

UK Borders Bill 2007

Public Bill Committee - March 2007

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Introduction

On 5th February 2007, the UK Borders Bill had its second reading in the House of Commons and will begin Public Bill Committee on 27th February 2007. This briefing focuses on the Refugee Council's key concerns relating to the new measures that will affect asylum seekers and refugees.

The Refugee Council's overarching concern is that this Bill will not assist in establishing an asylum system that protects refugees in fear of their lives and deals effectively with those whose claims have been fairly refused. We believe that the best way to establish a fair and efficient system is to get more decisions right first time. We are concerned that despite the introduction of the New Asylum Model there are still problems with asylum decisions.

1. Biometric immigration documents – non-compliance (clause 7)

Proposed amendment

Page 5, line 11, leave out ' In particular, the regulations may-' and insert

- (1) *In particular, the regulations may, only in so far as is compatible with duties arising under the European Convention on Human Rights, Convention relating to the Status of Refugees and Community Treaties.*

Summary of aim of the new clause

This new clause will ensure that the that all regulations passed pursuant to clause 7 are compatible with the UK's existing human rights obligations as contained within the European Convention on Human Rights, the Convention Relating to the Status of Refugees and Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and on the content of the protection granted.

Purpose of amendment and wider concerns

In clauses 5-15 the UK Borders Bill introduces a framework for the introduction of compulsory new biometric immigration documents which are to be issued to non-EEA nationals living in the UK. These documents are to be used in the wide set of circumstances specified in clause 5 (1) of the Bill. Clause 7 of the Bill sets out the framework for non-compliance with clause 5 (1) of the Bill, the detail of which is to be made by regulation. Clause 7 states:

7 Effect of non-compliance

- (1) Regulations under Section 5(1) must include provision about the effect of the failure to comply with the requirements of the regulations.*
- (2) In particular, the regulations may-*
 - (a) require or permit an application for a biometric immigration document to be refused;*
 - (b) require or permit an application or claim in connection with immigration to be disregarded or refused;*
 - (c) require or permit the cancellation or variation of leave to enter or remain in the United Kingdom*
 - (d) require the Secretary of State to consider giving a notice under section 9;*
 - (e) provide for the consequence of the failure to be at the discretion of the Secretary of State.'*

The Bill is not accompanied by a set of draft regulations setting out precisely how the penalty clause is to work. The accompanying explanatory notes to the Bill and the Government's Regulatory Impact Assessment shed no further light on this.

Whilst the Refugee Council notes that the detail of such a scheme is yet to become apparent, in its present form, the clause raises the possibility that immigration control could be used to penalise refugees, those with Humanitarian Protection Status and Discretionary Leave to Remain in the UK for non-compliance with the relevant registration requirements. The Refugee Council seeks reassurance that these provisions will not penalise people who fall into these particular categories.

If it is felt that the imposition of a framework allowing for the existence of immigration penalties is necessary, then the view of the Refugee Council is that it is imperative that the standards contained within the relevant international instruments should be made explicit.

Detailed concerns about clause 7

Specifically, the Refugee Council is concerned about the impact that regulations 7 (2) (b) and (c) and (e) could potentially have for refugees and other individuals with human rights-based protection in the UK. In particular as the clause stands it could potentially affect such categories of people in the following ways:

- (i) Refugees who are presently given 5 years leave to remain in the UK could ultimately be removed from the UK, or left without status as a result of:
 - (a) Cancellation of leave to remain and revocation of refugee status in the UK on grounds of non compliance with biometric requirements;
 - (b) Rejection of their applications for indefinite leave to remain based upon an ongoing need for international protection, where such rejection is based solely on the grounds of non-compliance with biometric requirements.
- (ii) Those individuals with Humanitarian Protection Status and Discretionary Leave to Remain in the UK (granted to individuals on the basis that returning them to their country of origin would breach international and domestic obligations) could ultimately be removed from the UK or left without status as a result of:

- (a) Cancellation of their leave on grounds of non compliance with biometric requirements
- (b) Refusal of applications for an extension of stay in circumstances where they are still in need of international protection
- (c) Refusal of applications for indefinite leave to remain refused on grounds of non-compliance with biometric requirements.

(iii) Both refugees and those with Humanitarian Protection could potentially see applications for family reunion, applications for leave in line with family members or applications of other family members rejected on grounds of non-compliance with biometric requirements. Further the clauses could potentially allow for the possibility of cancellation of any status secured by a family member.

Compliance with Refugee Convention and Council Directive 2004/83/EC

The UK is a signatory to the Refugee Convention 1951, and is bound by the minimum standards set out in Council Directive 2004/83/EC. It is therefore obliged to comply with the duties set out in the relevant instruments and prohibited from returning individuals to territories where there is a real risk that they will be subject to persecution. The Refugee Convention clearly sets out the limited circumstances in which refugee status may be revoked, where exceptions to non-refoulement apply, and when a refugee can be expelled or excluded from refugee status.¹ Non-compliance with biometric registration requirements is not a permissible basis for revocation, exclusion, expulsion or refoulement.

Further, the Council Directive provides that refugees should be issued residence permits for a minimum of three years and that these should be renewed unless compelling reasons of national security or public order arise². It does not allow for non-renewal in circumstances where there has been non-compliance with registration requirements. Therefore, the Refugee Council believes that it is imperative that these obligations are clearly written into any penalty scheme for non-compliance with clause 5 of the Bill. The proposed amendment will ensure that enforcement of the provisions is carried out appropriately.

Compliance with Human Rights Act and Council Directive 2004/83/EC

Under the Human Rights Act a public authority is prohibited from acting in a way that is contrary to the incorporated Convention rights. Accordingly, the Immigration and Nationality Directorate are prohibited from returning individuals to territories where they would be at risk of inhumane or degrading treatment or other flagrant breaches of human rights³

Further, Council Directive 2004/83/EC requires states to grant subsidiary protection to certain categories of individual⁴ and requires such status to be granted for one year and be renewable unless compelling reasons of national security or public order arise⁵. The Directive sets out the circumstances in which such status can be revoked. Again, the circumstances in which this take place do not include non-compliance with registration schemes. As in the cases of refugees, the Refugee Council believes that such standards should therefore be clearly reflected within clause 7.

¹ Articles 32, 33, 1C and 1F of the Refugee Convention 1951

² Article 24(1) of Directive 2004/83/EC

³ Ullah, R v Special Adjudicator [2004] UKHL 26 (HL)

⁴ Article 18 Council Directive 2004/83/EC

⁵ Article 24(2) Council Directive 2004/83/EC

Family unity for those granted protection

Article 23 of Council Directive 2004/83/EC applies to refugees and those who have been granted subsidiary protection (i.e. Humanitarian Protection Status). It requires member states to 'ensure that family unity can be maintained'⁶ and that all pre-existing family members of a refugee or someone with subsidiary status who do not individually qualify for such status are entitled to benefits set out in the Directive which include the issue of family permits⁷

Article 8 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998 requires that private and family life is respected and that there is no interference with these rights save for in specified circumstances where it can be shown that such interference is in accordance with law and necessary in a democratic society for protection 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.

In the light of the above obligations, the Refugee Council feels that these provisions should also be reflected within the relevant clause on non-compliance.

The Refugee Council notes that there are various categories of people that will fall outside the Directive and the scope of human rights protection. These categories could for example include cases involving refugees, people with Humanitarian Protection Status, or people subject to immigration control subsequent to recognition as refugees, or as persons in need of Humanitarian Protection, who are able to go and reside in another country with their spouses. These individuals could potentially be adversely affected by the penalty clauses through a rejection of, or refusal to, consider applications for family unity solely on the basis of non-compliance with biometric requirements

The Refugee Council opposes the use of immigration control to penalise refugees and others with human rights-based status in these circumstances for non-compliance with identity card requirements for the following reasons:

1. The Bill already creates a framework to impose civil penalties on those individuals who fail to comply with biometric requirements via a system of fining. This is adequate to ensure compliance with any biometric scheme. The use of immigration control to penalise defaulters is an unnecessary addition;
2. The Universal Declaration of Human Rights states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and state'.⁸ Given the importance of the family unit in particular to those individuals who have managed to flee human rights abuses and who are attempting to rebuild, and resume some normality in their lives, the application of a penalty that prevents or interferes significantly with this is draconian and disproportionate.
3. This application of immigration penalties in addition to civil penalties for refugees and other non-nationals in cases of non-compliance with biometric requirements stands in stark contrast with the penalties for non-compliance with requirements under the Identity Cards Act 2006. Under this Act the penalty for non-compliance consists of the imposition of a fine. The Refugee Council believes therefore that these provisions are discriminatory.
4. The imposition of immigration penalties on grounds of non-compliance with biometric requirements rather than on the basis of the substantive merit of a case is likely to lead to an

⁶ Article 23(1) of Council Directive 2004/83/EC

⁷ Article 23(2) of Council Directive 2004/83/EC

⁸ Article 16(3) Universal Declaration on Human Rights

increase in legal challenges. This is likely to result in a greater need for legal representation. No doubt, at least some of this increased demand for legal representation in relation to these decisions will be funded through public monies. The Refugee Council believes that at a time when the Government asserts that it is actively seeking to optimise the use of legal aid, the expenditure of public monies on funding asylum or immigration cases that have been refused without consideration of merit but on the basis non-compliance with biometric requirements runs counter to this objective.

2. Conditional leave to enter or remain (clause 16)

Proposed amendment

Leave out Section 3(1)(c)(iv) and(v) of Immigration Act 1971 as inserted by clause 16 (iv) and (v) and insert-

“(iv) a condition requiring him to report to an immigration officer or the Secretary of State where it appears that there is evidence that establishes on a serious basis that he is likely to abscond and that such a condition is justified as being necessary in a democratic society in the interests of public order, public safety, national security or for the prevention of crime; or

(v) a condition requiring him to reside at a specified address wherever it appears that there is evidence that establishes on a serious basis that he is likely to abscond and that such a condition is justified as being necessary in a democratic society in the interests of public order, public safety, national security or for the prevention of crime provided that such conditions shall be consistent with the Human Rights Act 1998, the European Convention on Human Rights and the obligations of the United Kingdom under the International Covenant on Civil and Political Rights 1966.”

Summary of aim of the new clause

These amendments are designed to bring the provisions into line with international human rights standards in particular, Article 12 of the International Covenant on Civil and Political Rights and Article 2 of Protocol 4 of the European Convention on Human Rights.⁹ They are also designed to ensure compliance with the Human Rights Act 1998. They are phrased in the alternative as it should not be necessary for residence conditions to be imposed if reporting conditions are in place.

Detailed comments and concerns

Clause 16 states:

Conditional leave to enter or remain

After section 3(1)(c) (iii) of the Immigration Act 1971 (c.77) limited leave to enter or remain; conditions) insert-

(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

(v) a condition about residence

The clause in its present form allows for the imposition of residence or reporting conditions upon anyone with limited leave to enter or remain in the UK. It includes those recognised as refugees and those with Humanitarian Protection Status or Discretionary Leave to Remain in the UK. Failure

⁹ This has been signed though not ratified by the United Kingdom.

to comply with any of the conditions raises the possibility of a refusal of leave to remain in the UK or the curtailment of leave.¹⁰

Presently the only conditions that can be imposed on someone's leave are those which restrict employment or occupation in the UK. It is also possible to impose requirements obliging individuals to maintain and accommodate themselves and any dependants without recourse to public funds, and requiring them to register with the police on arrival in the UK.¹¹ The new clauses therefore represent a significant extension of these powers.

It has been proposed that clause 16 will be used in relation to two categories of person. The Government's Regulatory Impact Assessment states that it is proposed to use these powers against 'people who have committed serious crimes in the UK but whose removal would breach international standards'. A further category of person against such powers could be employed are unaccompanied asylum seeking children with a view to effecting more swift removal upon reaching 18, thereby preventing absconding.

The present breadth of clause 16 means that the use of these powers will not simply be confined to those individuals who have committed serious crimes or minors. The clauses in their present form could, for example, be used to impose a curfew requirement on a refugee who has been a model citizen and had never engaged in criminality. Alternatively, the provisions could be employed in a way that significantly interferes with a person's daily life and responsibilities. For example, reporting requirements may be imposed requiring daily or weekly attendance and may interfere with a refugee's employment or a child refugee's education by affecting their ability to attend classes.

An unproductive measure

The Refugee Council opposes the introduction of clause 16 altogether and has not seen any evidence which would point to the existence of significant problems either generally, or more specifically in relation to the two targeted categories of person that would justify such measures. Specifically in relation to unaccompanied minors, there is no evidence to suggest that minors are more likely to abscond than any other category of non-national. On the contrary, it is in their interests not to abscond as they are dependant upon support from social services. Secondly, if as a result of the active review process, a negative decision is made, it will be in an individual's interest not to abscond in order to pursue their appeal. If, however, an individual decides not to pursue an appeal, or is unsuccessful in their appeal, the power to apply reporting conditions already exists. It is therefore difficult to see what additional benefit is gained, or how such a measure would meaningfully expedite removal once an unaccompanied minor turns 18.

An inappropriate message

The Refugee Council believes that such measures send out an inappropriate message to refugees and other individuals with human rights-based protection, as well as society at large by setting them apart from the rest of society. This is not conducive to community cohesion.

The Refugee Council believes that if the extension of such powers is necessary, they should accurately reflect their intended targets, and importantly, should reflect the international human rights standards by which the UK is bound. This is all the more important given that the Government is presently seeking to launch their campaign 'human rights, common values, common sense'.¹² Further it is considered that reporting and residence conditions should be applied in the alternative. If a reporting requirement is in place and implemented effectively there should be no need for an additional residence condition and vice versa.

¹⁰ *Mambakassa, R v SSHD* [2003] EWHC 319 (HC)

¹¹ Section 3(1)(c) Immigration Act 1971

¹² Lord Falconer's speech 'Human rights and common sense 09.02.07, Manchester University)

Inconsistency with the right to freedom of movement and residence

A general principle of international human rights law is that where individuals are lawfully within a state, they should enjoy freedom of movement and residence within that state.¹³ This well-established principle appears in Article 2 of the fourth protocol of the European Convention on Human Rights and also Article 12 of the International Covenant on Civil and Political Rights 1966 which the UK has both signed and ratified.

Both Articles 12 (1) and Article 2 of the Fourth protocol state:

'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

Restrictions on the right to freedom of movement and residence under international human rights law are only permitted by way of exception.¹⁴ Article 12 (3) of the International Covenant on Civil and Political Rights states that restrictions may be permissible so long as they are:

- a. provided for in law;
- b. necessary for the protection of national security, public order, public health and morals; and
- c. consistent with the other rights in the International Covenant on Civil and Political Rights.

Article 2 of the Fourth Protocol mirrors Article 12(3) except that it requires any restrictions to be 'necessary in a democratic society' and adds grounds of public safety and prevention to the grounds on which the right may be curtailed.

Inconsistency with other human rights standards

Article 8 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, also provides for the right to respect for private, family life and home unless the interference by a public authority 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 crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Article 5 provides for the right to liberty which can be constrained in certain prescribed circumstances.

It is clear that clause 16 goes further than the relevant human rights standards allow, as they allow for the imposition of residence or reporting conditions upon *anyone* with limited leave to enter or remain in the UK including refugees, and those with human rights-based protection in *any* circumstances rather than on the basis of strict criteria set out in the relevant standards. It should be noted that the present wording of the clause allows for the imposition of curfews and extremely intrusive reporting requirements that could be applied on a weekly or even daily basis. Such reporting requirements have the potential to significantly interfere with the lives of refugees and other individuals with human rights-based protection - in particular with their schooling, employment and child-care commitments. Our experience with reporting restrictions currently applied to asylum-seeking children and adults is that such restrictions tend to be applied in a disruptive fashion and often interfere with educational, employment and child care responsibilities

It is important to remember that a failure to comply with any of the conditions raises, at least in theory, the possibility of a refusal of leave to remain in the UK or the curtailment of leave. The Refugee Council is therefore extremely concerned by the prospect of the application of such conditions on refugees and those with Humanitarian Protection.

¹³ Beyani, C. 2000 'Human Rights Standards and the Free movement of People (Oxford University Press), Ch 2.

¹⁴ Beyani, C. 2000 'Human Rights Standards and the Free movement of People (Oxford University Press), Ch 2

The practical problem of ‘function creep’ and application and enforcement of the law

On a practical level, the Refugee Council notes that whilst the intended targets of the measures are not reflected in clause 16, the Minister for Immigration has indicated that these measures are to be employed solely against foreign prisoners who cannot be removed for legal reasons, and unaccompanied minors. The Refugee Council is aware of the inherent risk of ‘function creep’ in the application and enforcement of law. This danger is only too clearly exemplified by the well-publicised case of Walter Wolfgang, the 82 year-old heckler who was (along with 460 other individuals) detained and questioned pursuant to Section 44 of the Terrorism Act 2000 as a result of shouting “nonsense”. Clearly, at the time that the broadly-drafted provision was introduced it was not intended to be applied to 82 year-old hecklers attending party conferences, indeed a number of governmental assurances about its use were given in relation to Section 44.¹⁵

3. Support for failed asylum seekers (clause 17)

The Refugee Council's understanding of this clause is that it does not change the *de facto* practice with regards to the provision of support. It enables an individual to remain an asylum seeker or become an asylum seeker whilst they have a pending appeal against a negative asylum or immigration decision, or during any period in which they bring or are entitled to bring an appeal.

The Refugee Council welcomes the Government's commitment to continue support to asylum seekers throughout the appeals process.

While it is positive that asylum seekers appealing their decisions receive support, it remains a concern that when their claims and appeal have been refused people are not entitled to any housing and financial support and are left totally destitute – unless they fit the tight eligibility criteria for hard case support. Currently the UK is forcing people who have claimed asylum into destitution in the name of immigration control.

Two recent reports by Amnesty International and Refugee Action highlight the plight of refused asylum seekers, denied support, prevented from working, and of whom many cannot return home. You can read the reports here:

<http://www.amnesty.org.uk/content.asp?CategoryID=10682>

http://www.refugee-action.org.uk/campaigns/documents/RA_DestReport_Final_LR.pdf

The Refugee Council supports the *Still Human Still Here* campaign's amendment to Clause 17 which would end destitution of refused asylum seekers.

FURTHER INFORMATION:

Jonathan Cox, Parliamentary and External Relations Officer, Refugee Council

Matilda Gosling, Parliamentary Consultant, Refugee Council

020 7346 1214 or 07919 484066

parliamentary@refugeecouncil.org.uk

¹⁵ Legislation against Terrorism; A Consultation paper para 3.18, Home Secretary, Jack Straw Terrorism Bill, 2nd reading)