view, detention can only be justified for very short periods where all the appeal processes have been fully exhausted and there is reasonable evidence to believe that an asylum seeker will abscond.[178] In respect of the White Paper's proposals to have greater involvement of the police in the removal process, the LGA say:

> Local authorities are working in partnership with the police service to promote community safety, good race relations and refugee integration. However the involvement of the police in the removals process can compromise this work and damage trust. Therefore we welcome the aim of developing Immigration Service expertise in this field without police involvement.

The LGA also comment on the proposals in the light of the Yarl's Wood fire:[179]

> Recent events at Yarl's Wood are of great concern to all parties, particularly local councils and their communities where such centres are, or may be, located. The findings of the various reviews should be made public and should address in particular the consultation arrangements which were put in place for this centre, the extent that the concerns of the community and professionals could be expressed, for example in relation to sprinklers, and how they were addressed. It should also look at the lessons raised by this incident and about the changes needed to ensure that in future, local government and local communities have greater involvement in the planning, design, running and security of these centres.
>
> The LGA take the view that it is totally unacceptable that, through police council tax, local people should bear the financial risks clearly associated with these facilities.

2. The Immigration Law Practitioners' Association

ILPA is the UK's professional association of lawyers and academics practising, or concerned with, immigration, asylum and nationality law.

ILPA states that as, in their view, Oakington is not a "reception centre" but a detention centre it would have been more logical to have called it a detention centre. The new

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[178] Paragraph 12, Response to the White Paper available from: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94

[179] Paragraph 14 Ibid.

induction centres could then have been called reception centres. ILPA says that they "deplore the use of detention for administrative convenience."[180]

In connection with the increased powers of immigration officers to effect removals, ILPA comments that they are concerned there is no democratic accountability for the actions of the officers. There is no equivalent of the Police Complaints Authority to deal with complaints about their conduct.

ILPA puts forward its view on removal centres as follows:[181]

> ILPA believes that detention centres are being renamed removal centres in an attempt to assure the public about the government's ability to control immigration. In reality, many of those in removal centres have only just made their applications and have not even been served with any decision, let alone a refusal. This stigmatises asylum seekers and undermines their confidence in the asylum process, as they are made to feel that a refusal of their application is almost inevitable. ILPA considers that access to legal advice and representation should also be ensured at removal centres, to ensure that people's cases are considered fully and that removals are not carried out prematurely.

On the question on bail, ILPA express concern that, as the Government's plans for detention increase, there is not a corresponding access to bail hearings. They urge reconsideration of the repeal of Part III of the *Immigration and Asylum Act 1999*:[182]

> The need for stringent review of detention of immigration detainees was acknowledged during the passage of the 1999 Act - which was certified as complying with the Human Rights Act. The decision to repeal this legislation without providing equal safeguards for immigration detainees should be reconsidered.

ILPA take the view that without automatic access to bail hearings, there will inevitably be many people detained who do not fit the stated criteria for detention. They say they are aware of many detainees who are being kept in centres for months or even years before their applications are finally determined.

In response to the proposed change to the detention criteria which would enable families to be detained in a greater number of circumstances, ILPA say that they do not believe that children should be held in detention for administrative purposes or on account of actions taken by adult members of their family.[183] They observe that recent events at Yarl's Wood "have illustrated the obvious dangers faced by children when they are

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[180] Page 10, Response to the White Paper. Available from www.ilpa.org.uk under "Latest News."
[181] Page 11 Ibid.
[182] Page 11 Ibid.
[183] Ibid.

detained in the same facilities as traumatised and frustrated adults to whom they are not related."[184]

ILPA say they deplore the fact that the UK detains more asylum seekers than any other European country, and keeps them in detention for longer periods in, what it says, are unsafe conditions.[185]

3. The Refugee Council

The Refugee Council is a voluntary refugee agency in the UK. They offer direct services to refugees and asylum seekers, and are concerned with promoting refugee rights in the UK and abroad.

The Refugee Council responds to the White Paper's proposals for detention and removal by recognising that a credible immigration policy must include the ability to remove people at the end of the process if it has been confirmed that they are not in need of protection, and there are no other compelling reasons why the person should be allowed to stay.[186] They go on to express their concern that this can only be pursued "where the process of decision making is itself demonstrably fair" and "the interests of individuals are being protected." They comment that:

> …this remains far from being true with, in particular, the failure to ensure provision of legal representation from the outset of the case. We are concerned that the removal targets are unrealistic and are being set without ensuring that the process of decision making is itself fair.

The Council goes on to express concern about the manner of removal and the corresponding impact on community relations:

> There is increasing anecdotal evidence of people being detained and removed without warning, becoming detached from relatives and belongings with little or no opportunity to make appropriate arrangements. This can be extremely distressing and the source of very real problems and tensions. Social Services departments are also having to become involved in dealing with the subsequent problems that arise.

In relation to the Government's proposals to use charter flights to remove large numbers of asylum seekers, they observe that these are "extremely high profile events" which draw attention to the people being returned. As a consequence, they say, the individuals being returned to their home countries may be put at risk upon their return. They suggest that

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184 Ibid.
185 Ibid.
186 Paragraph 4.73, Chapter 4, Response to the White Paper. Available from: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

the use of such techniques should be used sparingly, and only when such risks to the individuals do not arise.

The Refugee Council believes that changing the name of detention centres to removal centres "appears to be for purely cosmetic purposes:"[187]

> Officials have made it quite clear that they will continue to detain newly arrived asylum seekers whose case is newly under consideration but who will be placed in a Centre designated "Removal". This does not suggest a dispassionate and independent process.

They confirm that they remain opposed to the detention of children, under the Government's plans to increase the number of circumstances in which families can be detained.

The Refugee Council state that, in their view, the failure to implement Part III of the *Immigration and Asylum Act 1999*, which provides for an automatic review of detention and entitlement to bail represents "a truly backward step."[188] They believe that failure to implement Part III is in contravention of Article 5 of the European Convention on Human Rights:

> There is a wealth of case experience through organisations such as Bail for Immigration Detainees (BID) to show that the process of internal review of cases by the Immigration Service is often deeply flawed, superficial and often contrary to the Immigration Services own internal instructions. It remains the practice to detain people on arrival as well as prior to removal.
>
> This means that people continue to be detained often for arbitrary reasons and for indefinite periods without any external scrutiny. The casework experience of BID itself highlights the shortcomings of the existing bail arrangements. There also remains the continuing problem of sureties for bail, which the White Paper does not address at all. It is wholly unrealistic to expect asylum seekers to be able to produce two individuals known to them, willing to vouch for them and able to produce the often considerable sums as surety.
>
> We remain opposed to all detention unless there is evidence that asylum seekers have committed a crime or are likely to abscond. Such evidence needs to stand up in court.

4. Oxfam

In their summary of responses to the White Paper, Oxfam state that:[189]

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[187] Paragraph 4.73 Ibid.
[188] Paragaph 4.83 Ibid.
[189] Available online at:

- Detention should only be used in exceptional circumstances, if the legal process of claiming asylum has been fully exhausted, and if there is clear evidence that an asylum-seeker may abscond
- Part III of the 1999 Immigration and Asylum Act, which legislates for automatic bail hearings for immigration detainees, should be retained and implemented
- The practice of detaining families with children should cease immediately

In addition, they believe that:[190]

> Steps to increase the number and speed of removals should only take place once a demonstrably fair determination process is in place.

5. The Immigration Advisory Service

IAS is a charity, giving a free legal advice and representation service to immigrants and asylum seekers.

In their response to the White Paper the IAS observe that the present system for dealing with asylum seekers is insensitive to the needs of those who have escaped from persecution or privation:[191]

> **9.** …The redesignation of detention centres as Removal Centres is acknowledged by Government officials as cosmetic, indicating only a change in Government emphasis rather than a change in rôle – their function will not change from that of detention centres, namely the detention of immigration detainees at any stage of the process, not just those who are about to be removed. It is an example of the Government playing to the populace rather than being concerned about the feelings of those detained. There will be an increased sense of desperation and a belief that their asylum claim is not being treated seriously for someone whose claim has not yet received an initial decision yet who is housed in a "removal" centre. Similarly, the decision by the Government not to implement Part III of the 1999 Act indicates a cavalier attitude towards those who are detained as to whether their detention is justified or not.

IAS regret that the Government has announced that it will be repealing Part III of the *Immigration and Asylum Act 1999* which would introduce a scheme of automatic bail applications:[192]

> The Government should provide evidence of how and why its own legal advice as to the need for such a provision in order to comply with its obligations under the European Convention on Human Rights has changed since the 1999 Act. We do

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www.oxfam.org.uk/policy/papers/asym2002/summary.htm

190 Page 3, Ibid.

191 IAS Response to the White Paper. Available from: www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

192 Paragraph 14 Ibid.

> not accept as anything other than specious the argument that streamlining the removals process in particular and immigration and asylum processes more generally [para 4.83] obviates the need for Part III. This argument would be more persuasive if the Government had a commitment to ensuring that all asylum seekers have early access to competent legal advice and representation but in the absence of both such a commitment and any such guaranteed provision those asylum seekers who do not have access to legal advice may not be able to avail themselves of the bail provisions in the 1971 Act, despite the welcome proposal that the anomaly whereby certain people are prevented from applying for bail. The Government has failed to explain why immigration detainees are given fewer rights in this respect than those accused of serious crime. The Government should ensure that for immigration detainees there is a presumption in favour of liberty (as under the 1976 Bail Act in the criminal jurisdiction and as provided for under Part III).

IAS also regret the Government's view that families should be detained in certain circumstances. They suggest that more rigorous reporting by asylum seekers (as contemplated by the Government in its proposed Reporting Centres) would be sufficient to guard against non-compliance [para 4.77].[193]

> Although we note the expression "in the case of families that detention should be used only when necessary and should not be for an excessive period" [ibid.] we note the regrettable change in the detention criteria to allow for longer detention of families and the fact that in a flagship Removal Centre (Yarl's Wood) half the newly built accommodation is for families – which hardly indicates that anything other than that the Government is planning to detain a large number of families.

F. Part 4 of the *Nationality, Immigration and Asylum Bill*

1. Extension of the Secretary of State's powers to detain

Under the current law immigration officers have the power to grant or refuse leave to enter to a person. As discussed above, they also have the power to detain a person, incidental to their powers to give or refuse leave to remain.[194] Previously, only immigration officers could grant leave to enter and remain. However, orders under section 3A of the *Immigration Act 1971* now provide that the power to grant or refuse leave to enter may be exercised by the Secretary of State (or his officers, including immigration caseworkers). Under the current law, however, officers acting on behalf of the Secretary of State do not have the accompanying power to detain a person at a port of entry, while they are deciding whether to grant or refuse leave. The Secretary of State can only grant temporary admission in these circumstances. This potentially leads to the situation where a decision on whether to grant entry is made by one officer, but a separate immigration officer has to become involved to decide whether to detain.

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[193] Paragraph 15 Ibid.
[194] See **II:B:1**

Clause 45 is intended to address this problem. It will enable the officer who is determining the asylum seeker's claim or immigration status on behalf of the Secretary of State, to determine at the same time whether that person should be detained. This can be done without having to involve another immigration officer.

Clause 45 will give the Secretary of State the same power to detain as the immigration officers in one of two circumstances. Firstly, he will be able to detain a person pending a decision by him to issue removal directions in respect of a person or pending removal.[195] Secondly, when the Secretary of State has the power to examine a person or to grant or refuse them leave to enter,[196] he may detain them in specified circumstances. He will be able to do so pending the examination, pending his decision to grant or refuse leave, pending his decision to issue removal direction, or pending the removal of the individual. However, he will only be able to detain a person where he has reasonable grounds for detention.[197] As an alternative **Clause 45(4)** will give the Secretary of State the power to grant temporary admission instead of detention.

Clause 45(5) will enable restrictions on temporary admission (such as reporting or residence conditions) which are imposed by an immigration officer, to be varied by the Secretary of State and vice versa. **Clause 45(6)** will make it an offence to fail to comply with a restriction on temporary admission imposed by the Secretary of State, as is currently the case with restrictions imposed by immigration officers.

2. Extended powers of detainee custody officers

The *Immigration and Asylum Act 1999* provides powers for detainee custody officers to act as an escort for a detained person in accordance with arrangements under that Act.[198] Under these provisions, a designated custody officer is responsible for a detainee. In particular, it is his duty to prevent the person's escape from lawful custody; to prevent, detect and report on any unlawful acts committed by the person; to ensure good order and discipline by the detained person; and to attend to his wellbeing. The custody officer has the power to search any detained person for whom he is responsible

Clause 46 will confer additional powers on custody officers of a detainee, who act as escorts, to enter private premises. They will be able to do so in order to search a person who has been arrested, prior to escorting him to a place of detention. The power will be confined to the situation when an immigration or police officer has executed a warrant at the premises and has arrested a person there.[199] The detainee custody officer will also have the power to enter business premises to conduct a search at the same time that an

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[195] Under Paragraph 10 or 14 of Schedule 2 of the *Immigration Act 1971*
[196] Under section 3A of the 1971 Act
[197] Cause 45(8)
[198] Paragraph 2 to Schedule 13 of the 1999 Act.
[199] Under paragraph 17(2) of Schedule 2 to the *Immigration Act 1971.*

immigration officer has entered premises to arrest someone for an immigration offence under **Clauses 119 and 120** of the Bill.[200]

3. Re-naming of Detention Centres

Clause 47 of the *Nationality Immigration and Asylum Bill*, will rename detention centres as "removal centres." The Refugee Council, ILPA and the Immigration Advisory Service have criticised this change as cosmetic, misleading and unfair to those detained, some of whom may only have arrived and may yet to have their claim for asylum determined.[201]

4. Bail

Clause 48 provides that the Secretary of State, or an official acting on his behalf, will be able to grant bail to a detained person[202] in the same circumstances as the Chief Immigration Officer may currently. The power will have effect on the eighth day after the detention began. Prior to this time, bail may still be granted by a chief immigration officer.

Clause 48 will also largely repeal Part III of the *Immigration and Asylum Act 1999* which provides for automatic review of the detained immigrants, and creates a statutory right to bail.[203] Part III has never been implemented. The rights to apply for bail will continue under the existing legislation.

Various bodies, including the Refugee Council, Oxfam, the Immigration Advisory Service, and the Immigration Law Practitioners' Association are of the opinion that repealing Part III of the 1999 Act will mean that people continue to be detained for "arbitrary reasons" and for "indefinite periods without external scrutiny."[204] They also take the view that without Part III of the 1999 Act being brought into force, the current system for detention and bail is contrary to article 5 of the ECHR (right to liberty). Further views from these bodies are discussed above under **II:E: Reactions to the White Paper and Yarl's Wood**.

5. Travel expenses for reporting restrictions

Where an asylum seeker is required to report to a reporting centre or other location, **Clause 49** will give the Secretary of State the power to meet the travel costs of attending the centre.

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[200] Discussed below at **V:G**
[201] See above under **II:E**
[202] Detained under Paragraph 16 of Schedule 2 to the 1971 Act.
[203] See above for further analysis under **II:B:7** and **II:E**
[204] Refugee council response, Paragraph 4.83. Available from: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

The Immigration Law Practitioners' Association and the Local Government Association responded to the White Paper by suggesting that applicants must be provided with fares to attend such centres where they are destitute or on low income.[205]

6. Induction requirements

Clause 50 provides that an asylum-seeker may be required to reside at a location for a period of up to 14 days near a place where a programme of induction will take place. The intention is that all asylum-seekers will be given an induction at the outset of their claim.

According to the White Paper, induction centres will initiate asylum seekers into the IND procedures.[206] Information on where the person is to be dispersed will be provided, as well as information on voluntary departure. An asylum seeker will remain in such a centre for 1 to 7 days. Each induction centre will house between 200 to 400 asylum seekers, and will provide full board. They will be located close to major asylum intake areas.

The Explanatory Notes to the Bill state:

> The purpose of this induction is to inform the asylum-seeker about how the asylum process will work, up to and beyond the initial decision on their claim; to explain what responsibilities they have to comply with requirements placed upon them as part of that process; and to consider any requests for support. The residence restriction can be imposed regardless of circumstances, for example, whether or not the asylum-seeker has alternative accommodation available to them.[207]

In respect of the induction centres, ILPA have emphasised the importance of being able to seek legal advice before interview. They point out that this will be of assistance, not only to the applicant, but also to the integrity of the decision making process.[208]

7. Restriction on asylum seekers who have leave to enter or remain.

Clause 51 is concerned with asylum seekers who have existing leave to enter of remain in the UK at the time that they make a claim for asylum. This would be the case, for example, when a person is admitted as a visitor and then claims asylum. **Clause 51** provides that such asylum seekers and their dependants may have restrictions (for example, reporting or residence) imposed on them as those asylum seekers who do not

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[205] Page 9, ILPA's Response to the White Paper. Available from www.ilpa.org.uk under "Latest News"
Paragraph 11, LGA's Response to the White Paper. Available from: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94

[206] Page 53, *Secure Borders, Safe Haven*

[207] Paragraph 108, Bill 119-EN

[208] Page 6, Responses to the White Paper. Available from www.ilpa.org.uk under "Latest News."

have leave to remain.[209] Such restrictions may be, for example of residence or reporting. The Explanatory Notes comment:[210]

> The purpose of this provision is to ensure that all asylum-seekers, whatever their circumstances prior to making a claim, can be subject to the same basic process including, for example, the requirement to keep in touch through regular reporting.

Furthermore, **Clause 51** will mean that an asylum seeker with existing leave to remain, who fails to comply with a restriction, will become liable to detention.[211] Restrictions imposed under this clause cease to have effect once a person ceases to be an asylum seeker.

8. Provisions for the removal of families of illegal entrants

Under the Immigration Act 1971, directions may be given for the removal of person who have been refused leave to enter the UK, and to illegal entrants. **Clause 52** of the *Nationality Immigration and Asylum Bill* allows removal directions to be given for the children of such people when those children were born in the UK.

9. Removal of those who seek leave to remain by deception

The Explanatory Notes to the Bill state:[212]

> **113.** Under section 10(1)(b) of the 1999 Act, there is a power to remove immigration offenders who have obtained leave to remain by deception. Clause 53 creates a power to remove people whose deception is discovered before leave is granted. People who seek to obtain leave to remain by deception and people who succeed in doing so both commit an offence under section 24A(1)(a) of the 1971 Act.

10. Revocation of indefinite leave to enter or remain

Indefinite leave to enter or remain means that a person is entitled to live permanently in the UK and is ordinarily resident here (also known as "settlement"). **Clause 55** of the *Nationality Immigration Asylum Bill* will give the Secretary of State a new power to revoke a person's indefinite leave to enter or remain in certain specified circumstances.

Currently, a person who has been granted indefinite leave to remain may be deported in some circumstances. This maybe, for example, if he commits a serious crime, or his

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[209] Paragraph 21 Schedule 2 *Immigration Act 1971*
[210] Paragraph 109 Bill 119-EN
[211] Under paragraph 16, Schedule 2 of the 1971 Act
[212] Bill 119-EN

presence is no longer conducive to the public good.[213] The provisions of the *Nationality Immigration and Asylum Bill* will enable the Secretary of State to revoke indefinite leave to remain in the following specified circumstances.

Clause 55(1) will allow the Secretary of State to revoke indefinite leave where the person is liable to deportation, but the person cannot be deported for legal reasons. The Explanatory Notes suggest the following example:[214]

> An example of how this power would be used is where a person has committed a serious criminal offence such that their deportation would be conducive to the public good but cannot be returned to their country of origin because they would thereby face treatment contrary to Article 3 of the Convention.

Clause 55(2) will allow the Secretary of State to revoke indefinite leave where a person is liable to deportation because they obtained leave by deception but they cannot be removed for legal or practical reasons.

Clause 55(3) will allow the secretary of State to revoke indefinite leave where a person (and their dependants) no longer have the status of a Convention refugee. This may occur if a person accepts the protection of their country of nationality, or re-establishes themselves in the country they originally fled.

The Bill provides that indefinite leave which was granted before the power in the Bill comes into force may also be revoked under these provisions.

11. Making of Removal Direction or Deportation Orders *before* notice of a decision or appeal

Clause 56 will re-enact section 15 of the *Immigration and Asylum Act 1999* Act which provides that an asylum claimant may not be removed from or required to leave the United Kingdom before notice of the Secretary of State's decision on the claim is given. However, some changes are made. **Clause 56(4)** will allow removal directions or a deportation order to be made *before* notice of a decision on the claim has been given. Similarly, other preparatory action may be taken before the determination of a claim is notified.

Clause 57 will re-enact the provision in Schedule 4 of the 1999 Act which states that a person may not be removed from or required to leave the United Kingdom while he is in the country and his appeal is pending, as defined in **Clause 82**. However, **Clause 57(3)** will allow removal directions or a deportation order to be made, and other interim or preparatory action taken *before* the appeal ceases to be pending.

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[213] Section 3(5) and (6) *Immigration Act 1971*

G. Compatibility of Part 4 with the Human Rights Act

The Explanatory Notes to the Bill set out the issues about the compatibility of the provisions on detention and removal with the *Human Rights Act 1998*:

> **Part 4: Detention and Removal**
>
> **240.** Part 4 of the Bill provides a power for the Secretary of State to link the provision of support with compliance with the conditions on which temporary admission or release has been granted. Termination of support would not itself necessarily lead to a breach of Convention rights but where a person as a consequence was at risk of treatment in breach of Article 3 support could be re-instated where a person agrees to comply with the conditions.

The views of other interested parties on the compatibility of this part with *the Human Rights Act 1998* have been considered above.[215]

III Immigration and Asylum Appeals

A. Introduction

This Section of the Research paper examines Part 5 of the *Nationality Immigration and Asylum Bill*. The Bill re-structures the existing legislation with the intention (according to the White Paper) of simplifying and speeding up the process.

The Bill contains provisions which deal with the appointment and functions of adjudicators. The "immigration decisions" which entitle an individual to appeal to an adjudicator are set out. The exceptions to these rights of appeal are provided for. The Bill then sets out what grounds of appeal are available.

The Bill also contains provisions in respect of "third country removals" – i.e. where the person is to be removed to a safe third country which he passed through on his way to claim asylum in the UK.

The Bill reforms the "one-stop" procedure. The "one stop procedure" refers to the requirement for an appellant to raise all relevant matters at a single appeal hearing. The Bill enables the Secretary of State to certify that the one stop procedure has not been followed so the appellant loses their right to a further appeal.

The Bill provides that where an immigration application is refused on the grounds of national security, or in the public interest, no appeal lies to an adjudicator.

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[214] Paragraph 118 Ibid.

[215] Please see above under **II: E**

The Bill also provides the jurisdiction for the Immigration Appellate Tribunal, and its procedure.

The provisions of Part 5 will be examined in greater detail under the following headings:

- The Current Law
- The White Paper
- Reactions to the White Paper
- The *Nationality, Immigration and Asylum Bill*

B. The Current Law

The system of immigration and asylum appeals is complex. This section of the Research Paper can only give a very brief overview of the system. Detailed information on the immigration appeal system can be found in *Macdonald's Immigration Law and Practice*.[216] A summary of the asylum appeals system for non-lawyers can be found in the Legal Services Commission (LSC) leaflet entitled "Claiming Asylum." The leaflet explains the asylum procedure. A similar overview of immigration law is contained in the leaflet entitled "Immigration and Nationality." The leaflets are available from the LSC web-site at:

www.legalservices.gov.uk/leaflets/cls/index.htm

Information from the Home Office on claiming asylum can also be found on the Immigration Nationality directorate web-site at:

www.ind.homeoffice.gov.uk/default.asp?pageid=15

Generally speaking, a person who has a right of appeal may appeal to an adjudicator at the Immigration Appellate Authority in the first instance. Further appeals lie in certain circumstances to the Immigration Appeal Tribunal, and from there to the Court of Appeal. Judicial review of the initial decision by the Home Office, or of the decisions of adjudicators and the Tribunal may be available in some circumstances.

It may be helpful at this point to outline what an asylum appeal is essentially about. An individual may appeal if the Secretary of State has refused to grant him refugee status under the Refugee Convention. Generally speaking, the appellant will be arguing that the Secretary of State was wrong in making this decision, and to remove him to his country of origin would be in breach of the UK's obligations under the Refugee Convention. He may also be arguing that his removal from the UK would be in breach of his human rights.

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[216] Chapters 12 and 18, (2001) Butterworths London

Some features of the asylum appeals system which are relevant in the context of the new Bill are the "certification" procedure, the "safe third country" procedure, and the "one stop" procedure. These also merit a brief explanation.

Certain provisions of the current appeals legislation allow the Secretary of State to certify a claim if it is "manifestly unfounded."[217] This means that the asylum seeker can only appeal to the adjudicator, provided the certification was made correctly.

If an asylum seeker has passed through a "safe third country" he may be returned there in specific circumstances, without his asylum claim being considered.

The "one stop procedure" was introduced by the *Immigration and Asylum Act 1999*. The effect of it is that any grounds of appeal which are available to an appellant must all be raised at a single appeal. If a person fails to raise all the relevant grounds at an appeal, generally he has no other right of appeal.

C. The White Paper

1. Introduction

The White Paper explains the Government's policy towards reforming the current system of asylum appeals. The Government's view is that the effect of the new system of induction, accommodation and reporting will be limited unless the delays in the appeals system are addressed.[218] To address the delays in the system, the Government intends to re-structure the existing legislation to speed up and simplify the system.

2. The "one stop" procedure

The White Paper states that the Government intends to reform the "one stop" procedure. The "one stop procedure" was introduced by the *Immigration and Asylum Act 1999*. The effect of it is that any grounds of appeal which are available to an appellant must all be raised at a single appeal. If a person fails to raise all the relevant grounds at an appeal, generally he has no other right of appeal.

The White Paper explains the procedure as follows: [219]

> **4.61** … The [one stop] principle has worked well but the provisions of the Act have not always been as easy to understand. The introduction of human rights appeals also meant that some of those who had exhausted all other appeal rights before the coming into force of the Act in October 2000 used them simply as a

[217] Immigration and Asylum Act 1999 Schedule 4 paragraph 9
[218] Page 62
[219] Page 62

> means to delay removal. This has led to the appeal system becoming clogged up and unable to deal effectively with the new appeals in a timely way.

3. Simplification of the current certification procedure

The Government proposes to simplify the current appeals system by ending the current "certification procedure." Under this procedure, the Secretary of State has the power to certify certain cases such as those which the Home Office determines as "manifestly unfounded."[220] A valid certificate has the effect of limiting the appellant's right of appeal so that he can only appeal to an adjudicator, but not from the adjudicator to the Tribunal. The Government intends to end this procedure so that more appeals can be heard by the Tribunal.

4. Delay and adjournments

The Government sets out in the White Paper how it intends to speed up the current appeals system. In its view:[221]

> There are far too many appeals which are adjourned and in many cases we believe that requests are made which are little more than a tactic to delay the outcome and therefore the removal of failed asylum seekers.

As a solution, the Government proposes to introduce a "statutory closure date" to prevent multiple adjournments at the adjudicator stage of the appeal system. In addition, all appeals will be required to be made in a prescribed way and time with a presumption that the more out of time an appeal is, without good reason, the greater onus will be on the adjudicator not to allow it to proceed.

5. Tribunal as a Superior Court of Record

The White Paper proposes further streamlining by making the Immigration Appeal Tribunal a Superior Court of Record:[222]

> This will reflect the fact that a high court judge heads the Tribunal and recognises the importance of its jurisdiction. As a Superior Court of Record there should be no scope for judicial review of its decisions, particularly of refusals to grant leave to appeal that are made in an attempt to frustrate removal. The Tribunal will focus entirely on the lawfulness of adjudicators' decisions rather than their factual basis. There will also still be a right of appeal from the Tribunal to the Court of Appeal on a point of law.

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[220] Schedule 4 Paragraph 9 *Immigration and Asylum Act 1999*
[221] Page 63 Ibid.
[222] Page 63

6. Judicial Review

The Government proposes that judicial review should only be available for meritorious cases. This will be achieved by ensuring that the "merits test" for the award of legal funding is properly applied by legal representatives. The Paper states that judicial review will be speeded up without reducing access for deserving applicants.[223]

7. Appointment of Adjudicators

Finally, the paper stated that more adjudicators would be appointed in order to increase the capacity of the system.[224]

D. Responses to the White Paper

1. Local Government Association

The LGA observe that they are concerned about the current backlog in delivering decisions, particularly for those asylum seekers who are supported by local authorities. They support the proposed increase in the appeals capacity as being "in the interests of both asylum seekers and local authorities."[225]

2. Oxfam

Oxfam makes the following observations on the question of reforming the appeals process:[226]

- Resources must be committed to ensuring that good quality and defensible decisions are made on asylum claims at 'first decision' stage
- There must be early provision of good-quality legal advice The asylum determination process must contain adequate safeguards against wrong decisions through recourse to the full range of judicial scrutiny
- An Independent Documentation Centre should be established in order to provide accurate, impartial and up-to-date information on countries from which people have fled

3. Liberty

Liberty is an independent human rights organisation which campaigns to defend and extend rights and freedoms in England and Wales.

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[223] Page 64 Ibid.
[224] Page 64 Ibid.
[225] Paragraph 17, Response to the White Paper. Available from: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94
[226] Summary of Responses to the White Paper. Available from: www.oxfam.org.uk/policy/papers/asym2002/summary.htm

In his initial response to the White Paper, John Wadham, the director of Liberty states that: [227]

> The Government's proposals to crack down on those who abuse the asylum system are in real danger of cracking down on those who genuinely need it – those who have been persecuted in other countries, those who have a right to be here.

Liberty go on to say that reducing bureaucratic delays in the asylum process will be welcome. However, they add that speeding up the process by simply reducing the ability of asylum seekers to appeal decisions will be an attack on the basic fairness of the system:[228]

> Restricting the grounds of appeal to points of law only is an alarming restriction that could see people deported despite having evidence that they will face persecution. The justification for restricting some appeals and imposing time limits ignores the fact that vast numbers of adjournments are granted to accommodate the inefficiencies in the Home Office's own Immigration Directorates. They're not sought by the applicant and indeed prolong a process that can cause people and families great uncertainty and distress.

4. Legal Action Group

The Legal Action Group is a national, independent charity which campaigns for equal access to justice for all members of society in the UK.

The LAG welcome the proposed end to the certification procedure by which appeals can be certified by the Home Office as "manifestly unfounded" thus restricting the appeal to the Tribunal. However in response to the other proposals to streamline the system (such as introducing a statutory closure date and to remove appeals against removal directions) the LAG says:[229]

> Sacrificing human rights in the name of administrative speed and convenience does this Government no credit whatsoever.

In response to the proposal that the Tribunal will be made into a Superior Court of Record, the LAG observe:

> Attractive though this might seem, it is quite another matter to create overnight a more weighty judicial culture.

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[227] Initial Response to the White Paper. Available at: www.liberty-human-rights.org.uk/

[228] Ibid.

[229] Editorial, Page 3, LAG Journal April 2002

It is their view that the White Paper "confidently suggests that the change will leave no scope for judicial review." LAG respond that the Tribunal will continue to deliver administrative justice, and there should be no move to oust the supervisory role of the High Court.

5. Law Society

The Law Society is the regulatory body for the solicitors' profession in England and Wales. The President of the Law Society has commented that the moves to reform the asylum system and speed up the decision making process will only succeed if there is enough guaranteed access to good quality legal advice from an early stage, and throughout the process.[230]

6. The Refugee Council

The Refugee Council is one of the leading refugee agencies in the UK. They offer direct services to refugees and asylum seekers, and are concerned with promoting refugee rights in the UK and abroad.

In the Executive Summary of their response to the White Paper, the Refugee Council comment that the proposals are the fourth attempt in less than ten years to reform the asylum system. The Council agree with the need for reform, and state that, in their view "…a fair and transparent asylum process lies at the heart of any credible asylum system."[231]

The Refugee Council welcome all measures to expedite the processes to reach decisions, provided that they are not at the expense of the fairness of the system.[232] However they note:[233]

> There are …repeated allusions to people using the system to delay the process of removal and no recognition that many of the delays and inconsistencies are of the governments own making. It was after all only in 1999 that the One Stop Appeal provisions were introduced with their "repetition of processes, lack of clarity, inconsistencies and omissions" (4.62) and it seems wrong to blame the appellants. In particular this applies to the reference to people exercising the rights under the Human Rights Act as delaying the process, given the way in which that Act was brought into effect with its interim arrangements.

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[230] Law Society Press Notice, *Asylum Reforms,* 29 October 2001. Available from: www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=5846

[231] Chapter 4, Response to the paper available online: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/execsumm.htm

[232] Chapter 4. Available from: www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

[233] Ibid.

The Council welcome the ending of certifying claims as, in their view, it has meant that different asylum seekers have different appeal rights. They note that evidence from appellate authorities, in evidence to the House of Lords Committee looking at minimum standards in the EU, was that they could see no benefit in the retention of such procedures. The view of the Council is that the key factor in an appeals system is to have good quality decision making with the benefit of competent legal representation. Cases should then be dealt with speedily on their merits within a single procedure.[234]

The Council express concern about the Tribunal becoming a Superior Court of Record:[235]

> The only way for this to be a credible option is if a High Court judge were to preside over every hearing. This does not seem to be the intention. The fact that a High Court judge heads the Tribunal overall is not a substitute for this sufficient to justify the claim that this "recognises the importance of its decisions". As presently constituted such enhanced status, and consequent narrowing of the scope of judicial review, is the source of some disquiet.
>
> There has been concern expressed about the quality and consistency of decision making within the IAT and these are to some extent attributable to the training and membership of the Tribunals themselves. IAT decisions are regularly overturned and at times robustly condemned. It cannot be right that such an important matter should be decided without direct judicial scrutiny.
>
> Equally, consideration of leave to appeal to the IAT should allow an oral hearing and refusals should be subject to judicial review.
>
> It appears that the policy objective is to reduce the possibilities of judicial review without any commensurate measures to improve either the quality of initial decision making or to sufficiently reform the IAT to enable it to be a credible Superior Court of Record.
>
> We are also concerned that appeal to the IAT will be only on questions of law rather than also on questions of fact. We understand that this is not true of other jurisdictions and appears unhelpful in relation to, for example, complex issues of fact relating to country conditions.

In respect of the proposals to control and restrict access to judicial review, the Council observe that this should not be at the expense of access to justice:[236]

> Procedural restrictions are not a test of deserving applicants and there already exist remedies to deal with clearly unmeritorious cases.

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[234] Paragraph 4.65 Ibid.
[235] Paragraph 4.66 Ibid.
[236] Paragraph 4.67 Ibid.

They welcome any efforts to increase the capacity of the appeals system, however they observe this should be accompanied by the supply of quality legal representation which, in their view, still remains inadequate.

7. Joint Council for the Welfare of Immigrants

On their web-site, JCWI describe themselves as:

> an independent national voluntary organisation, campaigning for justice and combating racism in immigration and asylum law and policy.

In their responses to the White Paper, the JCWI express disappointment at the proposed asylum reforms:[237]

> Comprising the longest chapter in the White Paper, the proposals on asylum policy contain the biggest number of disappointments. Headlined as "Ensuring End-to-End Credibility", the White Paper contains no discussion as to why the system is widely regarded as having little or no credibility at the present time. The lack of independence of decision-makers in the asylum consideration process is fundamental to the widespread concerns about the integrity of the system, with officials being required to make decisions in accordance with often-inappropriate schedules and dubious information resources on countries of origin. The credibility of the system is further strained by the fact that the government has closed off virtually all legal channels of arrival for asylum seekers, with the effect that applications are considered whilst the person concerned has been stigmatised for 'illegal' entry
>
> […]
>
> We note that many of [the measures proposed by the White Paper] are already in place and are in the process of expansion, raising doubts as to the value of the consultation process that the White Paper is supposed to entail. These measures will certainly increase the capacity of the system to enforce negative decisions against asylum seekers, but they do little to increase what should surely be the main function of asylum procedures, which is to maintain high standards of protection and ensure respect for human rights. The proposals are consistent with the frequently express presumption that the majority of asylum seekers are not genuine and are abusing procedures. We do not see what gain in terms of the end-to-end credibility of the system will emerge from measures framed in this one-sided manner

[237] Initial Responses available on line from: www.jcwi.org.uk/whitepaper/jcwiresponse.html

8. Immigration Advisory Service

The IAS is the UK's largest national charity giving a free legal advice and representation service to immigrants and asylum seekers.

The IAS appreciates the Government's concern at the failure of the One Stop Appeal procedure and the proposal to redraft the statutory provision to make it comprehensible and workable.[238]

The IAS comment on the proposals to address delays in the appeal system as follows:[239]

> **16.** We view with concern that some of the proposals designed to "address delays within the appeal system" [para 4.61] might defeat the declared need for adequate protection of genuine asylum seekers. One vivid example is the proposal [para 4.63] under which 'removal directions' following from an earlier refusal decision are to be classified as purely administrative decisions which would no-longer attract a right of appeal. We are surprised that the Government should try to introduce a measure which in its effect amounts to defining a substantive (and rather contentious) matter of statute law without apparently paying much heed to Strasbourg jurisprudence or the construction of the relevant provision by the United Kingdom courts.
>
> **17.** Although judicial opinion on this issue is divided but the predominant view is that debarring an appeal against a removal direction would frustrate the very purpose of both the ECHR and the Refugee Convention . The fact that the decision is 'administrative' in nature does not protect the individual who faces persecution if returned to his country of origin: the prime object of the Human Rights Convention is to protect a person who has established a reasonable likelihood of a breach of his/her Convention rights in the event of removal from the United Kingdom.

Their view on the imposition of stricter time limits is as follows:

> **18.** We have grave concern about the proposals designed to reduce adjournments and delays in appeal hearings [para 4.66] however laudable the objectives. The proposal for introducing stricter time limits for lodgement of appeal and removal of the right of appeal on failure to do so might defeat the main objective of protecting the rights of genuine asylum seekers and people likely to face violation of human rights. It has to be remembered in this context that certain human rights provisions, for example Article 3 relating to torture, are absolute in their nature permitting no derogation. In most other areas of human rights and asylum law

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238 Response to the White Paper
www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

239 Paragraph 16, Response to the White Paper
www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

> non-compliance with domestic administrative procedure would hardly justify a refusal of an individual's asylum or human rights claim.

The IAS welcome the proposal for elevating the Immigration Appeal Tribunal's status to a Superior Court of Record:

> **22.** …This would have the advantage of enhancing the binding effect of Tribunal decisions and achieving desired uniformity and coherence in judicial legal decisions. One way to resolve the current situation, however, might be to treat the Immigration Appeal Tribunal like the Administrative Court, i.e. retain the leave application but let a refusal be subject to renewed oral application to the Immigration Appeal Tribunal. In this way, unmerited leave refusals could be sifted out and the renewed oral hearing could deal with focussed issues. A more limited rôle for judicial review would be to challenge, if necessary, the Immigration Appeal Tribunal refusal of the renewed oral application. We have grave concern about the proposal that the Tribunal "will focus entirely on the lawfulness of adjudicators' decisions rather than their factual basis". This is seen as a measure to reduce the number of judicial review applications but an inherent danger lies in the fact that the Tribunal would no longer adjudicate on questions of fact. It is axiomatic that most immigration appeals relate to the determination of matters of fact rather than law. Under the proposal only an adjudicator in the first instance appeal would deal with all questions of fact and his decision would be final in this matter.
>
> **23.** It should be remembered that the Wilson Committee, the basis of the current appeals system, perceived the danger of relying on an adjudicator, sitting alone unaided by lay members, reaching a conclusive decision on complicated matters of fact . Hence the Committee's recommendation that a second tier appellate body, the Immigration Appeal Tribunal, with a legal chairman and two lay members be entrusted with the final decision making responsibility. Concerns were expressed during the passage of the 1969 Appeals Act in both Houses of Parliament about the wisdom of allowing a single adjudicator to determine difficult questions of fact which may seriously affect the lives of individuals . Over the years the wisdom of the Wilson Committee in this regard has been justified by the fact that immigration cases normally pose highly complex issues of fact affecting the liberty, livelihood and, not infrequently, the life of the individual concerned. The importance of careful determination of questions of fact (such as whether an appellant faced persecution or torture or whether a spouse had an intention to live together with the other spouse) cannot be overestimated. The issue of careful determination of matters of fact has assumed greater significance with the advent of asylum and human rights jurisprudence.
>
> **24.** It is significant to note that, although under the current procedure rules leave to appeal is granted by the Immigration Appeal Tribunal when an arguable question of law is raised, once leave has been granted the Tribunal assumes the responsibility of determining the appeal de novo including, when necessary, a relevant point of fact, without restricting its jurisdiction to the point of law raised in the grounds of appeal . The jurisdiction of the Immigration Appeal Tribunal to

> determine questions of fact without limiting itself to considering issues of law is described in detail by Woolf J [as he then was] in Zaman [1982] Imm AR 61.
>
> **25.** On the above premises, we are concerned that the proposed limitation of the Tribunal's scope of review of adjudicators' decisions would seriously impair the concept of a proper appellate review.

9. Immigration Law Practitioners' Association

ILPA, as the representative body of immigration and asylum practitioners who are directly involved in the current appeals system, comment extensively on the White Paper's proposals.[240]

a. Summary

In the summary of the response, ILPA express their disappointment that, in their view, the White Paper does not fulfil the Home Secretary's promise of "a substantial package of measures which will fundamentally overhaul our asylum and immigration policy."[241] They state that, in their view, the legislation is premature, given the current discussion within the EU for common standards.

With a view to improving the quality of initial decision making, ILPA say they would welcome a consultation on the transfer of initial decision making to an independent refugee body. This, they suggest, would "remove the process from the political arena and ensure that human rights concerns were the primary focus for decision makers."

b. Reducing Delay

ILPA state that they support the efficient processing of asylum appeals. However they add that efficiency "is meaningless unless allied to fairness and justice, concepts inherent in the English system of justice, which ought to be fundamental to asylum appeals." They express regret at the "repeated insistence that delays and problems in the systems are caused by asylum seekers and their representatives rather than the Home Office."[242]

ILPA observe that there are already ample mechanisms for the Immigration Appellate Authorities to deal with what are perceived to be delaying tactics, and there is no evidence to suggest that adjournments are being granted unnecessarily. They point out that under Paragraph 31 of the *Immigration and Asylum Appeals (Procedure) Rules 2000,* the appellate authority is under a duty not to grant an adjournment to an appeal hearing "unless it is satisfied that refusing the adjournment would prevent the just disposal of the

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[240] Page 13 et seq, Response to the White Paper. Available from www.ilpa.org.uk under "Latest News."

[241] Page 1, Summary, Response to the White Paper, available online: www.ilpa.org.uk under "Latest News"

[242] Page 1 Ibid.

appeal." It is ILPA's view that this provision is strong enough to prevent unnecessary appeals. Furthermore, they say that properly selected and trained adjudicators ought to be trusted to take independent decisions about adjournments and to steer cases to efficient conclusions. ILPA fear that there is a serious risk that further statutory mechanisms aimed solely at a faster appeals procedure will impact on judicial independence.

ILPA go on to propose ways which, they say, will alleviate delay. They suggest that committing resources to ensuring quality initial decision making by the Home Office will obviate the need to appeal. ILPA highlight the absence of any proposals in the White Paper to improve the quality of the initial asylum decisions. They say:[243]

> Poor initial decision making wastes public funds and court time. The fact that some 20% of applicants succeed on appeal confirms our view of the inadequacy of the initial decision making process.

They propose that greater efficiency within the Home Office Presenting Officers Unit[244] would mean that appeal cases are properly considered by the Home Office before the appeal hearing. They note that:[245]

> In our experience, considerable delay stems from adjournments at the request of the Home Office and from Home Office inefficiency in dealing with files in cases adjourned for further work by the Home Office.

They suggest that an effective appeals system also requires the statutory provisions for appeal to be simplified:

> Under section 69 of the 1999 Act, refused asylum seekers have a right to appeal against the immigration decision flowing from refusal of asylum. We are concerned that this is unduly complex. We would support the introduction of simplified provisions which make it clear that all those refused asylum have the right to appeal in country against denial of refugee status, irrespective of any consequent immigration decision.

ILPA takes the view that access to legal advice is also crucial for an efficient appeals system:

> We support recent initiatives to improve the quality of legal services offered to asylum seekers. We also support recent schemes for continuous training of advisers.

Further, they advocate full training and continuing refresher training for adjudicators to ensure that the appellate authority is staffed by quality personnel.

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[243] Page 6, chapter 4, Ibid.
[244] Comprising the caseworkers who represent the Home Office at immigration and asylum appeals
[245] Page 14 Ibid.

c. One stop appeals

ILPA comments:[246]

> ILPA notes the government's concern that some of those who had exhausted all other appeal rights before the coming into force of the Human Rights Act 1998 now have the right to extend the appeal process by way of appeal under section 65 of the 1999 Act. However:
>
> - We observe that these human rights appeals would not now be taking up the IAA's time if the Home Office had enacted section 65 of the 1999 Act so as to have retrospective effect.
> - It is not our experience that human rights appeals 'clog up' the appeals system. Nor is it wrong for appellants to utilise appeal rights set down by statute.
> - Any problem caused by those who had exhausted appeal rights before the Human Rights Act is only a temporary one, as more and more people come under the umbrella of 'one-stop' appeals.

ILPA welcome the Government's proposal to clarify the "one-stop" appeal provisions. They suggests how this might be implemented:

> - We would welcome a system where all those whose claims raise human rights issues are given appeal papers with the notice of refusal, without the need to make a further allegation under section 65 of the 1999 Act (see paragraph 4(4) of the Immigration and Asylum Appeals (Notices) Regulations 2000).
>
> - We have noticed that there is a variation in practices between ports about what constitutes a human rights allegation so as to trigger service of appeal papers. The current system means that some ports refuse to treat a one-stop statement as an allegation if the statement has been served on the Home Office prior to a refusal decision.
>
> - We are concerned about the Home Office's lack of response to one-stop statements. This lack of response means that the Home Office may not consider human rights grounds until the case has gone to the Home Office Presentation Officers Unit for an appeal hearing. At that late stage, the Home Office may seek an adjournment to consider human rights grounds.

d. Defining Appeal Rights

ILPA say that they understand the political imperative to define appeal rights. However, they make the following observations:[247]

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[246] Page 14 Ibid.
[247] Page 15

- Any statutory structure must include the right to appeal against an asylum refusal in a fresh application for asylum under the Immigration Rules HC 395 para 346

- As alluded to above, the Secretary of State can already prevent appeal against removal directions under section 73 of the 1999 Act. Further legislative provision to prevent appeals against removal directions is superfluous.

- Any statutory time limit for making a human rights claim should make provision for exceptions based on a change in the claimant's circumstances.

e. Abolition of Certification

ILPA welcome the proposal to abolish certificates under the *Immigration and Asylum Act 1999*.[248] It observes that this will substantially reduce the need to resort to judicial review as a means of challenging the incorrect decisions of adjudicators.

f. The Tribunal as a Superior Court of Record

ILPA observe that converting the IAT into a Superior Court of Record will have far reaching ramifications for asylum seekers, Home Office personnel and members of the Tribunal. They note that the White Paper gives few details. ILPA state that they oppose the change unless the following conditions are fulfilled:

- The Tribunal must retain factual jurisdiction
- The quality and status of the Tribunal's personnel must be assured
- There must be a provision for challenging decisions to refuse leave to appeal
- There must be available legal funding to reflect the increased status and importance of the appeal

g. Judicial Review

ILPA observe that a number of the proposed changes are likely to increase resort to judicial review in the absence of other opportunities for legal challenges. They suggest these include the measures denying an appeal for late Human Rights applications and imposing a statutory closure date for appeals.

They go on to comment:[249]

> The Home Office emphasises the misuse of judicial review. We think that this paints an inaccurate picture. Various recent high profile cases have been evidence of the value of judicial review in checking executive power. We note that it is

[248] Paragraph 9, Schedule 4
[249] Page 18, Ibid.

> precisely the effectiveness of judicial review which has precipitated certain legislative changes eg section 11 of the 1999 Act in light of third country judicial reviews.

They conclude by saying that "there is no substitute for quality decision making in the Home Office which would alleviate the need for individuals to apply for judicial review."

E. The *Nationality Immigration and Asylum Bill*

1. Appointment and Functions of Adjudicators

Clause 59 of the *Nationality Immigration and Asylum Bill* provides that the Lord Chancellor may appoint adjudicators to hear immigration and asylum appeals. Essentially, a person is eligible to be an adjudicator provided he is a lawyer of seven years standing or, in the opinion of the Lord Chancellor, he has some other suitable qualification. This clause also makes provision for the appointment of chief, deputy chief and regional adjudicators. **Schedule 3** of the Bill contains further provision in respect of the term of office, proceedings, staff and funding for adjudicators.

2. Rights of Appeal to an Adjudicator

Clause 60 provides that there is a right of appeal to an adjudicator in respect of any "immigration decision." An immigration decision means any of the following:

- refusal of leave to enter the UK
- refusal of entry clearance
- refusal of leave to remain in the UK
- refusal of a certificate of entitlement for right of abode
- refusal to vary a person's leave to enter or remain in the UK
- revocation of indefinite leave to enter or remain in the UK under **Clause 55** of the Bill[250]
- A decision to remove a person who is unlawfully in the UK
- A decision to remove an illegal immigrant from the UK
- A decision to make a deportation order
- A refusal to revoke a deportation order.

One effect of this is that a decision to make a deportation order following a court recommendation will now be appealable.

Clause 61 provides that a person whose claim for asylum is rejected by the Secretary of State may appeal against that rejection provided he has been granted exceptional leave to remain in the UK for a period exceeding one year. This provision relates to those asylum

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[250] Discussed above at **II:F:10**

seekers whose claim for asylum has been refused, but who have been granted exceptional leave to remain. Generally, an asylum seeker would appeal against the decision to remove him from the UK. In the case of a failed asylum seeker who has been granted exceptional leave to remain, as the individual is not going to be removed from the UK he cannot appeal against any decision to remove him. **Clause 61** is intended to preserve the right of such individuals to appeal against the refusal of asylum.[251]

3. Grounds of Appeal

Clause 62 sets out the grounds of appeal. An appeal brought under **Clause 60** must be brought on one of the following grounds:

- the decision was not in accordance with the immigration rules
- the decision was unlawful under the *Race Relations Act 1976* because it constituted unlawful discrimination by a public authority
- the decision is unlawful under the *Human Rights Act 1998*, because the decision of the immigration authorities was contrary to the European Convention on Human Rights
- the decision breaches the UK obligations under EU law
- the decision is not in accordance with the law
- the person making the decision should have exercised differently his discretion under the Immigration Rules
- the removal of the appellant from the UK would be in breach of the Refugee Convention
- the appellant objects to the country to which it is proposed to remove him

For appeals on this last ground, an alternative destination must be submitted along with evidence that the appellant would be allowed into that alternative country.

The Explanatory Notes to the Bill say that this clause brings together the various bases of appeal which were set out in separate sections in the existing legislation.[252]

The Bill then goes on to specify what matters the adjudicator must take into account when determining an appeal. **Clause 63** provides that during an appeal, an adjudicator must consider and determine any matter which is raised in the statement of additional grounds provided under **Clause 92**. A person who makes an application to enter or remain in the UK or who has had an "immigration decision"[253] made in respect of him may be required, by **Clause 92**, to state all additional reasons for wanting to enter or remain in the UK, and any grounds why he should not be removed under this clause. The idea behind this

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[251] Telephone call to Home Office source – 22 April 2002

[252] Paragraph 132 Bill 119-EN

[253] An "immigration decision" means any of the decision listed above under Clause 60 (such as refusal of leave to enter or remain etc.).

provision is to ensure that all relevant grounds should be dealt with at the same time at one hearing, under the "one stop" procedure.[254] **Clause 74** then provides that if an appellant tries to rely on a ground which he did not mention in the **Clause 92** statement, the Secretary of State may certify that ground as such. The result of such a certificate is that there can be no appeal based on these grounds. The appellant is similarly prevented from relying on a ground which is certified as having been raised in an earlier appeal.[255]

In other words, if there is a certificate under **Clause 74**, the adjudicator is restricted to determining the matters raised at the initial decision, as supplemented by the additional grounds statement.

The Explanatory Notes state:[256]

> Subsection 63(2) requires the adjudicator to consider and determine each of the grounds of appeal and additional grounds, and **prevents him from considering anything else** [*emphasis added*].

This statement may appear to suggest that an adjudicator is *automatically* prevented from considering any grounds which have not been raised in the **Clause 92** statement. However the wording of the Bill provides that the adjudicator is only prevented from considering other grounds apart from the statement once a certificate under **Clause 74** has been issued, and this meaning is what is intended to be conveyed by the Explanatory Notes.[257]

In considering an appeal, an adjudicator must have regard to evidence about any matter which he thinks is relevant when deciding on an appeal. This may include any evidence which concerns a matter arising after the date of the decision, except in the case of entry clearance and certificate of entitlement cases when the evidence to be considered is limited to that which was available to the decision maker.

Clause 64 provides that where a person has more than one immigration appeal pending, the appeals shall be consolidated so the matters can be determined at the same time.

4. Limitations on Rights of Appeal

The *Nationality Immigration and Asylum Bill* then provides exceptions and limitations on the right of appeal. The Explanatory Notes, by way of introduction, state:[258]

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[254] See below for further discussion of the one stop procedure **III:E:5**
[255] For further discussion on the certification procedure for one stop appeal, please see **III:E:5**
[256] Paragraph 133 Ibid.
[257] Telephone call to Home Office source 22 April 2002
[258] Bill 119-EN

> **137.** Clauses 66 to 77 set out detailed provisions relating to exceptions and limitations on the general right of appeal as well as stating when appeals may be pursued in the United Kingdom (ie when they are "suspensive"). It should be noted that the general exceptions do not prevent an appeal being lodged on asylum, human rights, European or race discrimination grounds. However, no appeal may be lodged on any ground when the application has been certified under the one-stop procedure (clause 74).

a. Failure to meet basic "non-discretionary" requirements

Clause 66 provides that a decision to:

- refuse leave to enter the UK
- refuse entry clearance
- refuse leave to remain in the UK
- refuse to vary a person's leave to enter or remain in the UK in certain circumstances

on the basis that the person does not meet one of the "basic non-discretionary requirements" in the Immigration Rules,[259] cannot be appealed. The basic non-discretionary requirements are listed as when a person:

- does not satisfy a requirement as to age, nationality or citizenship specified in the immigration rules (for example, is over 18 when the Rules specify he must be under 18)
- does not have a required immigration document (for example a passport or work permit or entry clearance)
- is seeking to enter the UK for a period which is longer than that permitted by the Immigration Rules (for example, is trying to remain in the UK as a visitor for longer than 6 months)
- is seeking to enter or remain in the UK for a purpose other than one which is permitted by the Immigration Rules.

Similarly, there is no appeal against specified immigration decisions if the application has been refused simply because the applicant did not pay the required fee, or did not use the correct application form.[260]

b. Visitor and student appeals

Clause 68 provides that a visitor, a student on a course of less than 6 months, or a prospective student (who has come to the UK to find a suitable course) cannot appeal a decision to refuse leave to enter the UK unless at the time of refusal he has entry

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[259] Cm 395

clearance. This is identical to the current exemption contained in the *Immigration and Asylum Act 1999*. **Clause 70** restates existing measures which provide that there is no right of appeal for short-term students and prospective students against a refusal of entry clearance.

c. Family appeals

Clause 69 provides that a person who applies for entry clearance as to visit family members may appeal against a refusal if he pays the prescribed fee. The definition of a person's family may be determined in accordance with future regulations. This is the same position as under the current law.[261]

d. "In country" appeals

Clause 71 provides that a person may only appeal whilst remaining in the UK in the following circumstances. Where the appeal is:

- against the refusal of a certificate of entitlement
- against a refusal to vary a person's leave to enter or remain
- against the variation of a person's leave to enter or remain in the UK
- against the revocation of a persons indefinite leave to remain under **Clause 55**[262]
- against the decision to make a deportation order.[263]

A person may appeal without having to leave the UK when they have entry clearance or a work permit. A person may also appeal in country if the appeal is on the grounds that the applicant's removal would be contrary to the Refugee Convention, that the original decision was contrary to the *Human Rights Act 1998*, or that the decision breaches EU law.

The Explanatory Notes state that the only change from the *Immigration and Asylum Act 1999* provisions is that an appeal to an adjudicator solely on race discrimination grounds will no longer entitle a person to appeal in country.[264]

e. Third Country Appeals

Clause 72 of the Bill is concerned with "third country" removals. Under the current provisions of the *Immigration and Asylum Act 1999*, an asylum seeker who has travelled from their country of origin through a "safe third country" may be removed to that third country provided that the Secretary of State has certified two matters.[265] Firstly, he must certify that the third country accepts responsibility for the asylum claim of the individual.

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260 Clause 67
261 Section 60(5)(a) *Immigration and Asylum Act 1999*
262 Discussed above under **II:F:10**
263 Under section 5(1) of the *Immigration Act 1971*
264 Paragraph 143 Bill 119-EN (termed a "suspensive appeal" in the E.N.)
265 Sections 11 and 12 of the 1999 Act

Secondly, that the asylum seeker is not a national of the third state. In addition, the certificate must not have been set aside on human rights grounds.

The current arrangements between states that determine which country has responsibility for a person's asylum claim are contained in the Dublin Convention. Further information on the Dublin Convention can be found in the Library's Standard Note.[266]

Clause 72 will change the existing legislation by removing an "in country appeal" if the Secretary of State has certified the claim as a third country case. An appellant may appeal from outside the UK. A person may still have the right to appeal within the UK if he claims that the decision to remove him to a third country breaches his human rights. This might be, for example, if removal to the third country would breach the person's rights not to be tortured or subject to inhuman or degrading treatment (Article 3 of the ECHR). This situation would arise if the immigration rules in the third country meant the person would then be deported to a country where he would be tortured. However, if the Secretary of State certifies the Human Rights claim as manifestly unfounded, there will be no right to remain in the UK to pursue the appeal.

In response to the third country procedure, the Immigration law Practitioners' Association express regret that the credibility of an asylum seeker is doubted because he failed to claim asylum in a country that he has passed through on his way to the UK. They note that there are many reasons why a genuine refugee may choose to claim asylum in the UK. They suggest historical links with Britain through our colonial past; the presence of family, friends or community in the UK and linguistic and cultural connections comprise some of these reasons.[267]

f. Asylum Appeals from outside the UK

Clause 73 is a new provision which will prevent an asylum appeal from being lodged outside the UK.

g. National Security and Public Interest

Clause 75 provides that there is no appeal to an adjudicator where the Secretary of State certifies that the original decision was made on grounds of national security, in the interests of the relationship between the UK and another country, or is desirable for another reason of a political kind. There is no further amplification of these grounds in the Bill. The Explanatory Notes state that alternative rights of appeal are available to the Special Immigration Appeal Commission.[268]

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[266] "The Dublin Convention" SN/HA/1198. Available from the Parliamentary intranet.
[267] Page 1, Response to the White Paper. Available from www.ilpa.org.uk under "Latest News."
[268] Paragraph 148 Bill 119-EN

The Commission was set up in response to criticisms by the European Court of Human Rights. The European Court criticised the lack of appeal against the Home Secretary's decision to deport on national security grounds, or to exclude from the United Kingdom on grounds that this was conducive to the public good. The Commission now also hears appeals against the decision of the Secretary of State to certify suspected terrorists under the *Anti-terrorism, Crime and Security Act 2001*.

In conducting this type of appeal, the Commission will be able to consider sensitive information that it does not have to disclose to the appellant. The interests of the appellant will be protected by a Special Advocate, appointed by the Attorney General, who will have access to all the material relied upon by the Home Secretary. Further information on the operation of the Commission can be found in the Library's standard note entitled "Immigration and Asylum: the Special Immigration Appeals Commission."[269]

Clause 76 provides that there is no appeal against the refusal of entry clearance or leave to enter if the Secretary of State certifies that the exclusion or removal was conducive to the public good.

5. The "One Stop" procedure

The Nationality Immigration and Asylum Bill increases the use of the "one stop" procedure. The "one stop" procedure means that a person who appeals an asylum decision must raise all the relevant grounds of appeal in the single appeal hearing.

Clause 92 of the Bill specifies that any person who makes an application to enter or remain in the UK or who has had an "immigration decision" made in respect of him, may be required by the Secretary of State to state any additional reasons for wanting to enter or remain in the UK, and any grounds why he should not be removed. An "immigration decision" means any of the decisions listed above under **Clause 60** (such as refusal of leave to enter or remain etc.). **Clause 63** provides that during an appeal, an adjudicator must consider and determine any matter which is raised in the statement of additional grounds provided under **Clause 92**.

The Bill then provides that the Secretary of State or an immigration officer will be able to certify a decision if a person has not followed the one stop procedure. This will prevent there being any further appeal, or an appeal on the certified ground. **Clause 74** provides for four ways in which an appeal may be certified, thereby stopping the right of appeal.

Clause 74(1) provides that a person cannot appeal if the Secretary of State or an immigration officer has certified that:

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[269] SN/HA/1083

- the person was notified of an earlier right to appeal against another immigration decision (whether or not that appeal right was exercised)
- that, in the opinion of the Secretary of State or immigration officer, the person is seeking to delay his removal by appealing
- that in the opinion of the Secretary of State or the immigration officer, the person has no other legitimate ground for appeal

In other words, if the claim is certified, a person who has had a previous opportunity to appeal will not usually be able to appeal again, if it is thought that he is seeking to delay his removal and has no legitimate ground for appeal.

Clause 74(2) provides that a person cannot appeal if the Secretary of State or an immigration officer has certified that

- the matter was raised on an earlier appeal
- the matter should have been raised under an earlier appeal under **Clause 92**
- the matter could have been raised at an appeal had the appellant chosen to exercise their right of appeal

Clause 74(3) provides that where a further appeal lies, a person may not rely on grounds which have been relied upon in a previous appeal.

Clause 74(4) provides where a further right of appeal lies, a person may not rely on grounds which should have been raised at an earlier appeal under **section 92.**

The Explanatory Notes state:

> **147.** In all cases, the person will have been warned, in accordance with regulations, that failure to disclose additional grounds might lead to certification (subsection (5)).

They go to explain:

> The earlier legislation is extended in two ways. First, a certificate can be made when the person has not actually had a full one-stop appeal: though they must at least have been required to raise any additional grounds and had the opportunity (by complying with the requirement) to avail themselves of an appeal against refusal of those grounds. Secondly, an application or grounds of appeal can be certified if the person has left the United Kingdom and returned (subsection (6)).

6. Tribunals

Clauses 78 to **81** provide for an appeal from an adjudicator to a Tribunal on a point of law. Further appeal from the Tribunal to the Court of Appeal or Court of Session is provided for.

7. Procedure

Clauses 82 to 86 contain measures which will regulate the appeals procedure. The Explanatory Notes state:

> **158.** Clause 84 re-enacts, with amendments, and expands upon paragraphs 2 and 4 of Schedule 4 to the 1999 Act. These concern procedural rules made by the Lord Chancellor governing appeals to the adjudicator and Tribunal. The new measures are covered in subsections (2)(g), whereby the rules may prevent adjournment of a case, subsection (2)(h) requiring determination within a certain period and subsection (2)(i) enables electronic communication at hearings, for example video-links, subsection (2)(j) provides for the remittal of an appeal to an adjudicator under clause 80, subsection 2(k) enables an adjudicator to set aside a decision of himself or another adjudicator and subsection (2)(p) which requires an adjudicator to give notice of determination to a specified person. Subsections (3) and (4) re-enact paragraph 8 of Schedule 4 to the 1999 Act, which makes it an offence to fail to give evidence or produce a document without reasonable excuse when required to do so by the Rules

The regulation making power under this Clause could be used to implement some of the Government's more controversial reforms to the asylum system which are designed to reduce delays. For example, the rules may prohibit further adjournments, and may allow for the imposition of a statutory time limit. The criticisms of these proposals have been considered above under **III:D** of this Research Paper.

IV Immigration procedure

A. Introduction

Part 6 of the *Nationality Immigration and Asylum Bill* will introduce miscellaneous measures which are concerned with effective border control.

The various measures which comprise the Government's policy on border control can be found in Chapter 6 of *Secure Borders, Safe Haven*. The Government expresses concern that with the increase in international travel, increased effort must be made to have efficient border controls. The proposals in the White Paper include the increased use of visa regimes, pre-clearance schemes and airline liaison officers, for example.

The *Nationality Immigration and Asylum Bill* will introduce various schemes for the provision of data for the purposes of effective border control. The Bill will allow a scheme to be introduced that requires physical data, such as iris or facial images, to accompany applications for leave to enter or remain. The Secretary of State will be given the power to operate a scheme whereby people may voluntarily provide such physical data in order to assist their entry into the UK.

The Bill provides for the introduction of an "authority to carry scheme." Under such a scheme, carriers will be required to check the details of passengers against a Home Office database to confirm they pose no immigration or security risk.

The Secretary of State will also be able to require an employer, financial institution or local authority to supply him with information in respect of immigration. The Inland Revenue and port medical inspectors will have to supply the Secretary of State with information for specified purposes.

Finally, the Bill will allow for a fee to be charged for work permit applications. It will also bring those who give advice on work permits within the supervisory jurisdiction of the Immigration Services Commissioner.

The JCWI set out their initial response to the White Paper's proposals for border controls as follows:[270]

> The chapter on border controls is completely devoid of any sign of new thinking in this important area. The recent experience of the use of Airport Liaison Officers at Prague Airport is presented uncritically as a measure which should be repeated on a wider basis. No mention is made of the fact that the Prague incidents were reviewed in highly critical terms in the Czech Republic, and that evidence suggests crude discrimination on the basis of ethnicity made a disproportionate negative impact on travellers of Roma origin. The prospect of a challenge to this practice in the European Court of Human Rights now looms as a consequence of the Prague operation.
>
> Recent research has indicated the extent to which visa and border control regimes give rise to substantial levels of discrimination against individuals on the basis of their ethnic or national origins. (Cf. Borders and Discrimination in the European Union, Ryszard Cholewinski, ILPA/MPG, 2002). The existence of such discrimination undermines the effectiveness of immigration procedures because any system that is suspected of discrimination on grounds of race and nationality will be deprived of legitimacy in moral and ethical terms. In our view, this section of the White Paper would have been more constructive if it had contained positive proposals aimed at ensuring the complete and total elimination of all such forms of discrimination, rather than advocating an extension of the procedures in which it is most firmly rooted.

The provisions of Part 6 of the *Nationality Immigration and Asylum Bill* will be considered under the following headings:

- Work Permits
- The Authority to Carry Scheme

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[270] Response to the White Paper. Available from:

- Provision of information on physical characteristics
- Disclosure of Information
- Miscellaneous Provisions
- Compatibility of Part 6 with the *Human Rights Act 1998*

B. Work Permits

The Work Permit Scheme is one of the main ways in which a person can come to the UK to undertake skilled employment for a particular employer.[271] In 2001 there were over 104,000 new work permits issued, in addition to 33,000 extensions and changes of employment to existing permits.[272] This represents an increase from 80,000 new work permits and 22,000 extensions in 2000.

In February 2002, the White Paper stated that charges for work permits would be introduced to relieve pressure on general taxation.[273]

Clause 94 provides that the Secretary of State may, by regulations, require the payment of a fee for work permit applications. The regulations may apply generally, or only in specified circumstances. Any regulations must be made by statutory instrument and subject to the negative resolution procedure.

Clause 95 brings legal advisors who provide advice on work permits within the supervisory jurisdiction of the Office of the Immigration Services Commissioner (OISC). The OISC was set up as part of a new system of regulation under the *Immigration and Asylum Act 1999* to meet concern about the poor quality of service offered by some immigration advisers.

The OISC's role is described further on its web-site.[274] Further information about the OISC can be found in the Library's Standard Note entitled "Immigration and Asylum: Access to Legal Advice."[275]

C. The Authority to Carry Scheme

1. The White Paper

The "authority to carry scheme" (ATC) would require carriers to seek authority to bring passengers to the UK. The White Paper explains the proposed ATC scheme:[276]

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http://www.jcwi.org.uk/whitepaper/jcwiresponse.html

271 For further information, please see the web-site of Work Permits (UK) at: www.ind.homeoffice.gov.uk/default.asp?pageid=1558

272 Page 39 *Secure Borders, Safe Haven*

273 Page 43 *Secure Borders, Safe Haven*

274 www.oisc.org.uk

275 SN/HA/1091

276 Page 94 *Secure Borders, Safe Haven*

> 6.12 We believe we should build on the successes of visa regimes, the ALO network, juxtaposed control and pre-clearance to strengthen further the controls we operate abroad. This is essential so that we can continue to operate an effective immigration control despite the likely increase
>
> 6.13 We have therefore been developing ideas including an 'Authority to Carry' concept that would allow carriers to check the details of passengers against Home Office databases and receive instant confirmation that they pose no known security or immigration threat. A feasibility study will be undertaken this spring with a view to developing a scheme that could be rolled out shortly after that and in conjunction with carriers and other stakeholders.
>
> 6.14 The use of modern technology provides an opportunity for carriers to check and receive instant confirmation that they are free to carry the passenger to the UK. This will provide reassurance that those who are known to pose a threat to the UK will not be able to travel here. Authority to Carry will not replace the other measures detailed above or the controls carried out at UK ports but will complement them by providing another tool in the management of those travelling to the UK. Knowing that passengers have been cleared through the Authority to Carry scheme will also allow the Immigration Service to target its resources better at areas of high risk. This in turn will have benefits for travellers who will pass more quickly through our ports as they experience reduced processing times on arrival in the UK. This, with the use of the other measures detailed above, represents an integrated and flexible approach to border control.

2. Reactions to the White Paper

a. Oxfam

In their Summary Response to the White Paper, Oxfam state:[277]

> The imposition of border controls on countries in troubled areas of the world forces asylum seekers to resort to the services of traffickers and smugglers in order to seek protection.

b. Immigration Law Practitioners' Association

ILPA comment on the authority to travel scheme as follows:[278]

> ILPA is extremely concerned that the functions of public officials, including decision making on immigration, will be carried out by a wide variety of people including commercial operators who are neither adequately trained nor qualified to carry out these functions. There must be adequate safeguards to any such

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[277] www.oxfam.org.uk/policy/papers/asym2002/summary.htm

[278] Response to the White paper. Available from www.ilpa.org.uk under "Latest News"

systems, information is accurate and properly interpreted and that they have acted with appropriate discretion.

3. The *Nationality Immigration and Asylum Bill*

Clause 96 of the *Nationality Immigration and Asylum Bill* will enable the Secretary of State to operate an ATC scheme. The Explanatory Notes to the Bill envisage that the scheme will require carriers to check the details of passengers travelling to the UK against information on a Home Office database. This will be to confirm that passengers pose no known immigration or security risk, and to confirm that their documents are in order.[279]

The Secretary of State will be able to make regulations which require a carrier who brings a person to the UK without the required authority, to pay a penalty.[280] In particular, the Bill will allow for the regulations to make similar provision as currently exists under the carriers' liability legislation.[281]

The Secretary of State will be able to set up different ATC schemes according to the class of carrier and also to the type of passenger. This means that passengers defined by a specific nationality may be subject to an ATC scheme.[282] He will also be able to operate different schemes for different purposes. The Bill provides that the grant of ATC under the scheme does not mean that the passenger has been granted leave to enter or remain in the UK.[283] The Regulations under this section must be made by statutory instrument subject to positive approval by the House of Parliament.

D. Provision of information on physical characteristics

1. The Current Law

Under the current law, certain classes of people may have their fingerprints taken, and may be required to provide other information on their physical characteristics. These classes of people include:[284]

- Any person who fails to produce a valid ID document or passport upon arrival in the UK
- any person who has been refused leave to enter but who has been temporarily admitted, if an immigration officer suspects that the person will break any of the conditions of his temporary admission (for example residence or reporting).

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279 Paragraph 170 Bill 119-EN
280 Clause 96(1)
281 Further information on the Carriers' Liability Legislation can be found in the Library's Standard Note "Carriers' Liability and the Standard Penalty" SN/HA/1049. This note includes a discussion on the recent court case questioning the legality of the carriers' liability provisions.
282 Clause 96(3)
283 Clause 96(8)
284 Section 141 Ibid.

- any person who has been given removal directions under the specified provisions

Sections 142 to 146 of the *Immigration and Asylum Act 1999* contain further measures which, amongst other things, require a person's attendance for the purposes of gathering the physical data, and provide for the destruction of the physical data. Reasonable force may be used to ensure the person's attendance or for the provision of their fingerprints.

2. The *Nationality Immigration and Asylum Bill*

The *Nationality Immigration and Asylum Bill* is intended to supplement the existing powers.[285] It will enable the Secretary of State to set up compulsory and voluntary schemes for the provision of information on physical characteristics for the purposes of an application for leave to enter or remain in the UK.

Clause 97 of the *Nationality Immigration and Asylum Bill* will allow the Secretary of State to set up a compulsory scheme. This may require an immigration application to be accompanied by specific information about the external physical characteristics of the applicant. A person seeking to enter into the UK may also be required to provide such information. An immigration application is defined as application for entry clearance, leave to enter or leave to remain, or a variation of leave to enter or leave to remain in the UK. The Explanatory Notes explain that the data which may be required includes features of the iris and any other part of the eye. This is consistent with the Government's view, expressed in the White Paper, that "technological solutions" such as iris recognition, should be used to detect and deter clandestine entrants. The Government states that it will also to increase further the effectiveness of control and the speed at which certain passengers will be able to enter the UK:[286]

> **6.16** We will develop processes which allow entry to the UK to be automated by using biometrics technology, such as iris or facial recognition or fingerprints. Use of technology in this way will provide benefits for frequent travellers and those whose applications to travel here have already been accepted by virtue of their visa or leave to remain. The use of a biometric measure would also reduce the incidence of fraud, in that passports and/or UK visas held improperly would not be able to be used to gain entry because of the significantly enhanced security provided by unique biometric identifiers.

Clause 97(3) provides that the power in this clause does not extend to those to whom sections 141 to 146 of the 1999 Act apply. These groups continue to be covered by sections 141 to 146.

Clause 97(4) goes on to specify what the future regulations may provide for in particular. They may require a person to provide information in a specified form. They may require

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[285] Explanatory Note Bill 119-EN Paragraph 175
[286] Page 95 *Secure Borders Safe Haven*

an individual to submit to a specified process in order to record the information. They may provide for what is to happen if the mandatory information is not provided. For example, the application may be disregarded. The regulations may confer a function on an authorised person in connection with this clause. They may regard the authorised person to have regard to a code, which may be specified by the Secretary of State. They may make provision about the use and retention of information provided.

One potentially controversial provision is that the regulations may include permission to use the information for specified purposes which do *not* relate to immigration.[287]

Any future regulations *must* include provision about the destruction of information which is obtained or recorded under these provisions. They *must* require the destruction of the information after ten years. They *must* include provision similar to that contained in the *Immigration and Asylum Act 1999* which provides for the destruction of fingerprints obtained from those subject to immigration control.[288] Similar safeguards for obtaining the information from children as currently exist in relation to taking their fingerprints must be contained in any future regulations.[289]

There is no power to arrest persons who refuse to provide the data, or to use force to obtain the data. This may be contrasted with those who will continue to be covered by sections 141 to 146 of the 1999 Act.

These regulations are to be made by statute and are subject to negative resolution.

Clause 98 provides that the Secretary of State may operate a voluntary scheme for individuals to provide information on their external physical characteristics. This will accelerate the procedure by which these individuals can enter into the UK. Regulations under this section may permit those who participate to be charged a fee. They may also contain safeguards about the use and retention of data.

3. Reactions to the Proposals

The Immigration Law Practitioners' Association

In response to the proposals for the compulsory and voluntary collection of physical data, ILPA say that there are real civil liberties implications. In their view, this is particularly so as regards the right to privacy and data protection, given the proposals for the use of increased technology for detection. ILPA is concerned that there must be adequate safeguards to protect the rights of the individuals.

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[287] Clause 97(4)(g)
[288] Clause 96(5)
[289] Under section 141 of the *Immigration and Asylum Act 1999*

E. Disclosure of Information

1. The White Paper

The White Paper makes the following proposals in relation to disclosure of information:[290]

> **5.18** In performing its law enforcement functions, the Immigration and Nationality Directorate requires information from various other sources to enable it to combat fraud, people trafficking and illegal employment and to locate offenders. The Government is considering whether the powers currently possessed by the Immigration and Nationality Directorate and the Joint Entry Clearance Unit in this important area are adequate to meet the challenges of the early 21st Century. We will decide whether they should be strengthened in the forthcoming legislation. We are examining the degree to which more information might be shared within Government, taking into account the work of the Cabinet Office Performance and Innovation Unit on data sharing, Lord Grabiner's recommendations following his investigation into the informal economy and the degree to which information might be required from a broader range of social players. There is clearly a vital balance to be struck here between the rights of individuals to privacy on the one hand and the wider needs of society on the other. In reaching decisions on these matters, we will take this fully into account.

2. The *Nationality Immigration and Asylum Bill*

The *Nationality Immigration and Asylum Bill* makes provision for the disclosure of information for various immigration purposes. For example information which may help locate a person suspected of committing an immigration offence may have to be disclosed by certain bodies.

The bodies covered by the Bill include Local Authorities, the Inland Revenue, the Police, Medical Inspectors, Employers, and Financial Institutions.

Non-disclosure under these provisions, without a reasonable excuse, may be an offence.[291]

Further explanation on the operation of these provisions can be found in the explanatory Notes.

F. The Compatibility of Part 6 with the Human Rights Act

The Explanatory Notes to the Bill set out the issues about the compatibility of the provisions on detention and removal with the *Human Rights Act 1998*:[292]

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[290] Page 80, *Secure Borders Safe Haven*
[291] Clause 108
[292] Bill 119-EN

Part 6: Immigration Procedure

241. Part 6 contains provision for the collection of data pertaining to physical characteristics. The collection, retention and use of data raise issues under article 8. The Government's view is that these powers are justifiable within Article 8.2 for the prevention of crime and disorder and for the maintenance of an effective immigration control, which is for the economic well-being of the country.

242. Part 6 also contains provision for the disclosure of information to the Secretary of State by public authorities and other persons in specified circumstances. These provisions raise issues under Article 8 but they are limited powers, restricted to circumstances where there is reasonable suspicion that an offence is being committed, and are necessary for the economic well-being of the country and the prevention and detection of crime. The provisions are regarded as proportionate for the purposes for which they are introduced.

The views of other interested parties on the compatibility of the provisions with the Human Rights Act have been considered in this Research Paper as they arise in relation to the White Paper's proposals.

V Offences

A. Introduction

The *Nationality Immigration and Asylum Bill* creates several new criminal offences. The White Paper sets out some of context to the new legislation.[293] According to the Paper, the impetus behind the introduction of the new offences is to tackle organised crime more effectively. In particular, the Government wants to tighten up the laws on "people smuggling." It also wants to prohibit people trafficking where exploitation, including for the purposes of prostitution, is involved. Reform of the law which prohibits illegal working is also an issue. The White Paper makes the distinction between people smuggling where people are brought in with some measure of consent, and people trafficking where people are brought into the UK with the aim to exploit them.

Further discussion on organised crime and immigration can be found in the Library's standard note entitled "Racketeering and People Smuggling."[294]

The Local Government Association supports the Government's proposals to penalise traffickers and smugglers.[295]

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[293] Chapter 5 *Secure Borders, Safe Haven*
[294] SN/HA/1200
[295] Paragraph 30, Response to the White Paper available from: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94

In its initial response to the White Paper, the Joint Council for the Welfare of Immigrants take the view that the White Paper proposals considering issues of fraud, illegal entry and illegal working are "fatally flawed" because they do not consider the reasons why the problems have been increasing in recent years.[296] In their view, the upsurge in organised crime in respect of immigration has emerged out of a failure of those countries receiving migrants and refugees to develop policies and strategies for the proper management of all forms of migration. They go on to say:

> For JCWI, the question of whether a better system to tackle fraud and other forms of illegality can be put in place depends wholly and exclusively on whether open and comprehensive polices for the better management of migration are being operated. By any measure, the immigration policies in place in the UK, and those advocated in this White Paper, continue to fall a long way below this standard.

The JCWI was particularly concerned that any enforcement action should not penalise the victims of traffickers, rackets and exploitative employers.

The Refugee Council observed that the White Paper fails to acknowledge that "many people are forced to resort to human smugglers:"[297]

> A report by the UN Commissioner for Refugees published in July 2000 concluded that the main nationalities being smuggled and trafficked into Europe are those very same nationalities that are recognised as refugees by European countries.

The new offences introduced by the *Nationality Bill* will be considered in more detail below under the following headings:

- Assisting unlawful immigration
- Traffic in prostitution
- Illegal working
- Offences relating to registration cards
- Immigration stamp offences

Part 7 also confers new powers on immigration and police officers to enter and search premises in connection with immigration offences that are examined below.

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[296] Initial Response to the White Paper available online at: www.jcwi.org.uk/whitepaper/jcwiresponse.html

[297] Chapter 5, Response to the White Paper available online from www.refugeecouncil.org.uk/infocentre/asylumprops/cons_response/contents.htm

B. Assisting Unlawful Immigration

1. The current law

Section 25 of the *Immigration Act 1971* makes it an offence to assist unlawful immigration in any of four ways.

Section 25(1) contains three offences. It is an offence to assist illegal entry. It is also an offence to secure or facilitate the entry of an asylum seeker for profit. A third offence is committed by helping a person obtain leave to remain in the UK by deception. The maximum penalty for these offences is ten years imprisonment on indictment and/or a fine. Bona fide organisations which are set up to assist asylum seekers (such as refugee NGOs) are exempt. The offence can be committed outside the UK by one of the specified categories of British citizen. Where the convicted person is the owner of a ship, aircraft or other vessel, the court has the power to order the forfeiture of the ship.[298] Section 25A of the 1971 Act makes provision for a ship or vessel which may be subject to forfeiture under section 25 to be detained. The court may allow the ship to be released upon the payment of a surety in certain circumstances.

The last of the four offences contained in section 25 of the 1971 Act can be found in subsection 2. By this, it is an offence to knowingly harbour an illegal entrant, or a person who has overstayed. The maximum penalty for this offence is 6 months imprisonment and/or a fine on summary conviction.

2. The White Paper

The White Paper sets out its approach to the prevention of "people smuggling" in the following terms:[299]

> A comprehensive approach to organised immigration crime must include having appropriate legislation. We will send out a clear signal that where criminals seek to bring people into the UK illegally, and exploit them, they will face the full force of the law. People smuggling is already a criminal offence but we will make the law stronger and more effective.

It goes on to say later:[300]

> NEW LAWS ON PEOPLE SMUGGLING
>
> 5.24 We will be using forthcoming immigration legislation to strengthen the law on people smuggling. The offence of facilitating illegal entry currently carries a

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[298] Section 25(6) and (7)
[299] Page 83 *Secure Borders, Safe Haven*
[300] Page 84 *Secure Borders, Safe Haven*

> maximum penalty of 10 years' imprisonment. We propose to increase it to match the 14 year maximum for many drug trafficking offences, which is significantly higher than the 8 years recommended by the EU Framework Decision on the facilitation of illegal entry. The law will also penalise those who attempt to benefit from people smuggling, even if they have not been directly involved in it, or who help immigration offenders to remain here unlawfully.
>
> 5.25 We will ensure that the law enables the removal of people who arrive here legally but then try to rely on deception or forged documents in an attempt to obtain further leave. We will also make it an offence to possess counterfeit endorsing stamps of the kind used to grant leave to enter or remain.

3. Response to the White Paper

Immigration Law Practitioners' Association

ILPA state that a 14 year prison term, as suggested in the Paper, is wholly inappropriate for a person who assists an individual to escape persecution. In its view, the Government should introduce a "not for gain" defence for those who do not profit from assisting someone enter the UK.[301]

4. The *Nationality, Immigration and Asylum Bill*

Clause 112 of the *Nationality Immigration and Asylum Bill* will substitute a new section 25, 25A, 25B, and 25C into the 1971 Act.

a. The new section 25

A person will commit an offence if he knowingly facilitates the breach of immigration law by an individual who is not an EU citizen. It will also be an offence for a person to do anything which he has reasonable cause to believe may facilitate the breach of immigration law by such a person. Thus a person may commit an offence of helping unlawful immigration even when the assisted individual does not actually manage to breach the law, for example, because he is apprehended.

Under the Bill, "immigration law" means the law of a Member State which controls the entitlement of non-nationals to enter the State, to travel within it, or to remain in the State. As such the new offence will be broader than the existing offence under the 1971 Act under which it is only an offence to breach the immigration laws of the UK.

As the offence will require a breach, or an attempted breach, of immigration law, it will be necessary for the criminal court which is trying the person to determine what the immigration law is in a Member State. For evidential purposes, when a Government of a

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[301] Page 19, response to the White Paper, available online from www.ilpa.org.uk under "Latest News"

Member State issues a document which certifies the law in that State, it will be admissible in the court proceedings, and it will be conclusive evidence of the law.[302]

The Bill provides that the offence may be committed by anything done within the UK. It may be committed outside the UK by an individual who is a one of the categories of British citizen, including British subjects and protected persons.[303] The categories will be the same as under the old section 25 of the 1971 Act, except for the addition of British nationals (overseas). This is a form of nationality which was created by the *Hong Kong Act 1985*. British nationals (overseas) also used to be classed as British dependent territories citizens. Since 1997, they no longer are. This has meant that since 1997, British nationals (overseas) have not been included in the list of those who can be prosecuted for assisting illegal entry offences under the 1971 Act. The addition of British nationals (overseas) to the categories of citizens who can be prosecuted for such offences will rectify the position.

A person who is found guilty of the new offence may be sentenced to a maximum of 14 years imprisonment and/or a fine on indictment, or 6 months imprisonment and/or a fine[304] on summary conviction.

The Explanatory Notes to the Bill state that the new section 25 will enable the UK to comply with article 27 of the Schengen Convention. It will also assist compliance with a European Directive on Unauthorised Entry, Transit and Residence which has yet to be adopted formally.[305]

There will be no separate offence of harbouring an illegal entrant (as there is under the existing section 25(2)). The Explanatory Note states that such conduct will now fall within the general offence contained in the new section 25. The effect of this will be that the maximum penalty for harbouring an illegal immigrant will rise from 6 months to 14 years.

5. The new section 25A

Clause 112 will introduce a new section 25A into the 1971 Act which will make it an offence to help an asylum seeker enter the UK. This offence will be committed when a person knowingly facilitates the entry of an individual, for profit, who he knows or has reasonable cause to suspect is an asylum seeker. This will replace identical offence in the existing section 25(1)(b). The new section 25A will maintain the existing position so that persons from organisations (such as NGOs) who assist asylum seekers are exempt from these provisions.[306] As with an offence under the new section 25, an offence under this

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[302] New section 25(3) 1971 Act
[303] New section 25(4) and (5) 1971 Act
[304] Not exceeding the statutory maximum
[305] Paragraph 195 Bill 119-EN
[306] New section 25A(3)

section can be committed within the UK, or outside the UK by one of the specified categories of British citizen. The maximum penalty is 14 years imprisonment for a conviction on indictment and/or an unlimited fine, or 6 months and/or a fine on summary conviction.[307]

6. The new section 25B

The new section 25B contains the offence of knowingly facilitating a breach of a deportation order in force against a citizen of the European Union. An offence will also be committed when a person does anything which he has reasonable cause to believe will facilitate a breach of a deportation order in force against a European Union citizen. This would presumably cover the situation where help is given, but a breach is not actual committed. This might occur, for example, because a person is apprehended before the breach can take place. As with the other offences introduced by **Clause 112** discussed immediately above, the offence may be committed outside of the UK by a person who falls into one of the specified categories of British citizen. The maximum penalty is 14 years on indictment and/or a fine, or 6 months imprisonment and/or a fine on summary conviction.

7. The new section 25C

This new section provides for the confiscation of a vehicle, ship or aircraft. These are in almost the same terms as those currently contained in the 1971 Act. The existing provisions will be extended so that if the person who is convicted is the secretary of a company which owned the vehicle, that vehicle may be liable to confiscation. This is in addition to liability to forfeiture when the director or manager of a company who owns the vehicle is convicted, as exists under the current section 25 of the 1971 Act.

C. Trafficking in Prostitution

a. Background

"People trafficking" involves transporting a person into a country for the purposes of exploitation. The exploitation may be sexual, and it may involve either adults or children.[308]

The problem of people trafficking was examined in the Home Office Report *Setting the Boundaries – Reforming the Law on Sex Offences*.[309]

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[307] There is a possible misprint in this section. The new section 25A(4) provides that section 25(7) of the 1971 Act applies for the purposes of section 25A. It is not clear what this refers to, as the new section 25 does not appear to have a subsection 7.

[308] The White Paper also considers the situation where people are exploited for employment.

[309] Chapter 7, July 2000, Home Office available from: www.homeoffice.gov.uk/cpd/sou/vol1main.pdf

> **7.5.1** Trafficking for sexual exploitation involves several elements. Firstly it requires the recruitment of people from one place to work in another. Traditionally this has been understood to bring people in from one country to another, but there is no reason why the movement of people within a country from one geographical location to another (say Newcastle to London) should not be considered to be a form of trafficking. The recruiting process may involve deception as to the nature of the work: individuals sometimes believe that they are being recruited to act as domestic staff, waitresses, hairdressers, etc., whilst others are fully aware that they are to be offered for prostitution. Even if it is understood that they will work in prostitution, there is often deception relating to the conditions of work, and in particular the amount of money that can be earned. Often trafficking from abroad is arranged as a 'package' with travel, accommodation and support services in the UK. This can create a form of debt bondage that can be expressed in monetary terms or in a requirement to service a large number of clients in a given time.

The White Paper explains the phenomenon of trafficking as follows:[310]

> People trafficking is transporting people in order to exploit them, using deception, intimidation or coercion. Those who can truly be described as trafficking victims have usually been treated as little more than a commodity. The exploitation may take the form of bonded labour or servitude which violates their legal or human rights. It may be commercial sexual exploitation. It is often accompanied by violence, or threats of violence, against the victim or their family. The victim may agree to a deal which includes entry into the UK and work on arrival. They then find that their wages are largely diverted to pay off 'debts' to the criminals, and that they have been deceived as to the nature and conditions of the work. Trafficking usually involves a breach of immigration law – either illegal entry, or overstaying. When it does, it can make the victim more vulnerable because they are reluctant to seek help.

The Home Office report stated that there was increasing evidence to suggest that people trafficking is a growing area of transnational organised crime.[311] The Internal Office of Migration estimated that in 1995 half a million women were trafficked into the EU.[312] The first major UK research on trafficking in the UK estimated that between 142 and 1420 women a year were trafficked into UK to work in the sex industry.[313] Although in a recent PQ, Bob Ainsworth stated that "forming an accurate estimate of the levels of trafficking in people is problematic due to the hidden nature of the act" and that there is

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310 Page 77 *Secure Borders, Safe Haven*

311 Page 123 Ibid.

312 Page 123 Ibid.

172 Dr Liz Kelly and Linda Regan, Child & Women Abuse Studies Unit, University of North London, draft report, 'Stopping Traffic'. The numbers take as a baseline how many women came to the attention of the police, and then multiply by various factors to reach an assessment of the wider problem.

currently no accurate, reliable data in the UK or EU beyond the estimate in the Home Office report.[314]

b. The Current Law

There is no specific law against trafficking people into the UK. However, a number of the existing sexual offences have been used to successfully prosecute traffickers. These include the following offences. Sections 30 and 31 of the *Sexual Offences Act 1956* prohibit a man from living on the earnings of a prostitute, and a woman from exercising control over a prostitute respectively. Section 25(1) of the *Immigration Act 1971* prohibits illegal entry, although the Home Office report states that this is often too technical to use as it can be difficult to prove. Fraud, forgery, false imprisonment can be used, in addition to offences of sexual and physical violence. According to the report, however, the sentences were very low in practice. Eighteen months imprisonment was common even when criminal organisations were involved.[315]

The report reviewed the effectiveness of the present regime and concluded that it was varied across the experience of the police forces:[316]

> **7.2.2** We had mixed evidence of the effectiveness of the present offences ss30 and 31 of the 956 Act. The offences are complex and not readily understood. Those police forces with dedicated Vice Units who developed an expertise in the offences found them relatively straightforward and effective. Other forces without that degree of specialist knowledge found them too complex to be readily used. Police forces have to identify what priority to give to policing this area in the context of other conflicting priorities. We also noted that s30 places a reverse burden of proof on the defendant in certain circumstances to show he was not living off the earnings of a prostitute. This places a heavy burden on the defendant and raises fair trial questions under the ECHR. This provision has been considered in Strasbourg and found not to be a violation, but the issue of whether a reverse burden is justifiable needs consideration.
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> **7.2.3** Some of the other existing offences in the Sexual Offences Act 1956 (s22 causing prostitution of women; s24 detention of woman in brothel or any other premises etc.) are very little used. In part, this may be because they carry low maximum penalties: two years' imprisonment, as opposed to seven years' imprisonment for living on the earnings or controlling a prostitute. Another reason is the fact that some of these offences rely heavily on the victims being willing to come forward and give evidence in court. This is a particular problem in relation to those who have been trafficked into this country. They are often too terrified to come forward on the basis that either the loved ones in their country of origin may be at risk, or that their families might be told of the work which they

[314] HL Deb 15th April 2002 764W
[315] Page 124 Ibid.
[316] Ibid.

> have been doing in this country, which can, in some instances, put the victims themselves at risk of harm when they return home.
>
> **7.2.4** A number of people pointed out that there were few effective provisions in the law relating to the pimping or sexual exploitation of children. S28 Sexual Offences Act 1956 (offence of causing prostitution of a girl under 16) was very limited in its scope as it could only apply to a person in charge of the child, and it had a very low penalty. It was suggested that there should be increased focus on those who buy the services of children, such as the kerb-crawlers who looked for children and vulnerable young people. In this context the Government's commitment to provide a specific power of arrest for the police (which would apply to all acts of kerb-crawling involving adults as well as children and vulnerable young people), was welcomed by most but not all commentators; some thought it would reduce the safety of women working on the street.

The debate on this issue is reproduced in the Volume 2 appendix H8 of the Home Office report. Contributors felt there were too few prosecutions under the existing legislation.

As a result of the review, the Home Office report concluded that there should be a specific trafficking offence. This offence would involve bringing or enabling a person to move from one place to another for the purpose of commercial sexual exploitation for reward.[317]

c. The White Paper

The White Paper sets out the Government's proposals for reform:[318]

> NEW LAWS ON TRAFFICKING FOR SEXUAL EXPLOITATION
>
> **5.27** This unacceptable crime was covered by a comprehensive review of the law on sex offences which the Government published in July 2000. Amongst its recommendations was a proposed new offence of trafficking for the purpose of commercial sexual exploitation.
>
> **5.28** Existing laws already cover this area but they are out of date and the penalties generally are low. Following responses to public consultation, we are considering what changes to the law are necessary to strengthen the legal framework for tackling these evils. We intend to bring forward wide-ranging changes to the law to deal with trafficking for commercial sexual exploitation both domestically and internationally. In the short-term, however, we are determined to close the loophole that allows foreign and EU nationals of whatever sex or age to be brought to the UK for the purposes of sexual exploitation. We will use the forthcoming immigration legislation to introduce a new offence of trafficking for the purposes of sexual exploitation as a stopgap

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317 Recommendation 49, Page 132 Ibid.
318 Page 85 *Secure Borders, Safe Haven*

pending the major reform. This will carry a heavy maximum penalty of 14 years' imprisonment.

d. Reactions to the proposal

ILPA welcome the proposal for a new offence of trafficking for the purposes of sexual exploitation. They stress, however, the importance of introducing detailed anti trafficking legislation as soon as possible which includes trafficking for labour exploitation.[319] They also state that the primary concern in any legislation should be the welfare of the victim. Specialised agencies need to be set up to provide secure accommodation, advice and support.

JCWI is also concerned with the victims of traffickers.[320] It notes that the White Paper promises measures to "deal appropriately and compassionately with victims of traffickers" and "help to those trapped in conditions of gross exploitation." JCWI then suggest the possibility of an amnesty policy for irregular migrants which, it says, has been used successfully in other countries.

e. The Nationality Bill

The *Nationality Immigration and Asylum Bill* contains six separate offences. The offences are intended to prohibit all those who traffic an individual at all stages from arrival into the UK, whilst in the UK, to facilitating the individual's departure from the UK. A person will commit an offence if he intends to exercise control over the individual himself, or if he believes someone else will do so.

Under **Clause 113(1)**, a person will commit an offence if he arranges or facilitates **the arrival in the UK** of an individual and he intends to exercise control over prostitution by the individual in the UK or elsewhere. The Bill will also make it an offence for a person to arrange or facilitate an individual to come to the UK when he believes that another person is likely to exercise control over prostitution by the individual in the UK or elsewhere.

Clause 113(2) will make it a separate offence for a person to arrange or facilitate travel **within the UK** of an individual who has arrived in the UK in circumstances where an offence under **clause 113(1)** has been committed. This is provided the person who arranges travel in the UK intends to exercise control over prostitution by the individual, or believe that someone else is likely to do so.

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[319] Page 20, Responses to the White Paper available online under "Latest News" from: www.ilpa.org.uk

[320] Initial response to the White Paper, available online from www.jcwi.org.uk/whitepaper/jcwiresponse.html

Clause 113(3) will prohibit a person from arranging or facilitating the departure from the UK of an individual when he intends to exercise control over prostitution by the individual, or believes that another person is likely to do so.

For the purposes of the offences, a person exercises control over prostitution by another if, for the purposes of gain, he exercises control, direction or influence over the prostitute's movements in a way that shows he is aiding, abetting or compelling the prostitution.

The maximum penalty will be 14 years imprisonment and/or an unlimited fine after conviction on indictment. The penalty on summary conviction will be a maximum of 6 months and a fine not exceeding the statutory maximum.

Clause 114 provides that any of the **clause 113** offences may be committed by anything done in the UK. They may be committed outside the UK by one of the specified categories of British citizen, or by a body incorporated under UK law. In addition, those who are convicted of the offence will be liable to the forfeiture of any vehicle used to commit the crime as under the new section 25C of the 1971 Act.[321]

Clause 114(4) provides that the trafficking offence shall be included in Schedule 4 of the *Criminal Justice and Court Services Act 2000*. This means that those convicted of this offence against a person under 18 who are sentenced to at least 12 months imprisonment will be disqualified from future work with children. Breach of such a disqualification order is a criminal offence.

D. Unlawful Working

a. Current Law

The current prohibition on illegal working is contained in section 8 of the *Asylum and Immigration Act 1996*. Under this, it is an offence to employ a person who has not been legally admitted under the Immigration Rules, and is permitted to work by the terms of his admission. An employer has a defence if he can show that before the employment began, the employee showed him one of the specified documents that confirmed he was legally in this country, and entitled to work. The employer must have retained the document, or a copy of it. He must have believed the document to be genuine. The maximum penalty is £5,000 for each illegal worker.

The Government has stated that the measures have not proved to be an effective deterrent.[322] No people were successfully prosecuted in 1997, only 1 in 1998, 9 in 1999 with a provisional figure of 23 in 2000.

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[321] As inserted by the *Nationality Immigration and Asylum Bill* Clause 112

[322] Page 79 *Secure Borders Safe Haven*

In 2001, a Ministerial Working Group was established, chaired by Lord Rooker, to look at the problem.

b. The White Paper

The White Paper suggests that those who are in the country illegally are vulnerable to exploitation by traffickers who may force them to work for "unacceptably low wages."[323] Employees may have to work below the minimum wage, while employers also avoided their responsibilities of welfare provision, safety requirements or paying tax and NI contributions. The Paper states that such employers gained an advantage over legitimate employers. As a result legitimate employers may be driven out of business. The Government is also concerned that the availability of illegal work will attract migrants to come to the UK. It observed that there was no accurate way of estimating the numbers involved.

The White Paper proposes that the present enforcement arrangements should be improved in a number of ways. Firstly, the type of documents which are acceptable evidence of a person's legal working status will be reduced. The Government says that the introduction of the Application Registration "smart" card will provide better safeguards against fraud and forgery. It intends to improve the enforcement capacity of the Immigration Service, who will work with specialist police teams. Joint operations will be mounted to tackle illegal working. The *Proceeds of Crime Bill* will be used to confiscate the profits of illegal working from employers. New penalties in respect of people smuggling will apply to all those who assist illegal immigrants. Finally, the security of National Insurance Numbers will be improved.

c. Response to the White Paper

The Immigration Law Practitioners' Association

ILPA say that it is necessary to distinguish between the offence committed by the employers by exploitation and poor working conditions, and the situation of those working illegally. In ILPA's view, the latter case has arisen because of the failure of the Government to provide accessible channels for legal migration. They say that this is particularly so especially in the low skilled categories, where workers are needed but are vulnerable to exploitation. ILPA welcome the Government's statement in the Paper that it will ensure legitimate labour routes to the UK through managed migration schemes. However, it observes that nothing in the proposals for the Paper gives effect to that aim.[324]

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[323] Page 77 *Secure Borders Safe Haven*

[324] Page 19, Response to the White Paper, available online at: www.ilpa.org.uk under "Latest News"

ILPA also express concern that section 8 of the *Asylum and Immigration Act 1996* which contains the current illegal employment offence leads to discriminatory practices by employers, contrary to the *Race Relations Act 1976*.[325] They point out that those who are entitled to work in the UK do not necessarily have the required documentation to support this. Furthermore, they question whether most employers will have the equipment to read the biometric information on the smart cards.

In respect of greater joint enforcement action taken by police and immigration officers, ILPA stress that it is important that efforts made by the police to build good race relations are not undermined by such action.[326]

Finally, they feel that it is essential for the wider issues of labour migration policy to be considered by the Ministerial Working Group, rather than simply trying to prevent illegal working outside of this broader context.[327]

d. The Nationality Bill

Clause 115 will amend the employers' defence under section 8 of the *Asylum and Immigration Act 1996*. It will be a defence to the charge of employing an illegal worker for an employer to show that he has complied with the requirement set down by order of the Secretary of State. Such an order may require the production of a number of specified documents, which may be retained, copied or recorded. The Bill will extend the offence to make each partner of a partnership liable for the commission of the offence by the other partners. **Clause 115(4)** provides ancillary powers that will enable immigration officers to enter premises in order to arrest, enter and search the premises under a warrant.

E. Registration Card Offences

1. Background – ID cards

At the beginning of September 2001, the *Guardian* discussed the possibility that a form of identity cards might be introduced for asylum seekers.[328] They reported that the Home Affairs Select Committee, after studying the immigration problems around the Channel, strongly backed the introduction of a voluntary entitlement card. This could be used to access treatment in a hospital, or welfare benefits. The article then went on to report that the then Home Secretary, Jack Straw, "was not impressed" by the idea as a card which began as voluntary card would soon become compulsory. The high cost and difficulty of producing such "high-tech" devices was also reportedly a factor that was considered by the previous Home Secretary. This would have to include the appropriate "reading" devices to check whether the presented card was genuine. In addition, it was reported, the

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[325] Ibid.
[326] Page 20 Ibid.
[327] Ibid.
[328] *ID Cards may solve Asylum Crisis* A Travis, 6th September 2001

whole of Whitehall would have to introduce comprehensive data sharing arrangements if the Government was going to deliver on its promise to open access across all public services. The article went on to say that "officially, the Home Office is keeping an open mind on the subject." The article reported that "a compulsory identity card [for the whole population] is now a non-starter."

Some days later, in the aftermath of the terrorist attacks on the World Trade Centre on September 11th, the introduction of a compulsory national identity card became a key issue. The *Guardian* reported that compulsory identity cards were being considered "very seriously" alongside the package of measures to combat the threat of terrorism.[329] It was reported that ministers would combine a compulsory identity card with a "citizen's access card" which would provide entitlement to public service such as health care, schooling and welfare. A News of the World/Mori Poll at the time showed that 86% of those polled supported some form of ID card.

By the end of September, it was reported that opposition to the introduction of ID cards was growing.[330] Charles Kennedy was reported as saying that rushed law changes supported by all UK parties tended to result in bad legislation. He said that ID cards had failed to stop terrorism in other countries, such as France, Spain and Italy, where they were already in place. In response, David Blunkett was reported as saying that he would not be rushed into making a "snap announcement" on ID cards. He said:

> I'm giving it fairly high priority in terms of the discussions and the consideration behind the scenes. There are much broader issues about entitlement and citizenship and not merely security in terms of some form of identity card which we are looking at very seriously indeed.

He also stated that improvements in electronic fingerprint technology or "iris prints" meant the threat of forgery would not make the system redundant.

A pamphlet containing arguments against the introduction of ID cards was published jointly by the civil liberty and democracy groups Liberty and Charter 88.[331] In respect of cards in an immigration context, Mark Littlewood, the Director of Campaigns for Liberty observed:

> There is no good evidence that ID cards would help tackle illegal immigration or domestic crime. There is, however, ample evidence that compulsory ID cards –

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329 *Asylum seekers to be given ID cards*, A Travis and L Ward, 24th September 2001.

330 BBC News, ID cards opposition grows, 24th September 2001. Available from: http://news.bbc.co.uk/hi/english/uk_politics/newsid_1559000/1559245.stm
See also *Compulsory ID cards to access schools, hospitals*, K Ahmed, The Observer, 30th September 2001.

331 *ID Cards: arguments against*, available from www.charter88.org.uk/id_cards/

> and the police powers that could accompany them – can do real damage to community relations.

Chris Lawrence-Pietroni, the Deputy Director of Charter 88 said that identity cards are limited in their use because, as with passports, they can be forged.

In his statement to the Common on 29th October 2001, David Blunkett stated that smart cards *for asylum seekers* would be phased in from January 2002.[332]

> Instead of the standard acknowledgement letter, which is used for identification, smart cards will be phased in from January to ensure entitlement. That will guarantee identification and tackle fraud. Using new biometric techniques including fingerprints and photographs, we will provide both security and certainty.

Later in the debate, Diane Abbott asked whether the new smart cards would mean that people would be stopped on the street and asked for their card.[333] The Home Secretary replied "the cards would not allow people to be stopped on the street; they are not about policing." Later, Harry Cohen enquired:[334]

> I have many constituents from ethnic minority backgrounds with full and proper rights to stay in this country. Will the Home Secretary assure me that they will not be asked repeatedly to show an entitlement card that they neither have nor need?

David Blunkett responded:

> The answer is absolutely no – the card is for a specific purpose. As I said earlier, it will supersede the letter, which is unsatisfactory, not secure and clearly leads to fraud in many cases.

A *Guardian* report on 30th October 2001 speculated that the asylum cards could provide a trial run for a national identity card scheme.[335]

From 31st January 2002, new asylum applicants at the Asylum Screening Unit in Croydon have received a card carrying his photograph and fingerprint information. The card also carries the name, date of birth and nationality of the applicant. The place and date of issue, information regarding dependants, the language spoken and whether the holder is entitled to work are also recorded. The card includes a secure updatable chip for additional information such as the holder's address.[336] Application Registration Cards

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[332] HL Deb 29th October 2002 Col 628
[333] HL Deb 29th October 2001 Col 637
[334] Ibid. Col 647
[335] *Asylum Seekers to be given ID cards,* A Travis, 30th October 2002.
[336] Current News, *Application Registration Cards for asylum seekers launched,* Refugee Council web-site:

(ARC) replace the Standard Acknowledgement Letters which are currently used for the identification of asylum seekers.

Then, in early February, the BBC reported again that the new asylum cards may pave the way to national "entitlement cards."[337] Liberty told the BBC that it would oppose the plans. Former Labour Home Office Minister, Mike O'Brien, was reported as saying that the ID cards could be easily forged and would cost £1 billion to introduce. Home Office Minister Angela Eagle is reported as saying that the cards would have their advantages. It would be easy to establish identity, allowing quicker access to both financial and state public services. She said that the disadvantages are that "people may feel that there is too much information around; that they feel they are being watched." The BBC reported Mr Blunkett as saying the main use of cards would be to demonstrate what entitlement people have to state services, not to identify them. It would also be to address fraud. The Liberal Democrat Home Affairs spokesman also opposed the idea of identity cards which could become "show on demand."[338]

2. The White Paper

With the publication of the White Paper, *Secure Borders, Safe Haven*, in February, the issue of entitlement cards to the whole population was specifically addressed.[339] It observes that immediately after September 11th, the Government did not plan to introduce an ID card scheme, but that the policy was being kept under review. The Paper goes on to say that the Government is considering a universal entitlement card that would allow people to prove their identity more easily. It would also provide access to public services. The Government envisage that such a scheme could combat fraud and illegal working.

The Paper goes on to say:

> …the introduction of an entitlement card would be a major step and that [the Government] would not proceed without consulting widely and considering all views expressed very carefully.

The Paper states that the Government intends to publish a consultation paper in the Spring or early Summer.

Chapter 4 of the White Paper sets out the uses of the Application Registration Cards for asylum seekers.[340]

> 4.26 The ARC will be used in a number of situations:

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www.refugeecouncil.org.uk/news/index.htm

337 *Move towards Compulsory ID cards,* BBC web-site http://news.bbc.co.uk/hi/english/uk_politics/newsid_1802000/1802847.stm

338 See also *Compulsory ID cards are back on the agenda,* A Travis, The Guardian, 6th February 2002

339 Page 82 *Secure Borders Safe Haven*

340 Page 54 Ibid.

> • It will become a routine part of the reporting procedure and will contain details specifying the next date on which the holder must report.
> • Those claiming NASS support will be expected to present an ARC at the Post Office at the time of payment.
> • They will be a much more reliable form of identification for use in everyday transactions such as registering with a doctor.
> • They will assist immigration officers to establish identity during enforcement operations.

The White Paper confirms that an audit will be conducted of all those asylum seekers who hold the old Standard Acknowledgement Letter and replace them with the new smart card.

In its response to the White Paper, the Immigration Law Practitioners' Association state their view on the Application Registration Cards for asylum seekers:[341]

> ILPA presumes that these cards will also act as a form of identity that will allow applicants to open a bank account and apply for a driving licence, which has not been possible with the current Standard Acknowledgement Letter. We also presume that these cards will not be required to access medical or educational facilities.

The Local Government Association also respond to the introduction of the smart cards for asylum seekers:[342]

> 16. The LGA supports the introduction of ARC cards to replace Standard Acknowledgement Letters. In particular the Association welcomes the opportunity they provide for enabling asylum seekers to access their entire subsistence allowance in cash. If the cards could be read by the Benefits Agency it would provide the opportunity to eliminate some of the paperwork and delays associated with giving successful asylum applications access to benefits and housing. The Government should look at this as a possible way forward. However, the LGA would not support the wider use of these cards as a passport for other local authority and NHS services.

The Refugee Council respond to the introduction of the smart cards by recognising that it is necessary for asylum seekers to have a robust form of identification if they are to access certain services:

> **4.25-4.27** …Our main concern is that service providers may demand to see the ARC before they allow the asylum seeker access to health, education, or even

[341] Page 7, Response to White Paper. Available online from www.ilpa.org.uk under "Latest News"
[342] Page 3, Response to White Paper. Available online from: www.lga.gov.uk/Briefing.asp?&lsection=0&id=SX931C-A780DA94

> police services. We do not wish to see the ARC being requested in situations where ID is currently not a prerequisite for everyone.
>
> We accept the Government's reassurance that the ARC will not be used as substitute for cash or as an entitlement card, nor that asylum seekers can be required to produce the ARC on demand. However, the technology behind the ARC makes these things, and more, possible. We therefore want to see legislative safeguards to ensure that the use of these cards cannot be changed in the future without full parliamentary scrutiny.
>
> It is possible that asylum seekers will be without an ARC, if a card is lost or stolen or being updated with information such as permission to work. In such cases, there would need to be sufficient flexibility to enable individuals to continue to access support and other services.

One article in the local press reported the views of asylum seekers subject to the regime:[343]

> One asylum seeker said: "I escaped torture from Saddam's murderous regime. I did not come to England to get rich but to preserve my life. By labelling me a fraudster and a criminal can no longer make a distinction in my mind between the persecution I escaped and the racism I am currently experiencing in this country."
>
> "It leaves me with a great sadness because I believe that I have a lot to contribute." Roya Rafati, a refugee and black and minority ethnic worker who moved to the UK from Iran 25 years ago, believes the card will create more problems for asylum seekers. "They are being singled out and targeted," she said. "The card will make them more vulnerable and a cast off from the rest of society and it puts asylum seekers at risk.

3. The *Nationality, Immigration and Asylum Bill*

As discussed, the new smart cards are already being phased in, and there is no need for legislation. The *Nationality Immigration and Asylum Bill*, however, will create a number of new offences relating to the creation, possession and use of false or altered registration cards.

A person will commit an offence if he:[344]

> (a) makes a false registration card;
> (b) alters a registration card with intent to deceive or to enable another to deceive;

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[343] *Asylum Seekers Reject Cards*, Plymouth's Western Morning News, 1st February 2002
[344] Clause 116

(c) has a false or altered registration card in his possession without reasonable excuse;
(d) uses or attempts to use a false registration card for a purpose for which a registration card is issued;
(e) uses or attempts to use an altered registration card with intent to deceive;
(f) makes an article designed to be used in making a false registration card;
(g) makes an article designed to be used in altering a registration card with intent to deceive or enable another to deceive;
(h) has an article within paragraph (f) or (g) in his possession without reasonable excuse.

The maximum custodial sentence for the offences involving possession of a false or altered card, or an article designed to make one, is two years on indictment. The maximum custodial sentence for the other offences (including making, altering and using the card) is ten years imprisonment.[345]

The Secretary of State will be able to alter the definition of a registration card by order which must be approved by resolution of both Houses of Parliament.[346]

Clause 118 will make falsification of a registration card an arrestable offence so that immigration officers or police officers will be able to arrest someone who they suspect has committed the offence, without a warrant. They will also be able to enter premises with a warrant to search for and arrest a person who has committed the offence, or to search for evidence that this offence has been committed.

F. Offences Concerning Immigration Stamps

Clause 117 contains the new offence of possession of an immigration stamp, or replica immigration stamp without reasonable excuse. The Explanatory Notes to the Bill explain:

> 212. Clause 117 creates an offence of possession of an immigration stamp, whether genuine or a replica, without a reasonable excuse. The offence relates to stamps used by immigration officers or officers acting on behalf of the Secretary of State to endorse documents, when exercising their powers under the Immigration Acts. It is punishable by a maximum custodial sentence of two years, a fine or both.

Clause 118 will make possession of an immigration stamp an arrestable offence so that immigration officers or police officers will be able to arrest someone who they suspect has committed the offence, without a warrant. They will also be able to enter premises

[345] The new section 26A(6) of the *Immigration Act 1971* inserted by Clause 116
[346] The new section 26A(7) of the *Immigration Act 1971* inserted by Clause 116

with a warrant to search for and arrest a person who has committed the offence, or to search for evidence that this offence has been committed.

G. Powers of Entry and Search

In the White Paper, the Government indicated that it would "improve the enforcement capacity and capability of the Immigration Service, to make tackling illegal working a higher priority and developing joint Immigration Service and police teams with specialist skills to target illegal working."

The *Nationality, Immigration and Asylum Bill* will give immigration officers and police officers the power to enter business premises to search for and arrest those who are in the UK illegally. Such persons will include: illegal entrants; those who have obtained leave to enter or remain in the UK by deception; and persons who are liable to be detained under the 1971 Act because their leave to remain has been suspended, or because they are required to submit to an interview by an Immigration Officer. [347]

The power may only be exercised to the extent that it is reasonably required to search for and arrest an illegal immigrant.[348] Furthermore, the officer must have reasonable grounds for believing that the person whom he is seeking is on the premises.[349] Authority to use this power must have been given by the Secretary of State (through someone with the rank of Assistant Director of Immigration) or a Chief Superintendent of Police (in the case of a police officer). Such an authorisation is valid for seven days after it has been given.[350]

In order to exercise the power, the officer must produce identification at the premises which confirms his status provided that the premises are occupied.[351]

Clause 119 also provides that an officer may use reasonable force if necessary in order to enter business premises to arrest. Reasonable force may also be used in order to fingerprint a person who is subject to immigration control or to require such a person to attend for the purpose of fingerprinting.

Clause 120 of the Bill provides two new powers to search a business premises for evidence of illegal working; one without a warrant and one with. A search without a warrant can be conducted when an officer has entered a business premises under powers provided by **Clause 119** and has arrested a person who is illegally in the UK, or if he believes a person on the premises is liable to arrest on this basis. The officer may then search the premises if he believes that an immigration employment offence has been

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[347] Clause 119 inserts section 28CA into the *Immigration Act 1971*
[348] The new section 28CA(2)(a) of the 1971 Act
[349] The new section 28CA(2)(b) of the 1971 Act
[350] The new section 28CA(2)(c) of the 1971 Act

committed by the arrested person.[352] The officer must reasonably believe that employee records will be found on the premises that will be of substantial value in proving the immigration employment offence. The officer has the power to seize and retain any employee records that he finds. He may do so if the records provide evidence of illegal working *or* of a fraudulent claim of support by an asylum seeker.[353] Unlike search *with* a warrant discussed immediately below, the Bill does not explicitly prohibit the seizure of privileged documents. Although, under the established law in relation to such documents, the officers would not be entitled to seize privileged documents in any event.

The officer may only search the premises to the extent reasonably required to find the employee records. He must have identified himself to establish his status, provided the premises are occupied. Furthermore, it must not be practical to communicate with a person entitled to grant access to records, and access to the records must not be possible unless a warrant is produced.

Clause 120 also provides the separate power to enable an immigration officer to apply to a magistrate for a warrant to search business premises. The magistrate must be satisfied that the employer has provided inaccurate or incomplete information under his duty to disclose information[354] and that employee records which will provide some of the missing information will be found on the premises. In addition, it must not be practical to communicate with someone who can grant access to the premises or the records; that access to the premises or the records will be refused without a warrant. Finally, it must be shown that the purposes of the search will be frustrated or seriously prejudiced unless an immigration officer can secure immediate entry to the premises. The Bill specifically provides that a warrant will not be granted to access records which are protected by legal or other privilege (in contrast with the wording of search *without* a warrant considered above).[355]

As with searches conducted without a warrant, the officer will have the power to seize and retain any employee records which he finds, except privileged documents. He may do so if the records provide evidence of illegal working OR of fraudulent claim of support by an asylum seeker.[356]

Clause 121 define "business dwelling" and "employee records" for the purposes of **Clause 119** and **120**.

H. Compatibility of Part 7 with the Human Rights Act

The Explanatory Notes to the Bill set out the issues about the compatibility of the provisions on detention and removal with the *Human Rights Act 1998*:

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[351] The new section 28CA(2)(d) of the 1971 Act
[352] i.e. an offence under section 8 of the *Asylum and Immigration Act 1996* discussed above under *
[353] The new section 28FA(3) inserted into the 1971 Act by Clause 120
[354] Contained in Clause 105 of the *Nationality Bill* discussed above at **IV:E**
[355] The new section 28FB(4) inserted into the 1971 Act by Clause 120
[356] The new section 28FB(6) inserted into the 1971 Act by Clause 120

> **Part 7: Offences**
>
> 243. Part 7 of the Bill contains provisions on powers of search and entry. These powers raise issues under Article 8. The powers are necessary for the prevention of crime. There are a number of safeguards in relation to the use of the powers. In the Government's view, the powers are justifiable under Article 8.2.

The views of other interested parties on the compatibility of the provisions with the Human Rights Act have been considered in this Research Paper as they arise in relation to the White paper's proposals.

VI General Reactions to the *Nationality, Immigration and Asylum* Bill

A. Newspaper report 13 April 2002

An article in by the *Guardian* on 13 April 2002 reported some of the reactions to the Bill itself (as opposed to the White Paper).[357]

It reported:

> Critics expressed alarm at the apparent ratcheting up of the terms of the debate and – with barely a month allowed for discussion of February's White Paper which trailed most of the Bill's content – accused Mr Blunkett of paying lip-service to consultation.

Habib Rahman, the Chief Executive of the Joint Council for the Welfare of Immigrants said "the Bill is even harsher than the White Paper."

John Wadham, the director of Liberty, said "The Government's proposals to crack down on those who abuse the asylum system is in real danger of cracking down on those who genuinely need it – those who have been persecuted in other countries, those who have a right to be here. It will inevitably affect black and ethnic minority people more than whites."

B. Joint response 12 April 2002

In a joint response from Amnesty International, Oxfam and the Refugee Council, Nick Hardwick of the Refugee Council said: "Though the Government has shown a clear intention to address issues around economic migration into the UK to meet labour shortages, there are still big gaps in relation to asylum which must be filled if Britain is to

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[357] *Blunkett Lays Down the Law on Asylum* Page 7

honour its obligation to provide safety and dignity to those forced by persecution to flee their own countries."[358]

The three agencies then go on to address several areas of concern:

- a failure to guarantee asylum seekers access to legal advice despite having said in the White Paper that it is "committed to ensuring access to quality legal advice" at all stages
- new measures that would remove an increased number of child asylum seekers from mainstream education provision
- no provision of automatic bail hearing to challenge the detention of asylum seekers, despite a commitment to allow this in the 1999 Act.
- Clear concern – despite the welcome removal of vouchers – that the cash based system perpetuates an unjust "poverty level" support provision roughly 30% less than that for non-asylum seekers
- Absence of measures to address shortcomings in the asylum application decision-making procedure.

C. Joint statement 22 April 2002

The British Medical Association, Children's Society, Churches Commission for Racial Justice, Family Welfare Association, Oxfam, Refugee Council, Save the Children and the Transport and General Workers' Union have issued a joint press statement on behalf of asylum seekers and refugees, as well as the communities in which they are relocated.[359]

> We share a belief that the right to asylum should be valued and preserved by all nations. Our organisations have been at the forefront of attempts to reform the UK asylum system to ensure greater fairness in the way decisions are made and that support for refugees and asylum seekers is based on their needs and is in keeping with our responsibilities under the 1951 UN Convention on the rights of refugees.

The organisations say in their press release that asylum policy developments in recent years have caused them alarm, both in their capacity as civil society organisations and as service providers. They state that the focus on deterrence of asylum seekers has seen a more punitive philosophy take hold of government policy towards asylum seekers. However, they observe, while this has had no effect in reducing numbers of asylum applications, it has had "a detrimental effect on the well-being of asylum seekers, on community relations and, ultimately, stretched frontline services to breaking point."

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[358] www.refugeecouncil.org.uk/news/april2002/relea053.htm

[359] 22 April 2002

The organisations say that they welcomed the new White Paper, *Secure Borders, Safe Haven*, as an opportunity to reform the asylum system.

> Civil society – be it local government, social services, the healthcare system or the voluntary sector – has paid a hefty price in attempting to meet the demands placed upon them by the now well-documented, short-comings of the present system. We recognise the importance of a credible and fair asylum process, both in relation to the determination of cases and to support arrangements.

The organisations then put forward the joint statement on their views as to what key values should underpin a sustainable system of support. They observe that, based on their experiences, asylum policy will only be successful if it seeks to:

1. Build strong and safe communities
2. Promote inclusion
3. Secure the best interests of children
4. Promote good health
5. Support independence and integration through work

The press release then outlines what the organisations believe a successful asylum policy should contain under each of these headings.

1. Building strong and safe communities

The organisations make the following recommendations:

> Asylum seekers in need of accommodation have often been dispersed to areas that have serious socio-economic problems. Forced dispersal to areas that are ill-prepared to provide appropriate support has prompted, in some instances, hostile behaviour, racial tension and social unrest.
>
> Dispersal, where it has been made to work through effective leadership and investment, is more cost effective and community-oriented than the implementation of a system of centres for asylum seekers, which in themselves are already generating hostility from communities resistant to hosting them. Given that the dispersal system is likely to remain as the cornerstone of the asylum accommodation system we would hope that the government would seek to develop best practice and use this to ensure a more consistent, sensitive approach to dispersal across the country.
>
> As part of this, residents need to be better prepared for new arrivals to their communities. The highly charged media representation of asylum seekers and refugees has undermined public understanding of the reasons why people leave their country. Communities – from schools right through to local authorities – need to be encouraged to develop a more realistic understanding of asylum matters. NASS is charged with developing effective communication strategies for dispersal areas and we urge that it is obliged to act upon this responsibility.

Any expansion of the detention facilities would mark a regressive step for asylum policy. We believe that the practice of using detention facilities to hold asylum seekers is inhumane, and it is especially inappropriate for families.

- The asylum support system needs more investment and greater involvement of local authorities. Local authorities have a key role, both in terms of helping to ensure asylum seekers are appropriately placed, and in the planning and delivery of key services, which must be reflected in Government funding priorities.
- Supporting asylum seekers in the community – rather than accommodating them in centres – should be the objective of the government's asylum accommodation policy.
- With regard to dispersal, asylum seekers should have more choice over where they are accommodated.
- Detention should only be used in exceptional circumstances. We are opposed to any moves that would lead to the expansion of detention facilities, the detention of families, and the use of the prison system to hold asylum seekers.

2. Promoting inclusion

The organisations welcome the commitment to the end of the voucher system. However, they raise concerns about the Application Registration "smart" cards:

While the Home Secretary has given assurances to Parliament that the smart card would ensure access to some cash element, concerns do remain that this policy could ultimately be socially divisive. It is for this reason that we would be opposed to moves that would see the ARC used in any determination of asylum seekers' entitlement to universal services such as health and education.

The policy of requiring asylum seekers to live on an income far below the poverty line has also caused widespread, unnecessary hardship. The Government's own Social Exclusion Unit (SEU) considers low income to be a key risk factor for social exclusion, yet asylum seeking adults continue to be made to live on 70% of the basic levels of Income Support and are denied access to a range of safety-net benefits, like milk tokens and vitamins. Nobody in our society should be forced to live on below the level that is officially regarded as the minimum necessary to meet basic living needs, and we call upon the government to ensure that asylum support is up-rated to full Income Support levels with immediate effect.

- The ARC cards should not cause asylum seekers to be excluded from mainstream society, for instance by becoming a 'passport' to health and education services for asylum seekers. The functions of the ARC cards and the requirements for asylum seekers to show them should be defined in legislation.
- The level of support provided to allow asylum seekers to meet their basic living should be set and maintained at the same as level as Income Support.
- Asylum seekers to have access to the full range of passported benefits.
- The SEU's work programme should include a report to Government and Parliament on asylum seekers and refugees.

3. Securing the best interests of the child

The organisations comment that refugee children are particularly vulnerable, and their needs and interests require special and separate attention:

> At a crucial time in their lives, they will have suffered significant dislocation and upheaval, including disruption of any education.
>
> The asylum process must not in any way compromise or militate against the proper care and development of children. In particular, children who have had experiences of torture, political violence and other forms of persecution, have specific developmental and health needs, which must be fully catered for in all aspects of the asylum process and support arrangements.
>
> We support this Government's broader agenda of tackling poverty and promoting social inclusion and cohesion – and we believe those who oppose the social exclusion of children must also oppose the social exclusion of asylum seeking children. We would, therefore, regard moves to segregate refugee and asylum seeking children from the mainstream – such as educating them in centres, not state schools – to be regressive in the extreme.
>
> Furthermore, all children in the UK should be explicitly guaranteed the same rights. The UN Conventions on the Rights of the Child provide the framework for the treatment of refugee children, and, in particular, that the best interests of the child is the key consideration in all policy decisions relating to the children of refugees and asylum seekers. In view of this, we call upon the Government to withdraw its Reservation to the UN Convention on the Rights of the Child.
>
> • Refugee and asylum seeking children must be treated as children first and foremost
> • Refugee and asylum seeking children should enjoy the same protection, and the same promotion of their welfare as other children.
> • Refugee and asylum seeking children should have access to full-time, mainstream education.
> • Refugee and asylum seeking children should never be detained.

4. Promoting good health

The organisations observe that Government strategies to promote good health are being undermined by the problems asylum seekers and refugees face.

> Asylum seekers are at risk of poor health because they live in poverty, an established risk factor for ill health. They are also more likely to live in poor quality housing and may be under severe mental health pressures resulting from torture, dislocation and stress over the outcome of their asylum claims. Meeting the needs that arise from this has put considerable stresses onto the health and social care sectors.

> Some doctors and dentists are reluctant to take on asylum seekers because they feel that they do not have the training or resources to attend to them adequately. The public health implications of this for society as a whole of this are considerable, an issue that has already been raised by the medical professionals. To care effectively for asylum seekers, health and social services need additional resources, including training and support to provide sensitive, responsive assistance. Yet even in this challenging environment, good practice has been developed, particularly where there has been a constructive relationship between the healthcare services and local authorities.
>
> The health needs of asylum seekers have been compromised by the failure to resource the dispersal system. In order for the dispersal policy to work, dispersal areas need to have adequate social and health structures in place before people are dispersed, and those with specific health needs should not be sent to areas where there are insufficient sources of help.
>
> • We welcome the Government's commitment to produce guidelines on working with asylum seekers for health professionals. However, we believe that many of the health problems faced by asylum seekers and refugees are a result of their social exclusion. These problems need to be tackled, as outlined above.
> • The Department of Health should fund and promote accessible and appropriate health services for asylum seekers, as well as to support appropriate health promotion initiatives.

5. Supporting independence and integration through work

The organisations note that unemployment rates among refugees are "unacceptably high" - double the rate of ethnic minorities generally. In their view, it is difficult to reconcile this with the levels of experience, skills, qualification and motivation which refugees have to offer. They go on to comment:

> In its consultation paper on the integration into society of refugees, the Government acknowledged that those who are not active participants in economic life of the country become increasingly marginalised. Refugees need measures that will help them rebuild their lives, contribute to the economy and make successful settlement more likely.
>
> However, the Government refuses to allow asylum seekers to work (for the first 6 months) or even access vocational training courses. We cannot see the sense in reinforcing the social exclusion of asylum seekers through these restrictions only to have to undo that damage once, as happens to a significant proportion, they are recognised as refugees by the Government.
>
> Furthermore, the Home Secretary's intention to aid the integration of refugees is in danger of being undermined by a lack of resources on the ground. In our experience, failure to learn, for example, English, has not been because of reluctance on the part of refugees but because of a severe shortage of teaching provision, appropriate courses and the money to attend college or even buy course books.

- Asylum seekers should have access to vocational training courses and should be allowed to work without having to wait for 6 months.
- The provision of English language classes should also be significantly improved, in both quality and quantity.
- We urge the Government to consider piloting programmes to help refugees move through a staged progression, from arrival to employability, and then employment, ensuring today's refugees can contribute to contribute to the UK economy just as generations of refugees before them have done.

6. Conclusion

It is the organisations' view that "past asylum policy has been long on immediate political fixes and short on understanding and compassion, resulting in problems across society and four changes of approach in ten years."

They express their hope that the Government will take the opportunity to provide stability for and restore credibility to the asylum system. In their view, change after change has generated confusion and other support services have paid a hefty price in attempting to adapt and meet needs. They also believe that it has also damaged the credibility of the asylum process in the eyes of the public.

The organisations conclude that their experience of the asylum system is that it has "stigmatised and excluded some of the most vulnerable in our society, divided communities and stretched service provision to the extreme." The participants express the hope that the Government will "engage in meaningful dialogue with civil society organisations about how the problems have arisen and how they can be avoided for the future."