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Parliamentary Briefing:

## Asylum & Immigration Bill

Commons Second Reading

17 December 2003

### SUMMARY

Amnesty International UK, the Refugee Council and the Refugee Legal Centre believe it is clear that the public wants a system that helps refugees in fear of their lives and deals effectively with those who have been fairly rejected. This Bill would severely damage any prospect of achieving this.

We believe the best way to establish such a system is to get more decisions right first time. Doing this will lead to fewer appeals, speedier results, lower costs and greater public confidence in the system.

### KEY POINTS

1. Poor initial decisions are the main cause of delay.
2. The government should focus on getting decisions right first time
3. The Bill would restrict appeal rights, put the appeal system beyond the reach of the courts and deny justice to refugees
4. Refugees should not be jailed for not having valid travel documents on arrival
5. The UK must share not shift its responsibility for refugees

## **1. POOR INITIAL DECISIONS ARE THE MAIN CAUSE OF DELAY**

### **THE BILL**

The Bill contains no measures aimed at improving the quality of initial decisions.

### **SUMMARY OF CONCERNS**

- The number of appeals upheld against Home Office refusals by adjudicators confirms - but is not the only indicator - that the problem of poor decision-making that has dogged the system for many years remains.
- The recent increase in the number of initial decisions made has not seen a reduction in the proportion of decisions overturned on appeal.

### **KEY POINTS**

- Getting more decisions right first time will lead to fewer appeals, speedier results, lower costs and higher public confidence by the system. Even if the Government met its target for processing appeals within 4 months, the additional costs to the taxpayer of getting so many decisions wrong first time – including the use of adjudicators' time, legal fees and support and detention costs while the appeal is resolved - are self-evidently significant.
- The Home Office's own figures reveal that, in the twelve months leading up to October 2003, 20 per cent (15,130 cases) of appeals heard at the first tier of the appeal system against initial refusals were allowed. The success rate for many countries is even higher. For example, currently 41 per cent of Somali and 30 per cent of Zimbabwean appeals heard are successful.
- The Home Affairs Select Committee, in its report on 'Asylum Removals' (April 2003), expressed its concern with 'the high number of initial decisions which are not sustained,' (paragraph 36). The Committee concluded that 'improvements are essential to the process of initial decision-making,' (paragraph 135).

## **2. THE GOVERNMENT MUST FOCUS ON GETTING DECISIONS RIGHT FIRST TIME**

### **THE BILL**

Clause 6 lists types of behaviour – such as the use of false documents - that must be taken into account by decision-makers in determining whether to believe a statement made by someone claiming asylum. The only other decision-making aspect of the Bill is Clause 10 (appeals). Additionally, the Department of Constitutional Affairs has outlined plans to restrict legal aid for asylum seekers.

### **SUMMARY OF CONCERNS**

- Decision making on asylum claims should be 'front-loaded' - resources should be focused on good quality, defensible decisions early in the decision-making process.
- Funding for legal representation at the outset of an asylum claim improves first initial decision-making and should be retained.
- A credible first initial decision-making process also makes it easier to tackle misuse of the system, because the appellate authority would not be clogged up with refugees who have received poor quality initial decisions.

### **KEY POINTS**

- Clause 6 is unnecessary – how someone arrived into the UK is already taken into account by decision-makers in assessing an applicant's credibility insofar as that is considered relevant on the facts of each case. The clause is also unbalanced – it does not have regard to the difficulties faced by refugees in seeking refuge in this country
- 'Front-loading' cases enhances efficiency by ensuring that the initial Home Office decision is based on a full understanding of the applicant's case and is therefore reliable. This avoids the need for appeals against initial refusals that should never have been made and cannot be defended.
- An essential component of such an approach is early provision of good quality legal advice and representation so that the individual may make a full statement of all the relevant elements of their claim for refugee status. Good legal representation may be all that stops a refugee being sent home to torture or worse. Commenting on the Government's outline of its proposals to cut legal aid for asylum seekers, a memorandum from the specialist advisers to the Constitutional Affairs Select Committee noted, 'one might also think that the Government might be in favour of retaining legal aid for initial applications, in order for lawyers to assist the Home Office in coming to the right decision at an early stage. Regrettably that is not the case, and these proposals make that abundantly clear.'

### **3. THE BILL WOULD RESTRICT APPEAL RIGHTS, PUT THE APPEALS SYSTEM BEYOND THE REACH OF THE COURTS AND DENY JUSTICE TO REFUGEES**

#### **THE BILL**

Clause 10 replaces the current two-tier tribunal system (adjudicators and the Immigration Appeal Tribunal (the IAT)) with a single tier (the Asylum and Immigration Tribunal (the AIT)). Clause 10 also prevents judicial review, which would insulate the Home Secretary and the proposed AIT from any kind of legal challenge to any asylum decision.

#### **SUMMARY OF CONCERNS**

- The removal of 2<sup>nd</sup> tier appeal rights together with the abolition of the higher courts' powers to scrutinise decisions of the new appellate authority or decisions to remove asylum seekers from the UK constitute the most dangerous – and constitutionally unprecedented - proposals in the Bill.
- Delays in appeals before the IAT are minimal in cases which do not have a real prospect of success.
- The statistics show that the existing second tier appeal to the IAT retains value.
- Unlike other tribunal systems dealing with issues that are not matters of life and death, there is no right of appeal to the Court of Appeal or from there to the House of Lords
- The proposed prevention of judicial review has serious constitutional implications for the UK.
- The new AIT would be unaccountable and could act unfairly without fear of intervention by the courts.

#### **KEY POINTS**

- ❑ Appeals to the IAT are subject to a strict merits test. Currently, appellants who wish to challenge an adverse adjudicator decision must apply for leave to appeal to the IAT. The IAT considers the merits of each case on the papers and will not entertain an unmeritorious or unimportant case. Save in a handful of cases in which leave to appeal is granted for some other compelling reason, all cases which proceed in the IAT have a significant prospect of succeeding. Cases held not to be meritorious are dismissed summarily within a matter of days.
- ❑ The IAT will only grant leave if there is a real prospect that appellant will be found to be a refugee or otherwise in need of protection (or exceptionally if the case is of general importance). In these circumstances, any further delay in the determination process would appear to be entirely justified and necessary to achieve justice.
- ❑ Without the check of the second-tier of appeal, some refugees may not be recognised as such by the Government and may be removed to face persecution or worse. Government figures on the success rate at the IAT are misleading since they appear to be calculated on the number of appeals allowed by it as a percentage of the number of appeals originally made to adjudicators.
- ❑ The Chief Adjudicator has recently confirmed that in 2002-2003, 25% of applications for leave to appeal to the IAT were granted, and 55% of cases that went to appeal were allowed by the IAT or remitted to an adjudicator for reconsideration because of errors of law that may have affected the outcome.
- ❑ No other tribunal systems (eg those concerned with land, pensions, social security, employment and tax) have barred judicial oversight of the appellate authority's decisions.
- ❑ The attempt to prevent judicial oversight is of major constitutional significance and seeks to put the decision-making process beyond the law. The AIT would be a tribunal not a Court –yet it would review its own decisions on the papers alone, just once. The AIT would become the only judicial or quasi-judicial appointees - save for the Judicial Committee of the House of Lords – who would be totally unaccountable before any court of law. So for example, decisions of the AIT could not be challenged even if they breached the rules of natural justice. There are numerous examples of natural justice challenges having been successfully made to the High Court under the present system.
- ❑ The prevention of judicial review is likely to be incompatible with the European Convention on Human Rights.

#### **4. REFUGEES SHOULD NOT BE JAILED FOR NOT HAVING TRAVEL DOCUMENTS**

##### **THE BILL**

Clause 2 would make it an offence for refugees, including unaccompanied children, to arrive in the UK without a reason acceptable to the Home Office for not having a passport. Complying with instructions given by an agent would not appear to be an acceptable defence. The offence would carry a sentence of up to two years.

##### **SUMMARY OF CONCERNS**

- The Bill is in danger of criminalising many refugees forced to flee on false papers.
- Clause 2 pays insufficient regard to the protection afforded by Article 31(1) of the Refugee Convention. This provides that asylum seekers should not be penalised on account of their illegal entry and presence providing they present themselves promptly to the authorities.

##### **KEY POINTS**

- ❑ Measures penalising refugees for arriving without travel or identity documents, in effect, punish refugees for behaving like refugees. UNHCR, the UN's refugee agency, points out that 'in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents.' Often this is because of the impossibility of obtaining a passport from the very authorities that are responsible for the acts of persecution from which people are fleeing.
- ❑ The destruction of documents will frequently not be in the person's control. Many people whom the Home Office recognises as refugees have only reached safety in the UK through smuggling or trafficking networks. They are powerless to refuse to obey ruthless smugglers and traffickers who demand they destroy or return documents as a condition of travel. Clause 2 would expressly penalise refugees, including women and children, if a trafficker or a smuggler forces them to either destroy or hand back their documents - even if complying with such instruction is the only way to escape persecution.
- ❑ Clause 2 pays insufficient regard to the Home Office's own research which shows that a majority of asylum seekers arriving in the UK are ignorant of asylum procedures in the destination country, and are reliant on the advice of agents to secure passage to a safe country.

#### **5. THE UK MUST SHARE NOT SHIFT ITS RESPONSIBILITY FOR REFUGEES**

##### **THE BILL**

Clause 12 and Schedule 3 of the Bill would allow the Home Secretary to refuse to consider an asylum application made in the UK on the grounds that the applicant can be removed to another country, irrespective of whether the applicant has any links with it. At the time of writing, the purpose behind this new power is unclear. It is possible that this power will be used by the Government to develop its controversial idea of sending applicants to 'Zones of Protection', or 'safe havens', in or near refugee-producing regions.

##### **SUMMARY OF CONCERNS**

- The provision deeming human rights claims relating to removal to a third country to be unfounded is likely to be incompatible with the European Convention on Human Rights.
- The Secretary of State can add to the list of countries to which asylum seekers can be sent while their asylum claims are pending – the present list therefore offers little comfort.
- Insofar as this provision enables (whether by intention or otherwise) the setting up of "Zones of Protection":
  - (i) The determination procedures in the Zones of Protection are unlikely to meet UK standards of fairness so as to ensure compatibility with the UK's international obligations
  - (ii) There is concern about whether the human rights of those removed to Zones of Protection will be safeguarded - experience of refugee camps in the developing world has shown that, with the best will in the world on the part of the relevant authority, human rights are routinely abused.
  - (iii) Removing asylum seekers to Zones of Protection in the developing world is likely to shift the burden on examining claims to States which already shoulder a greater burden of the world's refugees than the UK, and which are less well-equipped to deal with additional cases

## KEY POINTS

- ❑ The Bill extends the Secretary of State's powers to remove an asylum seeker to a third country without deciding the asylum claim. Asylum claims and human rights claims that relate to conditions in the third country would be deemed by statute to be unfounded (regardless of the facts of the individual case).
- ❑ Whilst in the third country, asylum seekers would not have effective access to UK status determination procedures. In developing countries there is good reason to doubt the fairness and effectiveness of the procedures that will be adopted to ensure that no applicants are removed from the third country to another State in breach of the Refugee Convention or the European Convention on Human Rights.
- ❑ Experience of refugee camps in the developing world also gives cause for concern at the treatment applicants will receive whilst their claims are being processed in the third country, and in particular whether that treatment will violate their human rights.
- ❑ Although the countries listed in Schedule 3 are not routine human rights abusers, no provision is made for the examination of the facts of an individual case to determine whether for a particular applicant, removal to that third country will violate his or her human rights. Further since the lists in Schedule 3 can be added to by the Secretary of State, the human rights conditions currently pertaining in the countries on the list offers little comfort.
- ❑ The concept of responsibility-sharing and international solidarity underpins the Refugee Convention and the international protection regime. The Government's proposal seek to shift responsibility for some of the world's most vulnerable people away from the UK. Yet the UK is one of the world's richest countries. Even when its physical size and national population are taken into account, the UK comes just 32<sup>nd</sup> (source: UNHCR) in the share it contributes to the global system, well below top-ranked Iran, Burundi and Guinea. Inevitably, moving the responsibility for asylum seekers away from the UK and out of Europe will shift it on to poorer countries that have less capacity to provide them with adequate protection.
- ❑ Developing countries support seven out of ten of the world's refugees. Most host countries in regions of origin are poor, many are themselves in a state of conflict and most lack adequate systems for safeguarding human rights. The UK government (ranked 32<sup>nd</sup> in its responsibility share of the world's refugees) is currently holding talks with the Tanzanian government (ranked 4<sup>th</sup>) with a view to establishing a 'protection zone' there. It is unprincipled of the Government to be further shifting responsibility for refugee protection to poorer countries.
- ❑ The provision could be used to facilitate the removal of asylum claims to 'Zones Of Protection'. It is therefore unclear how it fits in with recent Government statements. Immigration Minister Beverley Hughes has told the Home Affairs Select Committee that the measures in the Bill on safe third countries would have 'no relevance...at all' to the 'Zones of Protection' concept (Q. 868; 19 November 2003). During the debate on the Queen's Speech, the Prime Minister himself ridiculed the idea of sending asylum seekers to impoverished countries. *'That would be an interesting conversation. The British Foreign Office: "Hello, are you a very impoverished nation? You've got to be really impoverished. How do you fancy a few thousand British asylum seekers?" A piece of cake. That is not fantasy island but a fantasy policy that shows that the Conservatives have no genuine policy agenda.'* (Hansard, 26 November 2003; col. 30).

### **FURTHER INFORMATION:**

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