

A briefing on the Draft (partial) Immigration and Citizenship Bill 2008

1. Introduction

This Briefing provides an overview of the Draft (partial) Immigration and Citizenship Bill and focuses on those elements of the Bill that are of most significance for refugees and asylum seekers. The Refugee Council's primary concern is the protection of refugees; those who are in the UK, as well as those who have been prevented from entering. We believe that refugees should have access to a fair determination procedure and should never be forced to return to situations where they face persecution. We believe that those who are recognised as refugees should enjoy the full benefits of the Refugee Convention, and be granted permanent settlement immediately.

The Immigration and Citizenship Bill brings a complete overhaul of our immigration laws and an opportunity to put in place an asylum system that has refugee protection at its core. However, as currently drafted, the Bill represents a missed opportunity. The Government has clearly not put refugee protection at the heart of its vision for the future immigration system.

Part two of the draft Bill greatly extends the Government's power to prevent people's entry into the UK. Whilst this is promoted on grounds of national security, there is no regard shown for the consequences of returning refugees to persecution. It is regrettable that the Government is seeking to further strengthen the UK's extra-territorial border controls with no regard for the impact that these have on refugees and on refugee protection.

The third part of the draft Bill, together with the *Paths to citizenship* document, outlines the Government's plans to introduce a 'probationary citizenship', and extends the time a refugee has to wait for naturalisation or permanent residence from five years to at least six, and possibly to as long as ten years. The Refugee Council believes that restricting the ability of refugees to benefit from permanent residence and extending the period in limbo for refugees is unacceptable. Refugees should be able to get on with their lives without prolonged periods of uncertainty.

Part four of the draft Bill provides for the making of expulsion orders to enable the removal of people from the UK and to prohibit their re-entry for lengthy periods of time. As presently drafted, these expulsion orders do not distinguish as now between a deportation order, made on the basis of criminality or safety to the public, and a purely administrative removal of a person whose claim for asylum has been refused. Both groups of people will face potentially the same extended bans on re-entry. The Bill, as currently drafted, does nothing to improve the UK asylum determination system. As a result, people with protection needs will continue to be wrongly refused asylum and returned to countries where their safety is far from certain.

Parts five and six of the draft Bill relate to the Government's continuing intention to detain refugees, including children, while it processes their asylum applications. The Refugee Council believes that recent reforms of the asylum determination procedure, including the introduction of the New Asylum Model

with its rapid processing times, leave the Government with no justification for this. Furthermore, Part five gives new powers to the Secretary of State allowing her to overrule the courts on whether bail should be granted; powers which we believe are inappropriate to her role.

Part seven of the draft Bill lists and adds to the range of acts and omissions that are to be treated as immigration offences; acts that may be committed by refugees and which could lead to terms of imprisonment. For instance, in the absence of any lawful means of entering the UK as a refugee, most refugees will face the risk of prosecution on account of their entry to the UK. The Bill also sets out a wide range of acts and omissions during the course of the asylum process which are to be treated as offences. The Bill increasingly criminalises those who seek sanctuary in the UK.

It should also be noted that some key parts of the final Bill are absent from the current draft. In particular, the draft contains nothing regarding the provision of support during the asylum process. We are concerned that when the Government's proposals are finally revealed, the terms of asylum support are likely to be even more restrictive than they currently are. Further, there has been much unease in health and asylum organisations in recent years about the growing restrictions on refugees' access to health care. Both of these gaps in the Bill have clear implications for refugees' wellbeing, and restricting health care also has a wider public health impact.

The Refugee Council is deeply concerned that the Government's approach to simplifying immigration law is overly preoccupied with extending its powers of control and management which are to be achieved at the expense of its fundamental duty to ensure the protection and safety of refugees seeking sanctuary here.

2. Background to the draft Bill

The cornerstone of current immigration law is the 1971 Immigration Act. Since this Act, there has been significant legislative development with each successive piece of legislation building on or amending what has gone before, with the result that many find interpreting legislation overly complex. Laws concerned primarily with non-immigration matters, such as health and housing, contain provisions with implications for immigration legislation. In addition to the primary legislation, there are the many Immigration Rules and Statutory Instruments. The list of repealed legislation contained in Schedule 3 of the new draft Bill refers to over 20 Acts of Parliament and numerous other Statutory Instruments and Orders.

The Refugee Council has supported calls for a single, overarching piece of immigration legislation. The Government accepted the need for reform of the complex legislative framework, but announced in 2007 that it intended to go much further by seeking to simplify the legislation at the same time as consolidating it.¹

The Simplification Consultation

In 2007, the Government published a consultation document outlining how it proposed to approach the simplification of immigration law. The document stated that Government would review the content and role of primary legislation, of the Immigration Rules and of the asylum policy instructions and guidance. The Government articulated that it would aim to maximise the transparency, efficiency, clarity and predictability of the law, adopt the use of plain English and so enhance public confidence in a system which was comprehensive. It would seek to minimise the need for further legislation, limit recourse to

¹ The announcement was accompanied by a consultation document. See "Simplifying Immigration Law – An Initial Consultation BIA: June 2007 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/>

the issuing of concessions outside the rules, reduce the scope for decision-makers to exercise discretion, eliminate inconsistencies and remove duplication found in different parts of the system, whilst adding to its powers where it found gaps so that cases could be resolved fairly, speedily and effectively.

The Refugee Council published a response to this consultation. In December 2007, the UKBA published a summary of all the responses it had received.²

3. An overview of the Refugee Council's key concerns about the draft Bill

On July 14th 2008, the Draft (partial) Immigration and Citizenship Bill was published.³ It was accompanied by a document entitled *Making Change Stick*⁴ which outlines what is in the draft partial Bill and what has not been included but which the Government intends to include in the final Bill. At the same time, UKBA published its response to the consultation on *Paths to Citizenship* on its proposals to introduce a 'probationary citizenship'.⁵

The Refugee Council has four overarching concerns about the draft Bill. Firstly, we are concerned that it is only a partial Bill. Significant areas, such as entitlement to asylum support, are currently missing and only briefly referred to in *Making Change Stick*. There is nothing in the draft Bill about rights of appeal beyond the Asylum and Immigration Tribunal to the higher courts.⁶ Given the crucial role the House of Lords has played in safeguarding refugees' protection needs, it is regrettable that stakeholders have been given only a truncated opportunity to view the proposals and contribute to their development.

Secondly, the Refugee Council believes that the current draft partial Bill represents a series of missed opportunities. In particular, we believe that refugees should be given indefinite permission to remain in the UK the moment that they are recognised as refugees. They should not have to face five years of uncertainty before indefinite permission to stay is granted. The Refugee Council has been urging the Government to review its policy of limiting initial leave to five years since the policy was first introduced in 2005. Far from responding positively to this concern, the Government plans to compound the problem by introducing a new 'probationary citizenship', adding to the hurdles that refugees will have to negotiate. Even after waiting for five years, it is proposed that refugees will have to wait at least a further year as they serve their 'probationary citizenship'. If refugees do not wish to take British citizenship, they will have to wait a further two years before they receive permanent permission to stay.

Thirdly, the Refugee Council is concerned that the legislation relating to the protection of refugees is to be contained in the Immigration Rules, rather than in primary legislation, the Bill itself. The Government's justification for this is that it is simpler to have the provisions together in one place. However, the Rules, which will become of fundamental importance, can be amended by Government with minimum parliamentary scrutiny. The recent introduction of stringent re-entry bans by means of a statement of changes in the immigration rules and which had to followed by the issuing of Ministerial

² See Refugee Council response to Simplifying Immigration Law: an initial consultation: August 2007 <http://www.refugeecouncil.org.uk/policy/responses/2007/simplifyingimmigration.htm> and Simplifying Immigration Law: responses to the initial Consultation: BIA: December 2007 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/>

³ See Draft (partial) Immigration and Citizenship Bill: public scrutiny document: UKBA: July 2008 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/>

⁴ "Making Change Stick – and introduction to the Immigration and Citizenship Bill 2008": UKBA: July 2008 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/>

⁵ The Path to Citizenship: next steps in reforming the immigration system: government response to Consultation: UKBA: July 2008. <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/>

⁶ Since this briefing was written UKBA has published a Consultation Document of the proposed new appeal structure called "Immigration Appeals: fair decision, faster justice" August 2008. <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/immigrationappeals/>

concessions in response to complaints about their consequences serves to illustrate the force of our concern.⁷

Finally, we regret that the Bill appears to eliminate some basic safeguards that are essential in ensuring that refugees are identified and offered protection. We are particularly concerned about the loss of appeal rights for refugees from the so called Non-Suspensive Appeal (NSA) countries whose claims are refused. The Refugee Council remains opposed to the practice of requiring people to return to countries where they fear persecution in order to pursue an appeal. However, it is a matter of grave concern that some asylum seekers are set to lose their appeal rights altogether under this draft Bill.

4. Timetable

No formal deadline	UKBA Consultation on draft Bill - public scrutiny questionnaire ⁸
October 2008	Home Affairs Select Committee scrutiny of the draft Bill. Deadline for written evidence September 17 th 2008. ⁹
October 2008	Joint Committee on Human Rights scrutiny of the draft Bill. Deadline for written evidence 31 st October 2008.
January 2009	Bill likely to be laid before Parliament
October 2009	Government expectation that the Bill will receive Royal Assent.

5. The detail of the draft Bill

Part 1 Regulation of entry and stay in the UK

Part 1 sets out the basic framework for regulating entry to and stay in the UK. It introduces the term 'permission' which will replace the previous terms: 'leave to enter', 'leave to remain' and 'entry clearance'. People will either have permission to be in the UK, or they won't. If they are here without permission, they must seek it, or risk being prosecuted for an offence. Permission can be temporary, granted for a specific purpose and subject to conditions or permanent and not subject to any conditions. People granted refugee status, humanitarian protection and discretionary leave will have temporary permission.

Refugee Council concerns

These provisions create a group of people who will have the right to be in the UK, and hence *permission* in the normal sense of the word, but who will not actually be granted 'permission' in the new legal sense of the word. We are concerned that this is likely to lead to confusion. An example is those asylum seekers who currently are given temporary admission but who will in the future be granted 'immigration bail' (for more detail about 'immigration bail' see Part 5 of the draft Bill, and page 9 of this briefing).

It is not clear what the position of those with *Special Immigration Status* will be under the Bill. However, the Refugee Council believes there is no justification for maintaining this status, with its severe restrictions upon the rights of individuals.¹⁰

⁷ See Statement of Changes in Immigration rules HC 321: BIA: February 2008

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2008/hc321.pdf?view=Binary>

⁸ See Draft (partial) Immigration and Citizenship Bill: public scrutiny document: UKBA: July 2008

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/>

⁹ Home Affairs Committee: Draft Immigration and Citizenship Bill: Call for written evidence 22nd July 2008

http://www.parliament.uk/parliamentary_committees/home_affairs_committee/hacpn080722no56.cfm

¹⁰ Special Immigration Status was introduced in the Criminal Justice and Immigration Act 2008 Part 10. See "Special Immigration Status": Refugee Council October 2007

http://www.refugeecouncil.org.uk/policy/briefings/2007/special_immigration_status.htm

Refugee Council recommendations

- A term other than 'immigration bail' should be adopted to describe the status of asylum seekers awaiting a decision on their claim. 'Bail' should only be used to describe the situation of those people who have been detained and released on conditions.
- Legislative provisions relating to Special Immigration Status should be repealed.

Part 2 Powers to examine etc.

This part of the draft Bill gives to the Secretary of State powers to enquire about the citizenship and immigration status of any individual entering, residing in, or leaving the UK. It is both a border control measure and an extension of internal immigration controls. It extends existing powers, in particular those of 'juxtaposed controls' operating overseas; powers whereby the UKBA can operate UK immigration controls in another country long before people reach the UK. This part of the Bill also greatly increases the Government's powers of enquiry after individuals have entered the UK.

Refugee Council concerns

The Refugee Council is concerned that people who need to flee persecution are increasingly unable to do so. The proposed new powers are extremely broad and far-reaching, allowing immigration officials to make enquiries about anybody, anywhere in the world. It is essential that immigration officials operating to prevent entry into the UK from overseas are also required and empowered to address protection needs people may have.

The increase in the number of immigration officials posted abroad, and the new powers they will be given to refuse entry and cancel previously granted permission, must be accompanied by concomitant powers for officials to deal with individuals they come across who need international protection, including refugees outside their country of origin. In some countries where the UK posts immigration officers, there is no access to an asylum process (in some countries, no such system even exists) and refugees are unable to obtain effective protection, including most crucially protection from *refoulement*. Some countries where UK officials operate are places where refugees are trying to escape *from* for reasons outlined in the 1951 Convention. The proposed new power to refuse permission must, under no circumstances, prevent individuals fleeing persecution or lead to them being sent to face persecution.

The Refugee Council believes that protection safeguards must be put in place. Where there is not a robust system which ensures access to protection in the country where the UK official is posted, this would by necessity entail the UK official conducts a mandatory 'refusal/return' interview of those who are stopped, in order to afford them the opportunity to express any protection needs and be advised of their right to seek asylum.

The exploration of 'Protected Entry Procedures' (PEPs), which could help to ensure that the UK is able to facilitate access to protection to those in need whilst preventing other forms of irregular travel, should be pursued.¹¹

The Refugee Council is concerned at the lack of transparency and accountability for what happens 'out of sight' in border posts abroad. Detailed records should be kept, and be available for public scrutiny, of to the numbers and profiles of persons who are denied entry. The Refugee Council recommends a

¹¹ It is worth noting that PEPs are part of the 08/09 work plan of the European Commission.

system of independent monitoring of decisions to refuse permission to enter which are made outside the UK.

Where the government stations immigration officials abroad in partnership with other countries, in a 'juxtaposed controls' type arrangement, it should be cognizant of the host Government's human rights treatment of its own citizens as well as its treatment of non-nationals. In some countries of origin and asylum, the treatment of such individuals can be extremely harsh, including torture, inhuman and degrading treatment and even death. In all the government's dealings abroad, it must uphold its moral and legal responsibilities to act in ways that are compatible with its international legal obligations, including those under the European Convention on Human Rights.

The Refugee Council is additionally concerned about the lack of safeguards in the Bill regarding the enquiries that the Secretary of State may make within the UK. It is worth noting that the wide powers of enquiry would mean that British citizens may be stopped in the street and required to prove that they are a British citizen and may be detained if they are unable to do so. There is no requirement that officials must have a 'reasonable suspicion' to justify stopping someone in order to make enquiries.

Refugee Council recommendations

- In extending its power to enquire and refuse travel and entry, the Government should take steps to ensure that protection needs are identified and met.
- Mandatory 'refusal/return' interviews should be conducted by officials engaged in preventing further travel, to ensure that refugees are aware of their rights and to protect against *refoulement*.
- Decisions on refusals at the border should be recorded and a system of independent monitoring introduced to ensure scrutiny of the impact that refusals are having on access to protection for refugees.
- The Government should explore the possibility of Protected Entry Procedures to facilitate access to protection without the need for unlawful travel.

Part 3 Citizenship

This Part of the draft Bill amends existing paths to naturalisation and introduces the concept of "probationary citizenship" outlined in the Government's response to the consultation document *The path to Citizenship*.¹² The Government's intention, not currently provided for in the Bill, is to introduce this for all refugees prior to their being eligible for naturalisation or permanent permission.¹³

Even after five years of temporary leave, refugees will be required to wait at least a further year as 'probationary citizens' before naturalisation. They will only be eligible after one year if they can demonstrate that they are 'active citizens' by performing some form of voluntary activity. Otherwise, they will have to wait for an additional two years before being eligible for citizenship (i.e. a total of eight years since the initial granting of refugee status). If refugees do not wish to become British citizens and decide to seek permanent residence only, they will be required to wait a further two years if volunteering (i.e. a total of eight years since the initial grant of refugee status) or an additional 4 years if unable to demonstrate active citizenship before receiving permanent residence (i.e. a total of ten years since being initially granted refugee status).

¹² The Path to Citizenship: next steps in reforming the immigration system: government response to Consultation: UKBA: July 2008. <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/>

¹³ Ibid The basic scheme is outlined there. See the Table on P14 for the timings.

Refugee Council concerns

The Refugee Council believes that a person recognised as a refugee by the UK should receive permanent residence from this date and not be forced to endure the uncertainty of an initial period of temporary leave. Refugees arriving in the UK through the Gateway Protection Programme receive permanent residence straightaway and we believe that the same practice should apply to all those who are granted refugee status in the UK. Permanent residence helps a refugee to begin to rebuild their life in the UK.

The Refugee Council believes that refugees and others with international protection needs should be exempt from fee charges for naturalisation or permanent residence. They should be exempt whether these charges are imposed directly, through the application process, or indirectly as a result of requirements to take the English for Speakers of Other Languages with a Citizenship Context or the Life in the UK test. We are also concerned that the current proposals make no reference to those refused asylum but granted Discretionary Leave (DL). Provisions should be introduced for those with DL to apply for permanent residence and naturalisation.

The Refugee Council has expressed strong reservations about the implications for refugees of the routes to citizenship proposals.¹⁴ Our first concern is that we believe the language of 'earning the right to stay' in the UK and 'probationary periods' runs counter the Government's commitment to fulfil its obligations under the Refugee Convention and the European Convention on Human Rights. Granting long-term, secure protection to refugees who have fled persecution cannot be something that is earned and the Government's routes to permanent status should reflect this.

Secondly, entering the probationary citizenship period will follow a positive review of a person's refugee status after five years of temporary leave. Refugees will be required to satisfy English language requirements and knowledge of life in the UK as a pre-entry condition. We do not currently know what will happen to refugees who are unable to meet these criteria but a refugee could be in the position of receiving permanent asylum in the UK but then being granted successive periods of temporary leave. This is unacceptable for people who have experienced persecution, forced migration to the UK and the anxiety of an asylum process extended over a number of years. If UKBA is intent on including refugees in the probationary citizenship period, it should only apply it to those seeking naturalisation.

Thirdly, we do not think the requirement to engage in voluntary work within the probationary citizenship period is either necessary or fair. We believe that all those in the UK should be encouraged and supported to live as active citizens. At present, many refugees and asylum seekers contribute actively to life in the UK in a variety of ways.¹⁵ However, we are opposed to the linking of naturalisation and permanent residence to active citizenship. There are many different reasons for volunteering, but being required to take part in order not to prolong the passage to citizenship risks undermining the voluntary nature of the activity. Making volunteering such a core component of the process could also be discriminatory as people with illnesses and disabilities, women and single parents may find it difficult to find suitable volunteering opportunities.

Finally, the Refugee Council is concerned that including refugees within the outlined routes to citizenship will lead to refugees being inappropriately refused access to a range of services. Following publication of the proposals, we have already had enquiries from a local authority asking whether refugees have no recourse to public funds during the probationary period, and from an education advice service confused about refugees' entitlement to further and higher education.

¹⁴ See "The Refugee Council response to Paths to citizenship" May 2008
<http://www.refugeecouncil.org.uk/policy/responses/2008/citizenship.htm>

¹⁵ For example the Institute for Public Policy Research found that a very high proportion of refugees interviewed were volunteering. J. Rutter, M.Latorre and D.Sriskandarajah (2008) *Beyond Naturalisation: Citizenship policy in an age of super mobility*. London: IPPR.

Refugee Council recommendations

- All refugees and those granted protection under the ECHR should be granted permanent residence at the time they are recognised as refugees. They should not be required to overcome further hurdles in order to be able to settle permanently.
- Refugees should not be charged fees for naturalisation or permanent residence at any stage whether directly, through the application process, or indirectly through taking English for Speakers of Other Languages with a Citizenship Context or the Life in the UK test.
- Refugees should not be required to perform voluntary activities in order to speed up their passage to citizenship or permanent permission.
- Government guidance must state clearly and consistently the services to which refugees are entitled.

Part 4 Expulsion orders & removal etc. from the UK

Part 4 of the draft Bill combines the previous powers of administrative removal and deportation into a new single power of expulsion. Expulsion orders will cover those refused permission, those entering illegally, those in breach of conditions of permission, those obtaining, or seeking to obtain permission by deception, foreign criminals (defined at Clause 51) and persons whose expulsion is conducive to the public good. Expulsion orders will prohibit someone from arriving in or entering the UK. This means that now merely being removed, having been refused permission, will lead to a re-entry ban, possibly for a long period of time.

This Part also includes a new power to direct a captain of a ship, aircraft or train to carry out a removal, as well as a power to provide assistance to voluntary leavers.

Refugee Council concerns

It is a matter of concern that the penalties that are to be imposed on those who are being removed after having their claim for asylum refused, or after having lived in the UK as a recognised refugee until the point at which their temporary leave ran out and their refugee status was not renewed, are the same penalties that will be imposed on people who previously would have been subject to a deportation order based on their previous, often criminal, behaviour.

In the absence of any lawful means of entering the UK, refugees will fall foul of these provisions by entering the UK using false documentation, despite the fact that Article 31 of the Refugee Convention states that refugees should not be penalised for the use of false documentation (see Part 11 of the draft Bill and page 15 of this briefing). If they are removed, they will suffer the additional penalty of being prevented from applying for any form of permission to return to the UK for an indefinite period of time. We are concerned that the imposition of re-entry bans will further undermine the right to seek and enjoy asylum from persecution, by preventing refugees from re-entering the UK.

The Refugee Council is concerned about the definitions of what is 'conducive to the public good' as well as 'criminal behaviours' that might lead to exclusion. For example, previous legislation has incorporated a very broad definition of terrorism, including acts which encourage criminal damage, into the interpretation of the Refugee Convention. As a result, political refugees who have opposed repressive regimes in their home countries may fall within this broad definition and be excluded from protection as a result. Further, in 2004, the Secretary of State produced a list of 'particularly serious crimes' which

includes shoplifting (theft) and graffiti (criminal damage).¹⁶ The Refugee Council believes that it is not proportionate to seek to remove people to countries where they will not be safe simply because they have committed a relatively minor offence.

The powers to assist voluntary leavers and to participate in projects which assist the settlement of migrants are to be welcomed. However, we are concerned that the current draft Bill contains no safeguards to the current UK practise of removing people to countries that are unsafe or experiencing rapidly deteriorating conditions, such as presently face central and southern Somalia and Zimbabwe, and contrary to the advice of the United Nations High Commissioner for Refugees (UNHCR) to refrain from such forcible removals. We believe there is a need to introduce an obligation on the Secretary of State to monitor the post-return outcomes of asylum seekers who are returned where such returns are contrary to advice from UNHCR or are to countries experiencing significant or widespread human rights violations. We recommend that the Bill be used to introduce powers to fund the monitoring of post return outcomes to ensure that returns are safe and sustainable. We should also like to see the appointment of an independent monitor to oversee and provide an independent assessment of returns and their outcomes.

Refugee Council recommendations

- People should not face lengthy re-entry bans simply because they have been removed following the refusal to recognise them as refugees, or the refusal to renew their refugee or humanitarian protection status. They should be specifically excluded from re-entry bans and should be allowed to apply to enter under the Rules straight away.
- The Government should establish independent monitoring to ensure the safety and sustainability of returns, and should use the Bill to introduce powers to fund this monitoring.

Part 5 Powers to detain and immigration bail

This Part of the draft Bill provides powers to detain any person who might be liable to examination under Part 2 of the Bill (see page 5 of this briefing). It replaces existing powers of temporary admission, temporary release, and bail with 'immigration bail', which will be used to refer to all those who are awaiting a decision on their asylum claim.

There are amendments to the powers in the Asylum and Immigration Tribunal to grant bail. Clause 62(2) (c) states that where a person's removal is imminent, and there is no outstanding appeal, the Secretary of State has to give her consent to a grant of bail made by the Asylum and Immigration Tribunal (AIT). Clause 68 contains a power for the Secretary of State to vary conditions of bail. Conditions imposed by the Secretary of State cannot be cancelled by the Courts although they can be amended.

Clause 62(6) lists matters the Secretary of State or the Tribunal must have regard to when granting bail. They relate to matters such as likely breaches of conditions of bail, a criminal record or likelihood of offending. Part 7 of the draft Bill also makes it an offence to fail to comply with a condition of immigration bail.

Clause 64 introduces a financial security condition whereby the Secretary of State may require the deposit of a sum of money as a condition of bail. This differs from the present practice whereby sureties are simply required to undertake to pay in the event of a breach of conditions. Provision for oversight of

¹⁶ Contained within the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004. For a discussion of these issues see the Refugee Council 2007 briefing on Special Immigration Status http://www.refugeecouncil.org.uk/policy/briefings/2007/special_immigration_status.htm

the Secretary of State's decision about whether or not any of the money should be forfeited does not appear in the proposed legislation.

Refugee Council concerns

These powers amalgamate and amend existing powers. Most worrying is the requirement for the Secretary of State's consent to grant bail in the case of imminent removal. It is commonplace for people to be held in detention for months, or in extreme cases for years, when there are practical difficulties in effecting removal. Despite such lengthy detention, the individuals affected would all be described by UKBA as facing 'imminent removal'. Currently, the courts may step in and grant bail to individuals falling within the category, but under the new proposals the Secretary of State could prevent this from happening.

We are similarly concerned that the Secretary of State will have the power to impose far more rigorous conditions than imposed by the AIT at a bail hearing. For example, this could mean that an individual is required by the Secretary of State to report daily, when the AIT had required weekly reporting as a condition of bail. Conditions imposed by the Secretary of State cannot be cancelled by the Courts. These proposed extensions of the Secretary of State's powers undermine the independence of the judiciary in determining the appropriateness of bail.

Part 5 contains a list of matters that must be considered when deciding whether to grant immigration bail and whether to make bail conditional. The Refugee Council believes that as currently drafted the list is imbalanced and may mean that an individual is less likely to receive bail than if additional factors were also considered, such as the length of time spent in detention, an individual's state of health and the impact that detention would have on the individual and their family.

The Refugee Council is extremely concerned about the possible requirement for a deposit of a sum of money in order to be granted bail. Refugees and asylum seekers are less likely than many other people in society to have access to the sums of money required, nor to know people who are willing and able to pay these sums on their behalf. Currently, where sureties are found, they rely upon a trusting relationship with the detainee and an assumption that money only has to be promised and is unlikely to have to be handed over. Detainees are likely to encounter even greater difficulties in finding sureties if the proposed requirement to pay the money up front and have it held indefinitely is introduced.

The Refugee Council opposes the use of the term 'immigration bail' for people who are awaiting an outcome on their asylum claim. We believe that the term is inappropriate for use in relation to people who are here lawfully, awaiting the outcome of their asylum application, including those who have not been detained or released from detention. We are concerned that this is yet another example of the creeping criminalisation of asylum and of asylum seekers. To suggest that asylum seekers are all 'on bail', with its associated connotations of criminal behaviour, is entirely inappropriate. Further, the provisions making a breach of a condition of immigration bail an offence means that asylum seekers may be faced with up to 51 weeks imprisonment for something as minor as a failure to report. This is wholly disproportionate.

Refugee Council recommendations

- The independence of the Courts should be maintained and the Secretary of State should not have the power to overrule or vary AIT decisions on bail.
- A term other than 'immigration bail' should be used to refer to the status of asylum seekers awaiting a decision on their claim. 'Bail' should only be used to describe the situation of those people who have been detained and released on conditions.

- Financial deposits should not be required as a condition of bail. The existing system of forfeiture in the event of a breach should be maintained.

Part 6 Detained persons and removal centres

This Part of the draft Bill outlines provisions relating to the management and regulation of removal centres.

Refugee Council concerns

The Refugee Council believes that alternatives to detention should be found wherever possible, and that asylum seekers should never be detained in order to process their asylum application. We regret that the draft Bill will allow the Government to pursue its plans to expand the detention estate by up to 60%.¹⁷ Detention is particularly damaging for children, and the Refugee Council believes that children should never be detained. We are incredibly concerned that in the last twelve months, the proportion of children detained longer than the 28 days, for which Ministerial approval is required, has doubled from 29% to 57%.¹⁸

The Refugee Council urges the Government to take the opportunity provided by the Bill to introduce a statutory requirement for an independent review of decisions to detain people subject to immigration control, and for an automatic right to a bail hearing after seven days. It is unacceptable to maintain the current situation whereby asylum seekers are detained for months, in some cases years, even though there is no realistic prospect of their removal.

Refugee Council recommendations

- Children should never be detained.
- The Government should include in the Bill an independent review of decisions to detain people subject to immigration control.
- Detainees should have a right to a statutory bail hearing after seven days.
- Applicants for protection should never be detained in order to assess their asylum application.

Part 7 Offences

This Part outlines the legislation on offences, including entering the UK without immigration permission, staying in the UK without permission, breaching the conditions of immigration permission, entering the UK without a passport, and assisting an asylum seeker to enter the UK. It adds a new offence of obstructing, resisting or assaulting officials in the course of their duties under the Bill.

Refugee Council concerns

¹⁷ UKBA press release 19th May 2008

<http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/2008/largescaleexpansionofbritainsdet>

¹⁸ See Table 13 of the UKBA Quarterly Statistics <http://www.homeoffice.gov.uk/rds/pdfs08/asylumq108.pdf>

The Refugee Council is concerned that the cumulative effect of existing and proposed immigration offences is that refugees and asylum seekers are increasingly likely to find themselves criminalised and to face serious repercussions as a result. The lack of legal routes to the UK for asylum seekers means that offences relating to facilitating illegal entry are likely to disproportionately affect refugees and others with international protection needs who are driven to assist family members to flee persecution and seek sanctuary in the UK. Documentation offences are particularly worrying and run contrary to the spirit of the Refugee Convention, whose drafters recognised that many refugees are not able to obtain the required official travel documents to enable them to flee from persecution.

Under the Bill, it will continue to be an offence to fail to produce a valid travel document at the time of an asylum claim. It is of grave concern that there are refugees in British prisons who have been placed there solely for using false documentation in order to flee persecution. In the absence of legal entry routes into the UK for asylum seekers, many will have placed themselves in the hands of agents and may have little actual control over their documentation. Refugees should be protected by Article 31 of the Refugee Convention, which says they should not be penalised for using false documents. Currently, refugees facing documentation offences are commonly unable to obtain appropriate immigration advice and representation as they are represented by solicitors who are not specialists in immigration law. (For more information see Part 11 of the draft Bill and page 16 of this briefing).

The additional offence of obstructing, resisting or assaulting officials included is extremely wide ranging and ill defined. The term 'obstructing' is not defined and is capable of being open to broad interpretation. The range of people who may be 'obstructed' or 'resisted' is very wide and includes all contracted staff involved in the processes of detention and removal. Given that there is recent evidence of some of these staff engaging in inappropriate behaviour towards those whose detention or removal they are involved in, this is a matter of concern.¹⁹

Refugee Council recommendations

- Individuals' asylum claims must be considered prior to charging them with any documentation offence. Those with protection needs should not be charged with offences that result from the manner in which they entered the UK.
- The UKBA should conduct an impact assessment to ascertain the implications of immigration offences for refugees, asylum seekers, and others with international protection needs.
- All people charged with documentation offences should have immediate access to immigration legal advice and representation in order that they may be appropriately advised.

Part 8 Carriers Liability

This Part of the draft Bill replicates and extends existing provisions, whereby carriers of irregular or undocumented entrants into the UK may be fined. *Making Change Stick* states that further measures are planned, but does not specify what they might be.

Clause 149 does provide for regulations to be made for "authority-to-carry" schemes. This goes much further than previous powers requiring carriers to make available passenger lists of people they are carrying. Authority-to-carry schemes will require carriers to actively seek authority in advance to carry a passenger.

¹⁹ See for example "Outsourcing abuse" A report by Birnberg Peirce & Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns: July 2008: <http://www.medicaljustice.org.uk/images/stories/reports/outourcing%20abuse.pdf>

Refugee Council concerns

Carriers Liability is a mechanism which limits the ability of people fleeing persecution to reach a place of safety. It is crucial that people unable to enter the UK (or indeed the EU) as a result of such controls do have their protection needs addressed at the point at which they are stopped and interviewed.

The Refugee Council believes that it is inappropriate for government to use private companies to perform the state's immigration control function. In order to avoid Carriers Liability fines, some companies contract private security companies to screen entry to the UK. The operation of private companies, particularly in transit areas (which include detention facilities) very often outside public scrutiny, could result in *refoulement*.

Refugee Council recommendations

See the recommendations relating to Part 2 of the Bill on page 6 of this briefing.

Part 9 Illegal workers

This Part outlines provisions relating to illegal working and to the regulation of employers.

Refugee Council concerns

The Refugee Council believes that asylum seekers should be entitled to work while in the UK. They should not face destitution if their asylum claim is refused and their asylum support terminated. The current draft Bill provides an opportunity for the Government to introduce this entitlement to work. We are concerned that there are currently thousands of asylum seekers at the end of the asylum process whose asylum claims have been refused, but who are unable to return home to their countries of origin because such returns would be unsafe. These asylum seekers, including those from Zimbabwe and parts of Iraq, are forced into destitution. For some, their only means of survival may be to work in the informal economy. We are thus concerned that the Government's policy of enforced destitution for those at the end of the asylum process provides some asylum seekers with little alternative but to work outside the formal economy and thereby fall foul of illegal working legislation.

In relation to refugees with status, we are concerned that the Bill will not simplify the current situation, whereby employers, wary of penalties for employing people illegally, look for traditional documentation, such as national passports, in preference to the less familiar documentation possessed by refugees and others with protection status. Legislative provisions relating to illegal working must be accompanied by clear guidance to employers to ensure that the legislation does not disadvantage refugees who are looking for work or who are currently in employment.

Refugee Council recommendations

- All asylum seekers of working age should be entitled to apply for work permission. At a minimum this should be after six months of claiming asylum and for those refused asylum but unable to return immediately.
- The Government should conduct an impact assessment to establish the impact that legislation to combat illegal working is having on refugees, as well as promoting clear guidance to ensure that

employers are aware of the entitlement to work of those with refugee and humanitarian protection status.

Part 10 and Schedules 1 and 2 Appeals

Part 10, together with Schedules 1 and 2, outlines the proposed structure for the Asylum and Immigration Tribunal and also amends immigration appeal rights. Appeal rights are now to be triggered only if decisions have been taken as specified in Clause 174(1) – ‘not in accordance with the Rules’ or ‘not in accordance with the law’. It will thus no longer be possible to appeal on the grounds that an official failed to exercise a discretion allowed for within the Immigration Rules.

A further change is that asylum applications that are certified as ‘clearly unfounded’ and which previously had the right of an out of country appeal (once the asylum applicant had left the UK), would have no right of appeal at all under the draft Bill.

Under Clause 171, there is no right of appeal against an exclusion order made on the basis of the use of deception, breaching immigration permission (Clause 171(3) a), or having committed a ‘serious’ crime Clause (171(3) (b)).

Refugee Council concerns

The Refugee Council expressed strong concerns in 2002 when the provisions relating to the appeal rights of ‘clearly unfounded’ cases were changed to allow for appeals only to be made from outside the UK.²⁰ We believe that a right of appeal is a fundamental safety net that helps to ensure that people with protection needs are correctly identified and granted status accordingly. Whilst we are concerned that it is exceptionally difficult to conduct an appeal from outside the UK, the current draft Bill will worsen the situation even further by removing appeal rights entirely from this group of people.

We are deeply concerned that there will be no right of appeal against exclusion on the grounds of deception, breaching immigration permission, or committing a crime that is defined in statute as ‘serious’. Deception, in particular, is a matter that should properly be determined by the courts, and is not something that should define an individual’s appeal rights.

Furthermore, there is no provision so far in the Bill for onward appeals from the AIT to the Higher Courts.²¹

The Government has previously explored the option of insulating immigration law from the higher levels of judicial scrutiny, thus preventing appeal to the Court of Appeal and up to the House of Lords.²² These proposals were strongly opposed, the Government’s attempts to restrict judicial scrutiny were ultimately withdrawn and the proposed legislation was amended. However, In *Making Change Stick*, reference is made to the ‘increasing number of judicial reviews’ which hamper ‘swift action by UKBA’. The document states that ‘Work is currently underway to identify ways of reducing the burden on the High Court’.²³

²⁰ See the Refugee Council briefing *The Nationality, Immigration & Asylum Act 2002: changes to the asylum system in the UK* December 2002 <http://www.refugeecouncil.org.uk/policy/briefings/2002/nia.htm> and see the comments on P4 of “Refugee Council response to the consultation on the IND Review “Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system” August 2006 <http://www.refugeecouncil.org.uk/policy/responses/2006/indreview.htm>

²¹ Since this briefing was written UKBA has published a Consultation Document of the proposed new appeal structure called “Immigration Appeals: fair decision, faster justice” August 2008.

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/immigrationappeals/>

²² This was a proposed provision of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which the government withdrew and amended. See the Refugee Council briefing “The Asylum and Immigration Bill 2003 January 2004 <http://www.refugeecouncil.org.uk/policy/briefings/2004/bill2003.htm>

²³ See P8 of “Making Change Stick – and introduction to the Immigration and Citizenship Bill 2008”: UKBA: July 2008

Some fundamental protections within refugee law have only been established by appeal to the highest levels of the judiciary and the Refugee Council is opposed to any measures that would fetter judicial scrutiny of asylum decisions which are, in many cases, life and death decisions.

Refugee Council recommendations

- All asylum applicants should have an in-country right of appeal and access to the highest levels of the judicial system.

Part 11 General supplementary provisions

Most of the clauses in this Part of the draft Bill are miscellaneous and regulatory and not of concern for this briefing. Clauses 189 and 193 are, however, relevant and are covered below.

Clause 189 - Duty regarding the welfare of children

This Clause requires immigration officials specifically designated by the Secretary of State to have a duty to promote and safeguard the welfare of children in carrying out their duties. This wording is the same as that in Section 11 of the Children Act 2004, which placed a duty on other agencies, such as the prison service or police, whose role brings them into contact with children, despite their primary function not being the provision of children's services.

Refugee Council concerns

The Refugee Council welcomes the recognition of the need for this duty. However, it is unclear whether the duty will be applied in the same way to UKBA as to the other agencies to which Section 11 of the Children Act applies. Much of the Section 11 duty is implemented through guidance that will not automatically apply to UKBA, whose duty will arise through this separate piece of immigration legislation. It is also unclear to what extent this duty will apply to all UKBA's functions, as the clause gives considerable discretion to the Secretary of State to designate which officials the duty will apply to.

Refugee Council recommendations

- Legislation should specify which officials are to be designated as responsible for the duty of care. The duty should apply to all relevant officials, including those who do not have direct contact with children but whose actions e.g. policy development, have an impact on children in the immigration system.
- Guidance should ensure that the UKBA's duty is implemented in line with the other agencies to which it applies.

Clause 193 General provision relating to offences – defence for a refugee

This is a revised version of the defence contained in earlier legislation, whereby refugees have a defence against prosecution for several offences if they can establish that they are refugees and that they applied for asylum at the earliest opportunity.

Refugee Council concerns

The Refugee Council has longstanding concerns about these offences, as the statutory defence does not in practice provide effective protection from prosecution. Refugees are routinely charged and imprisoned on arrival in the UK, long before they have the chance to establish whether they may be accepted as a refugee. They commonly struggle to get appropriate legal advice, relying on duty solicitors familiar with the criminal law rather than immigration law.

Refugee Council recommendations

See the recommendations relating to Part 2 of the Bill on page 6 of this briefing.

Part 12 Definitions

Meaning of 'protection application'

Clause 205 (3) defines a refugee as someone who is recognised as a refugee for the purposes of the Refugee Convention, on the grounds that removing them would contravene the UK's obligations under that Convention.

Refugee Council concerns

The Refugee Council is concerned that this is a fundamental misrepresentation of the Refugee Convention. It essentially sets out that only those recognised by the Home Office can be refugees when this is simply not the case. A refugee is somebody who meets the criteria set out in the 1951 Refugee Convention. This is clearly set out in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

Thus, a refugee is a refugee when s/he arrives in the UK. The UK asylum determination system is declaratory and can recognise, but not confer that person's refugee status.

Refugee Council recommendations

- The definition of a refugee within the Bill should reflect that contained in the 1951 Refugee Convention.

Part 13 Final provisions

These relate to expenditure, the extent of the draft Bill and the dates of commencement.

Appendix 1

Summary of the Refugee Council's recommendations

1. Refugees seeking to come to the UK because they are in fear of persecution should only be prevented from doing so if there are viable alternatives available to them to seek and receive the protection that they are entitled to. (Part 2).

- In extending its power to enquire and refuse travel and entry, the Government should take steps to ensure that protection needs are identified and met.
- Mandatory refusal/return interviews should be conducted by officials engaged in preventing further travel, to ensure that refugees are aware of their rights and to protect against *refoulement*.
- Decisions on refusals at the border should be recorded and a system of independent monitoring introduced to ensure scrutiny of the impact that refusals are having on access to protection for refugees.
- The Government should explore the possibility of Protected Entry Procedures to facilitate access to protection without the need for unlawful travel.

2. Refugees within the UK should not be criminalised for seeking asylum. Their claims should be considered within a procedure that allows adequate time for them to present their asylum claim, provides for them to have legal advice and representation throughout the process and to have a right of appeal from within the UK. They should not be detained whilst their asylum claims are processed and should be allowed to work during this time. (Part 1, Part 5, Part 6, Part 7, Part 10, Part 11).

- Individuals' asylum claims must be considered prior to charging them with any documentation offence. Those with protection needs should not be charged with offences that result from the manner in which they entered the UK.
- The UKBA should conduct an impact assessment to ascertain the implications of immigration offences for refugees, asylum seekers, and others with international protection needs.
- All people charged with documentation offences should have immediate access to immigration legal advice and representation in order that they may be appropriately advised.
- A term other than 'immigration bail' should be used to refer to the status of asylum seekers awaiting a decision on their claim. 'Bail' should only be used to describe the situation of those people who have been detained and released on conditions.
- Legislative provisions relating to Special Immigration Status should be repealed.
- The independence of the Courts should be maintained and the Secretary of State should not have the power to overrule or vary AIT decisions on bail.
- Financial deposits should not be required as a condition of bail. The existing system of forfeiture in the event of a breach should be maintained.
- Children should never be detained.
- The Government should include in the Bill an independent review of decisions to detain people subject to immigration control.

- Detainees should have a right to a statutory bail hearing after seven days.
- Applicants for protection should never be detained in order to assess their asylum application.
- All asylum applicants should have an in-country right of appeal and access to the highest levels of the judicial system.
- All asylum seekers of working age should be entitled to apply for work permission. At a minimum this should be after six months of claiming asylum and for those refused asylum but unable to return immediately.
- The Government should conduct an impact assessment to establish the impact that legislation to combat illegal working is having on refugees, as well as promoting clear guidance to ensure that employers are aware of the entitlement to work of those with refugee and humanitarian protection status.
- Legislation should specify which officials are to be designated as responsible for the duty of care. The duty should apply to all relevant officials, including those who do not have direct contact with children but whose actions e.g. policy development, has an impact on children in the immigration system.
- Guidance should ensure that the UKBA's duty of care towards children is implemented in line with the other agencies to which it applies.
- The definition of a refugee within the Bill should reflect that contained in the 1951 Refugee Convention.

3. Refugees whose need for protection is recognised by the UKBA should immediately be given permanent rights of settlement and not be made to fulfil other obligations such as learning English or doing voluntary work. (Part 3)

- All refugees and those granted protection under the ECHR should be granted permanent residence at the time they are recognised as refugees. They should not be required to overcome further hurdles in order to be able to settle permanently.
- Refugees should not be charged fees for naturalisation or permanent residence at any stage whether directly, through the application process, or indirectly through taking English for Speakers of Other Languages with a Citizenship Context or the Life in the UK test.
- Refugees should not be required to perform voluntary activities in order to speed up their passage to citizenship or permanent permission.
- Government guidance must state clearly and consistently the services to which refugees are entitled.

4. Refugees whose need for protection is not recognised by UKBA should only be removed from the UK to countries that are safe and to which returns can be sustainable. Returns should be monitored. (Part 4)

- People should not face lengthy re-entry bans simply because they have been removed following a refusal to recognise them as refugees, or a refusal to renew their refugee or humanitarian protection status. They should be specifically excluded from re-entry bans and should be allowed to apply to enter under the Rules straight away.

- The Government should establish independent monitoring to assess the safety and sustainability of returns, and should use the Bill to introduce powers to fund this monitoring.