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Asylum and Immigration: the 2003 Bill

This paper provides some background to and analysis of the Government's *Asylum and Immigration (Treatment of Claimants, etc.) Bill* [Bill 5 of 2003-04], which is due to be debated on second reading in the House of Commons on Wednesday 17 December 2003.

Measures in the Bill which have proved particularly controversial include those on: the removal of support for families which may lead to children being taken into care; the removal of appeal rights; and the charges for immigration applications.

Relevant to the Bill but not included in it are the government's proposed changes to legal aid for asylum and immigration, which were announced on the same day that the Bill was published. These changes do not need primary legislation, and are discussed in a separate Library Research Paper (RP03/89).

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Summary of main points

Background

The Government's stated policy is to encourage legal migration to the UK and establish new routes for overseas citizens to work here legally, while attempting to limit the number of asylum applicants and trying to prevent unfounded asylum claims and appeals. The number of asylum applications has indeed fallen this year, and the number of people arriving on work permits has risen, continuing the trend of recent years. The Government also wants to speed up the systems for dealing with asylum and immigration applications, appeals and removals, and to reduce the overall costs.

Asylum and Immigration Bill

The *Asylum and Immigration (Treatment of Claimants, etc.) Bill* is the fifth asylum and immigration bill in eleven years, and the third since Labour came to power in 1997. It was published on 27 November 2003 following a very short consultation exercise entitled *New legislative proposals on asylum reform*. The Bill also contains further measures which were not included in the consultation.

This Bill is relatively short, but covers several major and complex areas. It would:

- create further criminal offences for asylum seekers who arrive with no documents or who refuse to co-operate with attempts to remove them by applying for new ones;
- extend the definitions of 'safe countries';
- restructure the immigration and asylum appeals system and remove a number of layers of appeals;
- withdraw asylum and other support from families who do not leave within two weeks of being declared in a position to do so;
- create a new criminal offence of trafficking for labour exploitation or organ removal;
- give immigration officers more powers of arrest, search and seizure (not covered in this paper);
- introduce electronic tagging for asylum and immigration detainees;
- allow higher fees to be charged for immigration applications; and
- give the Immigration Services Commissioner more powers to regulate immigration advisers.

The Bill covers all of the UK, with the exception of the new trafficking offence which would not apply in Scotland. One provision (assessing the credibility of an asylum or human rights claimant) could also be extended by Order in Council to the Isle of Man and/or any of the Channel Islands, where immigration and asylum laws are based on those of the UK.

The Government's Explanatory Notes on the Bill (Bill 5-EN) provide an insight into how the Government intends the provisions to work. They refer to the Home Secretary's statement on 25 November 2003 that 'in my view, the provisions of the Asylum and Immigration (Treatment of Claimants, etc.) Bill are compatible with the Convention rights', and include reference to a saving provision which would counteract a possible breach of Convention rights in relation to withdrawing support (paras 135 and 137).

The House of Commons Home Affairs Committee will be publishing a short report on the Bill before Second Reading.

Legal aid (see Library Research Paper 03/89, 12 December 2003)

The Government published a consultation paper entitled *Public Consultation on Proposed Changes to Publicly Funded Immigration and Asylum Work* in June 2003. Also issued for consultation, by the Legal Services Commission, was a 'draft immigration specification'. The main proposals in the Consultation Paper included:

- fixing a maximum number of hours of legal advice allowed for each client,
- identifying each client by a unique file number, and
- introducing a system of accreditation which would apply to all those providing advice on immigration and asylum matters through public funding.

The Constitutional Affairs Committee conducted a brief enquiry to examine the proposals set out in the Consultation Paper and concluded that the Department of Constitutional Affairs "needs to undertake serious further work before it is able to put any sensible proposals on the table". The Government put forward revised proposals in a memorandum to the Committee dated 24 October 2003 and in a Written Ministerial Statement dated 27 November 2003 - the same day that the *Asylum and Immigration (Treatment of Claimants, etc.) Bill* was published.

These proposals are discussed in Library Research Paper 03/89.

Reactions

Only a few of the Government's latest proposals have been widely welcomed - for instance the new trafficking offence, increasing the Immigration Service Commissioner's powers, and introducing a unique file number and an accreditation system for legal aid. Typically, although there has been acceptance of some of the Government's aims, the United Nations High Commissioner for Refugees, non-governmental organisations and the press have been critical of its means. Especially controversial have been: the removal of support for families which may lead to children being taken into care; the removal of appeal rights; and the charges for immigration applications.

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I Introduction

A. Levels of asylum and immigration

The Government's overarching policy on immigration and asylum is to encourage legal migration while trying to prevent illegal entry and unfounded asylum claims:

> The Government is determined that there should be a balanced approach in asylum and immigration policy, so that we bear down on those who would seek to enter the UK illegally and who make unfounded claims, whilst ensuring effective help for refugees who need our protection. Our policy on asylum has to be seen in the wider context of managed migration, through which we are opening up routes for people to enter the UK legally. That is why we are committed to continued reform, as necessary, of the asylum system to ensure that those in need of protection are identified quickly and those who try to exploit the system are prevented from doing so.
>
> [...]
>
> The Government is also concerned to ensure that community relations are not adversely affected by what may be seen in many quarters as continuing evasion and exploitation of immigration and asylum controls at significant cost to the taxpayer[1]

The UNHCR acknowledges that ensuring a balance between penalising individuals who abused the asylum system and protecting those in need is a legitimate concern of governments, as is providing fair and efficient procedures. However, it has highlighted the problems of doing so, and offered its help to the UK Government in achieving these goals.[2]

An increasing number of people are now being granted work permits under the existing scheme. Since 1993, the number of work permit holders given leave to enter the UK has risen sharply, from 48,000 in 1993 to 120,115 in 2002. Until 1997, most work permit holders entered the UK for the purposes of employment for less than 12 months. Since then more have entered for employment for a year or more. In 2002, 51,525 permit holders entered the UK for employment for a year or more compared with 34,095 for 12 months or less. The number of dependants of work permit holders given leave to enter the UK has doubled since 1993, from 14,890 to 34,495 in 2002. By comparison, the number of asylum seekers recognised as refugees or given exceptional leave to remain each year has been significantly lower. In 1993, 12,715 principal applicants (i.e. excluding dependants) were recognised or

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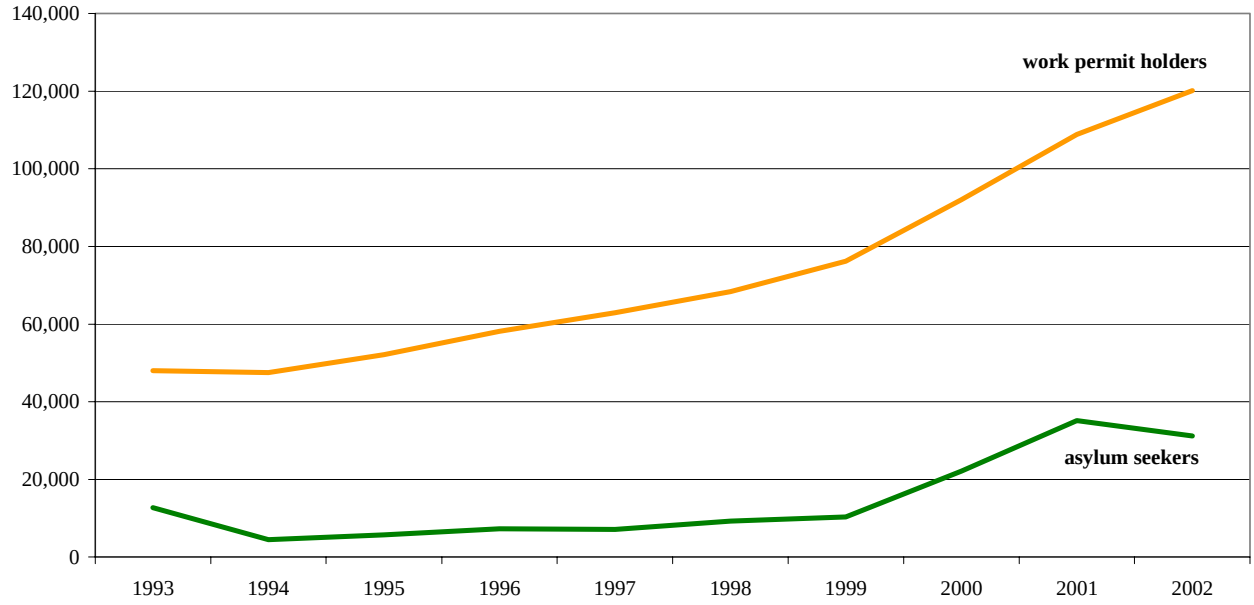
1 Home Office/Department for Constitutional Affairs, *New legislative proposals on asylum reform*, 27 October 2003: http://www.ind.homeoffice.gov.uk/default.asp?pageid=4444

2 UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, paras 3-5: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

given Exceptional Leave to Remain (ELR),[3] falling back to 7,100 in 1997, rising again to 31,225 by 2002 (see below).[4]

Work permit holders given leave to enter UK and asylum seekers recognised/given ELR, 1993-2002



The Government is also opening up new routes for foreign nationals who want to work legally in the UK, information on which is set out in a new Home Office website, www.workingintheuk.gov.uk. These include:

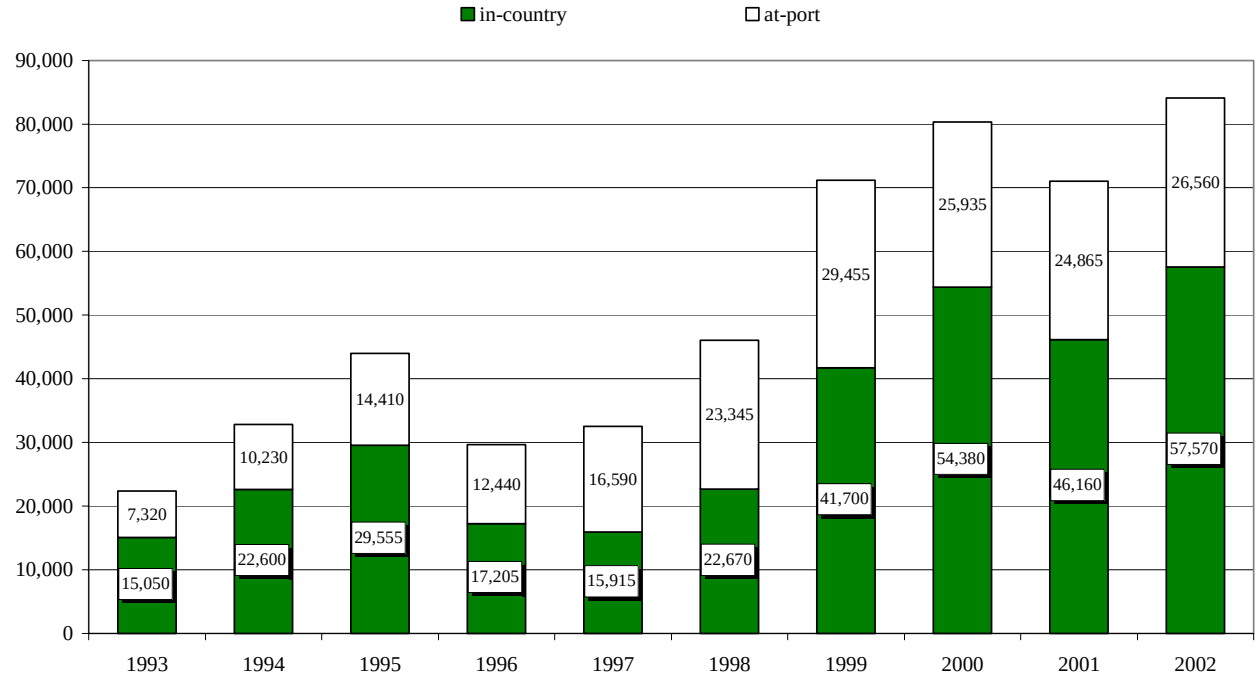
- **Highly Skilled Migrants Programme:** In July 2003, the Home Office revealed in answer to a written parliamentary question that, since the introduction of the Highly Skilled Migrants Programme in January 2002, Work Permits UK have approved 2,700 applications. However, statistics are not available for the number of those approved applicants who were subsequently granted entry into the UK.[5]
- **Seasonal Agricultural Workers Scheme:** In October 2003, the Home Office Minister, Beverley Hughes, announced that 25,000 places were available on the Seasonal Agricultural Workers Scheme and that most of these places were expected to be filled.[6]
- **Sectors based scheme:** The Home Office have announced a quota of 20,000 places in 2003-04 on the sectors based scheme, designed to allow low-skilled workers from outside the European Economic Area (EEA) to enter the United Kingdom to take short-term or casual jobs in the hospitality and food manufacturing industries. In the

3 now replaced by humanitarian protection, discretionary leave and leave outside the rules
4 Home Office *Control of Immigration Statistics 2002* (Cm 6053)
5 HC Deb 11 July 2003 c1051w
6 HC Deb 6 October 2003 c1250w

month between the launch of the scheme at the end of May 2003 and the end of June, 1,214 work permits had been issued for workers in the food manufacturing sector and 55 for workers in the hospitality sector.[7]

The number of asylum applications in the UK has been falling recently, after a number of years during which it rose steadily. In 2001, the number of applications fell by 10% to 71,025 - the first yearly reduction in applications since 1996 - but in 2002, the number of applications rose again to 84,130 (see the table below). This represented an increase of 18% compared to 2001. The following chart shows the numbers of applications for asylum both at port and in country from 1993 to 2002. The figures relate to principal applicants only and, therefore, do not show numbers of dependants.

Applications for asylum by location of application, 1993 to 2002



In February 2003, the Home Secretary announced his firm commitment to reducing the number of asylum claims to 50 per cent of their level immediately before the *Nationality, Immigration and Asylum Act 2002* received Royal Assent. In October 2002 there had been 8,770 asylum applications. In September 2003 there were 4,225 applications, and while the number for the third quarter of 2003 (11,955) was 13% higher than the previous quarter, it was also only 54% of the number in the same quarter in 2002. The Home Office claims this meets the target to halve the number of asylum applicants, as levels are now consistently far below the levels reported last year. To what extent this is a result of government policy is,

[7] HC Deb 21 October 2003 c554w

however, debatable: asylum applications fell by 20% across the industrialised world in the first nine months of 2003 compared with the same period in 2002.[8]

As the following table shows, in 2002 Home Office initial decisions allowed 36% of that year's asylum applicants to stay in the UK, either as refugees (12%) or on Exceptional Leave to Remain (24%). However, this does not represent the entire success rate, as a substantial proportion of applicants who are refused at the initial stage go on to win an appeal. The Refugee Council estimated in 2001 that 51% of asylum seekers are successful either at different appeal stages or where the Home Office reversed its own refusal decision.[9]

Principal applicants for asylum 1986-2003
Initial decisions - cases considered under normal procedures

		Decisions					
	Persons applying for asylum	**Recognised as refugee and granted asylum**		**Not recognised as refugee but given ELR**		**Refused**	
	Number	*Number*	*% of all initial decisions*	*Number*	*% of all initial decisions*	*Number*	*% of all initial decisions*
1986	4,266	348	12%	2,102	70%	533	18%
1987	4,256	266	11%	1,531	63%	635	26%
1988	3,998	628	23%	1,578	58%	496	18%
1989	11,640	2,210	32%	3,860	55%	890	13%
1990	26,205	920	23%	2,400	60%	705	18%
1991	44,840	505	8%	2,190	36%	3,380	56%
1992	24,605	1,115	3%	15,325	44%	18,465	53%
1993	22,370	1,590	7%	11,125	48%	10,690	46%
1994	32,830	825	4%	3,660	17%	16,500	79%
1995	43,965	1,295	5%	4,410	16%	21,300	79%
1996	29,640	2,240	6%	5,055	13%	31,670	81%
1997	32,500	3,985	11%	3,115	9%	28,945	80%
1998	46,015	5,345	17%	3,910	12%	22,315	71%
1999	71,160	7,815	37%	2,465	12%	11,025	52%
2000	80,315	10,605	12%	11,475	13%	67,910	75%
2001	71,025	13,495	11%	21,635	17%	91,565	72%
2002	84,130	10,205	12%	21,020	24%	56,060	64%
2003 Q1	16,000	1,520	7%	3,970	19%	15,275	74%
2003 Q2	10,585	1,010	7%	1,070*	7%*	12,575	86%
2003 Q3	11,985	775	5%	960*	6%*	12,475	88%

Note: Decisions do not necessarily relate to applications made during the same period. Data does not include dependents

* From April 2003, exceptional leave to remain was replaced with humanitarian protection (40 applications granted in Q3 2003) and discretionary leave (920 applications granted in Q3 2003)

Sources: Home Office *Asylum Statistics*

[8] UNHCR *Asylum Levels and Trends in Industrialised Countries – January to September 2003* (November 2003): http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=STATISTICS&id=3fa12c344&page=statistics

A significant number of refusals lead to appeals, which are heard in the first instance by adjudicators of the Immigration Appellate Authority. Detailed figures on asylum appeals are given in a separate section below (section V), but, by way of illustration, the total number of appeals determined by adjudicators during 2002 represented 92% of the number of applications for asylum refused during that year (albeit the appeals may or may not have related to initial decisions made in that period). However, the overall number of appeal applications has been falling recently. In 2002, the Home Office received 51,695 applications for appeal against initial asylum decisions, a decrease of 30% on the number of appeals lodged in 2001. Adjudicators determined 64,405 asylum appeals (principal appellants only) in 2002, 48% higher than the number considered during in 2001 (43,415).[10] 22% of appeals were allowed, 76% were dismissed, and 3% were withdrawn or abandoned.

Some adjudicator decisions are then appealed to the Immigration Appeals Tribunal, either by the applicant or by the Home Office. The number of applications for leave to appeal to the IAT has risen sharply in recent years, from 1,410 applications for leave in 1994 to 25,600 applicants in 2002. 22,825 applications for leave to appeal were determined in 2002 and most were refused - only 5,565 were actually heard by a full Tribunal in 2002. Most appeals heard by the IAT are either allowed or remitted back to IAA adjudicators. In 2002, 620 (11%) were allowed, 2,700 (49%) were remitted back to the adjudicators and 2,015 (36%) were refused.

In addition to the appeals process, there are also many applications for judicial review of actions by the Home Office, adjudicators and the Tribunal. In 2002, there were 2,980 decisions regarding leave to move for judicial review of asylum decisions, of which 260 (9%) were given leave. 30% of those cases given leave were subsequently allowed as a result of judicial review hearings while 67% were dismissed and 3% withdrawn.

Most people who are removed from the UK, or who depart voluntarily after enforcement action has been initiated against them, are non-asylum applicants. In 2002, of the 65,540 people who were subject to enforcement action under the 1971 or 1999 Acts and who were removed or departed voluntarily from the UK, 54,720 were non-asylum cases (up by 37% compared with 2001) and 10,740 were principal asylum applicants (up by 16%).[11] 895 principal asylum applicants left the UK in 2002 under the Assisted Voluntary Returns Programmes, down by 9% compared with the previous year (980).

In June 2001, the Home Secretary set a target of removing 2,500 refused asylum seekers each month, leading to the removal of 30,000 per year by Spring 2003.[12] This position was abandoned in September 2002 when the Home Secretary confirmed to the Home Affairs

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9 Refugee Council Statistics 2002: http://www.refugeecouncil.org.uk/infocentre/stats/stats004.htm

10 Home Office Quarterly Asylum Statistics (Q1 2003)

11 ibid; Home Office *Control of Immigration Statistics 2002* (Cm 6053)

12 Home Office *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Cm 5387) (2001)

Committee that the target was "massively over-ambitious" and "was not achievable".[13] A total of 12,925 principal applicants and their dependants were removed from the UK or departed voluntarily in the first nine months of 2003.

B. Costs of asylum and immigration system

The table below details the actual and budgeted expenditure of the Immigration and Nationality Directorate (IND) for the years 1999-00 and 2000-01. IND has not published an Annual Report since 2000-01.

Immigration and Nationality Directorate Budget and Expenditure

			£million
	Actual 1999-00	**Budget 2000-01**	**Actual 2000-01**
Pay costs	144.0	227.4	193.6
Non pay costs	84.7	200.5	193.9
Total running costs	228.7	427.9	387.5
Other current expenditure	9.8	9.3	12.5
Grants	11.5	40.0	35.8
Capital	18.3	125.4	64.7
Receipts	-10.3	-13.3	-16.6
Total non running costs	29.3	161.4	96.4
Total operating costs	258.0	589.3	483.9
Asylum support costs	535.8	702.0	746.9
Total overall expenditure	793.8	1,291.3	1,230.8

Source: IND Annual Report 2000-01

In a written answer on 30 April 2000, the Home Office Minister, Barbara Roche, provided information on the total operational costs of the Immigration and Nationality Directorate between 1994/95 and 2000/01:[14]

> **Mr. Ennis:** To ask the Secretary of State for the Home Department what the estimated total cost of dealing with asylum seekers' cases was in each of the last seven years. [158800]
>
> **Mrs. Roche:** The costs of dealing with asylum seekers' cases are not distinguished separately from the overall operational costs for Immigration and Nationality

[13] Home Affairs Committee *Minutes of Evidence for Wednesday 18 September 2002* 2001-02 HC 1186 q.86, q.88; see also Home Affairs Committee *Asylum Removals* Fourth Report of Session 2002-03 HC 654-I, especially pp. 13-14

[14] HC Deb, 30 April 2001 c540-41w

Directorate (IND). The total cost of running IND operations over the past seven years is given in the table:

	£ million
1994-95	183
1995-96	199
1996-97	212
1997-98	215
1998-99	209
1999-00	260
2000-01	{1}484

{1} Estimated

Determining the total cost of asylum seekers is more problematic. The Home Office Minister, Beverley Hughes, revealed in answer to a recent parliamentary question along these lines only that the cost of supporting asylum seekers in 2001-02 was £1,046 million:

> **Mrs. Curtis-Thomas:** To ask the Secretary of State for the Home Department how much asylum seekers cost public funds in the last 12 months per head of tax paying population. [132337]
>
> **Beverley Hughes:** The cost of supporting asylum seekers in the last financial year for which final data are available (2001-02) was £1,046 million.[15]

The Home Office outlined the cost of asylum support in 2000-01 (£751 million) in answer to a written parliamentary question from Humfrey Malins[16]

In January 2002, the Home Office detailed the costs of providing accommodation and emergency accommodation in response to a question from Simon Hughes, who was then the Liberal Democrats' front-bench spokesperson on Home Affairs:[17]

> **Simon Hughes:** To ask the Secretary of State for the Home Department what the total cost was of providing (a) accommodation and (b) emergency accommodation under the National Asylum Support Service-run asylum support system in (i) 2000-01 and (ii) in the current financial year to date. [28781]
>
> **Angela Eagle:** The total cost of (a) accommodation paid for directly under contract by the National Asylum Support Service (NASS) for (i) 2000-01 was £54.1 million

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15 HC Deb 30 October 2003 c320w
16 HC Deb 23 October 2002 c333w
17 HC Deb 23 January 2002 c938w

> and for (ii) current year to 30 November £150.1 million, and (b) emergency accommodation for (i) 2000-01 was £27.5 million and for (ii) current year to 30 November £38.2 million. These figures reflect the increased activity undertaken by the NASS since it began operation on the 3 April 2000. Costs in 2000-01 are cash based and for current year resource based. All figures are rounded to nearest £0.1 million.

The costs of providing support to asylum seekers while they await final decisions on their applications were outlined in a written answer on 10 April 2001:[18]

> **Miss Widdecombe:** To ask the Secretary of State for the Home Department what the cost of asylum support is, including unaccompanied minors (a) in the period 2000-01, (b) estimated for the current financial year 2001-02 and (c) estimated for the period 2002-03; and if he will make a statement. [157522]
>
> **Mrs. Roche:** [holding answer 9 April 2001]: Estimated expenditure on asylum support, including unaccompanied asylum seeking minors in 2000-01 is £751 million (estimated final outturn). This is made up of: Grant payments to local authorities for Adult, Families and unaccompanied asylum seeking children--£575 million Support payments by the National Asylum Support Service -- £115 million Payments to Department of Social Service (DSS) for supporting asylum seekers on benefit--£56 million Payments to the Scottish Executive for support to adults and families who applied before April 2000--£5 million. The budget of £702 million for 2000-01 was made up of an original sum of £604 million for asylum support costs together with transfers of £60 million from the Department of Health for the costs of unaccompanied asylum seeking children and £38 million from DSS for Housing Benefit costs. The additional £49 million expenditure was as a result of additional funds being provided to asylum support because of savings elsewhere in the Immigration and Nationality Directorate budget. Provisional estimates for asylum support costs for 2001-02 and 2002-03 were given in my reply of 24 July 2000, Official Report, column 450W, to the hon. Member for Aylesbury (Mr. Lidington). This funding will be reviewed if needed.

Further information regarding the costs of asylum support, including the National Asylum Support Service (NASS) and the voucher scheme was provided in a written answer on 11 December 2000:[19]

> **Mr. Simon Hughes:** To ask the Secretary of State for the Home Department what estimate he made of the administrative costs (a) in total and (b) per asylum seeker of providing support for asylum seekers through (i) the voucher system and (ii) the social security system; what the total cost to date is of administering asylum vouchers; and if he will make a statement. [141707]

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[18] HC Deb, 10 April 2001 c569-70w

[19] HC Deb, 11 December 2000 c52-3w

> **Mrs. Roche:** The total staffing and related costs of the National Asylum Support Service (NASS), which include the administrative costs of the voucher scheme, are estimated as £16 million for 2000-01. Based on an anticipated total of 43,000 applications for support the estimated administrative cost per asylum seeker in 2000-01 is £372. Total staffing and related administrative costs of NASS, including the costs of administering the voucher scheme, assessing applications for support and arranging the dispersal and accommodation of asylum seekers to 30 November 2000 are recorded as £9 million. Vouchers are printed and distributed by third party providers under contract to the Home Office and the costs of this service are commercially confidential. Payments made under the voucher contract to 30 November 2000 are included in the total staffing and related administrative cost. Between 1994 and 1999 the annual administrative costs for income support for asylum seeker claims for one year was estimated to be in the region of £1 million and £2.5 million in 1999-2000. The estimated costs in the current year to the end of October are £0.5 million. These figures, which are rounded to the nearest £0.5 million, are based on the cost of processing new income support claims and maintaining existing cases. Costs per asylum seeker are not available.

Lord Bassam, the Parliamentary Under-Secretary of State at the Home Office, estimated the total cost to public funds for support (including daily needs) of asylum seekers in the 1999/2000 financial year to be £537 million.[20] The Home Secretary provided further information in a written answer on 9 May 2000:[21]

> **Mr. Evans:** To ask the Secretary of State for the Home Department how much his Department spent (i) directly and (ii) indirectly on asylum seekers in (a) 1995, (b) 1996, (c) 1997, (d) 1998 and (e) 1999; and what estimate has been made of expenditure in the year 2000. [119485]
>
> **Mr. Straw:** [holding answer 17 April 2000]: The following amounts have been directly spent on supporting asylum seekers. Expenditure is recorded by financial year and it is not possible to give figures for calendar years.

Direct Costs *£ million*

Benefit	**1995-96**	**1996-97**	**1997-98**	**1998-99**	**1999-2000**
Home Office	--	--	--	--	537
Department of Social Security: Income Support & Jobseeker's Allowance	205	195	150	150	{1}--
Housing Benefit	205	195	145	125	--
Council Tax Benefit	10	10	10	10	--
Department of Health:					

[20] HL Deb, 6 April 2000 c149-50w
[21] HC Deb, 9 May 2000 c332-4w

Adults/Families	--	10	68	170	--
Children	--	3	2	20	52
Total (to nearest £ million)	420	413	375	475	590

{1} Home Office figures for 1999-2000 include the following amounts paid to the Department of Social Security for the cost of asylum support: Income Support and Jobseeker's Allowance--£170 million Housing Benefit--£135 million Council Tax Benefit--£10 million. Note: Figures may not sum due to rounding

The Department of Health did not incur costs of supporting asylum seekers before 1996-97, but from 1996-97 to 1998-99 was responsible for Special Grant payments to local authorities towards the cost of supporting asylum seekers. In 1999-2000, responsibility for grant payments for adult singles and families transferred to the Home Office, with responsibility for unaccompanied asylum-seeking children remaining with the Department of Health.

The Home Office also incurs other costs of dealing with asylum seekers, but these cannot be separated from the overall costs of the Immigration and Nationality Directorate. The following table shows the annual outturn for Immigration and Nationality Directorate, which includes the cost of dealing with asylum seekers. The budgeted amount for 2000-01 has yet to be confirmed.

Indirect Costs

£ million

Year	Amount spent
1995-96	199
1996-97	212
1997-98	215
1998-99	209
1999-00	{1}260

{1} Forecast outturn

The Lord Chancellor's Department also incurs costs in dealing with asylum seekers, but these cannot be separated from the overall running costs of the Immigration Appellate Authority. The following table provides administration costs of the Immigration Appellate Authority, which includes the costs of dealing with asylum seekers but excludes accommodation recruitment and other capital expenses. The budget for 2000-01 has yet to be confirmed.

£ million

Year	Amount spent
1995-96	8.4
1996-97	11.4
1997-98	12.5
1998-99	14.1
1999-00	16.1

> The Department of Social Security estimates that between 1994 and 1999 the annual administrative cost for income support asylum seeker claims was in the region of £1 million. In 1999-2000, the estimated cost is in the region of £2 million.
>
> The Department of Health is unable to quantify the indirect cost of asylum seekers as no data are collected for analysis.
>
> The Department for Education and Employment does not collect information centrally about education, training or employment provision for asylum seekers or their dependants and cannot supply costs spent directly or indirectly from 1995.
>
> The Department for the Environment, Transport and the Regions has no programme of expenditure on asylum seekers and indirect expenditure is not separately identifiable.

The costs of providing welfare benefits to asylum seekers were outlined in a written parliamentary answer to Chris Grayling on 8 January 2002:[22]

> **Chris Grayling:** To ask the Secretary of State for Work and Pensions what the total cost of benefits paid to people applying for asylum in the UK was in 2000-01. [23429]
>
> **Malcolm Wicks:** From 3 April 2000 the Home Office is responsible for supporting and accommodating asylum seekers awaiting a determination of their case. Those asylum seekers in receipt of benefits prior to 3 April 2000 continue to be eligible to claim income support, income-based jobseeker's allowance, housing benefit and council tax benefit. Provisional estimates are that benefit totalling £185 million was paid to these asylum seekers during the financial year 2000-01.

C. Previous Labour consultations and legislation

Since coming to power in 1997, the Labour Government has published six consultation papers on immigration and asylum. These have resulted in two major pieces of legislation in addition to the current Bill, dozens of pieces of secondary legislation and a large number of changes to the Immigration Rules and other policies and practices. This has prompted the comment in a recent legal textbook that:

> The speed of procedural change exhibited by these developments is one of the most significant features of this area of law. Few legal arenas can be more exposed to the pressures brought about by the media and public opinion than this […][23]

In 1998, the Government published consultation papers on the regulation of immigration advisers and on immigration and asylum appeals, which led to the publication of the White

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22 HC Deb 8 January 2002 c693-4w

23 Mark Symes and Peter Jorro, *Asylum Law and Practice*, 2003, preface p viii

Paper *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum*.[24] The subsequent *Immigration and Asylum Act 1999* was largely based on proposals from this white paper.

A little over two years after the 1999 Act was passed another White Paper followed: *Secure Borders, Safe Havens*,[25] which formed the basis of the *Nationality Immigration and Asylum Act 2002* as well as leading to a number of other changes which did not require primary legislation.

While the 2002 Act was still being implemented, the Department for Constitutional Affairs put forward a consultation paper on legal aid for immigration and asylum cases, *Proposed changes to publicly funded immigration and asylum work.* This was published in June 2003[26] and was the subject of a report from the Constitutional Affairs Committee of the House of Commons in October 2003.[27] During the Committee's inquiry, the Government amended its proposals[28] and a recent Written Ministerial Statement has set out how these plans will be taken forward.[29] A companion Library Research Paper, RP03/88, examines these developments, which may have a significant impact on some of the areas covered by the current Bill.

D. Complexity of existing legislation

UK asylum and immigration law is now extremely complex and extensive. A recent *Immigration Law Handbook* which sets out the main texts of UK immigration and asylum law in force as at September 2003 runs to 1083 pages, comprising twelve statutes, the Immigration Rules, four procedure rules, 21 further statutory instruments, 13 pieces of European legislation and nine international conventions etc.[30] This does not include any of the huge volume of case-law in this area.

The framework of the modern legal protection for refugees is based on the 1951 Geneva Convention Relating to the Status of Refugees, and its New York Protocol of 1967. This Convention has no enforcement mechanism, although the United Nations High Commissioner for Refugees (UNHCR) is charged with supervising the application of the

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24 Home Office, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum*, CM 4018, July 1998

25 Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, CM 5387, February 2002

26 http://www.dca.gov.uk/consult/leg-aid/asylum.htm

27 House of Commons Constitutional Affairs Committee *Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work* Fourth Report of Session 2002-03, HC 1171-I and II: http://mirror.parliament.uk/parliamentary_committees/lcdcom/lcdcom_reports_and_publications.cfm

28 The revised ideas are presented in an appendix to the Committee's report: Department for Constitutional Affairs/Legal Services Commission, *Evidence submitted to the Constitutional Affairs Committee*, 24 October 2003, Appendix 1 to HC1171-I (paras 18-24)

29 HC Deb 27 November 2003 cc37-40WS

30 Margaret Phelan and James Gillespie, *Immigration Law Handbook*, 3rd edition 2003

provisions on the Convention and signatory states have undertaken to co-operate with the UNHCR.[31] The UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* is widely recognised as constituting an important source of law, although it does not have the force of law.[32]

The Convention does, however, have a particular status in UK domestic law over and above binding the Government under international law. The *Asylum and Immigration Appeals Act 1993* formally incorporated the Geneva Convention into UK law, to the following extent:

- Section 1 defines an asylum claim as 'a claim made by a person…that it would be contrary to the United Kingdom's obligations under the [1951] Convention for him to be removed from, or required to leave, the United Kingdom'.

- Section 2 states that the Immigration Rules must not be interpreted as allowing the immigration authorities to do anything which would be contrary to the 1951 Convention. The 1951 Convention therefore has primacy over the Rules, by virtue of an act of domestic primary legislation.

- Section 8 enshrined in statute the right of all those refused leave to enter or remain, or who face deportation or removal as illegal entrants or crew members, to appeal on the ground that their removal would be contrary to the UK's obligations under the 1951 Convention (section 8 was repealed but this right was restated in section 69 of the *Immigration and Asylum Act 1999* and subsequently section 84 of the *Nationality, Immigration and Asylum Act 2002*).

Human rights law must also be taken into account throughout the immigration and asylum process, particularly following the implementation of the *Human Rights Act 1998*. Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights is particularly relevant as the Strasbourg and UK courts have consistently held that removing a person to a place where their Article 3 rights might be breached could itself amount to a breach of the Convention. Articles 6 (fair trial), 8 (respect for private and family life) and 9 (freedom of thought, conscience and religion) could also be identified as important in an asylum context.

II October 2003 proposals

On 24 October 2003 the Government announced that the Home Secretary would be 'clearing the decks for tough new asylum measures' by giving Indefinite Leave to Remain in the UK to 15,000 families with outstanding asylum claims.[33] This 'amnesty' is described in a Library

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31 UNHCR state art 8, and Geneva Convention art 35(1)

32 *T v Secretary of State for the Home Department* [1996] Imm AR 443, *per* Lord Lloyd at 479

33 see Home Office press release 295/2003, *Clearing the decks for tough new asylum measures*, 24 October 2003: http://www.homeoffice.gov.uk/n_story.asp?item_id=657

Standard Note,[34] and guidance on the policy has recently been published on the Home Office website.[35]

The following Monday, 27 October 2003, duly saw the announcement of 'tough new measures' in the form of a joint Home Office and Department for Constitutional Affairs consultation paper entitled *New legislative proposals on asylum reform*.[36] Despite its title, the consultation paper's proposals were not restricted to asylum policy: most of its provisions on appeals, undocumented passengers and immigration advisers could apply to immigration as well as asylum cases. However, proposals on safe third countries and on withdrawing support from failed asylum-seeking families relate only to cases involving asylum and/or human rights claims.

Responses to this short letter were requested by 17 November 2003, presumably in order to allow legislation to be announced in the Queen's Speech on 26 November. This three-week consultation period fell considerably short of the twelve weeks specified by the Government's Code of Practice on Written Consultation as the standard minimum period for a consultation.[37] The code allows for shorter consultation periods in certain circumstances:

> 2. There will sometimes be circumstances which unavoidably require a consultation period of less than 12 weeks. Among these may be timetables set out in statute; those unavoidably dictated by EU or other international processes; and those tied to the Budget or other annual financial cycles. Where reconsultation takes place on the basis of amendments made in the light of earlier consultation, a shorter period may also be necessary. 3. The nature of the problem dealt with may also occasionally mean that urgency is in the public interest, though real urgency of this sort is rare.

The Home Secretary had apparently been consulting within the Government and with the judiciary about aspects of these proposals since May 2003.[38]

The House of Commons Home Affairs Committee took evidence about the proposals from Beverley Hughes (the Home Office Minister with responsibility for asylum and immigration) on 19 November 2003. She revealed that the detail had not yet been finalised and discussions were continuing. The uncorrected transcript of those proceedings is available on the Committee's website,[39] and will also appear in the Committee's forthcoming report on the Bill. This report will be published at 00.01 hours on Tuesday 16 December 2003.

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34 SN/HA/2732, *Asylum 'amnesties'*, 7 November 2003

35 http://www.ind.homeoffice.gov.uk/news.asp?NewsID=337

36 Home Office/Department for Constitutional Affairs, *New legislative proposals on asylum reform*, 27 October 2003: http://www.ind.homeoffice.gov.uk/default.asp?pageid=4444

37 Cabinet Office, *Code of Practice on Written Consultation*, November 2000, criterion 5: http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm

38 Beveley Hughes MP, giving oral evidence to the House of Commons Home Affairs Select Committee on 21 November 2003. Uncorrected transcript Q818: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/uc692-ix/uc69202.htm

39 http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/uc692-ix/uc69202.htm

The legislation was presumably at a reasonably advanced stage when the Minister appeared before the Committee, however, as an asylum and immigration Bill was announced in the Queen's Speech a week later and presented to the House of Commons the following day, 27 November 2003. The *Asylum and Immigration (Treatment of Claimants, etc.) Bill* (Bill 5 of 2003-04) would implement nearly all the proposals in the consultation paper, and also includes hitherto unannounced measures on trafficking, electronic tagging and supplementary immigration fees. It does not cover the new legal aid proposals.

III Undocumented passengers

A. Background

The government has announced that it wants to tackle 'the problem of asylum seekers who deliberately destroy or dispose of their documents to make unfounded claims [...and...] to frustrate removal after making unfounded claims'.[40] David Blunkett explained:

> I am also dealing with the problems caused by the majority of asylum seekers who claim not to have travel documents - even those who arrived on planes having needed documents to get on the plane in the first place. The fact is, many destroy them en route because traffickers tell them it's their best chance of staying in UK - by making fraudulent claims and making it difficult to remove them if their claims fail. Most of the time, people need documents to travel. If they won't tell us how they got here without them it will be more difficult for their claim to succeed.[41]

The Immigration and Nationality Directorate estimated that, in the first six months of 2003, around 70% of at-port asylum applicants (est. 5,250) arrived without adequate documentation, of which most were arrivals at airports.[42] In September 2002, the Home Office had reported to the Home Affairs Committee inquiry on Asylum Removals that over 80% of port asylum applicants and 90% of in-country asylum applicants provide no travel documentation or other proof of nationality and identity.[43]

The Home Office memorandum noted two ways of providing travel documents to people who have none:

> 17. The return of failed asylum applicants and others who have no legal basis for remaining in the UK can sometimes be achieved by the use of two types of pro-forma travel documents. The first is the common format EU letter used by EU member

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[40] Home Office/Department for Constitutional Affairs, *New legislative proposals on asylum reform*, 27 October 2003: http://www.ind.homeoffice.gov.uk/default.asp?pageid=4444

[41] Home Office press notice 296/2003, *Asylum measures to build on success in halving numbers*, 27 October 2003: http://www.ind.homeoffice.gov.uk/news.asp?NewsId=326&SectionId=1

[42] Immigration and Nationality Directorate Management Statistics

[43] Home Affairs Committee *Asylum Removals*, 14 April 2003, HC 654 2002-03, Appendix 1: Memorandum submitted by the Home Office, para 16

> states. The number of countries which will not accept this letter has increased over the past two years and now numbers around 28 countries.
>
> The second is the Chicago Convention travel document. The Chicago Convention comes under the control of the International Civil Aviation Organisation (ICAO) and sets standards for air travel. Virtually all countries of the world are members of ICAO and signatories to the Chicago Convention. However, the number of countries failing to honour their obligations as signatories to the Chicago Convention has increased. One of the considerations for issue of the Chicago Convention Document is country of embarkation.
>
> 18. Without travel documentation removal cannot take place. The reluctance of some countries to document their nationals, as well as the propensity for individuals not to co-operate in the process, impacts adversely on the issue of documents, resulting in a major blockage to successful removal.
>
> 19. Some countries have lengthy verification processes before they will issue travel documents. These include the requirement to refer all applications to the relevant authorities in their own countries so that visits can be made by consular officials to the applicant's home town or village. While it is understandable that the authorities in those countries wish to satisfy themselves that the person being returned is indeed one of their citizens, the costs of the delay, for example the cost of support to families and in detention costs where the person is detained, can be considerable.
>
> 20. To help overcome some of these problems a dedicated documentation unit was established 4 years ago. IND officials have in place a programme of liaison visits to Embassies & High Commissions in the United Kingdom, and also to the relevant authorities in the countries themselves. These provide the opportunity to address difficulties in relation to documentation, and foster a better understanding of practices and procedures. The programme is being extended to facilitate the resolution of individual problematic cases.[44]

The UK can prosecute asylum seekers for using false documents under the *Forgery and Counterfeiting Act 1981*[45] and the *Immigration Act 1971*.[46] The number of non-British citizens proceeded against for offences under the 1971 Act relating to false documentation and deception has risen sharply in recent years. In 2001, 114 non-British citizens were proceeded against (compared to 10 in 1999 and 1 in 1997), of whom 107 (94%) were found guilty.[47]

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[44] Home Affairs Committee *Asylum Removals*, 14 April 2003, HC 654 2002-03, Appendix 1: Memorandum submitted by the Home Office

[45] forgery, use and possession of false instruments

[46] sections 24A (deception) and 26(1)(d) (falsification of documents)

[47] Offending and Criminal Justice Group, Home Office; Immigration and Nationality Directorate

In the 1999 case of *Adimi*[48] the Divisional Court held that these prosecutions are in some circumstances contrary to the UK's obligations under Article 31 of the 1951 Geneva Convention on the Status of Refugees. Article 31(1) states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The court in *Adimi* suggested that 'the combined effect of visa regimes and carriers' liability has made it well-nigh impossible for refugees to travel to countries of refuge without false documents',[49] and held that:

- where illegal entry or the use of false documents or delay can be attributed to a genuine desire to seek asylum, whether here or elsewhere, that conduct should be covered by Article 31(1);
- as to 'coming directly', some element of choice is open to refugees as to where they may properly claim asylum; any short-term stopover en route to their intended sanctuary cannot forfeit the protection of the Article; and
- 'presenting themselves without delay' does not require an asylum seeker to claim on arrival, so long as there is an intention to claim asylum within a short time of arrival having successfully secured entry on false documents.

The prohibition on penalties does not prevent the *detention* of asylum seekers, nor does it prevent their being charged as long as they are not convicted.[50]

As a result of the *Adimi* case, a limited defence for those ultimately recognised as refugees was added to the offences under the 1971 and 1981 Acts. This defence is contained in section 31 of the *Immigration and Asylum Act 1999*:

> **31 Defences based on Article 31(1) of the Refugee Convention**
>
> (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—
>
> (a) presented himself to the authorities in the United Kingdom without delay;

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48 *R v Uxbridge Magistrates' Court, ex p Adimi; R v Crown Prosecution Service, Secretary of State for the Home Department, ex p Sorani; R v Secretary of State for the Home Department, ex p Kaziu* [1999] INLR 490

49 [1999] 4 INLR 490 at 492G, *per* Simon Brown LJ

50 *Macdonald's Immigration Law and Practice* (5th edition, 2001) para 12.11

> (b) showed good cause for his illegal entry or presence; and
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.
>
> […]

However, the UNHCR has voiced its concerns that the practical application of the section 31 defence may not provide the full protection envisaged by Article 31 of the Convention.[51]

Recently an asylum-seeking couple who had been prosecuted and jailed for travelling on forged passports before this defence became available was awarded a record sum of £130,600 compensation from the Home Office. Press reports say that many more such claims are still to come.[52]

The international pressure group Human Rights Watch has identified problems with penalising asylum seekers who enter a country illegally:

> Fifty years ago the drafters of the Refugee Convention realized the difficulties that refugees face when leaving their countries, and made provisions under Article 31 of the Convention to prohibit countries from penalizing asylum seekers who enter a country illegally or through irregular channels. Today restrictive immigration policies and the closure of legal migration channels have made it impossible for many asylum seekers to leave their country and seek asylum in a legal manner. With no other avenues open, asylum seekers risk their lives at the hands of illicit human smuggling and trafficking rings to reach a country of asylum.[53]

The October 2003 consultation paper *New legislative proposals on asylum reform* shows that the Government is now seeking to penalise undocumented asylum seekers, in order to discourage them from disposing of their documents which makes removal more difficult:

> We therefore propose to introduce measures which would ensure that those asylum seekers who fail to provide documents without a good explanation and/or have travelled through a safe third country and/or who claim late, would have this taken into account when considering the credibility of their claim. These measures would

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51 see for example United Nations High Commissioner for Refugees, *UK New Legislative Proposals on Asylum Reform - UNHCR comments*, 26 November 2003, para 20: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

52 see 'Couple with forged passports win £130,600 for wrongful jailing' *The Guardian* 2 October 2003: http://politics.guardian.co.uk/homeaffairs/story/0,11026,1054009,00.html

53 Human Rights Watch, *Human Rights News: Background – Refugee Convention Violations*, 2001: http://www.hrw.org/press/2001/12/refconbg1211.htm

> require the decision-maker and appellate bodies to take account of the above situations when assessing the credibility of statements made by such persons in support of their asylum claim. Immigration rules already make a similar requirement for undocumented arrivals and those who delay making their application, but the proposed measures would make this requirement clearer and enable us to extend the policy to include those who have travelled through a safe third country.
>
> In support of this proposal, we also propose to create two new criminal offences. The first offence of being undocumented without reasonable explanation would apply to anyone, subject to certain exceptions (EEA nationals for instance), arriving at a UK port without adequate documentation to satisfy immigration control. The second offence of failing to co-operate with re-documentation would impose a duty on those with no right to remain in the UK, including failed asylum seekers, to co-operate with the re-documentation process. Prosecution would follow where it could be established that a person did or did not do something that had the effect of frustrating, obstructing or otherwise interfering with the re-documentation process.
>
> We also wish to consult on the introduction of measures to diminish the benefit of passengers destroying or disposing of documents in transit and before reaching passport control. While we have at this stage taken no decision on this, we will consider including powers that would allow us to require carriers to take copies of passengers' identity documents before they travel. We will be discussing the proposal with industry representatives to obtain further information on the practicalities of such a proposal ahead of taking a decision on the policy.

The Refugee Council believes that the measures in *New legislative proposals* would penalise genuine refugees in contravention of the Geneva Convention:

- We are concerned that this further criminalisation of asylum seekers in the face of reduced options for safe and legal transit is in contravention of our obligations under Article 31 of the Refugee Convention.
- There are already more than sufficient offences available, which are currently regularly used.
- There is anecdotal evidence that such prosecutions are currently pursued inappropriately and without adequate safeguards.
- We are opposed to the extension of immigration duties to carriers.[54]

The human rights organisation *Liberty* suggested that the creation of further criminal offences 'plays into the hands of traffickers':

> They will encourage people to enter the country without formally claiming asylum on the basis that, if they go through the proper channels, they will be treated as

[54] The Refugee Council's response to new legislative proposals on asylum reform, November 2003: http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf

> criminals. Whether this is a fair assessment, and we appreciate that the consultation specifies the need for unreasonableness, this will be the image the process will have.[55]

B. The Bill

The Bill contains two new offences, and one measure relating to the credibility of undocumented arrivals. The two new offences would come into force automatically, two months after Royal Assent, unlike the rest of the Bill which would brought into force by commencement order.

These provisions have been broadly welcomed by both the Conservative and the Liberal Democrat parties.[56]

1. Offence of being without a passport

Clause 2 of the Bill would make it a criminal offence for any non-EEA national to be unable to show a passport (or equivalent identification) for himself or herself, or any dependant children, when first interviewed by an immigration officer. This would be an offence of strict liability, and there would be a presumption that the person does not have a passport with him if he failed to produce it to an immigration officer on request. The maximum sentence available on conviction would be two years' imprisonment and/or a fine.

There would be a defence if the person could show that he had a reasonable excuse for not being in possession of a passport. This would impose a legal burden on the defence, contrary to the general rule in criminal cases that the prosecution bears the entire burden of proof - the 'one golden thread' in the web of English criminal law.[57] This general rule is, however, subject to numerous exceptions,[58] and in this case the defence would have to prove on the balance of probabilities that he had a 'reasonable excuse'. This would be weighed up against any prosecution evidence that the defence was not in fact reasonable.

Under clause 6(2) certain matters would be excluded from being considered as reasonable excuses. Crucially, if a document was deliberately destroyed on the instructions of a 'person who offers advice about, or facilitates, immigration into the United Kingdom' (i.e. traffickers, but the definition is broader than that) this would not be considered a reasonable excuse. Nor would destroying a document, either as a delaying tactic or in order to increase the chances of

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55 Gareth Crossman, *Liberty response to the joint Home Office and Department of Constitutional Affairs consultation on asylum reform*, November 2003, para 8: http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2003/pdf-documents/nov-03-asylum-reform-response.pdf

56 HC Deb 2 December 2003 cc392-3 (David Davis, Shadow Home Secretary) and c401 (Mark Oaten, Liberal Democrat 'Shadow Home Secretary')

57 *Woolmington v DPP* [1935] AC 462

58 See *R v Turner* (1816) 5 M & S 206 at 211; *Magistrates' Courts Act 1980*, s101; R *v Edwards* [1975] QB 27 at 40; *R v Hunt* [1987] AC 352 (HL)

a claim or application (presumably for immigration or asylum) succeeding, although it is not entirely clear here who would have to prove the person's motive.

This clause is worded differently from the early suggestions that the offence would be of 'failure to provide a good explanation for being without travel documentation'.[59] If it had been set out like this, the prosecution would have had to prove that the person did not have a good explanation, and so there would have been no reversal of the burden of proof. However, the Home Office considers that the legal burden imposed on anyone wishing to use the defence as set out in this clause is a 'justified and proportionate response to the legitimate aim of the statute in accordance with Strasbourg and domestic case law'.[60]

There is no specific mention here of a defence for refugees or asylum seekers in line with Article 31 of the Convention. The Bill would not make any changes to the existing offences of using false documents nor the defence for refugees in section 31 of the 1999 Act, so a person who arrived on false documents and did not dispose of them might avoid prosecution under the new offence but still be open to prosecution under those measures.

The UNHCR is concerned that any new offence would further expose asylum seekers to penalisation for illegal entry or presence, contrary to the UK's obligations under Article 31:

> Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its own merits.[61]

2. Undocumented claimant's credibility affected

Clause 6 would provide specific rules for determining an asylum-seeker's credibility. There are already provisions about credibility in the Immigration Rules,[62] but the Bill would introduce similar provisions into primary legislation for the first time. The Immigration Rules must be interpreted in accordance with the Geneva Convention[63] but the Convention does not have primacy over UK primary legislation.

The Home Office *Asylum Policy Instructions* contain the current guidance for caseworkers on assessing a claimant's credibility:

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59 Home Office press notice 296/2003, *Asylum measures to build on success in halving numbers*, 27 October 2003: http://www.ind.homeoffice.gov.uk/news.asp?NewsId=326&SectionId=1

60 Home Office Explanatory Notes [Bill 5-EN] para 136

61 UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, para 19: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

62 HC 395 of 1993-94, as amended, paras 340-342: http://194.203.40.90/default.asp?PageId=3197

63 *Asylum and Immigration Appeals Act 1993* s2

11. CREDIBILITY

The caseworker, when assessing an application, should consider whether there is any reason to doubt the credibility of the applicant. **Where credibility is in doubt, the applicant should be given the opportunity to explain the reasons behind their actions or statements.**

Where the applicant has been given no opportunity to explain inconsistencies, care should be taken about using the inconsistencies to question credibility.

As noted above, question marks over an applicant's credibility do not negate their claim to asylum if other objective evidence demonstrates a reasonable likelihood of persecution should they be returned.

Discrepancies, exaggerated accounts, and the addition of new claims of mistreatment may affect credibility. However, they may equally reflect a concern on the part of the applicant, or their advisers, to bolster a claim due to a very real fear of return. **Applicants should be given the opportunity to explain any apparent discrepancies and the reasons for any changes in their accounts.**

11.1 Factors affecting credibility

When two or more people give an account it is possible that differences will occur due to recall, emphasis and perspective. This should not necessarily be interpreted as indicating that they are not giving honest accounts of their own experiences. A caseworker will have to give careful consideration to whether discrepancies in an account can be explained or whether they damage the applicant's credibility. Paragraph 341 of HC 395 (as amended) [the Immigration Rules] sets out some factors which may damage an applicant's credibility ***if*** no reasonable explanation is given.

These are as follows:

i) The applicant failed, without reasonable explanation, to make an application for asylum at the earliest reasonable opportunity after their arrival in the United Kingdom, unless the application is founded on events that have taken place since their arrival in the United Kingdom.

It remains important, however, to consider the case as a whole, and particularly the circumstances surrounding the application and its timing. It is important that the applicant is given an opportunity to provide an explanation for any delay in submitting their asylum claim and that such explanation is substantively considered in the asylum decision.

ii) The applicant made the application after they had been refused leave to enter under the 1971 Act, or has been recommended for deportation by a court empowered under the 1971 Act to do so, or has been notified of the Secretary of State's decision to make a

deportation order against them or has been notified of their liability for removal.

iii) The applicant has provided manifestly false evidence in support of their application, or has otherwise made false representations, either orally or in writing.

As paragraph 199 of the UNHCR Handbook states, untrue statements ***by themselves*** are ***not*** a reason for refusal of refugee status and it is the caseworker's responsibility to evaluate such statements in the light of ***all*** of the circumstances of the case.

iv) That on their arrival in the United Kingdom the applicant was required to produce a passport and either:
a) failed to do so without providing a reasonable explanation; or
b) produced a passport which was not in fact valid, and failed to inform the immigration officer of that fact.

v) The applicant has otherwise, without reasonable explanation, destroyed, damaged or disposed of any passport, other document or ticket relevant to their claim.

This does not ***automatically*** undermine the applicant's credibility.

In each case, we should ask the applicant for an explanation. It should be remembered that genuine asylum seekers sometimes have no alternative but to travel on forged travel documents which may subsequently have to be returned to an agent.

vi) The applicant has undertaken activities in the UK before or after lodging their application, which are inconsistent with their previous beliefs and behaviour, and are calculated to create or substantially enhance their claim to refugee status.

This provision is designed to guard against the applicant who deliberately sets out to make himself a refugee, for example by high profile activities or criticism of his government while in the UK in a way that is inconsistent with his previous behaviour (we call this an ***engineered asylum claim***). There may, however, be situations where the applicant's actions would put him at risk for a Convention reason were he to be returned to his country of origin. If this is the case then he should be granted asylum in line with the requirements of the Convention.

vii) The applicant has lodged concurrent applications for asylum in the UK or in another country.

Where a caseworker has reason to believe that the applicant has lodged concurrent asylum applications in another country they may wish to seek confirmation. Information from the European Union

countries can be obtained via the Third Country Unit. Where a person has lodged an asylum claim in another Member State, that Member State may be obliged to accept the return of the person under the provisions of the Dublin Convention.

11.2 Other factors

Paragraph 341 also allows the Secretary of State to take into account any other factors that lead him to conclude that an applicant's account is not credible.

11.3 Agents and representatives

Paragraph 342 of HC 395 (as amended) states that the actions of anyone acting as an agent of the asylum applicant may also be taken into account in regard to matters of credibility.

11.4 Gaps in an applicant's knowledge

An inability to provide information relevant to an asylum claim may not of itself undermine credibility. In certain cultures men do not share information about their political, military or even social activities with their female relatives and caseworkers should consider whether this might account for gaps in a woman's knowledge.[64]

Under clause 6 of the Bill, failure to produce a passport or destroying, altering or disposing of a travel document (without reasonable excuse), and trying to pass off a fake passport as valid, would be 'taken into account' in assessing whether or not to believe an asylum seeker. None of these would automatically result in an asylum or human rights claim being rejected.

Moreover, behaviour which the immigration officer or appeals tribunal thinks is 'designed or likely' to conceal information, to mislead, or to obstruct or delay the handling or resolution of a claim could damage the claimant's credibility under clause 6.

The UNHCR sees no practical benefit in introducing these new requirements, given that the *Asylum Policy Instructions* already contain guidance and that failure to provide documents should not be a reason for rejecting an asylum claim.[65]

However, clause 6(3) also introduces a new provision, that an asylum seeker who travelled through a 'safe country' would have the credibility of his asylum or human rights claim cast into doubt. No such provision currently appears in the *Immigration Rules* or *Asylum Policy Instructions*. This is discussed below in the section on safe countries (section IV.C).

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64 Home Office *Asylum Policy Instructions - Deciding Claims - Assessing the Claim*, para 11: http://194.203.40.90/default.asp?PageId=3792

65 UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, paras 14-16: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

3. Offence of failing to comply with re-documentation

Clause 14 concerns cooperation with deportation or removal, and includes - but is not limited to - failed asylum seekers. It sets out a list of actions which may be required of someone in order for them to get a travel document which would facilitate their departure from the UK. The clause does not specify that the requirement must be reasonable, but if the Secretary of State made an unreasonable requirement the applicant could seek to challenge it by judicial review.

Under this clause people could be required to make a passport application to the government of the State from which they had been seeking asylum, and imprisoned or fined for not doing so. They could also be prosecuted for failing to complete a form or answering questions 'accurately and completely'.

Failure (without reasonable excuse) to comply with an order to do one of these things would be an arrestable offence with a maximum penalty of two years' imprisonment and/or a fine. The Home Office Explanatory Notes on the Bill suggest that the defence of reasonable excuse will place an 'evidential' burden on the accused, and that this is compatible with Strasbourg and domestic case law.[66] An evidential burden is different from a legal burden (which, as explained above, would apply to the defence of reasonable excuse under the clause 2 offence) - it simply requires the defence to put forward enough evidence to satisfy the court or jury that there is an issue which the court or jury can properly be asked to consider. Once the issue is raised, satisfying the evidential burden, the general rule is then that it is for the prosecution to disprove the relevant defence.[67]

The UNHCR recognises the problems with readmission to countries of origin that arise with undocumented rejected asylum seekers, but suggests that this should be addressed 'in appropriate international fora, as well as on a bilateral basis' rather than by creating a new offence:

> UNHCR is concerned that criminalizing persons who do not co-operate in the re-documentation process may be counterproductive as return of persons with a criminal record may be rendered more difficult. UNHCR would instead advocate the promotion of sound, equitable and humane conditions in connection with the return of these persons, and appropriate return counseling to encourage voluntary returns.[68]

4. Proposals to require carriers to copy documents

The consultation paper *New legislative proposals* mentions that the Home Office is considering including powers that would require carriers to take copies of passengers'

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66 Bill 5-EN, para 141

67 *Andrews and Hirst on Criminal Evidence*, 4th edition 2001, para 3.06

68 UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, para 22: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

identity documents before they travel. No such provision appears in the Bill as published - the Government is apparently discussing the proposal with industry representatives to obtain further information on the practicalities of introducing such a requirement. In response to a question from John Denham, who chairs the Commons Home Affairs Committee, the Home Secretary David Blunkett suggested that, if matters were resolved quickly, such a measure may be put forward as an amendment to the Bill.[69] The Conservative Party appears to support this proposal.[70]

The House of Commons Home Affairs Committee questioned the Home Office Minister Beverley Hughes about these proposals when it took evidence from her on 19 November 2003:

> **Q834 Mr Taylor**: May I move on to ask you what progress you have been able to make in discussing with carriers a power to require them to copy passengers' identity documents before they travel? Are there practical difficulties with this? Have you made headway?
>
> **Beverley Hughes**: We are still in consultation with the carriers. Officials met some of the representatives from the industry earlier this month, and we are still in discussions with them and receiving their responses at the moment.
>
> **Q835 Mr Taylor**: Is it within your knowledge that other countries impose such a requirement, and do you think it would be feasible for the UK to do it on its own, without other national precedents?
>
> **Beverley Hughes**: We understand that Netherlands already do this, that their scheme is based on carriers' liability legislation, and that they have a scheme requiring all carriers to produce copies of documents in respect of all passengers from a list of specified countries. I think there are about 20 countries on their list. So there is at least one precedent.
>
> **Q836 Mr Taylor**: Anecdotally, does it seem to work in Netherlands?
>
> **Beverley Hughes:** We have not been aware of any problems they have had. Clearly, there are logistical and practical issues that would have to be resolved, and that is one of the points of discussion at the moment.[71]

The press has reported that the Secretary of State for Transport, Alistair Darling, would not support such a proposal. The *Sunday Times* of 30 November 2003 quoted from a letter apparently written to John Prescott by Mr Darling two weeks previously:

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69 HC Deb 2 December 2003 c386

70 David Davis, Shadow Home Secretary, HC Deb 2 December 2003 c393

71 Uncorrected transcript of evidence: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/uc692-ix/uc69202.htm

> In a letter copied to Blair and fellow cabinet ministers, Darling ways he will refuse to give his backing to the "premature" proposals in the asylum and immigration bill.
>
> "Boarding times are likely to be extended by hours rather than minutes and that will cause us severe problems", he wrote on November 17. "The proposal would completely change the way that carriers collect information, by requiring them to take copies of documents.
>
> "It is evident from the limited consultation we have been able to carry out that the practicalities of such an arrangement are liable to be costly and time-consuming, causing considerable customer inconvenience and delay to services for which we shall be blamed."
>
> In a damning passage, he added: "I fear that announcing legislation on a proposal which will be unquantifiably costly, cumbersome and labour-intensive sends a difficult message."
>
> […]
>
> Darling says Blunkett's proposal would cost airlines millions of pounds and particularly hit the small carriers. He also questions whether the plans would be legally enforceable because they could conflict with the jurisdiction of foreign countries.
>
> The transport secretary argues that the plans would have knock-on effect and make British airlines less competitive. He said it would be better to negotiate a voluntary agreement with the airlines rather than imposing new laws on them.[72]

This proposal may be seen in the context of the Government's 'authority to carry' scheme which relies on carriers transmitting passenger information at the time of check-in so that checks may be made against Home Office databases.[73]

IV Safe countries

A. Background[74]

1. Introduction

Two different but related concepts are discussed in this section:

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[72] David Cracknell, 'Cabinet backlash threatens Blair's asylum crackdown', *Sunday Times* 30 November 2003

[73] *Immigration Act 1971* Sch 2 para 27B (as inserted by *Immigration and Asylum Act 1999* s 18), and the *Immigration (Passenger Information) Order 2000* SI 2000/912

[74] Parts 1 and 2 of this section are adapted from Mark Symes and Peter Jorro, *Asylum Law and Practice*, 2003, ch 12

- returning asylum seekers to a safe third country (i.e. not their country of origin) so that their substantive application is dealt with there; and
- designating safe countries of origin - sometimes known as a 'white list'. Asylum applicants from these countries have their substantive application considered in the UK but the appeals process is accelerated or allowed only from outside the UK (which usually means from the applicant's country of origin).

The section on international policy covers both of these issues, and then two separate sections on UK policy look at the two different concepts in detail.

2. International policy

The Refugee Convention does not address the question of which country should determine whether or not a person is a refugee. The Executive Committee of the UNHCR has stated that account should be taken of the asylum seeker's intentions, and asylum should not be refused solely on the ground that it could have been sought from another state.[75]

The EU is moving towards a co-ordinated approach to asylum policy, though the UK, Ireland and Denmark can choose the extent to which they wish to be involved. The UK has opted in to a significant number of new EU measures on asylum and is involved in discussions on future policy. One such measure is the so-called 'Dublin II' Regulation 2003 which allows asylum applicants to be transferred to another EU Member State with which the applicant has links.[76] In addition, a Resolution on 'countries in which there is generally no serious risk of persecution' was agreed by Ministers in 1992, in order to apply an accelerated procedure to the determination of asylum claims from a list of countries which were considered safe.[77] This Resolution was implemented domestically in the UK from 1996 to 2000 (when it was known as the 'white list'), but was omitted from the certification procedures in the *Immigration and Asylum Act 1999*, only to return in different form under the *Nationality, Immigration and Asylum Act 2002*. The 1992 Resolution will, in due course, be replaced by a proposed Council Directive on minimum standards for granting refugee status: the draft Directive contains provisions on 'Safe Countries of Origin' and on 'Safe Third Countries'.[78]

3. UK policy on safe third countries

Since 1990, the UK has refused to consider asylum claims made in the UK if the applicant passed through a 'safe third country', unless the applicant has substantial links with the UK. Symes and Jorro suggest that this is an inversion of the internationally-recognised principle that applications should be considered where they are made unless there are strong connections with another state.[79]

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75 Conclusion 15 (1979)
76 Council Regulation (EC) No 343/2003 (OJ 2003 L 050/1)
77 for the text see (1993) INLP Vol 7 (No 1) p31
78 COM (2002) 0326.
79 Mark Symes and Peter Jorro, *Asylum Law and Practice*, 2003, p513

A detailed account of the development of rules on safe third countries, and appeals against the Government's use of the rules, follows.

The 1990 *Immigration Rules* provided for non-consideration of an asylum claim on safe third country grounds, making such a decision appealable.[80] An accelerated appeals procedure was introduced under the *Asylum and Immigration Appeals Act 1993* in cases where the Home Secretary certified that an appellant's claim did not raise any issue as to the UK's obligations under the Refugee Convention. The Home Secretary could decide not to certify and instead to consider a substantive claim, but his decision on this was not - and is not - reviewable on appeal.

However, following the success of a large number of appeals to adjudicators which were, in effect, against decisions to remove applicants to third countries, the Government introduced provisions in the *Asylum and Immigration Act 1996* which meant that, where the third country in question was an EU Member State or a country designated by order, an appeal would be 'non-suspensive'. This means that an appeal does not suspend the applicant's removal from the UK, and appeal rights can be exercised only from abroad (i.e. after removal).

The 1996 Act set out the statutory conditions for the Home Secretary's issuing of a 'safe third country certificate' in cases where he declined to consider a claim for asylum made in the UK on the ground that the claim should be made elsewhere. These conditions are repeated almost exactly in section 12 of the *Immigration and Asylum Act 1999* and are now that:

1. the applicant is not a national or citizen of the country to which he is to be sent;
2. his life and liberty would not be threatened there for a Refugee Convention reason (race, religion, nationality, membership of a particular social group, or political opinion); and
3. the government of that country would not send him to another country otherwise than in accordance with the Refugee Convention.[81]

Section 11 of the 1999 Act also introduced an alternative procedure where the proposed removal is to an EU member state in accordance with 'standing arrangements' (e.g. the Dublin Convention, the Dublin II Regulation or bilateral arrangements for determining which state is responsible for considering asylum applications). Since EU member states are regarded by the UK as safe for Refugee Convention purposes (section 11(1) of the 1999 Act), the Secretary of State need only certify that:

1. the Member State has accepted that it is the state responsible for considering the asylum claim; and

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[80] HC 251, para 75
[81] 1999 Act s12(7)

2. in his opinion, the claimant is not a national or citizen of that Member State.

The *Immigration Rules* add two further requirements for a certificate to be issued under either provision. These are that:

1. the asylum applicant has not arrived in the UK directly from the country in which he claims to fear persecution, and has had an opportunity to make contact with the authorities of the third country in order to seek their protection; or
2. there is other clear evidence of his admissibility to a third country or territory.[82]

The effect of certification in either case is that the claimant can be removed from the UK to the third country without his asylum claim being substantively considered here. However, the appeal rights are different depending on the circumstances:

1. where removal is to a Member State under standing arrangements, the certificate can only be appealed against on human rights grounds while the person remains in the UK; if the Home Secretary certifies that the human rights claim is, in his opinion, clearly unfounded then there is no suspensive right of appeal against removal; and the claimant can be removed without being able to challenge the basis of the safe third country certificate on judicial review;
2. safe third country certificates relating to removals either to a Member State other than under standing arrangements or to a designated country outside the EU (currently Canada, Norway, Switzerland and the USA)[83] can be challenged by way of judicial review; but otherwise the limitations on appeals are as for type 1 removals;
3. certificates issued where the removal is to a non-designated state outside the EU can be appealed against with suspensive effect (i.e. while the appellant remains in the UK) to an adjudicator as long as the appellant has made a human rights claim; however, the Home Secretary can still prevent a suspensive right of appeal by issuing a different type of certificate under section 94(7) of the 2002 Act.

The *Immigration Rules* leave the Home Secretary with discretion not to remove an asylum seeker to a safe third country even if the legal conditions for doing so are fulfilled.[84] His use of this discretion cannot be appealed against to an adjudicator, but may be challenged on judicial review if it can be shown that he acted contrary to stated policy. The stated policy on the exercise of discretion in safe third country cases where family ties to the UK are claimed was set out in a Written Answer of 22 July 2002.[85]

Removing an asylum applicant (or any other person) from the UK in circumstances that would contravene his human rights under the European Convention on Human Rights would

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82 Immigration Rules (HC 395 of 1993-94 as amended) para 345
83 *Asylum (Designated Safe Third Countries) Order 2000* SI 2000/2245
84 Immigration Rules (HC 395 of 1993-94 as amended) para 345
85 Beverley Hughes, HC Deb 22 July 2002 c860W

be unlawful (*Human Rights Act 1998*). Therefore an applicant could bring a human rights claim[86] against his removal under any safe third country certificate if:

- he has instituted, or could institute an appeal to an adjudicator against the immigration decision that provides for such removal, and
- he has made a human rights claim, unless either
    - the appeal is finally determined, withdrawn or abandoned or can no longer be brought in time, or
    - the Home Secretary has issued a further certificate stating that the human rights claim is clearly unfounded.

Under section 93 of the 2002 Act, if the Home Secretary certifies the human rights claim as clearly unfounded the applicant's right to appeal to an adjudicator can only be exercised from abroad. Symes and Jorro suggest that 'since this is effectively a useless remedy the applicant will have the option of seeking a judicial review of the certification of his human rights claim as clearly unfounded'.[87] Where there is no such human rights certification, it is unlikely that judicial review of a third country certificate will be brought as there will always be the alternative remedy of a suspensive appeal to an adjudicator.[88]

Unlike previously[89] there is no right of appeal against the third country certificate itself. The right of appeal is now against the immigration decision that provides for removal to the third country, similarly to where a removal decision is taken following substantive refusal of an asylum or human rights claim.

4. UK policy on safe countries of origin

The *Asylum and Immigration Act 1996* had introduced a 'white list' of safe countries of origin. Asylum applicants from any of the countries on the list were subject to an accelerated procedure for determining their claim.

The Labour Government's 1998 white paper *Fairer, Faster and Firmer* declared its opposition to generalised 'white lists':

> The Government considers that the so-called "White List" procedure, whereby most applications from certain listed countries are put into an accelerated appeal process on the basis of a country-wide assessment rather than the circumstances of the individual case, is an unsatisfactory feature of the present system and should be replaced as part of the wider overhaul of appeals in asylum cases.

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86 as defined by s113 of the *Nationality, Immigration and Asylum Act 2002*

87 Symes and Jorro para 12.41

88 Symes and Jorro para 12.45

> […] It considers that a better approach would be to replace the White List with arrangements to certify appropriate cases individually using the case-specific provisions for accelerated appeals in the current legislation […][90]

The white list introduced by the 1996 Act was abolished in 2000.[91]

However, the *Nationality, Immigration and Asylum Act 2002* reintroduced a version of the white list. Section 94 of the 2002 Act provides that, on refusal of any asylum or human rights claim, the Secretary of State may certify it as 'clearly unfounded'. Anyone whose claim has been certified under this section can appeal against an adverse immigration decision only from outside the UK. This is known as a 'non-suspensive appeal', which, as explained above, means that the person can be removed from the UK before appealing.

There is a rebuttable presumption that a claim will be unfounded if it is from someone who is entitled to live in one of the countries specified in the section. This list of countries - which has been added to twice since the section came into force - is currently:[92]

1. Cyprus
2. Czech Republic
3. Estonia
4. Hungary
5. Latvia
6. Lithuania
7. Malta
8. Poland
9. Slovakia
10. Slovenia
11. Albania
12. Bulgaria
13. Serbia & Montenegro
14. Jamaica
15. Macedonia
16. Moldova
17. Romania
18. Bangladesh
19. Bolivia
20. Brazil
21. Ecuador
22. Sri Lanka
23. South Africa
24. Ukraine.

In most instances, the number of applications from these countries has fallen since the new provisions were implemented, particularly from states of the former Yugoslavia, Poland and Sri Lanka. In 2002, however, asylum applications from many of the countries specified in section 94 resulted in relatively high success rates, especially those from Macedonia (33%), Serbia and Montenegro (formerly the Federal Republic of Yugoslavia) (30%), Bangladesh (28%) and Albania (24%). Meanwhile, in 2002, a number of appeals were upheld in favour of applicants from the former Yugoslav states, Sri Lanka, former USSR states (including the Baltic states), and Macedonia. Data relating to applications, initial decisions and appeals from applicants from the countries listed in the amended section 94 are reproduced in the table on the next page:

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89 under the *Immigration and Asylum Act 1999* s71(2), which provided that appeals to the adjudicator against third country certification were non-suspensive if removal was to be to an EU member state or designated third country; and that there was no further appeal from the adjudicators to the Tribunal.

90 Home Office, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum*, CM 4018, July 1998, paras 9.9 - 9.10

91 *Asylum (Designated Safe Third Countries) Order 2000* SI 2000/2245

92 *Nationality, Immigration and Asylum Act 2002* s94 as amended by the *Asylum (Designated States) Order 2003* SI 2003/970, art 3 (added nos. 11-17 with effect from 1 April 2003) and the *Asylum (Designated States) (No 2) Order 2003* SI 2003/1919, art 2 (added nos. 18-24 with effect from 23 July 2003)

Asylum applications, decisions and appeals by nationality (states from which applications presumed unfounded, 2002 Act, s94 as amended)

	Applications							Decisions (2002)		Appeals (2002)		
	2001	**2002**	**change**	**2003**			**change**	**Allowed**	**Refused**	**Allowed**	**Refused**	**Withdrawn**
	annual	*annual*	*2001-02*	*Q1*	*Q2*	*Q3*	*Q1-Q3*					
Albania	106	115	8.5%	230	140	125	-45.7%	24.3%	75.3%	13.8%	79.6%	6.7%
Czech Republic	825	1,365	65.5%	20	20	25	25.0%	0.8%	99.2%	5.2%	85.9%	8.9%
Federal Republic of Yugoslavia [1]	3,230	2,265	-29.9%	345	175	170	-50.7%	30.0%	70.0%	15.9%	78.1%	6.0%
Macedonia	755	310	-58.9%	35	10	10	-71.4%	33.3%	67.8%	11.2%	79.6%	8.2%
Moldova	425	820	92.9%	…	75	70	-6.7%	16.3%	84.4%	8.5%	83.1%	6.8%
Poland	615	990	61.0%	35	20	10	-71.4%	0.0%	99.5%	3.9%	89.4%	6.7%
Romania	1,400	1,210	-13.6%	245	95	120	-51.0%	6.4%	93.6%	4.6%	88.2%	7.2%
Ukraine	445	365	-18.0%	95	65	85	-10.5%	3.2%	96.8%	12.6%	81.6%	5.8%
Other Former USSR [2]	895	1,245	39.1%	360	135	170	-52.8%	5.7%	94.3%	16.7%	77.0%	6.3%
Other Former Yugoslavia	85	90	5.9%	25	10	5	-80.0%	9.7%	87.1%	31.8%	62.1%	6.1%
Other Europe [3]	335	300	-10.4%	20	20	15	-25.0%	6.1%	95.5%	14.3%	80.2%	5.5%
Bangladesh	510	720	41.2%	205	190	190	-7.3%	28.2%	71.8%	9.5%	87.1%	4.3%
Sri Lanka	5,510	3,130	-43.2%	300	245	85	-71.7%	14.4%	85.6%	22.6%	75.8%	1.6%
Ecuador	255	315	23.5%	65	40	25	-61.5%	9.4%	90.6%	12.3%	83.6%	4.1%
Jamaica	525	1,310	149.5%	390	215	190	-51.3%	2.7%	97.3%	10.0%	80.0%	10.0%
Other Americas [4]	170	240	41.2%	80	60	40	-50.0%	5.4%	91.9%	11.1%	85.2%	3.7%
Other Africa [5]	670	1,295	93.3%	600	340	480	-20.0%	21.1%	78.9%	16.5%	76.9%	6.6%

Note: figures may not sum due to rounding
1 - now Serbia and Montenegro (including the Province of Kosovo, administered by the UN since 1999)
2 - including Estonia, Latvia and Lithuania
3 - including Bulgaria, Cyprus, Hungary, Malta, Slovakia and Slovenia
4 - including Bolivia and Brazil
5 - including South Africa

Source: Home Office *Asylum Statistics*

Asylum applicants from the listed states will be subject to a fast-track procedure and will be detained at Oakington Reception Centre to have their cases decided within seven days (see below). A different fast-track procedure applies to those detained at Harmondsworth Removal Centre, who are subject to an accelerated appeals process under the Fast Track Procedure Rules.[93] The following Written Answer gives mores details of fast-tracking:

> Applications are considered suitable for fast tracking if, upon initial screening, they are believed to be straightforward and capable of being decided within about seven to 10 days, and the applicant is from a country on the Fast Track Processes Suitability List (previously referred to as the "Oakington List"). A country will be added to the list only if we consider that it produces some types of claim which are capable of being decided quickly. There are no other specific requirements.
>
> The countries (or part countries) presently appearing on the list are:
>
> > Afghanistan, Albania, Bangladesh, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, China, Congo, Cyprus, Czech Republic, Djibouti, Ecuador, Estonia, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Hungary, Iraq, Ivory Coast, India, Jamaica, Kenya, Latvia, Lithuania, Macedonia, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Moldova, Mongolia, Mozambique, Namibia, Niger, Pakistan, Poland, Romania, St. Lucia, Serbia and Montenegro, Senegal, Slovakia, Slovenia, Somaliland, South Africa, Sri Lanka, Swaziland, Tanzania, Togo, Trinidad and Tobago, Turkey, Uganda, Ukraine, Zambia, Zimbabwe.
>
> Not all applications from the countries listed above are considered suitable for fast tracking. We are keeping under review the basis on which we consider an application suitable for special fast-tracking arrangements. [94]

The list of fast-track countries currently includes all 24 countries in the 'section 94 list' and also a further 41 countries.

B. Proposed changes

New legislative proposals gave a brief outline of the Government's latest ideas for returning asylum seekers to a safe third country (i.e. not their home country) for their claim to be dealt with there:

> A further proposal would deal with situations where it is decided that a country other than the United Kingdom is best placed to consider someone's asylum or human rights claim substantively. We intend to legislate so that a person will not be able to challenge their removal to certain safe third countries on the basis of the way they will be treated. The designated countries will be those where we are satisfied that an individual will be neither persecuted nor subjected to torture or inhuman or degrading

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93 *Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003* SI 2003/801

94 HC Deb 17 Nov 2003 c666W

> treatment or punishment, nor one which would remove a person in breach of the principles of the Refugee Convention or the ECHR. This would facilitate their faster removal from the UK, consistent with our international obligations.[95]

This would replace the existing provisions under section 11 and 12 of the 1999 Act, discussed above.

The UNHCR discourages states from returning asylum seekers to other countries in the absence of multilateral or other agreements:

> UNHCR discourages unilateral action by states to return asylum seekers to countries through which they have passed or have been granted visas, without the countries' agreement, because of the risk of chain deportation, forcible returns to situations of persecution, and of orbit situations as well as the need for international solidarity and burden sharing. UNHCR has similar reservations with regard to the return of asylum seekers to countries which they have never transited through.[96]

In its comments on *New legislative proposals*, the UNHCR considered that the Government's proposed criteria for countries deemed 'safe' were inadequate. It identified what should, in its view, be taken into account:

> 26. […] UNHCR has, inter alia, identified the following factors for consideration in determining whether the return of an asylum seeker to a particular country can take place:
>
> - ratification of and compliance with the international refugee instruments, in particular, compliance with the principle of non-refoulement [no removal to a country in which the asylum seeker might face persecution];
> - ratification of and compliance with international and regional human rights instruments;
> - readiness to permit asylum seekers to remain while their claims are being examined on the merits;
> - adherence to recognized basic human rights standards for the treatment of asylum seekers and refugees; and notably
> - the state's willingness and practice to accept returned asylum seekers and refugees, consider their asylum claims in a fair manner and provide effective protection [2].
>
> 27. These factors should form part of any case by case decision making process and the preparation of a list, or a system for identification, of third countries. In the implementation, the UK Government should ensure that they have received, on a bilateral basis, the explicit consent of the third state to admit the asylum seeker in

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95 Home Office/Department for Constitutional Affairs, *New legislative proposals on asylum reform*, 27 October 2003: http://www.ind.homeoffice.gov.uk/default.asp?pageid=4444

96 UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, para 25: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

question and to grant him or her access to a fair asylum procedure, so as to ensure that the application will be examined on its merits. There should be prior notification to the receiving country that the asylum claim has not been examined on the merits and that the person, if he or she wishes to do so, must be admitted in the refugee status determination procedure of the receiving country. In addition, it would be desirable that removed asylum seekers could be provided with a form stating that the application has not been examined in substance, and with an information leaflet on the asylum procedure of the receiving country. Careful consideration should also be given to the receiving country's facilities for reception and longer-term integration, including absorption capacities.

28. Any list-based general assessment of safety of a third country needs to be applied flexibly, and ensure due consideration of that country's safety for the individual asylum seeker. The asylum seeker should be given an effective opportunity to challenge a presumption of safety of a country. The officers of the Third Country Unit performing these assessments should be of the highest competence and be fully informed and regularly updated on the situation in the "safe third countries". Additional safeguards such as an oversight procedure should also be implemented.

29. UNHCR recommends that similar to the rationale behind the introduction of the newly created Country Advisory Panel, the UK Government should involve academics, NGOs, IGOs and other external experts when determining which countries should be deemed "safe" in line with the above-mentioned criteria. Without the input of such interlocutors, and the higher level of scrutiny introduced as a result, a significant number of judicial challenges are likely to continue in this area. Needless to say, such challenges introduce further inefficiencies into the asylum procedure.[97]

C. The Bill

1. Credibility

Clause 6(3) of the Bill provides that any asylum seeker who travelled to the UK through a 'safe country' would have the credibility of his asylum or human rights claim case cast into doubt. There are no exceptions for unaccompanied asylum seeking children.

No such provision appears in the current rules on credibility of asylum applicants.[98] These existing rules are set out above in the discussion of credibility of undocumented asylum seekers.

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[97] UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, paras 26-29: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

[98] Immigration Rules (HC 395 of 1993-94 as amended) paras 340-42, and Home Office *Asylum Policy Instructions - Deciding Claims - Assessing the Claim*, para 11: http://194.203.40.90/default.asp?PageId=3792

The Refugee Council suggests that the idea that an individual's asylum claim can be deemed less credible if they have travelled through another country before reaching the UK stems from the 'myth' that refugees should seek asylum at the first possible opportunity:

> there is nothing in international law that obliges people in need of international protection to make a claim for asylum in the first country they reach. This was confirmed at the end of 2002 when experts meeting under the auspices of UNHCR concluded: "There is no obligation under international law for a person to seek international protection at the first effective opportunity". Indeed, UNHCR guidance is that the intentions of the asylum seeker should "as far as possible be taken into account."[99]

The UK courts have interpreted the 1951 Refugee Convention as leaving refugees some element of choice as to where they may properly claim asylum. According to the court in the case of *Adimi* one of the determining factors as to whether an asylum seeker who arrived through a third country should be penalised is whether or not he found protection there (formally or as a matter of fact) from the persecution he was fleeing.[100] However, primary legislation would trump both the Refugee Convention and UK case-law.

The UNHCR considers it inappropriate to juxtapose transit through third countries and the credibility of a claim since, in its view, these issues bear no relationship to each other.[101]

2. Removals

Clause 12 and **Schedule 3** are intended to provide a new system for removals to 'safe third countries'. This would replace the provisions of sections 11 and 12 of the 1999 Act and the limits on appeals under section 93 of the 2002 Act (see above). The Explanatory Notes explain how the Home Office thinks the new provisions will work.[102] They will be more restrictive than the existing 'safe third country' provisions set out above, particularly in restricting the appeals that may be brought from outside the UK and in limiting the rights to a human rights appeal against removal to other European countries. The Bill reflects some of the provisions in the draft EU Directive on minimum standards for granting refugee status.[103]

Schedule 3 of the Bill proposes three categories of 'safe third country' to which asylum applicants could be removed without their substantive claim being considered in the UK:

1. *Part 2: countries which would be considered safe for 'third country nationals' not only under the Refugee Convention but also under the more exacting provisions of the*

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[99] *The Refugee Council's response to new legislative proposals on asylum reform,* November 2003: http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf

[100] [1999] INLR 490 at 497A-C

[101] UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, para 13: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

[102] Bill 5-EN, paras 68-80

[103] COM (2002) 0326.

European Convention on Human Rights (ECHR). The list of countries proposed in the Bill for this category consists of the 15 Member States of the EU, the ten new accession countries, and Iceland and Norway which are in the European Economic Area but not the EU. This list could be lengthened or shortened by an order from the Secretary of State (subject to the affirmative resolution procedure).

2. *Part 3: countries which would be considered safe for third country nationals only for the purposes of the Refugee Convention but not for the ECHR*. The Home Secretary would make this list by order under the affirmative resolution procedure, but the Bill does not give any indications of the countries concerned. Some idea could possibly be gleaned from the list in section 94 of the 2002 Act (see above).
3. *Part 4: countries which would be certified safe only for particular third-country nationals*. This would be on a case-by-case basis for individual asylum claimants.

Under Part 2 of Schedule 3, the only possible appeal in relation to removal to one of the 'safe third countries' listed there would be where the claim relates to the person's human rights within the UK and the Secretary of State has not certified that such a claim is clearly unfounded. No appeal on ECHR or Refugee Convention grounds could be pursued from outside the UK.

Part 3 would relate to countries (as yet unspecified) outside the EU/EEA. In this case, no appeal against removal based on Refugee Convention rights would be possible, either from the UK or from outside the UK. However, appeals against removal on any ECHR grounds could be pursued from within the UK (unless the Secretary of State certifies that the claim is clearly unfounded).

The restrictions on appeals under Part 4 would be the same as those for Part 3, but would apply only in relation to particular individuals rather than to anybody who is being removed to the country in question.

Judicial Review of the Home Secretary's certification decisions under Schedule 3 would still be available.

3. Safe countries of origin

Clause 11 would amend the provisions on non-suspensive appeals for unfounded human rights or asylum claims in section 94 of the 2002 Act. It would allow the 'white list' of safe countries of origin to include states or parts of states as safe for particular descriptions of person. A rejected asylum or human rights claim from such a person would then be presumed to be clearly unfounded, and so any appeal could only be conducted from outside the UK.

A new subsection 94(5C) suggests that a 'description of person' might relate to their gender, language, race, religion, nationality, membership of a social or other group, political opinion or other attribute or circumstance. The Home Secretary would, presumably, require detailed intelligence about how such groups are treated in the countries or parts of countries concerned before adding them to the list.

The Home Affairs Committee recommended in its May 2003 report on *Asylum Removals* that:

> (1) if the Secretary of State wishes to add further countries to the list in Section 94 of the Nationality, Immigration and Asylum Act, he should append a written memorandum to the relevant Statutory Instrument, explaining the rationale for believing those countries to be safe;
>
> (2) if grounds other than nationality for considering a claim "clearly unfounded" are developed by the Home Office, an explanation of those grounds should be made available to this Committee; and
>
> (3) a review of the practicality and effects of non-suspensive appeals should be carried out after they have been in operation for 12 months.[104]

D. Reactions

The Refugee Council opposes the Government's latest proposals on safe countries for a number of reasons:

- We are opposed in principle to the designation of countries as safe for all people for all time and believe that decisions subsequently made are driven by political rather than human rights considerations.
- People are not obliged to seek asylum at the first available opportunity and to link a failure to do so to credibility is a matter of great concern.
- If the proposal is about transferring responsibility to safe third countries this should be subject to the procedural safeguards enumerated by UNHCR.
- Denying the right of appeal against removal to a safe third country will seriously compromise refugee protection.[105]

The Immigration Law Practitioners' Association feared that these proposals, along with the reduction in appeal rights, would lead indirectly to more asylum seekers being returned to persecution in their countries of origin:

> There are already extensive powers, established over many years, restricting the possibilities for asylum seekers to challenge decisions by the Secretary of State that their asylum claims must be decided elsewhere, under third country procedures. It is not clear what further extensions of these powers are being proposed here – the proposals are too vague. However any expansion of these kinds of powers is likely to put more asylum seekers at risk of indirect return to persecution in their counties of origin, through misuse of the powers, or through mistakes, as their powers to argue

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[104] Home Affairs Committee, *Asylum Removals* HC 654-I, April 2003, paragraph 42

[105] *The Refugee Council's response to new legislative proposals on asylum reform*, November 2003: http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf

that the Secretary of State has got it wrong in a particular case are likely to be still further reduced.[106]

V Appeals and judicial review

A. Background

The main features of the current appeals system - which enables asylum and immigration decisions by the Home Office, the Immigration Service and British posts abroad to be reviewed by an independent judicial body - are as follows:[107]

- The 'Immigration Appellate Authority' (IAA) consists of adjudicators and the Immigration Appeal Tribunal (IAT). It is independent of the Home Office and is part of the Court Service within the Department for Constitutional Affairs. Its personnel are now appointed by the Lord Chancellor, although until 1987 they were appointed by the Home Office.

- There are two levels of appeal:

    1. appeals are dealt with first by a legally-qualified adjudicator, who generally sits alone to hear a case;
    2. in most cases, there is a right to make a written application for leave to appeal to a higher level, the Immigration Appeal Tribunal, which can review the adjudicator's treatment of the case. The IAT comprises a panel, usually of two or three people, at least one of whom must be legally qualified. It will grant leave to appeal typically where there is a legal point at issue, or where there are other special circumstances which justify a further appeal. If leave is granted, a hearing before the Tribunal is arranged.

- If a person applies to the IAT for leave to appeal and is refused, there is no right of appeal against that decision. Judicial review of a refusal of leave to appeal to the IAT used to be available, but this was replaced on 1 April 2003 by a new paper-based final review (Statutory Review) by an Administrative Court judge.

- If the IAT grants leave to appeal but then dismisses the appeal after a hearing, a written application can be made to the IAT for permission to appeal to the Court of Appeal (or Court of Session in Scotland). If this too is refused, a renewed application for permission can be made to the Court of Appeal itself. Few cases reach the Court of Appeal and even fewer go beyond that to Court to the House of Lords, which is the final level of appeal in the UK.

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[106] ILPA, *Response from the Immigration Law Practitioners' Association to new legislative proposals on asylum reform*, November 2003: http://www.ilpa.org.uk/

[107] adapted from Joint Council for the Welfare of Immigrants, *Immigration, nationality & refugee law handbook*, 2002 edition, p600

- In certain cases, usually involving questions of national security, the right of appeal is not to the adjudicator or the IAT but instead to the Special Immigration Appeals Commission (SIAC). If the SIAC dismisses an appeal, the way to challenge the decision is to ask for leave to appeal to the Court of Appeal.

The appeals system has been amended many times in recent years. In general, the appeals system which applies to a case is that in force at the time of the primary decision being appealed against, so there may be several different systems operating for older and newer cases at any one time.

The current system of immigration appeals was first introduced by the *Immigration Appeals Act 1969***.** A tribunal-based system including lay members was chosen instead of a court-based one because it was thought that it would be concerned mainly with matters of fact rather than matters of law.[108] If that was the case then, it certainly is no longer, and this is reflected in the fact that every adjudicator appointed since 1987 has been legally qualified.[109] Section 81 of the 2002 Act reflects the requirement introduced by the 1999 Act that every adjudicator must be legally qualified. The Tribunal still includes lay members.[110]

At first the rights of appeal were of limited value in asylum cases and, therefore, those who had been refused asylum often resorted to judicial review. However, following a case in which the European Commission of Human Rights held that this was an inadequate remedy,[111] the *Asylum and Immigration Appeals Act 1993* introduced an in-country right of appeal for nearly all rejected asylum claimants. It also, however, prevented appeals going as far as the Tribunal where the Secretary of State had certified that the refused asylum claim was without foundation.[112] This 'certification procedure' was later developed and expanded far beyond its original scope.

Further changes to the appeals system were introduced by the *Asylum and Immigration Act 1996* and the *Immigration and Asylum Act 1999*. One of the major changes introduced by the 1999 Act was the 'one-stop' process. This covers the whole process from application to the grant of leave or removal, and is therefore not just an appeals system. Under the one-stop process, an applicant can only have one application running at a time. Anything he or she says to add to it or change it until the immigration authorities make a decision is a variation of the application. An application will attract only one decision and one appeal, however many times it is varied. The intention was to stop applicants making separate appeals on every aspect of their claim.

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[108] Wilson Committee Report, *Report of the Committee on Immigration Appeals* (set up in 1966 and chaired by Sir Roy Wilson QC) - Cmnd 3387, 1967

[109] *Macdonald's Immigration Law and Practice* (5th edition, 2001) para 18.10 fn2

[110] *ibid* para 18.11

[111] *Vilvarajah v UK* (1991) 14 EHRR 248

[112] 1993 Act Sch 2 para 5(3) (as originally enacted)

Most recently, Part 5 of the *Nationality, Immigration and Asylum Act 2002* and its associated new procedural rules[113] re-structured the appeals system and introduced some further changes. These took effect on 1 April 2003 and the changes were summarised in a Home Office press notice of that date:

> **Asylum appeals**
>
> Further reforms coming into force today will help to prevent the appeals process being used to frustrate and delay removal from the UK, including:
>
> - making it clear someone can be returned to another EU country when they have already claimed asylum there, without the right to an appeal in the UK;
> - a new five-day limit for detainees to lodge appeals and a closure date to prevent multiple adjournments of appeal hearings;
> - streamlining appeals to prevent multiple appeals on grounds which could and should have been raised at an earlier stage;
> - a power for the Tribunal to certify a vexatious or unreasonable appeal as having no merit; and
> - a paper-based, fast and final review (Statutory Review) by an Administrative Court judge - replacing Judicial Review for those refused permission to appeal to the Tribunal.[114]

The Immigration Appellate Authority is supervised by the Council on Tribunals, which operates under the *Tribunals and Inquiries Act 1992*.[115] The Government is currently proposing that the Immigration Appellate Authority and other major tribunals combine their administrations into a new, unified Tribunals Service.[116] A White Paper on the unified Tribunals Service is expected imminently.[117]

B. Asylum appeals statistics

1. Adjudicators

Just as the number of asylum applications has risen sharply over the past decade, so has the number of first-tier appeals (which are determined by adjudicators of the Immigration Appellate Authority), from 2,440 appeals in 1994 to 64,405 in 2002. In 2002, the total number of appeals represented 77% of all initial decisions made in that year (83,540). While around three-quarters of all appeals determined by IAA adjudicators result in dismissal, since 1999 the proportion of appeals allowed has increased. In 2002, 76% of appeals to IAA

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[113] *Immigration and Asylum Appeals (Procedure) Rules 2003* SI 2003/652

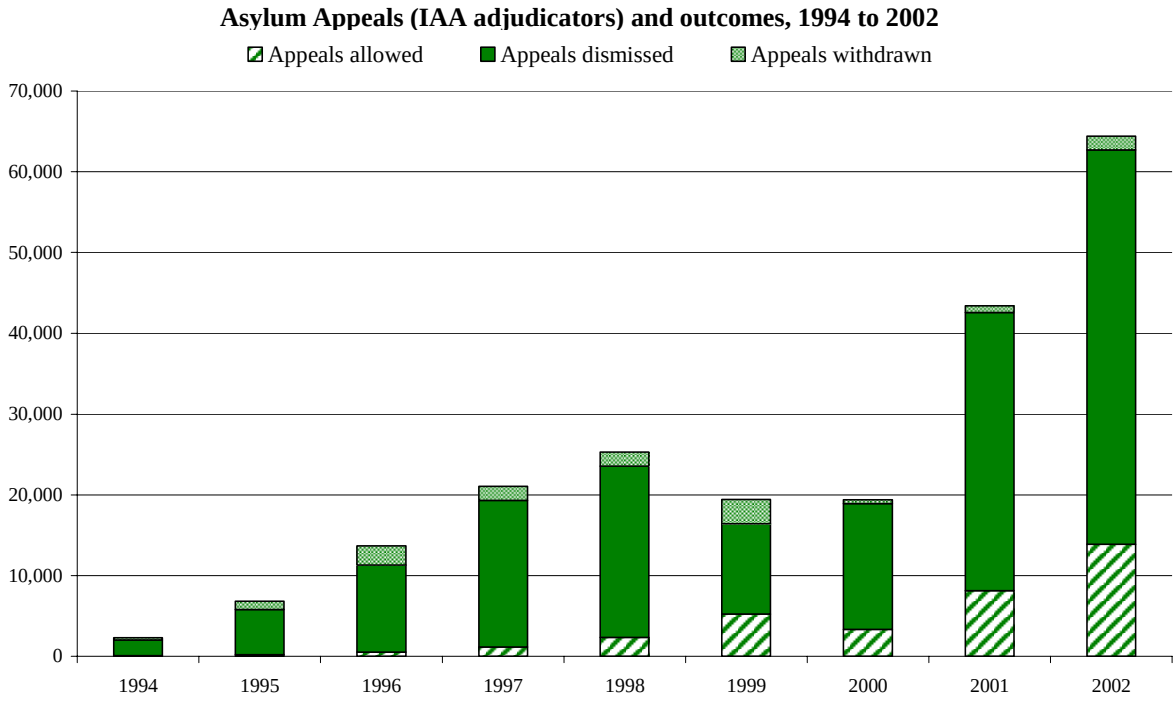
[114] Home Office press notice 096/2003, *Major building blocks of immigration reform now in place - Home Secretary*, 1 April 2003: http://194.203.40.90/news.asp?NewsId=260&SectionId=1

[115] http://www.council-on-tribunals.gov.uk

[116] see Lord Chancellor's Department press notice, *Government Announces Modernised Tribunals Service in the Greatest Shake-Up for 40 years*, 11 March 2003: http://www.dca.gov.uk/civil/tribspn.htm

[117] HC Deb 12 March 2003 c18WS

adjudicators were dismissed, 22% were allowed and 3% were withdrawn. In 2002, IAA adjudicators determined 6,435 appeals from nationals of Sri Lanka, 5,605 from FRY nationals and 5,520 from Turkey. Appeals were most likely to be successful among nationals of Eritrea (39%), Iran and Zimbabwe (both 38%), and least likely to be successful among nationals of India (3%), Poland (4%), the Czech Republic and Romania (both 5%).[118]



2. Immigration Appeal Tribunal

The number of applications for leave to appeal from adjudicators to the IAT has risen sharply in recent years. In 1994, there were 1,410 applications for leave to appeal, of which the IAT made a decision on 1,385 applications. By 2002, this had risen to 25,600 applicants for leave to appeal, of which the IAT made a decision on 22,825. Most applications for leave to appeal are refused. For example, only 6,920 cases were forwarded to the full Tribunal in 2002, and 5,565 appeals were actually determined during that period.

In 2002, the majority of appeals determined by the IAT were either allowed (11%, 620 cases) or remitted back to IAA adjudicators for further consideration (49%, 2,700 cases). The remainder were either dismissed (36%, 2,015 cases) or withdrawn (4%, 225 cases). The IAT remits only if the determination was so flawed that it could not stand or if there was new evidence that had not been considered. If it is remitted *de novo* (i.e. to a new adjudicator) it indicates that the determination was unsustainable; if it is remitted to the same adjudicator it usually means there was some evidence that needs to be assessed. Remitted cases are absorbed in the general statistics for adjudicator hearings, and may or may not be decided in

[118] Further information is available in Library Standard Note *Asylum Appeals statistics*, available on the Parliamentary intranet at http://hcl1.hclibrary.parliament.uk/notes/sgss/snsg-02692.pdf

the appellant's favour (outcomes of remitted appeals are not included separately in the published data).

The Home Secretary has consistently referred to 3% of appeals to the IAT being successful and, therefore, a 97% success rate at the adjudicator stage,[119] but this is not apparent from the published statistics. The 3% figure may allude to the proportion of the adjudicator decisions which are eventually overturned, but not all of the cases decided by the IAT over a particular period would have been heard by the adjudicators during that same period. Also this would ignore the role of remittals.

3. Higher courts

If the IAT dismisses an appeal after a hearing, a written application can be made to the IAT for leave to appeal to the Court of Appeal (or Court of Session in Scotland). If this application is refused, a renewed application for leave can be made to the Court of Appeal (or Court of Session) itself. A determination from either of these courts may then proceed to the House of Lords with leave. The Immigration and Nationality Directorate of the Home Office, the Department for Constitutional Affairs and the Court Service are unable to provide data relating to immigration and asylum appeals which proceed from the Immigration Appeal Tribunal to the Court of Appeal or, from there, to the House of Lords.

4. Judicial Review

Most applications for leave to move for Judicial Review of asylum and immigration cases are unsuccessful. Typically, only around one-quarter to one-third of such applications are granted leave to move for Judicial Review, although in 2002 just 9% of leave applications were successful. There are no apparent trends to the outcome of Judicial Review hearings. In some years a majority of cases are successful, whereas in others most cases are dismissed. In 2002, 30% of cases considered were allowed while 67% were dismissed.

[119] see for example HC Deb 2 December 2003 c377 and cc399-400

Asylum appeals detemined by adjudicators of the Immigration Appellate Authority (IAA), excluding dependants, 1994-2003

principal applicants only

	Initial decisions (Home Office)	**Appeals received (Home Office)**	**Appeals received (IAA)**	**Total appeals determined**		**Appeals allowed**		**Appeals dismissed**		**Appeals withdrawn**	
				number	*% of initial decisions*	*number*	*% of total determined*	*number*	*% of total determined*	*number*	*% of total determined*
1994	20,990	10,580	6,675	2,440	12	95	4	1,970	86	235	10
1995	27,005	14,035	15,810	7,035	26	230	3	5,565	82	1,035	15
1996	38,960	22,985	22,580	13,790	35	515	4	10,785	79	2,360	17
1997	36,045	20,950	22,385	21,090	59	1,180	6	18,145	86	1,720	8
1998	31,570	14,320	15,440	25,320	80	2,355	9	21,195	84	1,770	7
1999	33,720	6,615	7,775	19,460	58	5,280	27	11,135	57	3,050	16
2000	101,650	46,190	28,935	19,395	19	3,340	17	15,580	80	475	2
2001	126,690	74,365	47,905	43,415	34	8,155	19	34,440	79	825	2
2002	87,285	51,695	64,125	64,405	74	13,875	22	48,845	76	1,685	3
2003 Q1	20,765	12,600	18,090	20,595	…	3,480	17	16,445	80	670	3
2003 Q2	14,655	10,800	17,835	19,345	…	4,060	21	14,875	77	415	2

Quarterly data is estimated

Source: Home Office *Asylum Statistics*

Outcome of appeals determined by adjudicators of the Immigration Appellate Authority, excluding dependants, by nationality, 2002

	Appeals determined by adjudicators (2)						
	Total	**Allowed**		**Dismissed**		**Withdrawn**	
		number	*as % of total determined*	*number*	*as % of total determined*	*number*	*as % of total determined*
Albania	1,200	165	14	955	80	80	7
Czech Republic	960	50	5	825	86	85	9
FRY	5,605	890	16	4,375	78	335	6
Macedonia	490	55	11	390	80	40	9
Moldova	295	25	9	245	84	20	7
Poland	895	35	4	800	90	60	6
Romania	760	35	5	670	88	55	7
Russia	465	120	26	320	69	25	5
Turkey	5,520	1,320	24	4,070	74	130	2
Ukraine	515	65	12	420	82	30	6
Other Former USSR	1,350	225	17	1,040	77	85	6
Other Former Yugo.	330	105	32	205	62	20	5
Europe Other	455	65	15	365	80	25	5
Total Europe	**18,835**	**3,160**	**17**	**14,690**	**78**	**985**	**5**
Colombia	660	160	24	465	70	35	5
Ecuador	365	45	13	305	83	15	4
Jamaica	400	40	9	320	80	40	10
Americas Other	135	15	11	115	84	5	5
Americas Total	**1,565**	**260**	**17**	**1,205**	**77**	**100**	**6**
Iran	3,765	1,430	38	2,210	59	125	3
Iraq	4,570	1,130	25	2,970	65	470	10
Middle East Other	960	365	38	525	55	65	7
Middle East Total	**9,295**	**2,930**	**32**	**5,705**	**61**	**665**	**7**
Algeria	1,465	200	14	1,190	81	75	5
Angola	565	120	21	365	65	80	14
Burundi	350	90	26	230	65	35	9
Cameroon	480	150	31	315	66	15	3
Congo	615	180	29	405	66	30	5
Dem Rep of Congo	1,650	520	31	1,035	63	95	6
Eritrea	705	275	39	390	56	40	6
Ethiopia	615	230	37	340	55	50	8
Gambia	45	10	20	35	78		2
Ghana	205	10	6	175	87	15	8
Ivory Coast	325	65	20	245	75	15	5
Kenya	555	95	17	430	78	30	6
Nigeria	905	60	6	790	87	55	6
Rwanda	280	60	22	185	66	30	12
Sierra Leone	1,030	120	12	870	85	40	4
Somalia	3,015	1,065	35	1,570	52	380	13
Sudan	480	225	46	240	50	20	4
Tanzania	65	10	17	50	76	5	7
Uganda	750	155	21	570	76	25	3
Zimbabwe	2,405	925	38	1,370	57	110	5
Africa Other	605	100	17	465	77	40	7
Africa Total	**17,115**	**4,660**	**27**	**11,270**	**66**	**1,190**	**7**
Afghanistan	2,040	230	11	1,235	60	580	28
Bangladesh	580	55	10	505	87	25	4
China	2,590	165	6	2,395	92	35	1
India	1,695	45	3	1,580	93	70	4
Pakistan	2,690	395	15	2,150	80	150	6
Sri Lanka	6,435	1,455	23	4,880	76	100	2
Vietnam	305	50	16	250	82	5	2
Far East Other	1,140	185	16	910	80	40	4
Far East Total	**17,475**	**2,575**	**15**	**13,900**	**80**	**1,000**	**6**
Nationality not known	120	15	13	95	81	5	6

(1) Figures (other than percentages) rounded to nearest 5, with '*'= 1 or 2. Figures may not add up due to independent rounding.
(2) Figures include cases withdrawn by the Home Office, as well as the appellant.
(P) Provisional figures.

Source: Home Office Asylum Statistics

Further appeals to the Immigration Appeal Tribunal and outcomes of Tribunal hearings, excluding dependants, 1994 to 2002

	Applications for leave to appeal to the Tribunal		Appeals to the Tribunal		Outcome of Tribunal hearings			
	Applications	*Decisions*	*Received*	*Determined*	*Allowed*	*Dismissed*	*Withdrawn*	*Remitted*
1994	1,410	1,385	…	270	10	65	5	190
1995	3,065	3,000	675	390	20	105	20	240
1996	5,620	5,345	1,010	900	55	285	10	550
1997	8,915	8,130	2,185	1,375	…	…	…	…
1998	10,910	10,315	1,775	1,090	…	…	…	…
1999	8,635	9,575	2,135	1,790	…	…	…	…
2000	6,020	5,490	1,615	2,635	815	1,385	220	215
2001	15,540	13,540	3,860	3,190	475	1,140	150	1,430
2002	25,600	22,825	6,920	5,565	620	2,015	225	2,700

Source: Home Office *Asylum Statistics*

Applications for Judicial Review and outcomes, excluding dependants, 1994-2002

	Applications for leave to move for Judicial Review				Outcome of Judicial Review hearings					
			of which: granted leave		Allowed		Dismissed		Withdrawn	
	Applications	**Decisions**	**to move**	***% (*)***	**Total**	***% (**)***	**Total**	***% (**)***	**Total**	***% (**)***
1994	…	…	…	…	…	…	…	…	…	…
1995	855	…	…	…	…	…	…	…	…	…
1996	1,225	915	190	*21*	…	…	…	…	…	…
1997	1,350	1,250	320	*26*	…	…	…	…	…	…
1998	1,890	1,220	300	*25*	…	…	…	…	…	…
1999	1,790	1,125	395	*35*	135	*57*	25	*11*	75	*32*
2000	1,920	2,095	555	*26*	365	*48*	300	*40*	95	*12*
2001	2,210	2,300	290	*13*	260	*68*	60	*16*	60	*16*
2002	3,075	2,980	260	*9*	25	*30*	60	*67*	5	*3*

* as percentage of applicants
** as percentage of total determined

Source: Home Office *Asylum Statistics*

C. Proposed changes

The consultation paper *New Legislative Proposals* mooted several changes to the system of immigration and asylum appeals, with the intention of tackling the apparent problem of 'applicants who lodge groundless appeals to delay removal'.

The proposals consisted of:

- replacing the current two-tier appeals structure (adjudicators plus Immigration Appeals Tribunal) with a single appeal to a new single-tier Tribunal called the Asylum & Immigration Tribunal (AIT) and headed by a President;
- having the vast majority of appeals heard and decided by a single immigration judge working closely with more senior judiciary; and
- looking at ways to restrict access to the higher courts.

The Immigration Law Practitioners' Association (ILPA) suggests that it is inappropriate for the Home Office to be involved in deciding reforms to the immigration appeals system (which is the responsibility of the Department for Constitutional Affairs) as the Home Office is a party to appeals and has a vested interest in the appeals process:

> The Home Office's support for legislative moves to abolish the right to challenge itself damages the appearance of separation of powers. We believe that it is constitutionally inappropriate for the executive branch of government to utilise the appeals system as a method of implementing its own policy concerns surrounding immigration and asylum.[120]

ILPA also criticised the consultation paper's proposals for being so vague as to make it impossible to give a proper response.[121] It did however pick up on some particular issues, such as the proposition that most appeals would be heard and decided by a single judge even though the new system would be single-tier:

> Other comparable tribunals (such as the social security appeals system and the employment tribunals system) are two-tier. Indeed, this was the model suggested by Sir Andrew Leggatt in his report 'Tribunals for Users: One System, One Service' (March 2001). In addition, both the Social Security Appeals Tribunal and the Employment Tribunals are three-member panels even at first instance. Yet it is proposed that migrants and asylum seekers should be denied a second-tier appeal without the added safeguard of a panel decision at first instance.[122]

ILPA also suggested an alternative way of preventing abuse of the appeals system:

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[120] Immigration Law Practitioners' Association, *Response from the Immigration Law Practitioners' Association to new legislative proposals on asylum reform*, November 2003: http://www.ilpa.org.uk/

[121] *ibid*

[122] *ibid*

> There are many other ways of preventing abuse of the appeals system. ILPA has long advocated that all migrants and asylum seekers should have access to quality representation. We believe that the LSC should act firmly against those representatives who lead their clients up the garden path with unscrupulous or poor quality advice. We believe that it is far more appropriate to target cowboys in this area than to remove rights of appeal.[123]

Amnesty International's UK Refugee Affairs Director, Jan Shaw, criticised the appeals proposals:

> Further proposals to restrict appeals also risk jeopardising the lives of asylum-seekers who already suffer from poor initial decision-making and need safeguards against return to torture, imprisonment or even death.
>
> Rather than 'cracking down' on asylum seekers, the government should be working to make the decision-making process more reliable and the safeguards against hasty return more robust.[124]

The Refugee Council was also critical of the proposed reduction of appeal rights, saying.

- […] There are already mechanisms available to prevent abuse. A significant proportion of cases succeeds at Tribunal level indicating a continuing need for such scrutiny.
- We are extremely concerned about the suggestion of further reductions in access to judicial review, which we regard as an essential constitutional safeguard.[125]

Dr Heaven Crawley of the Institute of Public Policy Research suggests that these proposals might even have a negative impact on the Government's aim of encouraging legal migration:

> Further restrictions on appeal rights and limits on legal aid are based on the assumption that all asylum-seekers are abusing the system and that decision-making by the Home Office does not require independent judicial oversight. These two assumptions are not supported by the evidence.
>
> The government's continuing assault on the asylum process reinforces negative public attitudes towards immigration and undermines the government's efforts to deliver managed migration.[126]

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[123] *ibid*

[124] Amnesty International UK press release, *AI Criticises UK Government Plans to Prosecute Asylum Seekers Over Travel Documents*, 27 October 2003: http://www.amnesty.org.uk/news/refugees/271003.shtml

[125] The Refugee Council's response to new legislative proposals on asylum reform, November 2003: http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf

[126] Institute of Public Policy Research press release, *IPPR on Queen's speech 2003*, 26 November 2003: http://www.ippr.org/press/index.php?release=267

Migration Watch UK has, however, proposed a similar one-tier appeals structure with limited opportunities for judicial review:

> Abolish the Immigration Appeal Tribunal. Appeals, with leave, would go straight to the Court of Appeal, just as appeals from County Courts have always done. There would thus remain three levels of appeal but the right to apply for judicial review would need to be restricted.[127]

In principle, the UNHCR supports the UK's attempts to reduce the levels and layers of appeal provided that procedural safeguards and due process are observed, and overall quality of decisions both at first instance and on appeal are improved.[128] Its response to the consultation paper also highlighted the importance of appealing to the higher courts:

> in order to ensure consistency in the interpretation of refugee law, including procedural safeguards, it would be useful to leave open the possibility for individuals to challenge complex and precedent-setting points of law at higher instance courts. In the UK, it is often through the higher courts that protection principles and the finer points of refugee law are authoritatively articulated. To remove this indispensable layer of appeal would negatively impact upon the valuable guidance role played by jurisprudence in the UK.[129]

D. The Bill

1. Introduction

Clause 10 of the Bill, entitled 'unification of the appeal system', goes considerably further than the proposals outlined in the consultation paper. The Bill proposes not only replacing the two-tier system of adjudicators and Tribunal with a single-tier Tribunal, but also abolishing the jurisdiction of the Court of Appeal (and the Court of Session in Scotland and the Northern Ireland Court of Appeal) and the House of Lords in nearly all immigration and asylum cases, as well as limiting the circumstances in which judicial or statutory review relating to such cases is possible.

The Bill does not, however, propose any changes to the system of appeals to the Asylum Support Adjudicators against decisions relating to asylum support from the National Asylum Support Service (NASS).[130]

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[127] Migration Watch UK, *Asylum laws: A Way Forward*, 25 July 2003: http://www.migrationwatchuk.org/default.asp?menu=publications&page=publications.asp

[128] UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, paras 7-11: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

[129] UNHCR press notice, *UK New Legislative Proposals on Asylum Reform - UNHCR Comments*, 26 November 2003, para 7: http://www.unhcr.org.uk/press/26Nov03_legislation_UNHCR_comments.htm

[130] under the *Immigration and Asylum Act 1999* ss102-4 and Sch 10

The Home Office Regulatory Impact Assessment on the reform of the appeals system estimates the total savings as being anywhere between £41,000 and £23.2 million.[131]

2. The new 'final' Tribunal

Clause 10 would abolish the existing system of adjudicators and Immigration Appeals Tribunal, and replace it with a single-tier Asylum and Immigration Tribunal whose decisions would be exclusive and final.

The proposed new section 108A of the *Nationality, Immigration and Asylum Act 2002* (as inserted by clause 10(7) of the Bill) would mean not only that could there be no judicial review of the new Tribunal's actions or inactions, but also that there could be no appeal from the Tribunal to the Court of Appeal (still less from there to the House of Lords).

Only the Tribunal itself would be able to review its own decisions, and any such review would be conducted entirely in writing. ILPA has criticised this 'internal' review:

> We do not believe that judicial oversight can be provided 'in house'. If the only remedy against an AIT decision were to be a review by a senior AIT member, the review would lack independence because it would amount to a review of the AIT by the AIT itself. In order to comply with the rule of law, there must be independent review.[132]

Because neither the appellant nor the Home Office would be able to take a case further than the Tribunal, existing Court of Appeal and House of Lords judgments would remain as precedent in the area of immigration and asylum (unless the Tribunal itself referred a point of law to the Court of Appeal - see below). The current Tribunal is not a superior court of record so its decisions are not binding on itself or on adjudicators (though it has developed a practice of 'starring' certain determinations which should then be considered binding).[133] Adjudicators' decisions are certainly not binding: the inappropriateness of first-tier tribunals setting precedent has been explained by Wade and Forsyth:

> It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time ... In enforcing this rule the courts are underlining the difference between judicial and administrative processes. The legal rights of litigants are decided according to legal rules and precedents which are sometimes held to prevail over the court's own opinion. But if an administrative authority acts in this way its decision is ultra vires and void. It is not allowed to

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131 Home Office, *Regulatory Impact Assessment: the Asylum and Immigration (Treatment of Claimants, etc.) Bill: reform of the asylum immigration and nationality appeals system*, 24 November 2003, para 23

132 ILPA, *Response from Immigration Law Practitioners' Association to new legislative proposals on asylum reform*, 17 November 2003

133 Practice Direction 10

> "pursue consistency at the expense of the merits of individual cases". This doctrine is applied even to statutory tribunals, despite their resemblance to courts of law.[134]

A leading immigration barrister, Frances Webber, has strongly criticised the ousting of the jurisdiction of the higher courts:

> In no other field apart from immigration is recourse to the higher courts prevented, in apparent breach of article 13 of the European Convention on Human Rights, which enjoins Member States to provide effective remedies against potential breaches of Convention rights. The Court of Appeal has frequently spoken about the high constitutional importance of access to the courts, and senior judges are likely to oppose the attempt to deprive them of their supervisory role, particularly in asylum cases where the consequence of getting it wrong can be fatal, and the Home Office and the immigration appeal Tribunal have frequently got it wrong in the past. [135]

Many lawyers' and refugees' organisations are concerned about how these proposals on appeals would interact with the proposed cutbacks on legal aid in asylum and immigration cases. Their fear is that if applicants are inadequately represented there will be more wrong decisions and, hence, a greater need for appeals and judicial review. Or, to put it another way:

> On the one hand, asylum seekers are told that they will only be given one chance to persuade a legal body of the merits of their claim. On the other hand, they are to be deprived of the legal help required to do it.[136]

3. Human rights implications

The new subsection 108A(4) of the 2002 Act (as inserted by clause 10(7) of the Bill) contains the unusual provision that the *Human Rights Act 1998* should be read subject to the limitations on right to appeal contained in clause 10. The Explanatory Notes say that the effect of this is to prevent appeals against or challenges to the Tribunal's actions on human rights grounds going beyond the Tribunal.

This may raise questions of compatibility with the European Convention on Human Rights (ECHR). For instance, the requirements of Article 3 and 8 ECHR demand that there is thorough investigation into any allegation of a potential breach of those articles. More generally, reducing the effective scope of the *Human Rights Act 1998* may give rise to arguments about whether it continues to provide an effective remedy in terms of Article 13 ECHR.

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134 Wade and Forsyth, *Administrative Law*, eighth edition, pp 328-29

135 Frances Webber, *Concern at new asylum measures*, 1 December 2003: http://www.irr.org.uk/2003/december/ak000001.html

136 Frances Webber, *Concern at new asylum measures*, 1 December 2003: http://www.irr.org.uk/2003/december/ak000001.html

The Government's Explanatory Notes on the Bill address these arguments:

> Clause 10 raises issues under article 13 of the ECHR in relation to the removal of appeal rights. People may also wish to challenge whether their substantive Convention rights under articles 3 and 8 will be jeopardised by the absence of a further tier of appellate rights. However, article 13 does not require the provision of multiple tiers of appeal. What it requires is access to an independent national authority with powers to provide effective redress. The single tier Tribunal will meet this test. It is wholly independent of the initial decision-making body. The single tier tribunal will provide an effective remedy as article 13 requires and will safeguard appellants' Convention rights including those referred to in articles 3 and 8.[137]

The Explanatory Notes add that:

> 108A(3) limits a person's right to bring a further legal challenge that the tribunal has acted incompatibly with his Convention rights. Because of the elimination of further appeals and judicial review, a person would only be able to challenge a judicial act if the Lord Chancellor chooses to provide in rules for that challenge to be brought before some appropriate tribunal or court. However, the limitation imposed by clause 108A(3) is unlikely to raise ECHR issues. The Article 13 right to an effective remedy in respect of the underlying complaint is satisfied by the right of appeal to the Tribunal.[138]

Article 13 ECHR states:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

This Article was not incorporated into domestic UK law by the *Human Rights Act 1998* because the view was taken that the very fact of incorporation provides an effective domestic remedy to anyone whose incorporated rights are violated.[139] However, this would not prevent the European Court of Human Rights (ECtHR) from taking a view on whether the UK is in breach of Article 13.

Nothing in the Bill can limit the jurisdiction of the ECtHR. Indeed, it may result in more appeals to the Strasbourg court because, under the new scheme, domestic remedies in many cases would be exhausted at a much earlier stage than currently. The ECtHR has previously overturned the credibility findings of adjudicators.[140]

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[137] Bill 5-EN, para 138
[138] Bill 5-EN, para 139
[139] Lord Chancellor, HL Deb 18 November 1997 c475
[140] *Hilal v UK* (2001) 33 EHRR 2, [2991] INLR 595

4. Home Office deportation and removal directions

The new section 108A of the 2002 Act would be entitled 'exclusivity and finality of Tribunal's decision', and indeed most of the decisions and actions listed in the new section as unchallengeable are those of the new Tribunal. However, the new section 108A(2)(e) would also make deportation/removal decisions and actions by the Home Office unchallengeable in any court.

The 2002 Act had already made it clear that giving 'removal directions' after an earlier refusal decision was classified as a purely administrative decision which would not attract a right of appeal.[141] The Immigration Advisory Service suggested that this might breach the Refugee Convention and the ECHR:

> 17. Although judicial opinion on this issue is divided 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.[142]

5. Judicial review

The Bill would not remove every possibility for judicial review in asylum and immigration cases. The new section 108A has specific exemptions for:

- reviewing a decision by the Home Secretary to certify an asylum or human rights case as clearly unfounded (under section 94 of the 2002 Act);
- reviewing a decision by the Home Secretary to certify that an appeal is being brought solely to delay removal (under section 96 of the 2002 Act);
- reviewing a decision by the Home Secretary to certify certain matters relating to removals to a safe third country under Schedule 3 to the Bill; and
- considering whether a member of the Tribunal has acted in bad faith.

Judicial review would remain available in these cases and for any other executive actions (or inactions) from which it is not specifically barred. The Home Office Regulatory Impact Assessment relating to appeals states specifically that 'it is not proposed to oust JR of executive decisions' which it says currently comprise approximately 45% of asylum and immigration Judicial Reviews).[143]

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[141] *Nationality, Immigration and Asylum Act 2002* s82(2)(g),(h) and (i)

[142] Immigration Advisory Service, response to the white paper *Secure Borders, Safe Haven*, 22 March 2002: www.iasuk.org/press_office/display.asp?id=63&type=news&cat=54

[143] Home Office, *Regulatory Impact Assessment: the Asylum and Immigration (Treatment of Claimants, etc.) Bill: reform of the asylum immigration and nationality appeals system*, 24 November 2003, para 15

The inappropriateness of judicial review as a remedy, particularly in immigration and asylum cases, was addressed in the Leggatt Review of Tribunals.[144]

6. Remaining jurisdiction of the higher courts

The higher courts would not be completely without jurisdiction either. The Court of Appeal and House of Lords would still be able to hear appeals from the Special Immigration Appeals Commission (which deals with cases which have security implications), and also appeals in the remaining judicial review actions.

In addition a new section 108B of the 2002 Act would allow the President of the new Tribunal to refer a complex or important point of law to the Court of Appeal (or its equivalents in Scotland and Northern Ireland) in certain limited circumstances. His decision to refer (or not to refer) would not be subject to judicial review; and there would be no appeal to the House of Lords from any ruling of the Court of Appeal under this provision.

7. Membership, qualifications and procedure

Schedule 1 contains provisions on the membership, presidency, proceedings and staff of the new Tribunal, and replaces both Schedules 4 and 5 to the 2002 Act which dealt with adjudicators and the Immigration Appeals Tribunal respectively. The main differences from the current rules are that under Schedule 1 all members of the new Tribunal must be legally qualified, but the President of the new Tribunal would no longer need to be a member of the higher judiciary (the President of the IAT is currently a High Court judge).

As under the current legislation, the detailed rules of procedure for appeals to the new Tribunal would be contained in rules made by the Lord Chancellor, while 'directions' made by the President of the Tribunal would set out matters such as how many members of the Tribunal would deal with particular kinds of case. Nothing in the Bill would directly enact the consultation paper's proposal that the vast majority of appeals would be heard and decided by a single immigration judge.

VI Restricting support and assistance

By Tim Jarrett, Social Policy Section

A. Background

1. Introduction

The Bill proposes to take away benefits from failed asylum seekers once they are in a position to leave the UK. This could lead to their children being looked after by the local

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[144] Sir Andrew Leggatt, *Tribunals for Users - One System, One Service*, March 2001, paras 6.27-6.36: http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm

authority, a possibility that has provoked considerable controversy. However, two points may initially be made about this measure:

1) It is not an entirely new concept. Provision already exists in the *Nationality, Immigration and Asylum Act 2002* to withdraw support from failed asylum seekers and their dependants if they fail to comply with removal directions. The Bill proposes that benefits should be withdrawn earlier, specifically as soon as it is confirmed that the family is in a position to leave the UK, with the intention that this will encourage the family to leave the UK voluntarily without the need for removal directions to be issued and acted upon.

2) There is no specific clause in the Bill on taking children into care. Clause 7 proposes that benefits are withdrawn from a failed asylum seeker when the family is in a position to leave the UK; as a consequence of this, under section 20 of the *Children Act 1989*, the children concerned may be classed as "in need" and therefore should be provided with accommodation by a local authority, but their parents cannot be supported under this provision.

2. NASS support for families

In 1998 the Labour Government decided to abolish entitlement to mainstream benefits for all asylum seekers and, instead, introduce a new asylum support scheme run by a division of the Home Office.[145] The National Asylum Support Service (NASS) was set up under the *Immigration and Asylum Act 1999*, and the new scheme started on 3 April 2000. From this date new asylum seekers have been ineligible for mainstream social security benefits and have instead been able to apply for asylum support from NASS if they are destitute.

Under 1996 legislation asylum seekers' access to social security benefits and housing assistance was terminated as soon as the Home Office made its initial decision.[146] If they needed accommodation or support during an appeal they had to rely on the 'safety net' of local authority social services accommodation[147] or (for children and their families) assistance under Part III of the *Children Act 1989*.

By contrast, NASS asylum support is available throughout the appeals process. If there are no children in the household, asylum support will stop following a 'grace period' after the final determination of the claimant's case (which is either when their claim has been determined and they choose not to appeal, or because they have exhausted all appeal routes).

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[145] Home Office White Paper, *Fairer, Faster and Firmer - a Modern Approach to Immigration and Asylum*, CM 4018, 17 July 1998 para 8.21

[146] The *Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996* SI 1996/30 and the *Asylum and Immigration Act 1996* - see Library Standard Note SN/HA/2058, *Support for 'in-country' asylum seekers*, 31 October 2003

[147] for instance under the *National Assistance Act 1948*

The 'grace period' for NASS support was originally set at 14 days,[148] but recently it was extended to 21 days for unsuccessful applicants, and to 28 days for those who have received a positive decision.[149] There are no exceptions even for those who are unable to leave the UK or who are bringing an action for judicial review after an unsuccessful appeal or application for leave to appeal. Local authority social services support has now been withdrawn for most adult asylum seekers, but 'hard cases' support from NASS may be available in such cases under section 4 of the *1999 Act*.

NASS support for asylum seekers with minor dependants was originally continued up until the point when they were actually removed from the United Kingdom. However, the *Nationality, Immigration and Asylum Act 2002* introduced a whole range of restrictions on the support to which asylum seekers and failed asylum seekers were entitled, including withdrawing support from rejected asylum seekers with or without minor dependants who fail to comply with removal directions. Section 54 and Schedule 3 of the *2002 Act*, which came into force on 8 January 2003, withdrew access to asylum support and various forms of local authority assistance and support from four classes of 'ineligible person':

1. people who have refugee status in another EEA state[150] (and their dependants);
2. citizens of another EEA state (and their dependants);
3. failed asylum seekers who fail to co-operate with removal directions (and their dependants); and
4. people who are in the UK unlawfully but are not claiming asylum

The kinds of support and assistance affected include:

- NASS asylum support, interim support and 'hard cases' support;
- accommodation provided by local authorities under section 21 or 29 of the *National Assistance Act 1948*;
- local authority support for the elderly;
- local authority social welfare services;
- assistance to promote well-being under section 2 of the *Local Government Act 2000*;
- support provided to adults under the *Children Act 1989*; and
- equivalent support and assistance in Scotland and Northern Ireland.

Therefore, asylum seekers with a dependant child in the household who do not comply with removal directions will now have any of these forms of support stopped before they leave the UK. However, the new set of restrictions under section 54 'does not prevent' the provision of

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[148] *Asylum Support Regulations 2000* SI 2000/704 reg 1(2)

[149] *Asylum Support (Amendment) Regulations 2002* reg 3. Those who are given indefinite leave are no longer restricted from applying for mainstream social security benefits and local authority housing assistance.

[150] the European Economic Area (EEA) consists of the EU Member States plus Iceland, Liechtenstein and Norway.

support or assistance to the children themselves, for instance under Part III of the *Children Act 1989*.[151]

3. Removal of families

A memorandum from the union representing immigration staff, the Public and Commercial Services Union (PCS), to the Home Affairs Committee Inquiry into Asylum Removals suggests that there are considerable problems with the Government's policy of trying to remove failed asylum-seeking families:

> The media focus on failed asylum seekers and the resultant "government imperatives" has led to the removal of families being prioritised whilst offenders, sometimes violent criminals, remaining [sic] untouched. This ordering of business is largely a "business" decision, in that families deliver huge cost savings in asylum support, compared to the negligible savings from removing single males. Immigration Service staff are under pressure not to investigate non-asylum offenders… The enforcement arm of the department operates largely in a policy vacuum. No national policy is in existence for the newly formed arrest teams. There has been an increase in family removal activity yet no national guidelines have yet been produced. The pressure for instant results appears to subvert the normal rules of policy making and implementation.[152]

Beverley Hughes, Minister of State at the Home Office, told the Home Affairs Committee, on 19 November 2003, that forcible removal from the country "is an experience I would prefer families not to have, if I could".[153]

In the twelve months between November 2002 and October 2003, a total of 3,241 asylum and immigration removals were cancelled or deferred, although the figures do not show how many of these relate to families. Since April 2003, the monthly total of cancelled removals has increased significantly. While there were 41 cancelled or deferred removals in March 2003, by October the number had risen to 457.

Most cancelled or deferred removals were for administrative reasons (71%) such as deferral to another time (33%), administrative or other error (23%) or because the flight was cancelled by the airline (10%). Around one-in-seven cancelled or deferred removals was a result of failure to comply by the asylum or immigration applicant (14%): 9% of cancelled removals were because those who were to be removed failed to turn up ('no show') while 5% were because the applicant had otherwise absconded. Further information is provided in the following table:

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[151] *2002 Act* Sch 3 para 2(1)(b)

[152] published as as an appendix to the Home Affairs Committee report on Asylum Removals, Vol 2, HC 654-II of 2002-03, 14 April 2003

[153] Home Affairs Committee, *Asylum Applications*, uncorrected transcript, 19 November 2003, Q869

Cancelled and deferred asylum and immigration removals, November 2002 to October 2003

	Nov-02	Dec-02	Jan-03	Feb-03	Mar-03	Apr-03	May-03	Jun-03	Jul-03	Aug-03	Sep-03	Oct-03	*Total*
Administrative reasons													
Removal deferred (RD)	...	...	...	...	7	75	165	185	154	137	211	125	*1,059*
Error	...	...	...	...	4	47	65	78	89	109	115	123	*630*
Flight Cancelled	...	...	...	...	3	20	21	41	29	104	39	55	*312*
Carrier refusal of passengers	...	...	...	...	...	16	16	16	42	41	22	30	*183*
RDs set in Error	...	...	...	...	1	8	12	6	24	29	21	18	*119*
Previous RDs were "To Be Notified"	...	...	...	...	...	1	...	2	...	2	1	2	*8*
Total administrative reasons	…	…	…	…	*15*	*167*	*279*	*328*	*338*	*422*	*409*	*353*	*2,311*
Applicant failure to comply													
No Show	4	1	...	4	1	17	29	45	51	47	52	41	*292*
Absconded	7	4	4	6	8	12	17	14	30	16	18	14	*150*
Total applicant failure to comply	*11*	*5*	*4*	*10*	*9*	*29*	*46*	*59*	*81*	*63*	*70*	*55*	*442*
Further representations													
Further representations received	...	...	...	1	2	11	12	19	17	21	13	15	*111*
Claimed asylum	...	...	...	...	2	6	9	15	15	16	13	8	*84*
Barrier raised	...	...	...	...	4	7	4	7	17	13	8	9	*69*
Medical representations Received	...	...	...	...	...	6	6	17	11	8	3	1	*52*
Judicial Review threatened	...	...	...	...	...	4	1	3	4	5	16	10	*43*
Appeal received	...	...	...	...	5	7	6	4	5	6	5	...	*38*
Judicial Review application received	...	...	1	...	3	6	2	8	10	5	1	1	*37*
Human Rights Act application	1	...	1	1	1	...	6	4	2	3	4	4	*27*
MP representations received	...	...	...	...	...	2	...	2	...	3	7	1	*15*
Further asylum application	...	...	...	...	...	1	8	1	1	...	1	...	*12*
Total further representations	*1*	...	*2*	*2*	*17*	*50*	*54*	*80*	*82*	*80*	*71*	*49*	*488*
Total	***12***	***5***	***6***	***12***	***41***	***246***	***379***	***467***	***501***	***565***	***550***	***457***	***3,241***

Source: Immigration and Nationality Directorate

It should be noted that where a family has been in the UK for a long time, they may be able to take advantage of one of the rules or concessions on long residence to allow them to stay here. The main provisions which may be relevant are:

- the 10-year rule (for applicants who have been here legally for 10 years);[154]
- the 14-year rule (for applicants who have been here for 14 years, some of which was legal and the rest not);[155]
- the concession relating to children who have been here for 7 years;[156] and
- the concession for asylum-seeking families with children under 18 who applied for asylum before 2 October 2000.[157]

4. Local authorities' responsibility to look after children

a. Definitions under the Children Act 1989

Part III of the *Children Act 1989* concerns the provision of services for children and their families. A child is defined by the *Children Act 1989* as "a person under the age of eighteen"[158]; a "child in need" is one who is:

> unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority [under Part III of the Act];
>
> [whose] health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> [who is] disabled.

In addition, 'family', in relation to such a child, "includes any person who has parental responsibility for the child and any other person with whom he has been living".[159]

b. Accommodation for a child in need

In their consultation document of October 2003, the Government said that support would continue to be provided to children under Section 20 of the *Children Act 1989*,[160] which states that:

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[154] Immigration Rules (HC 395 of 1993-94, as amended) pars 276A-276D
[155] Immigration Rules (HC 395 of 1993-94, as amended) pars 276A-276D
[156] see HC Deb 24 February 1999 c309w
[157] Home Office policy note, *One-off exercise to allow families who have been in the UK for three or more years to stay*, 28 November 2003: http://www.ind.homeoffice.gov.uk/news.asp?NewsID=337
[158] *Children Act 1989* (chapter 41), section 105(1)
[159] *Children Act 1989*, section 17(10)
[160] Home Office and Department for Constitutional Affairs, *New Legislative Proposals on Asylum Reform*, 27 October 2003, Annex A, see: http://www.ind.homeoffice.gov.uk/filestore/Consultation_Letter.pdf

> (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
> (b) his being lost or having been abandoned; or
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

However, the case of *R v Barnet London Borough Council, ex parte G* demonstrated that the obligation to provide accommodation for a child under Section 20 does not extend to a requirement to provide accommodation for the child's parent.[161]

Section 20(4) also states that a local authority "may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare". Further, section 20(5) states that a local authority "may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare".

However, before providing accommodation for a child, section 20 of the Act states that the views of the child and those with parental responsibility should to be taken into consideration. Furthermore:

> (7) A local authority may not provide accommodation under this section for any child if any person who—
>
> (a) has parental responsibility for him; and
> (b) is willing and able to—
> (i) provide accommodation for him; or
> (ii) arrange for accommodation to be provided for him,
>
> objects.

With regard to Section 20(7) of the *Children Act 1989*, it should be noted that the right of persons with parental responsibility to object to a child being provided with accommodation is not an absolute right.[162] In addition to subsection 7, those with parental

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[161] Hershman and McFarlane, *Children Law and Practice*, para B161

[162] The exceptions are if that if a person with a residence order, or an order for the care of the child in his favour, agrees to the child being provided with accommodation, no other person may remove him. If the child is 16 or over and wishes to remain in the accommodation, then he cannot be removed [Hershman and McFarlane, *Children Law and Practice*, para B201].

responsibility also have powers under subsection 8 once the child has been taken into local authority accommodation. Section 20(8) states that "any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section". Hershman and McFarlane's *Children Law and Practice* explains that:

> Subject to certain exceptions,[163] when a child is being provided with accommodation by the local authority, any person who has parental responsibility may remove him from the accommodation provided, at any time and without giving notice. This does not cater for the situation which may occur where the local authority considers that the particular person wishing to remove the child (who need not be the person who requested that the accommodation be provided) does not have suitable accommodation for him, or is otherwise unsuitable. The only remedy to prevent the child's removal is to invoke the emergency provisions, or seek to obtain a care order [under section 31 of the *Children Act 1989*].[164]

c. Taking a child into care

Section 31 of the *Children Act 1989* allows a child to be taken into care by a local authority on a successful application to a court; the court may make a care order if it is satisfied:

> that the child concerned is suffering, or is likely to suffer, significant harm; and that the harm, or likelihood of harm, is attributable to (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or (ii) the child's being beyond parental control.[165]

The Act also states that:

> where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.[166]

When a child is taken into care, the local authority has parental responsibility for the child and has the power to determine the extent to which others with parental responsibility may exercise it.[167]

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[163] The exceptions are if that if a person with a residence order, or an order for the care of the child in his favour, agrees to the child being provided with accommodation, no other person may remove him. If the child is 16 or over and wishes to remain in the accommodation, then he cannot be removed [Hershman and McFarlane, *Children Law and Practice*, para B201].

[164] Hershman and McFarlane, *Children Law and Practice*, paras B191-194

[165] *Children Act 1989*, section 31(2)

[166] *Children Act 1989*, section 31(10)

[167] *Children Act 1989*, section 33(3)

Care orders can not be made for children who have reached seventeen years of age, or sixteen years of age if they are married.[168]

If a child is in the care of a local authority, as distinct from being a child in need (the difference being that a court has to approve a care order for the child to be in the care of the local authority), section 23 of the *Children Act 1989* states that the local authority must provide accommodation and maintain him in other respects, such as providing maintenance.[169]

d. Responsibilities of a local authority to children they look after

In respect of any child which is looked after by a local authority,[170] be they in the care of the local authority under a care order or a child in need who requires accommodation,[171] the local authority has a duty under the *Children Act 1989* to "(a) safeguard and promote his welfare; and (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case".[172]

B. The Bill

1. Consultation

The Government now wants to withdraw NASS and other forms of support - except local authority support for children under the *Children Act 1989* - from such families as soon as it is confirmed that the family is in a position to leave the UK. An outline of the new policy was announced in a press release of 24 October 2003, in which the Home Office said that "new measures … would end all future support for families who have been refused asylum if they refuse to take up the offer of a voluntary, paid route home". The Home Office added that "the new power to withdraw support from families who fail to take up the offer of a paid, voluntary route home builds on existing powers to remove support from those who do not comply with enforced removal directions".

Following the press release, on 27 October 2003 the Home Office and Department for Constitutional Affairs issued a consultation entitled *New Legislative Proposals on Asylum Reform*. The consultation included a section entitled "Restricting family support":

> Since Section 54 of the Nationality, Immigration and Asylum Act 2002 came into force, it has been possible for us to withdraw NASS [National Asylum Support

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[168] *Children Act 1989*, section 31(3)
[169] *Children Act 1989*, section 23(1)
[170] *Children Act 1989*, section 22(1)
[171] Where "accommodation" means accommodation which is provided for a continuous period of more than 24 hours [*Children Act 1989*, section 22(2)].
[172] *Children Act 1989*, section 22(3)

> Service] support from families with dependent children who have had their asylum claim determined (either because their claim has been determined and they choose not to appeal or because they have exhausted all appeal routes), if they have failed to comply with a removal direction. We propose that the law should be amended so that support for families whose claim for asylum has been rejected and who have no avenue of appeal left, will end as soon as it is confirmed that the family is in a position to leave the UK. This would provide an additional incentive to leave the UK promptly either via the Immigration Service or via a voluntary assisted return and would reduce the waste of public funds when such a family fails to comply with a removal direction. Support would continue in cases where the family would require a travel document to leave and they are complying with the re-documentation process. The process for removing support from those without dependant children when their claim is determined would remain unchanged. If asylum support is withdrawn from a family in this way, other forms of support, including that provided under section 2 of the Local Government Act 2000, would no longer be available except to the children under Section 20 of the Children Act 1989.[173]

2. Clause 7 of the Bill

The Bill proposes to bring forward the point at which the payment of benefits to failed asylum seekers with dependent children is stopped. It would mean that benefits to failed asylum seekers with children would be stopped as soon as it was confirmed that the family was in a position to leave the UK, rather than if a removal direction is not complied with as is currently the case under the *Nationality, Immigration and Asylum Act 2002*.

Clause 7 of the Bill would provide another class of person who was ineligible for the various kinds of support listed in Schedule 3 to the *2002 Act* (see above). This fifth class would be asylum seekers (and their dependants) whom the Secretary of State had certified as having failed without reasonable excuse to take reasonable steps to leave the UK voluntarily or to place themselves in a position in which they were able to leave the UK voluntarily. This certification could happen long before any removal directions were set. Asylum support and the listed types of local authority support and assistance for the adult members of the family would cease 14 days after the person had received a copy of the certificate.

The consultation paper *New legislative proposals* suggested that support would continue only in cases where the family would require a travel document to leave and they were complying with the re-documentation process. As is currently the case under Schedule 3, any children could still be supported under existing powers (including Part III of the *Children Act* 1989) despite the withdrawal of support to their family.

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[173] Home Office and Department for Constitutional Affairs, *New Legislative Proposals on Asylum Reform*, 27 October 2003, Annex A, see: http://www.ind.homeoffice.gov.uk/filestore/Consultation_Letter.pdf

Although the measure to cease benefits payments to those failed asylum seekers with children was introduced in the *Nationality, Asylum and Immigration Act 2002* and came into force on 8 January 2003,[174] Home Office officials have confirmed that there have not been any cases, to date, of benefits being withdrawn from families following a failed removal direction. Therefore no children have yet been taken into care as a result of benefits being withdrawn from their parents following a failure to comply with a removal direction under the 2002 Act.

3. The intention and effects of the policy

a. The intention of the policy

The intention of the policy is to "remove the current incentive for families to delay removal as long as possible and so save money in support and legal costs".[175] The Home Office Minister, Beverley Hughes, argued to the Home Affairs Committee that:

> the proposals are not at all intended to make families destitute. They are intended both as a deterrent but also as an incentive.[176]

Ms Hughes confirmed that these proposals could result in children being separated from their parents and put into care.[177] There is nothing explicit in the Bill which would provide new powers to take children into care so anything to this effect would have to be done using existing powers. BBC News Online quotes a Home Office statement of 23 November 2003 which defended the proposals as:

> the only logical way of dealing with people who have no right to be in the country and therefore no right to public funding or accommodation, but who are simply refusing the organised offer of a paid return home… The policy is not designed to make families destitute and we do not believe many, if any, people would put their children in this position. In rare cases where it is necessary to end support we would not want children to be made destitute as a result of the actions of their parents so provision would be made to take them into care.[178]

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[174] *The Nationality, Immigration and Asylum Act 2002 (Commencement No. 1) Order 2002*, SI 2002/2811

[175] Home Office Press Release 295/2003, *Clearing the Decks for Tough New Asylum Measures – Home Secretary*, 24 October 2003, see: http://www.homeoffice.gov.uk/n_story.asp?item_id=657

[176] Home Affairs Committee, *Asylum Applications*, uncorrected transcript, 19 November 2003, Q869, see: http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmhaff/uc692-ix/uc69202.htm

[177] Oral evidence to the House of Commons Home Affairs Committee, 19 November 2003. Uncorrected transcript Q869-Q878: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/uc692-ix/uc69202.htm

[178] BBC news online, *Asylum child care plan condemned*, 23 November 2003: http://news.bbc.co.uk/1/hi/uk_politics/3231418.stm

Beverley Hughes said that the policy "actually says to people, 'Look, there are some alternatives here. We hope that you will take the best alternative for yourself and your children, that is, to go voluntarily, but if you do not, you will be removed forcibly and you will not continue to get support until we have done that'".[179]

These comments were echoed by the Home Secretary in an article in *The Guardian*, in which he wrote:

> we have to deal with failed asylum seekers who refuse to leave … I did not come into politics to be the King Herod of the Labour party. All we are saying is that if failed claimants continue to refuse our offer to fly them home and help them resettle, we cannot provide indefinite state benefits.

He added that the policy "has to be a last resort if we are not to give up enforcing the immigration laws of this country altogether". The Home Secretary also said that "our obligations to the welfare of the child are paramount, which means they would have to be taken into care if they were likely to suffer as a result" of benefits being withdrawn from their parents.[180]

b. The number of children that may be affected

The Minister, in reply to a question asking how many children of asylum seekers would be taken into local authority care each year following the Government's recent announcement, told the House on 8 December 2003 that "it is not the Government's intention that any children will be taken into care as a result of this proposal",[181] having also told the Committee that "I hope it would not come to that in any individual circumstance at all".[182] The Home Secretary has said that "I have no desire to take children from parents and put them in care unless it is an absolute last resort".[183] The Minister also told the Committee that "if it came to it that in a particular case the children were taken into care, then we would act very quickly in those circumstances to remove the whole family completely, because clearly they would be with their parents. We would not be leaving those children with local authorities for long periods of time".[184]

However, *The Observer* said that "up to 2,000 youngsters could be affected by the clampdown".[185] Maeve Sherlock, director of the Refugee Council, has argued that "we

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[179] Home Affairs Committee, *Asylum Applications*, uncorrected transcript, 19 November 2003, Q869
[180] "Comment & Analysis: I am not King Herod", *The Guardian*, 27 November 2003
[181] HC Deb 8 December 2003 c235W
[182] Home Affairs Committee, *Asylum Applications*, uncorrected transcript, 19 November 2003, Qq870 and 875
[183] "Comment & Analysis: I am not King Herod", *The Guardian*, 27 November 2003
[184] Home Affairs Committee, *Asylum Applications*, uncorrected transcript, 19 November 2003, Q872
[185] "Asylum children will be forced into care", *The Observer*, 23 November 2003

could end up with quite significant costs of looked-after children without achieving any increase in removals",[186] a view supported by Stephen Rylance of Refugee Action.[187]

Although the Government has stated that it is not its intention that any children will be taken into care as a consequence of benefits withdrawn, another issue which has been raised is the possible scenario of failed asylum seekers consciously allowing their children to be taken into care; this would increase the number of children affected by the proposal in clause 7. On this issue, a Home Office spokesman told the *Daily Mail* that "we do not believe many, if any, people would put their children in this position".[188] Beverley Hughes was asked by John Denham, Chairman of the Home Affairs Committee, what might happen if parents who had been refused asylum "disappeared", so leaving their children in the care of the local authority; however, the Minister did not think that this practice would occur on a "big scale":

> **Chairman:** How do you prevent a situation where you would try to apply the new provision and the parents simply disappear, go illegal, leaving the children in the care of and at the expense of the local authority care under section 20 [of the *Children Act 1989*]?
>
> **Beverley Hughes:** That would be a difficult situation, because we would not, unless we could satisfy ourselves, want to return the children, but we could return them to other members of their family, and that might be a possibility.
>
> **Chairman:** Is it not the most likely response of people who have their support withdrawn, for the parents to disappear in that way?
>
> **Beverley Hughes:** I do not know. That is a very important generalisation about how people might regard their children as pawns in that game and be prepared to abandon them to a local authority. I am not sure that that would be something that many people would do on a big scale.[189]

However, *The Observer* reported that John Denham had subsequently

> warned that parents might simply go underground, surrendering children to the state in the belief that they would be better off raised in Britain. 'Faced with that choice, families might disappear and leave their children in care, thinking that is the better option, because at least the children would get to stay in Britain and perhaps the adults would get to stay here, albeit working illegally'.

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[186] "The asylum parents who could lose their children", *Daily Mail*, 24 November 2003
[187] "Failed Asylum Seekers May Lose Their Kids", *Daily Express*, 24 November 2003
[188] "The asylum parents who could lose their children", *Daily Mail*, 24 November 2003
[189] Home Affairs Committee, *Asylum Applications*, uncorrected transcript, 19 November 2003, Qq873-4

He added that "what might seem completely unpalatable to somebody who is looking at it through a traditional British nuclear family might not look quite the same in cultures more used to relying on extended families".[190]

4. The cost of the measure

The Explanatory Notes to the Bill state that, in regard to the costs for local authorities of looking after the children of failed asylum seekers, "the costs to these local authorities of children being accommodated under these circumstances would be met by Central Government. The savings made by this measure should cover any such costs".[191]

However, in a statement that was also critical of the nature of the proposals, the President of the Association of Directors of Social Services, Andrew Cozens, said, on the specific point regarding the impact on local authorities, that, "if put into effect, the proposal would put unacceptable pressure on what are already overstretched resources".[192]

In addition, the Government acknowledges that "it is possible that adding families as a new class of person who are ineligible for support to Schedule 3 to the Nationality, Immigration and Asylum Act 2002 may result in an increase in IND [Home Office Immigration and Nationality Directorate] staff required to deal with these cases".[193]

5. Compliance with the European Convention on Human Rights

The Home Secretary stated on 25 November 2003 that: "in my view, the provisions of the Asylum and Immigration (Treatment of Claimants, etc.) Bill are compatible with the Convention rights".[194]

On the specific point of the effects of clause 7, the Government acknowledged that it "raises an issue" under Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 8 (right to respect for private and family life) in relation to the removal of asylum support.[195]

The UK has to act in accordance with the European Convention on Human Rights (ECHR), including articles 3 and 8 of the ECHR, which are reproduced below:

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[190] "Asylum children will be forced into care", *The Observer*, 23 November 2003

[191] Explanatory Notes, *Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003*, para 121

[192] Association of Directors of Social Services, press release, *Aspects of Queen's Speech "belong to an earlier century" – ADSS*, 27 November 2003

[193] Explanatory Notes, *Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003*, para 124

[194] Explanatory Notes, *Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003*, para 135

[195] Explanatory Notes, *Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003*, para 137

Article 3

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Government has argued that:

> the provision [in the Bill] is aimed at encouraging those who can leave but are not doing so, to leave the United Kingdom. Any potential treatment contrary to Article 3 or Article 8 is therefore avoidable. In any event, there is a saving provision in Schedule 3 which would permit support to be provided to avoid a breach of a person's Convention rights in so far as is necessary.[196]

The Court of Appeal has recently held (admittedly in a different context) that withdrawal of support is not necessarily unlawful:

> It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself.[197]

In a subsequent case the Court of Appeal ruled that destitution does not necessarily constitute a breach of the Human Rights Act, though whether or not it did in any individual case would have to be assessed on its own merits.[198]

However, *The Guardian* reported that the pressure group Liberty had said there was a "distinct possibility" of a challenge under the Human Rights Act 1998 against the policy of taking children into care.[199]

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[196] Explanatory Notes, *Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003*, para 137

[197] *R v Secretary of State for the Home Department, ex p Q and others* [2003] EWCA Civ 364 at para 119(viii): http://www.bailii.org/ew/cases/EWCA/Civ/2003/364.html

[198] *R v Secretary of State for the Home Department, ex p T* [2003] EWCA Civ 1285: http://www.bailii.org/ew/cases/EWCA/Civ/2003/1285.html

[199] "Asylum children will be forced into care", *The Guardian*, 23 November 2003

6. United Nations' "Convention on the Rights of the Child"

The UK has been a signatory to the United Nations' "Convention on the Rights of the Child" (CRC) since 15 January 1992. Article 2 of the CRC states that:

> State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[200]

The preamble to the Convention states that:

> The States Parties to the present Convention … [be] convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.[201]

Although the Treaty is legally binding, it has required few specific changes in British law because its contents could be described as mainly aspirational. However, as a signatory to the CRC, the UK must report every five years on how the rights are being implemented to the United Nations' "Committee on the Rights of the Child", to which the Committee responds with its concerns and recommendations (the "concluding observations"). The UK last presented a periodic report to the Committee on 19 September 2002.[202]

7. Reactions

The Refugee Council agrees with the Government's aim but not its means:

- Whilst we accept that families that have reached the end of a fair and transparent determination process should be assisted to return, we consider removal of support whilst still in the UK to be inhumane.
- Most seriously the implication that children could be taken from their parents and placed in care flies in face of the principles of the Children Act where the well-being of the child is paramount.[203]

The Immigration Law Practitioners' Association raised some possible practical difficulties which might result from the Government's policy:

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[200] United Nations, *Convention on the Rights of the Child*, see: http://www.unhchr.ch/html/menu3/b/k2crc.htm

[201] United Nations, *Convention on the Rights of the Child*, see: http://www.unhchr.ch/html/menu3/b/k2crc.htm

[202] See: http://www.unog.ch/news2/documents/newsen/crc0237e.htm

[203] *The Refugee Council's response to new legislative proposals on asylum reform*, November 2003: http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf

> The present proposal […] places the responsibility on the failed asylum seeker to contact the Home Office or the IOM [International Organisation for Migration] in order to obtain a passage home. Given the general difficulties faced by anyone who tries to make direct contact with the Immigration and Nationality Directorate or obtain a swift decision from it, it is likely that the majority of these failed asylum seekers will find themselves on the street without any means of support for a considerable amount of time before their removal is organised.
>
> The proposal would also appear to introduce another new level of consideration for each case, that of whether a family is "in a position to leave the United Kingdom". It is not clear what factors would be considered but they could require the obtaining of medical and psychiatric reports, considerations of the effect on a child's education or the community impact of the removal of the asylum seeker. How long this would take and who would be charged with undertaking the consideration is equally unclear.
>
> It would appear that the proposal has been introduced in order for the government to be seen to be taking further action even though it is likely to create a procedure which is less clear, more complex and ultimately more costly. The prospect of failed asylum seekers and their dependent children living on the streets is also likely to create the need for even more applications to the High Court than were engendered by the much criticised Section 55 of the Nationality, Immigration and Asylum Act 2002. Furthermore, the suggestion that the state step in and accommodate the children involved under Section 20 of the Children Act 1989 conjures up the grimy images in the 1960s drama "Cathy Come Home".[204]

Alison Harvey, who chairs the Refugee Children's Consortium, wrote to the *Times* about these proposals on 26 November 2003. Her letter suggested that removing children into care because families had been denied support would contravene the Government's Green Paper *Every Child Matters*, the *Children Act 1989*, the UN Convention on the Rights of the Child and the *Human Rights Act 1998*:

> Sir, The Government tells us in its Green Paper on children at risk that every child matters. Perhaps someone should remind the Home Office. The Refugee Children's Consortium, a group that includes all the leading children's and refugee charities, opposes proposals to deny support to families at the end of the asylum process and remove their children into care (report, November 24). These are wholly at variance with the best-interests principle set out in the Children Act 1989.
>
> The separation of families to coerce them into leaving the country rides roughshod over that principle, and over the rights of the child as protected in the UN Convention on the Rights of the Child and the Human Rights Act 1998.

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[204] ILPA, *Response from the Immigration Law Practitioners' Association to new legislative proposals on asylum reform*, November 2003: http://www.ilpa.org.uk/

> The proposals would place children's health and development at risk, and put social workers in an impossible ethical position. There is a grave risk that, rather than be separated, families will seek to survive without any support.
>
> The Government's whole agenda for children at risk will founder if it cannot spread the "every child matters" philosophy across all departments. These proposals illustrate why the Home Office should not have the lead responsibility to support children in families who have sought asylum.
>
> The Government has provided no evidence of whether and how it has used the powers in the 2002 asylum legislation to deny support to families at the end of the asylum process, and made no case for their extension. The Refugee Children's Consortium opposes the existing powers and will work vigorously to oppose their extension.[205]

The Conservative leader Michael Howard wrote to Tony Blair on 28 November 2003 expressing his concerns about these proposals:

> I recognise that when benefit is removed from asylum seekers who have no genuine claim – a policy which was first introduced by the last Conservative Government and then reintroduced by Labour – local authorities might sometimes need to take action to protect children. This, of course, is quite different from threatening to place children in care to ensure that their parents leave the country. Neither the 1996 Act nor your own Government's 2002 Act, both of which withdrew benefits, were accompanied by such threats.
>
> I have made it clear that in my view this proposal offends against all standards of decent behaviour. I should be grateful if you would make it clear whether it is your intention to proceed with it.[206]

The reply to this letter was written by David Blunkett, and reported on the *BBC news online* website:

> Blunkett attacks Tory 'hypocrisy'
>
> Home Secretary David Blunkett has accused Conservative leader Michael Howard of "breathtaking hypocrisy" for his attack on new asylum plans.
>
> Mr Blunkett was countering criticisms of government plans that could see some asylum children taken into care. He said the Tory leader's criticism were "untenable" because of his own record as home secretary in the 1990s.

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[205] Letter to the *Times*, published 3 December 2003: http://www.timesonline.co.uk/article/0,,59-917532,00.html

[206] Conservative party press release, *Michael Howard writes to the Prime Minister about asylum*, 28 November 2003: http://www.conservatives.com/news/article.cfm?obj_id=80936

> […]
>
> Mr Blunkett said Mr Howard had moved to withdraw benefits from all asylum seekers when he was home secretary.
>
> "For you now to accuse of us going further than any civilised country should be prepared to go strikes me as an act of breathtaking hypocrisy," he said in a letter to Mr Howard.
>
> He urged Mr Howard to withdraw his remarks, made in his response to the Queen's Speech last week, and "stop relying on newspapers to write your scripts".
>
> And he argued the policy was aimed at safeguarding children.
>
> Mr Blunkett continued: "The government will always honour its obligation to put the interests of children first.
>
> "In any circumstances of potential destitution we will ensure children are protected whether their parents are failed asylum seekers or not.
>
> "However, these obligations must not hinder us from enforcing the immigration laws of the land.
>
> "Your position seems to be that we should not enforce immigration laws if children are involved."[207]

However, Mr Howard was not satisfied with this answer and wrote to the Prime Minster again:

> I am afraid the reply misses the point. The point at dispute is not the withdrawal of benefits from failed asylum seekers. Nor is it local authority responsibilities under the Children Act.
>
> The issue is that the Government should not be proposing that the children of asylum seekers should be taken into care in order to encourage their parents to leave the country. The Home Office was quoted on 23 November as saying it wished to encourage more people to take up the 'voluntary route', on the grounds that it was 'easier than if it gets to the stage of having the return enforced'.
>
> If people are not entitled to remain in Britain, they should be deported as a family. This is what would happen under an orderly asylum system. It is a measure of the failure of your approach that you seem incapable of implementing this. Instead, it will appear that deportation is seen as the Government as the last

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[207] 'Blunkett attacks Tory 'hypocrisy'', *BBC News Online*, 2 December 2003: http://news.bbc.co.uk/1/hi/uk_politics/3258102.stm

> resort, only to be tried after the threatened removal of children has not produced a 'voluntary' response.
>
> It is this that I find despicable. As Sir Bill Morris has said: "Using children to blackmail their parents is plumbing the depths of morality."
>
> I ask you once again if it is your intention to proceed with this proposal.[208]

VII Trafficking

A. Background

1. International instruments

Several organisations have been campaigning to end human trafficking, particularly of children. These include the UN Office on Drugs and Crime,[209] UNICEF (the UN Children's Fund),[210] ECPAT (End Child Prostitution and Trafficking)[211] and Anti-Slavery International.[212]

In November 2000 the United Nations' General Assembly adopted the *UN Convention Against Trans-National Organised Crime* and two optional protocols on trafficking in persons and smuggling of migrants.[213] Under the protocol, the parties agree to criminalise trafficking offences (including organising, directing, aiding, abetting, facilitating, or counselling the commission of an offence), provide assistance and protection for victims and, through co-operative measures and information sharing, aim to prevent trafficking.

The Convention and its protocols each required 40 ratifications before they would enter into force. The trafficking protocol currently has 117 signatories of whom 45 have ratified, including the United States, and will therefore enter into force on Christmas Day 2003. The Convention itself entered into force on 29 September 2003. The UK Government signed the Convention and both protocols on 14 December 2000 but has yet

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208 Conservative party press release, *Michael Howard: Letter to the Prime Minister on asylum*, 3 December 2003: http://www.conservatives.com/news/pressrelease.cfm?obj_id=81396

209 http://www.unodc.org/unodc/trafficking_human_beings.html?id=11705

210 see UNICEF UK campaign 'End child exploitation' publications page: http://www.endchildexploitation.org.uk/resources_publications.asp and UNICEF UK, *Stop the Traffic!* July 2003: http://www.endchildexploitation.org.uk/pdf/ct/UKtraffickingreportfinal.pdf

211 See ECPAT UK homepage: http://www.ecpat.org.uk/; ECPAT UK September 2003 newsletter: http://www.ecpat.org.uk/news0903.htm: and FAQs about Commercial Sexual Exploitation of Children, *What Can Be Done?*: http://www.ecpat.net/eng/CSEC/faq/faq14.asp

212 See Anti-slavery International trafficking homepage: http://www.antislavery.org/homepage/antislavery/trafficking.htm and *Human traffic, human rights: redefining victim protection 2002*, executive summary: http://www.antislavery.org/homepage/resources/exec%20summary%20&%20summary%20recommendations.pdf

213 United Nations General Assembly Resolution 55/25 (15 November 2000).

to ratify any of them. The Foreign Office website observes that 'the UK is continuing to encourage and, where necessary, assisting incorporation of the provisions of the Convention into domestic law around the world'.[214]

The Office of the UN High Commissioner for Human Rights has published *Principles and Guidelines on Human Rights and Human Trafficking*, which are intended to provide practical tools to ensure that human rights are at the centre of anti-trafficking strategies at national, regional and international levels.[215]

In August 2002, the European Union Council of Ministers' *Framework Decision on Combating Trafficking in Human Beings* came into force, with a deadline of 1 August 2004 for implementation by EU Member States. The Framework Decision stated that:

> The Member States must punish any form of recruitment, transportation, transfer or harbouring of a person who has been deprived of his/her fundamental rights. Thus, all criminal conduct which abuses the physical or mental vulnerability of a person will be punishable. The victim's consent is irrelevant where the offender's conduct is of a nature which would constitute exploitation within the meaning of the proposal, that is, involving:
>
> - the use of coercion, force or threats, including abduction
> - the use of deceit or fraud
> - the abuse of authority or influence or the exercise of pressure
> - the offer of payment
>
> Instigating trafficking in human beings and being an accomplice or attempting to commit a crime will be punishable…setting the maximum penalty at no less than eight years imprisonment…the Council will, by 1 August 2005, check that the Member States have taken the necessary measures [to transpose the Framework Decision into national legislation].[216]

A recent article in the *European Human Rights Law Review*, by Tom Obokata of the University of Nottingham School of Law, looks at the obligations in relation to the trafficking of human beings established under international human rights law. It identifies three such obligations:

1. to prohibit trafficking;
2. to investigate, prosecute and punish traffickers; and

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[214] http://www.fco.gov.uk//servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044551746259

[215] http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument

[216] European Union *Council Framework Decision 2002/629/JHA*, Official Journal of the European Communities L 203 (1 August 2003) also available at: http://europa.eu.int/scadplus/printversion/en/lvb/l33137.htm

3. to protect victims.[217]

2. The UK's position

The UK Government has stated its commitment to introducing a criminal offence of trafficking in human beings for the purposes of labour or sexual exploitation.[218] To this end, section 145 of the *Nationality, Immigration and Asylum Act 2002* created a specific offence of 'trafficking in prostitution' for the first time in the UK. This came into force on 10 February 2003[219] and was intended to be a stop-gap measure until the matter was addressed in the reform of sexual offences legislation (see below). The offence carries a maximum penalty of 14 years imprisonment and/or an unlimited fine.

The 2002 Act also provides that those convicted of the new offence against a child under 18 and subsequently sentenced to at least 12 months' imprisonment will be disqualified from future work with children.[220] If the court is considering making a confiscation order under the *Proceeds of Crime Act 2002* against a person convicted of a trafficking offence, it must assume that all his or her assets derive from that criminal conduct unless s/he can prove otherwise.[221]

Sections 57 to 60 of the *Sexual Offences Act 2003* then introduced a replacement set of offences on trafficking for the purposes of commercial sexual exploitation. These reproduce, with some significant amendments, section 145 of the *Nationality, Immigration and Asylum Act 2002*, but they have not yet been brought into force. The new offences cover trafficking into, within or out of the UK for sexual exploitation and also attract a maximum of 14 years' imprisonment, which is the highest determinate sentence that one can get (life imprisonment being the next level up).

Neither the 2002 Act nor the 2003 Act included any provisions on trafficking for labour exploitation. Some existing measures might be relevant - for instance, certain immigration offences such as 'assisting unlawful immigration', contained in sections 25-25C of the *Immigration Act 1971*. These offences were amended by section 143 of the 2002 Act, which also increased the penalties to a maximum of 14 years' imprisonment. The Home Office has, however, observed that this legislation is often difficult to apply since illegal entry can be hard to ascertain.[222] Other offences concerning fraud, forgery (of documents) and false imprisonment are also available to prosecutors to be used alongside offences of sexual and physical violence. A new Government initiative called

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[217] Tom Obokata, *Human Trafficking, Human Rights and the Nationality, Immigration and Asylum Act 2002* [2003] EHRLR 4, pp410-22

[218] see for example HC Deb 9 January 2002 c895-6w

[219] SI 2003/1

[220] section 164(4) of the 2002 Act does this by including the trafficking offence in Schedule 4 to the *Criminal Justice and Court Services Act 2000*.

[221] 2002 Act, Schedule 7, para 31

[222] Home Office *Setting the Boundaries* (2000), p. 105

REFLEX, established in 2001, is intended to bring together all the relevant agencies to gather information on organised immigration crime and to plan responses to it:

> We have established Reflex as a multi-agency response to organised immigration crime into the UK, including Northern Ireland. Reflex is led by the National Crime Squad and engages all the key agencies involved in combating organised immigration crime, including police, immigration services, security and intelligence agencies and the Foreign and Commonwealth Office (FCO), in building up intelligence and planning operations against the traffickers.[223]

When answering a PQ on human trafficking on 13 May 2003, the Foreign Office Minister, Bill Rammell, signalled the government's intention to introduce new legislation containing offences of human trafficking for labour exploitation 'as soon as parliamentary time allows'.[224] An article in the *Observer* on 9 November 2003 suggested that ministers had agreed during a meeting with police and campaigners the previous week that new legislation would be ready in time for the Queen's Speech:

> Traffickers who smuggle children into Britain to work as unpaid servants will face 14 years' imprisonment under a Bill that could become law by the end of the year.
>
> […] Unicef, the UN children's charity, claimed [Beverley] Hughes had assured it the Home Office was determined to rush the Bill through in time for the opening of the new session of Parliament on 26 November. 'They told us this was a priority for the Queen's Speech and that they're working hard to get it introduced,' said Fiona Whyte, parliamentary officer for Unicef. 'They gave us the clear indication that they would press for the same 14-year jail sentence handed down for those trafficking children for sexual exploitation under the Sexual Offences Bill.'[225]

3. Statistics

The *Observer* article added some background on the issue of child trafficking for forced labour:

> Unicef estimates a significant percentage of more than 10,000 children from West Africa, eastern Europe and Asia who enter the UK for fostering end up in an underground world of forced labour.
>
> Brought into the country clandestinely or by an adult claiming to be their parent, the children are secretly hired by professional families for childcare and chores.

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[223] HC Deb 26 November 2002 c248W
[224] HC Deb 13 May 2003 cc791-2W
[225] Amelia Hill, 'Child slave smugglers will face jail at last', *Observer*, 9 November 2003: http://observer.guardian.co.uk/uk_news/story/0,6903,1081037,00.html

> They are rarely paid, work long hours and are vulnerable to ill treatment without anyone even knowing they are in the country.
>
> The first recognised case of child trafficking in Britain took place in 1995 but the trade has increased so rapidly in recent years that pressure groups claim it has become a feature of many British cities.
>
> The Home Office has admitted that domestic service is one of the hardest forms of exploitation to detect and has admitted that closing the loophole that enables traffickers to escape detection is vital.[226]

There are **no** regular sources of Home Office data that report the numbers of women who have been trafficked into the UK from abroad for the purposes of sexual exploitation. Dr. Liz Kelly and Linda Regan of the Child and Women Abuse Studies Unit, University of North London, undertook a study into trafficking of women to the UK. They cited a number of different national and international estimates of the scale of people trafficking. These included:

- Global profits from the traffic in human beings amounted to $7billion annually (UN, 1998)
- Trafficking in human beings and illegal immigration is equivalent in financial terms to drug trafficking (UN, 1998)
- 500,000 women were trafficked into the European Union in 1995 (International Organisation for Migration [IOM], 1996)
- The specialist Metropolitan Police unit, CO14, reported that the first signs of trafficking into the UK were evident in the late-1980s in Triad-controlled brothels (CO14, 1999)
- A survey of police forces showed that the minimum number of women trafficked into the UK and known to the police in 1998 was 71, and over the previous five years was 271.[227]

B. The Bill

The new offence of trafficking for labour exploitation is contained in **clause 4** of the Bill. It would cover trafficking to, within or out of the UK, and would attract a maximum penalty (on conviction on indictment) of 14 years' imprisonment and/or a fine. The new offence would not apply in Scotland.

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[226] Amelia Hill, 'Child slave smugglers will face jail at last', *Observer*, 9 November 2003: http://observer.guardian.co.uk/uk_news/story/0,6903,1081037,00.html

[227] Policing and Reducing Crime Unit, Home Office *Stopping Traffic – Exploring the extent of and responses to trafficking in women for sexual exploitation in the UK* (Police Research Series paper 125) (2000)

This new offence will remain separate from the offence of trafficking for sexual exploitation in the *Sexual Offences Act 2003*. While the two offences are broadly similar (and have identical penalties) there are some differences, for instance:

- all the variants of the sexual trafficking offence require the perpetrator to have acted 'intentionally', but this word does not appear in clause 4;
- for the offence involving trafficking to the UK for sexual exploitation, the exploitation must happen after victim's arrival in UK, and equivalent time restrictions apply to the other sexual trafficking offences; there is no such restriction for the new offences in clause 4.
- for the new offence of trafficking for labour exploitation within the UK the perpetrator must have believed that the victim had been brought to the UK to be exploited, whereas there is no such requirement for the existing offence of trafficking for sexual exploitation within the UK.

The definition of exploitation in clause 4(4) - when combined with the sexual trafficking offences in the 2003 Act - meets the minimum requirements of the UN protocol:

> Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[228]

UNICEF UK welcomed the announcement of the new trafficking offence,[229] but the Immigration Law Practitioners' Association feel that simply creating another new offence is not enough:

> The creation of criminal penalties to punish those who profit from trafficking of women and children is an insufficient response to a trade which breaches the fundamental rights of the hundreds or possibly thousands who are brought into this country each year to be prostituted or treated as domestic slaves. It is also unlikely that this trade can be effectively brought to an end without the assistance of those who are trafficked. In order to gain their trust and co-operation measures will have to be taken to offer them protection in this country and not return them to the very countries where they are in danger of reprisals or re-trafficking.[230]

Other countries have implemented their international obligations against trafficking in a more comprehensive way. For example the US introduced new trafficking legislation in 2000: the *Victims of Trafficking and Violence Protection Act 2000*. According to the US Department of Justice, this new law:

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[228] United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, United Nations Doc. A/55/383 at 53 (2000)

[229] Letter to the Editor from Fiona Hesselden, Deputy executive director, Unicef UK, *Guardian* 28 November 2003

[230] ILPA, *Response from the Immigration Law Practitioners' Association to new legislative proposals on asylum reform*, November 2003: http://www.ilpa.org.uk/

- creates new laws that criminalize trafficking with respect to slavery, involuntary servitude, peonage or forced labor
- permits prosecution where nonviolent coercion is used to force victims to work in the belief they would be subject to serious harm
- permits prosecution where the victim's service was compelled by confiscation of documents such as passports or birth certificates
- increases prison terms for all slavery violations from 10 years to 20 years and adds life imprisonment where the violation involves the death, kidnapping, or sexual abuse of the victim
- requires courts to order restitution and forfeiture of assets upon conviction
- enables victims to seek witness protection and other types of assistance
- gives prosecutors and agents new tools to get legal immigration status for victims of trafficking during investigation and prosecution.[231]

A summary of the anti-trafficking legislation in a selection of European countries is given in a recent study from the *Separated Children in Europe Programme*.[232]

VIII Electronic tagging

By Pat Strickland, Home Affairs Section

A. Background

1. Introduction

Clause 15 of the Bill contains provision for the electronic monitoring of those subject to certain restrictions under immigration law, and of those released from detention on immigration bail. These were not set out in the consultation document, *New Legislative Proposals*. The Home Office Press Release on the Bill made it clear that the changes would allow for the release on bail or on temporary admission of those who would otherwise have been detained:[233]

- An enabling power to introduce tagging or tracking to maintain better contact with those subject to immigration control, including asylum seekers, and offer an alternative to detention for those who cannot offer suitable sureties.

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[231] US Department of Justice, Civil Rights Division, *New legislation: Victims of Trafficking and Violence Protection Act of 2000:* http://www.usdoj.gov/crt/crim/traffickingsummary.html

[232] Terry Smith, *Separated Children in Europe: Policies and Practices in European Union Member States: a Comparative Analysis*, Save the Children, 2003, ch 3: http://www.separated-children-europe-programme.org/Global/english/Publications.htm#compana

[233] Home Office Press Release 326/2003 "Final phase of asylum claims will build on progress of halving claims", 27 November 2003, http://www.homeoffice.gov.uk/n_story.asp?item_id=696

- Electronic monitoring will allow the release on bail and temporary admission/ temporary release of those at the lower end of the risk spectrum who would otherwise have been detained.
- Voice recognition technology could allow reporting by telephone rather than in person for low risk cases.

Reported remarks by the Home Secretary on the day the Bill was published indicated that those tagged would mostly be unsuccessful asylum seekers:

> Speaking about the tagging proposals, Mr Blunkett said: "It is an alternative to secure removal centres. If we can track people, both in terms of electronic tagging and in future satellite tracking, we can avoid having to use that."
>
> He added that people who would be tagged would mostly be unsuccessful asylum seekers, but would also include those who have "no justifiable claim at all, who we are waiting to remove".
>
> He continued: "We are currently moving to 3,000 secure removal places. If we are going to step up, as we have been, the policy of removals, then the capacity to hold people prior to removal would be exceeded. Therefore the tracking would be important in that regard."[234]

The Home Affairs Committee's April 2003 report on asylum removals considered the question of detention, concluding that it "can be justified especially prior to removal in cases where an individual has a history of evading the Immigration Service, or where there are reasonable grounds to suspect that the individual will abscond or pose a security threat or engage in criminal activities if allowed to remain at liberty".[235]

The report also drew attention to the lack of reliable statistics on the number of failed asylum seekers who remain in the UK:[236]

> **27. It is very difficult to address the problem of over-staying failed asylum seekers effectively in the absence of reliable statistics. It is not satisfactory that the Government is unable to offer even a rough estimate of the number of failed asylum seekers remaining in the UK.**

2. Existing uses of electronic monitoring

Electronic monitoring in England and Wales is currently used both as a sentence in its own right ('curfew orders'), and in 'Home Detention Curfew', whereby prisoners serving between three months and four years may be eligible to spend the last part of their

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234 "Tagging plan for asylum seekers", Press Association, 27 November 2003, at http://www.guardian.co.uk/Refugees_in_Britain/Story/0,2763,1094417,00.html

235 Home Affairs Committee, *Asylum Removals* HC 654-I, April 2003, paragraph 83

236 Ibid

custodial sentence electronically tagged at home. Curfew orders were originally provided for in the *Criminal Justice Act 1991*,[237] but were not made available to all courts until December 1999, following pilots. Home Detention Curfew has been in operation since January 1999 under provisions introduced by the *Crime & Disorder Act 1998*.[238] It was extended in July 2003[239], and the *Criminal Justice Act 2003* will extend it further.

An assessment of the Home Detention Curfew Scheme concluded that the net benefit was estimated to be around £36.7 million in the first year of the scheme's operation.[240]

3. Forms of electronic monitoring

Tagging involves the fitting of a small electronic device on the wrist or ankle of an offender and installing a monitoring device at their place of curfew. If the offender is not within the range set by the conditions of a curfew (usually the perimeter of a home) during the curfew hours, then the equipment will detect the absence and report it over a data link to a central monitoring service. Violations can lead to the curfew being revoked and the offender being returned to the courts or prison. The monitoring equipment is installed by private contractors.

Another form of electronic monitoring, voice verification, has been piloted since July 2001.[241] There have also been press reports that a new type of tag using global satellite positioning technology to pinpoint the wearer's location is being developed.[242] The Home Secretary has been reported as saying that he expects that a tag using this technology will be used within around 12 to 18 months.[243] The *Explanatory Notes* also make it clear that the Government envisages using this technology:

> 86. A person subject to electronic monitoring in accordance with these provisions is required to cooperate with arrangements for detecting and recording his location at specified times, during specified periods of time or throughout the currency of the arrangements. The electronic means employed in connection with such arrangements may include voice recognition technology, the use of a "tag" to confirm the presence of absence of the person from a specified location and in

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237 Now provided for by section 37 of the *Powers of Criminal Courts (Sentencing) Act 2000*

238 Sections 99 and 100 of the *Crime & Disorder Act 1998*, which inserted new sections 34A, 37A and 38A into the *Criminal Justice Act 1991*

239 *The Release of Short-Term Prisoners on Licence (Amendment of Requisite Period) Order 2003*, SI 2003/1602, and see the ministerial written statement at HC Deb 4 April 2003 c32WS

240 Home Office, *Monitoring of Released Prisoners: an evaluation of the Home Detention Curfew Scheme* March 2001, p42, at http://www.crimereduction.gov.uk/workingoffenders25.htm

241 Further information is available in a National Probation Service briefing, *Electronic Monitoring News*, Issue 01, *July 2003*, at; http://www.probation.homeoffice.gov.uk/files/pdf/,%20EM%20News%200703%20FINAL_.pdf

242 "5000 paedophiles to be tracked by satellite tags", *Observer*, 21 September 2003, http://observer.guardian.co.uk/uk_news/story/0,6903,1046614,00.html

243 "Tagging plan for asylum seekers", Press Association, 27 November 2003, at http://www.guardian.co.uk/Refugees_in_Britain/Story/0,2763,1094417,00.html

the future "tracking" technology to monitor the person's whereabouts on a continuous basis.

B. The Bill

Clause 15 would permit the electronic monitoring of adults who are subject to immigration control in the following circumstances:

- Where a residence restriction is imposed
- Where a reporting restriction could be imposed
- Where immigration bail is granted.

1. Residence and reporting restrictions

Various categories of people coming into the UK can be detained by immigration officers under Schedule 2 of the *Immigration Act 1971* (as amended). These include: people waiting for a decision on whether or not they will be given leave to enter; suspected illegal entrants; and people refused leave to enter who are awaiting removal. Detention can be "in such places as the Secretary of State may direct", which can include in ports, removal centres, police stations and, in a limited number of cases, prisons. The routine use of prisons for immigration detainees ended in 2002, but a small numbers of detainees remain in prison "for reasons of control and security".[244] The latest *Prison Population Brief* published by the Home Office says that there were 1,003 Immigration Act detainees in prison in April 2003.

However, these people do not necessarily have to be detained. They can be granted Temporary Admission instead, and this will normally be subject to conditions which may include requirements to live at a particular address ("residence restrictions"), and to report at specified intervals to the police or immigration service ("reporting restrictions").[245] There may also be restrictions on employment or occupation.

Clause 15 (2) of the Bill provides that where a residence restriction is in place, a person may also be required to cooperate with electronic monitoring. Electronic monitoring may also replace residence requirements (clause 15(3)).The provisions only apply to adults.[246]

2. Immigration bail

Certain categories of people can apply for bail from adjudicators or from an Immigration Appeal Tribunal. Clause 15(4) sets out that this may be granted subject to a requirement

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[244] HC Deb 1 May 2003 c 528W

[245] Under Schedule 2, paragraph 21 of the *Immigration Act 1971*

[246] Defined as those who appear to be adults to those imposing the residence or reporting restrictions or those granting immigration bail – clause 15(7)

to comply with electronic monitoring, and that this may (but need not) be imposed as a condition of bail.

C. Costs of detention

The average cost per place per day of detention in removal centres contracted out to the private sector is £97. The average cost of detention in Dover and Haslar, the two establishments operated by the Prison Service wholly as removal centres, is £66.56.[247]

D. Reactions

The Committee to Defend Asylum Seekers describes the proposal to tag asylum seekers facing deportation as "continuing the criminalisation of asylum seekers that successive governments have pursued."[248]

IX Fees for immigration applications

A. Background

Section 5 of the *Immigration and Asylum Act 1999* allows fees to be set for non-asylum applications received and processed in the UK. Charging on a 'cost recovery' basis under section 5 of the 1999 Act was introduced on 1 August 2003 for consideration of applications for leave to remain in the UK, variation of leave to enter or remain, or the fixing of a stamp in a new or replacement passport or travel document confirming indefinite leave (but not limited leave) to enter or remain in the UK.[249] The fees are £155 for an application made by post or £250 for an application made in person. There are certain exceptions, including for EEA nationals and for destitute victims of domestic violence.[250]

Charges for applications for work permit limited leave to remain are likely to be introduced in early 2004 at between £95 and £125, in addition to the existing charge of £95 for the work permit itself.[251]

Charging for visas and other applications from abroad is allowed under the *Consular Fees Act 1980*, and the current charges range from £22 (entry clearance for a Commonwealth

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247 HC Deb 16 September 2003 c669W

248 Committee to Defend Asylum Seekers, Online Petition Statement, 5 December 2003 at: http://www.labournet.net/antiracism/0312/ncadc1.html

249 *Immigration (Leave to Remain) (Fees) Regulations 2003*, SI 2003/1711

250 *Immigration (Leave to Remain) (Fees) Regulations 2003*, SI 2003/1711, reg 5

251 Home Office, *The Asylum and Immigration (Treatment of Claimants, etc.) Bill: Consolidated regulatory impact assessment for over cost charging; charging for transfer of conditions; and an extension of immigration officers' powers of arrest, entry and search*, 20 November 2003, para 8

country) to £260 (spouse, fiancé(e) or child coming for settlement).[252] Entry clearance officers have a discretion to waive these fees; some of the circumstances in which visas should be granted without charge are set out in instructions from UK Visas and include Cabinet ministers, destitute persons and nationals of Kyrgyzstan.[253]

Section 41(2) of the *British Nationality Act 1981* allows charges to be made for nationality applications under that Act.

Other countries also charge for immigration applications made in-country. For instance, charges for immigration applications lodged in Australia (as of November 2003) vary from AU$55 to AU$5,130 (£25 - £2140),[254] and those for similar applications in the USA (as of March 2003) vary from US$15 to US$1,000 (£9 - £573).[255]

B. The Bill

Clause 20 of the Bill would allow the fees set for certain immigration and nationality applications to exceed the administrative cost of determining or processing the application, and to include an extra amount which reflects the benefits that the Secretary of State thinks are likely to accrue to the person. If the application was unsuccessful the 'benefits' proportion of the fee could be refunded.

Clause 21 simply adds applications to transfer limited leave stamps into a new or replacement passport to the existing list of applications for which charges may be made. Section 5 of the 1999 Act currently refers only to applications to transfer indefinite leave stamps.

The Bill does not allow extra amounts to be added to the charges made under the *Consular Fees Act 1980* for equivalent applications at British posts overseas. The new charges would therefore apply only to people who are already in the UK, and not those applying to come to the UK.

The Immigration Advisory Service criticise this proposal as 'immigration only for the rich', and question how the Government will quantify in financial terms the benefits to the individuals of, for example, family visits. Recent press reports suggested that the additional charge would be £500 for each application,[256] but this figure was based on a

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252 *Consular Fees (No 2) Order 1999* SI 1999/3132, Schedule, Part II (as amended)

253 UK Visas, *Diplomatic service procedures, entry clearance volume 1, general instructions*, 7 March 2003, chapter 7 - fees: http://www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1035899049391

254 Australian Department of Immigration and Multicultural and Indigenous Affairs: *Immigration Charges (Fees)* - http://www.immi.gov.au/allforms/990i.htm#currentcharge

255 US Citizen and Immigration Services, *Forms and Fees* - http://uscis.gov/graphics/formsfee/forms/index.htm

256 see Alan Travis, '£500 charge to work in UK', *Guardian* 8 December 2003

Regulatory Impact Assessment for the Bill which actually puts forward a range of charges (possibly as part of a phased introduction of such charges) of between £20 and £500.[257] The actual levels of above-cost charges would be set by statutory instrument.

The Regulatory Impact Assessment identifies the following risks of introducing above-cost charging:

- An increase in fees over and above cost recovery would not directly impact on the quality of service. But there may be an expectation from customers that service levels should be improved, this is unlikely to happen as a result of over-cost charging.

- The level of entry fee is pitched at a level which encourages individuals to consider illegal entry, overstaying and working.

- The level of fee deters potential migrants, which could threaten the economic benefits they bring the UK (and the revenue from the fees themselves).[258]

Assuming the charging does not result in a downturn in applications, the Regulatory Impact Assessment suggests that the new charges will result in a net benefit to the public sector of £18million (if charges are set at £20 per application) to £439million (charges set at £500), of which £0.7million to £17.6million would be met by businesses, charities and the voluntary sector at no benefit to themselves.[259] It suggests that the drivers for change are that:

1. the UK substantially undercharges for migration services compared with other developed countries such as the USA and Australia.
2. migrants make a windfall gain through being granted access to the UK labour market
3. [there is] an ongoing need to raise revenue.[260]

No mention of these proposals appeared in the consultation paper that preceded the Bill.

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[257] Home Office, *The Asylum and Immigration (Treatment of Claimants, etc.) Bill: Consolidated regulatory impact assessment for over cost charging; charging for transfer of conditions; and an extension of immigration officers' powers of arrest, entry and search*, 20 November 2003, para 24

[258] ibid, para 28

[259] ibid, paras 25 and 27

[260] ibid, 20 November 2003, para 20

X Immigration Services Commissioner

A. Background

Part V of the *Immigration and Asylum Act 1999* introduced a new scheme for the regulation of immigration, asylum and nationality advisers. It set up the Office of the Immigration Services Commissioner (OISC) as an independent public body to ensure that immigration advisers are fit and competent and act in the best interests of their clients, and made it a criminal offence for an adviser to provide immigration advice or services unless their organisation is either registered with the OISC or has been granted a certificate of exemption by the OISC, or is an organisation otherwise covered by the Act. Information on this scheme, which became fully operational in April 2001, is given in a Library Standard Note.[261]

The Immigration Services Commissioner has published three annual reports.[262] He appears to be broadly satisfied with the extent of his powers and the general operation of the scheme, but has identified some areas of concern, including:

- immigration advisers touting for business;
- the activities of those non-legally qualified advisers who do not come forward for regulation;
- unqualified advisers evading regulation by setting up 'supervision' arrangements with solicitors; and
- some lack of co-operation from designated professional bodies (DPBs) in providing necessary information as to the extent to which each DPB had provided effective regulation of its members in the provision of immigration advice/services.

As far as DPBs were concerned the OISC was optimistic about working with them more fruitfully in the future:

> Finally, although I have identified issues to be addressed and where there have been some disappointments in our working together, I would like to recognize that they generally flow from considerations of principle which the Law Society of England and Wales has raised in good faith and do not reflect in any way upon the goodwill that my staff have experienced in dealing on a day-to-day basis with their counterparts in the Office for the Supervision of Solicitors. At an operational level, we have sought ways of working in harmony together. I believe that some of the issues of principle have, during the course of this reporting year, been

[261] SN/HA/2733, *Regulation of immigration advisers*, 5 November 2003
[262] see the OISC website: http://www.oisc.org.uk/home.stm

> resolved, which gives me cause to feel optimistic that we will be able to work together more effectively in the forthcoming year.[263]

B. The Bill

Clauses 16 to 19 of the Bill would:

- give the OISC a power to enter and search domestic or business premises on a warrant, where they have reasonable grounds for suspecting that immigration advice or services are being provided illegally;
- allow the OISC to seize and retain anything - including material protected by legal privilege - for which a search warrant has been obtained;
- place a duty on DPBs to provide information to the OISC where they have asked for it;
- abolish the right of appeal to the Immigration Services Tribunal for registered advisers regarding a complaint left on file; and
- create a new offence of advertising or seeking to provide immigration advice when unqualified to do so.

The Government's Explanatory Notes suggest that the new power to enter residential premises is necessary because 'a significant proportion of unregulated immigration advisers work from home', but no further details are given.[264]

This was one area where the Refugee Council welcomed the government's October 2003 proposals:

> We welcome any measures that facilitate the regulation of the quality of immigration advice and believe that more effective use of regulatory mechanisms is a far better option than the proposed restrictions to legal aid.[265]

The Immigration Law Practitioners' Association gave a qualified welcome:

> Subject to the caveat below, ILPA supports measures to increase the powers of the OISC to enter the private or business residences of unqualified immigration advisors, providing they are subjected to the appropriate procedural safeguards in the form of obtaining a warrant. The basis upon which such a warrant might be issued should be made clear. The proposals are silent as to what the OISC will be able to do once they have so entered. This needs to be clarified before further comment can be made.

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[263] Office of the Immigration Services Commission, *Annual report and accounts 2002/03*, 3 July 2003, HC 741 of 2002-03: http://www.oisc.org.uk/about_oisc/pdfs/02-03_oisc_annual_report.pdf

[264] Bill 5-EN, para 143

[265] The Refugee Council's response to new legislative proposals on asylum reform, November 2003: http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf

> Subject to a similar caveat, ILPA also supports provisions allowing the OISC to enter a solicitor's office and seize material when investigating an accusation of sham supervision, again subject to an appropriate warrant.
>
> ILPA does have concerns that neither of these powers are used in a way that prejudices the confidentiality/privilege of the cases of applicants who are advised by the objects of the exercise of these powers.
>
> **It is not clear to ILPA that the proposals to extend Schedule 5 para 7 are necessary.**
>
> In the proposals to enable the OISC to enter solicitors' offices when investigating a complaint, it is not made clear on what basis these powers would be made available, and after what other procedures had failed. These matters should be clarified. Again, the proposals appear to take no account of legal privilege or of client confidentiality.[266]

The civil rights organisation Liberty was more critical:

> **Office of the Immigration Services Commissioner**
>
> 11. As stated earlier, we accept that there are asylum advisors who do not act either in the interests of their clients and who abuse the legal process. We believe that this is best dealt with through proper accreditation. Any advisor not accredited should not be able to receive payment through Community Legal Service funds. The CLS should regularly carry out checks on the work of those who have been accredited. This should be sufficient to ensure that anyone carrying out improper work does not continue. We do not accept that it is necessary to allow the Commissioner powers to enter offices and seize files, as this will undermine professional privilege between solicitor and client. Similarly, if accreditation has ensured that only those firms who are able to justify the quality of their work are able to continue, it will not be necessary to introduce a new criminal offence of offering to provide work or services when unqualified. The only situation where an advisor would be able to continue is if they survived on private payment alone. Given the poor financial situation of many asylum seekers it is unlikely any advisor would be able to proceed on this basis.[267]

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[266] ILPA, *Response from the Immigration Law Practitioners' Association to new legislative proposals on asylum reform*, November 2003: http://www.ilpa.org.uk/

[267] Gareth Crossman, *Liberty response to the joint Home Office and Department of Constitutional Affairs consultation on asylum reform*, November 2003, para 8: http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2003/pdf-documents/nov-03-asylum-reform-response.pdf