



Joint submission from the Refugee Council, the Scottish Refugee Council and the Welsh Refugee Council to the Joint Committee on Human Rights Call for Evidence on the Draft (Partial) Immigration and Citizenship Bill 2008

October 31st 2008

About the organisations responding jointly to this Call for Evidence

As a human rights charity, independent of government, the Refugee Council works to ensure that refugees are given the protection they need, that they are treated with respect and understanding, and that they have the same rights, opportunities and responsibilities as other members of our society.

Scottish Refugee Council provides independent help and advice to those who have fled human rights abuses or other persecution in their homeland and now seek refuge in Scotland. We campaign to ensure that the UK Government meets its international, legal and humanitarian obligations and to raise awareness of refugee issues. Our vision is for a Scotland in which asylum seekers' and refugees' rights are respected and they are welcomed, treated with dignity and empowered to play a full and equal role in their new communities.

The Welsh Refugee Council's vision is to "empower refugees and asylum seekers to rebuild their lives in Wales". We campaign for a better deal for refugees, so that everyone who comes to Wales seeking asylum can live in safety, security and freedom.

1. Introduction

The Refugee Councils welcome the process of consolidation of immigration law in the UK as an opportunity to ensure that the overall framework of law enables the state to fulfil its duties under international law to those in need of protection. However, we regret that this approach has not been adopted with the current draft Partial Immigration and Citizenship Bill. We are concerned the draft Bill represents an attempt to simplify the law at the expense of ensuring the protection of refugees.

Our submission examines where the draft Bill fails to ensure refugee protection, under three main headings:

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Borders without doors for refugees

As a consequence of the border control measures set out in the draft Bill, refugees needing protection will be prevented from reaching the UK. Whilst the Bill increases the number and scope of measures of interception, it lacks safeguards to ensure these extra-territorial controls do not result in refugees being forced back to persecution. We are concerned that the Bill's provisions will mean that refugees seeking sanctuary are forced into the hands of smugglers and traffickers.

Undermining the human rights of refugees in the UK

The extensive use of detention powers, the use of destitution in order to coerce people to leave voluntarily and the designation of failure to comply with administrative asylum procedures as criminal offences, all undermine the human rights of refugees. The wide range of offences listed in Part 7 of the Bill, in conjunction with the lack of legal entry routes into the UK for refugees seeking asylum, means that those refugees who reach the UK are increasingly likely to face imprisonment or detention. Refugees should not be criminalised as a result of seeking asylum and should not be detained whilst their asylum claims are being processed.

Removal of refugees from the UK

The Refugee Councils are concerned that the Bill combines deportation orders and administrative removal into a single concept of expulsion, meaning that people who leave the UK because they have not been recognised as refugees will face with lengthy bans on re-entry. We do not believe that it is appropriate that people should be barred from entry simply because they have sought asylum. Further, the Refugee Councils believe that people should only be removed from the UK to countries that are safe and to which their return is sustainable. In order to ensure that all returns from the UK are safe and sustainable, we recommend that there should be independent monitoring of returns.

1. Borders without doors for refugees

The Refugee Councils are concerned that people who need to flee persecution are increasingly unable to do so. The Bill's strengthening of border controls and failure to ensure that refugees are able to access protection will further undermine the spirit of the 1951 Refugee Convention, will undermine the human right to seek and enjoy asylum from persecution, and will contribute to the growth of the smuggling and trafficking of refugees.

Part 2 of the Bill (Powers to Examine) gives the Secretary of State the power to make enquiries of anybody seeking to enter the UK in order to grant or refuse them permission to do so. This power would be exercisable anywhere in the world. It is clear from the explanatory notes that the Government's intention is to extend the reach of its border controls beyond the UK and the EU to all points of the globe.

Under the Bill, immigration officers may be posted abroad and will be given new powers to refuse entry and cancel permission to travel that has previously been granted. The Refugee Councils believe that these officials should also be given powers to enable them to ensure that those individuals they encounter who are in need of protection are able to obtain it. They should ensure that refugees outside their country of origin or habitual residence are able to access the protection to which they are entitled under international law. In some countries to which the UK posts immigration officers there is no functioning asylum determination, and in some countries there is no asylum determination system at all. This means that refugees are unable to obtain effective protection.

The Refugee Councils are concerned that restrictions on refugees' ability to access safety Page 2 of 8

will be further tightened by the proposed "Authority-to-carry" schemes (Clause 149) whereby carriers will be required to seek advance authority from the Secretary of State to carry each individual passenger.

2. Undermining the human rights of refugees in the UK

Detention and immigration bail

The Refugee Councils remain concerned about the extensive detention of refugees in the UK. Article 26 of the Refugee Convention requires states to allow free movement of refugees within their territory¹ and yet many are detained for indefinite periods of time, often for the purely administrative purpose of processing their asylum claim. Their detention is not subject to effective judicial scrutiny.

In a memorandum following visits to the UK in February and April 2008, Thomas Hammarberg, Council of Europe Commissioner for Human Rights, expressed strong concerns about the detention of refugees:

"The international refugee law principle of *non-detention of refugee applicants* should be firmly established in British immigration law. Their detention may occur only exceptionally, for the shortest possible time and only for the following purposes: (a) to verify the identity of the refugees; (b) to determine the elements on which the claim to refugee status is based; (c) to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the country of refuge; (d) to protect national security or public order".² He also noted the "absence of a special and precise legal framework regarding detention of asylum seekers in Fast Track Processes" leading to a situation where detention may be arbitrary and at the discretion of the immigration officer.³

Most worrying of the draft Bill's new provisions relating to detention is the requirement for the Secretary of State to consent to a grant of bail where the authorities claim there is 'imminent removal' (Clause 62 (2) (c)). The Refugee Councils believe that when one party to a case has an effective veto over a Tribunal's decision, the Tribunal can no longer be said to be independent. We note that 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 their removal. Despite such lengthy detention, the individuals affected would all be described by UKBA as facing 'imminent removal'. Even at present, detainees' representatives have had to resort to *habeas corpus* in order to secure the release of long term detainees. With the Secretary of State having to consent to a grant of bail we are concerned that this resort to the higher courts will be far more likely to be necessary.⁴

We are similarly concerned that the Secretary of State will have the power to impose far more rigorous conditions than those imposed by the Asylum and Immigration Tribunal (AIT) at a bail hearing (Clause 68). For example, this could mean that whilst the AIT may require an individual to report weekly as a condition of bail, in effect this may then be overruled by the Secretary of State were she to require daily reporting. The Refugee Councils strongly believe that the Asylum and Immigration Tribunal (AIT) should set the terms of bail not the Secretary of State who is herself one of the parties in the case.

Clause 62 (6) contains a list of matters that must be considered when deciding whether to grant immigration bail and whether to make bail conditional. The Refugee Councils believe that as currently drafted the list is will lead to the continued detention of individuals when such detention is not appropriate. We recommend that additional factors should also be considered, such as the length of

¹ See Article 26 of the Refugee Convention <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

² See [The Commissioner - CommDH\(2008\)23 / 18 September 2008](#) Paragraph 25

³ Ibid Paragraph 21

⁴ See *A & Ors, R v SSHD* EWHC 142 (Admin) 21.1.08 where three Algerians were released under *habeas corpus* after over a year in detention

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time spent in detention, an individual's state of health and the impact that detention would have on the individual and their family. The emphasis in the Bill appears to suggest a presumption in favour of continued detention irrespective of how long it has gone on or of the resulting effect on people's physical and mental health.

The lack of presumption of liberty is worse for those faced with expulsion on the basis that they are "foreign criminals". Irrespective of the nature of their offence, or whether they are a threat to the community, or the likelihood of their imminent removal, they must be detained under the Bill unless the Secretary of State "thinks it is inappropriate". (Clause 55 (4)). The Refugee Councils strongly believe that the presumption should always be in favour of release unless there is a good reason for detention.

The possible requirement under the Bill for a deposit of a sum of money in order to be granted bail is also a matter of extreme concern. 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. Under the Bill's new provision, 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. Refugees and asylum seekers are less likely than many other people in society to have access to the sums of money required, or to know people who are willing and able to pay these sums on their behalf.

Support

Of particular concern with regard to the support of refugees and asylum seekers is the use of destitution as an instrument of policy to coerce voluntary return, whereby individuals are reduced to destitution irrespective of the safety and sustainability of return to their country of origin. This is a breach in some cases of Article 3 of the European Convention on Human Rights, as people are forced into extremely vulnerable situations with a consequent impact on their physical and mental health. Asylum seekers whose claims have been refused are routinely forced into total poverty even though there is no current possibility of immigration officials being able to enforce their removal, for example because of difficulties obtaining travel documents, or on health grounds.

It is hugely wasteful and costly to have two parallel systems of support one, Section 4 support, for people at the end of the process, more restrictive than the other, Section 95 for those within the asylum process.⁵ Levels of asylum support are set below the UK poverty line. The levels of the more restrictive voucher based Section 4 scheme have not been reviewed since their introduction. The Refugee Council recently published a report highlighting the shocking impact on people of having to live entirely on a voucher system.⁶ The vast majority of refused asylum seekers are not even eligible for this reduced level of support and live indefinitely with no means of support. Severe implications result for those with health problems, such as HIV or diabetes, who are unable to maintain a healthy diet.

The Refugee Councils believe that asylum seekers should be allowed to work. Where they need support, there should be a single system of cash support for asylum seekers at all stages of the asylum process, up to the point of removal.

We would like to draw the Committee's attention to a recent case in the Court of Appeal where the judge declined to impose a custodial sentence on a man from Zimbabwe who had bought a forged South African passport in order to obtain work. The Court exercised "the judicial quality of mercy" for somebody "in a kind of Limbo".⁷

⁵ This refers to Section 4 and Section 95 of the 1999 Immigration and Asylum Act

⁶ See "More Token Gestures" Refugee Council, October 2008.

<http://www.refugeecouncil.org.uk/policy/position/2008/section4vouchers.htm>

⁷ See Reference by the Attorney General under S.36 of the Criminal Justice Act 1988 Ref No Nos 1 and 6

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Health

The Refugee Councils are concerned about restrictions on asylum seekers' entitlement and access to health care. The Refugee Council continues to work with clients who are either denied treatment entirely or, having received health services, are presented with a bill for charges that there is no realistic possibility that they could pay.⁸

We further note the concern expressed by the Joint Committee on Human Rights about health care provision within the detention estate, in particular in relation to mental health care.⁹ We are aware that there is evidence that problems of mental care provision persist. Her Majesty's Inspector of Prisons noted recently that at Yarls Wood Removal Centre mental health services were "limited" and recommended that a full assessment of mental health needs should be carried out.¹⁰ She made a similar recommendation in relation to Tinsley House in her March 2008 report, where she stated:

"The one permanent mental health trained nurse and the bank nurses with mental health qualifications were deployed to general duties, which limited their ability to offer primary care mental health support to detainees. The centre had no multidisciplinary mental health in-reach services, and mental health need had not been part of the recent needs assessment".¹¹

Criminalisation

The Refugee Councils are concerned that the effect of existing and proposed immigration offences is that refugees and asylum seekers will be increasingly likely to face prison. The lack of legal routes to the UK for refugees seeking asylum means that refugees are likely to be disproportionately affected by the measures which make it an offence to facilitate illegal entry.

Offences relating to the use of false documents to enter the UK are of particular concern as they 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 prior to fleeing persecution.¹² Under the Bill, it will continue to be an offence to fail to produce, when making an asylum claim, a valid travel document which had been used during the course of the journey to the UK. It is of real concern that there are refugees in UK 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 but, despite the possible defence reproduced in clause 193 of the draft Bill, in practice refugees are routinely imprisoned, often without the benefit of this defence even being explored. Currently many refugees facing prosecution for

<http://www.bailii.org/ew/cases/EWCA/Crim/2008/677.html>

⁸ See "First do no harm". Refugee Council June 2006 <http://www.refugeecouncil.org.uk/policy/position/2006/healthcare.htm>

⁹ JCHR Tenth Report "Treatment of asylum seekers" March 2007 Recommendation 51

<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>

¹⁰ See HMIP Yarls Wood Report 4-8 February 2008 Para 5.41 and Recommendation 5.66

http://inspectorates.homeoffice.gov.uk/hmiprisons/inspect_reports/ircinspections.html/544687/Yarls_Wood_2008.pdf?view=Binary

¹¹ See HMIP Tinsley House Report 10-14 March 2008 Para 5.26 and Recommendation 5.34

http://inspectorates.homeoffice.gov.uk/hmiprisons/inspect_reports/irc-inspections.html/544670/tinsley-house-IRC-2008?view=Binary

¹² Article 31 of the Refugee Convention states: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

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<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

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documentation offences are unable to obtain appropriate immigration advice and representation and instead are being represented by solicitors who do not specialise in immigration law. Alternatively, where they do get immigration advice they are advised to plead guilty as they are unlikely to get bail and would face even longer in prison awaiting trial than the likely sentence from the magistrate's or sheriff's court.

In a more recent statement the Commissioner for Human Rights wrote:

"To put a criminal stamp on attempts to enter a country would undermine the right to seek asylum and affect refugees. In addition, persons who have been smuggled into a country should not be seen as having committed a crime. There are agreed international standards to protect persons who have been victims of human trafficking from any criminal liability.

Criminalization is a disproportionate measure which exceeds a state's legitimate interest in controlling its borders. To criminalize irregular migrants would, in effect, equate them with the smugglers or employers who, in many cases, have exploited them. Such a policy would cause further stigmatization and marginalization, even though the majority of migrants contribute to the development of European states and their societies. Immigration offences should remain *administrative* in nature".¹³

Of further concern is that the draft Bill will further criminalise some refugees by making it an offence to breach reporting conditions (Clause 116), or fail to submit to a medical examination (Clause 102). These offences will be punishable by up to 51 weeks imprisonment. The Refugee Councils believe that this is a disproportionate response to what are essentially administrative matters.

We note that the range of actions related to obstructing, resisting or assaulting officials that are to be treated as offences is potentially extremely wide ranging and ill defined (Clause 121). The Bill does not contain a definition of the term 'obstructing' and we are concerned that it is capable of being open to broad interpretation. The range of people who may be 'obstructed' or 'resisted' is also very wide and includes all contracted staff involved in the processes of detention and removal. Given that there have been recent allegations of staff engaging in abusive behaviour towards those in whose detention or removal they are involved, this is a matter of concern.¹⁴

The Refugee Councils are also concerned about the definitions of 'conducive to the public good' and 'criminal behaviours' and the role if these definitions in decisions to exclude or remove individuals in need of protection. Previous legislation has incorporated a very broad definition of 'terrorism' that includes acts which encourage criminal damage, into the interpretation of the Refugee Convention. As a result, acts undertaken by political refugees who have opposed repressive regimes in their home countries may fall within the definition of 'terrorism' and as a consequence their claims for asylum may be excluded from consideration for protection entirely.¹⁵ Even those accepted as refugees may be subsequently subject to an expulsion order on the grounds that they have committed "particularly serious crimes" despite the fact that the list produced in 2004 included shoplifting (theft) and graffiti

¹³ See "It is wrong to criminalise migration" Council of Europe Human Rights Commissioner 29.9.08
http://www.coe.int/t/commissioner/Viewpoints/080929_en.asp

¹⁴ See "Outsourcing abuse" Birnberg Peirce, Medical Justice and NCADC July 2008
<http://www.medicaljustice.org.uk/images/stories/reports/outsourcing%20abuse.pdf>

¹⁵ Under Article 1 (f) of the 1951 Refugee Convention any body may be excluded from protection if:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

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(criminal damage) as examples of such serious crimes.¹⁶ The Refugee Councils believe 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.¹⁷

We are very concerned about the proposed treatment of those who will come within the category of Special Immigration Status.¹⁸ It is understood by the Refugee Councils that the people to be given this status, who the government wishes to remove from the country but cannot on human rights grounds, will, with their families, be kept on immigration bail indefinitely. They will be forbidden to work and required to live on vouchers with no recourse to public funds for any member of their family. In short, they and their partners and children will be cast into poverty and insecurity for an indefinite period, potentially lasting a lifetime.

3. Removal of refugees from the UK

The Refugee Councils are concerned about the combination of the current approaches of deportation and administrative removal into a single provision for expulsion. There is clearly a difference between the situation of somebody who is removed for having committed a serious crime and somebody who has been refused protection. The Government should not seek to impose penalties that are appropriate for those who have committed a serious crime upon those who have not committed such crimes. Refugees should not be barred from re-entry under the Rules.

Furthermore an expulsion order will be able to be imposed at any time and potentially hang over people's heads indefinitely. An order could be imposed for an indefinite period of time and be based on minor breaches of conditions such as a failure to report. It could be preceded by a criminal custodial sentence which again is disproportionate if the person is to be removed.

There will be no right of appeal against expulsion where in the view of the Secretary of State permission was obtained by "deception". The Refugee Councils strongly believe that the decision on whether deception has taken place should be made by an independent Court and not by the Secretary of State, who is one of the parties in the proceedings.

The powers in the Bill 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 curtail the current UK practise of removing people to countries that are unsafe or experiencing rapidly deteriorating conditions, or contrary to the advice of the United Nations High Commissioner for Refugees (UNHCR) to refrain from such forcible removals, such as to central and southern Somalia. 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 removed where such removals are contrary to advice from UNHCR, or are to countries experiencing significant or widespread human rights violations. The need for this monitoring may be of greater urgency should the government begin the forced removal of unaccompanied children to their countries of origin. We recommend that the Bill be

¹⁶ Article 33(2) of the Refugee Convention permits the return of refugees of "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". For the list of offences see Statutory Instrument 2004 No. 1910 The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 <http://www.opsi.gov.uk/si/si2004/20041910.htm>

¹⁷ These provisions are reproduced in Paragraph 45 (f) of the Draft Illustrative Immigration Rules on Protection published at the same time as the Bill http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/draftillustrativei_r.pdf?view=Binary

¹⁸ Introduced by the Criminal Justice and Immigration Act 2008. See the Refugee Council briefing http://www.refugeecouncil.org.uk/policy/briefings/2007/special_immigration_status.htm

used to introduce powers to fund the monitoring of post return outcomes to ensure that returns are safe and sustainable and that this should provide funds for independent monitoring.

4. Conclusion

It is the view of the Refugee Councils that this much needed reform of the legislative framework is being used by the Government to increase its extensive powers at the expense of providing protection for refugees and of the human rights of refugees and asylum seekers. The Government should:

- Ensure that our borders are protection-sensitive and ensure access to protection for those who are stopped in transit.
- Retain the right to challenge detention decisions before a truly independent Tribunal.
- Ensure access to quality immigration legal advice and representation throughout the asylum process and in particular before proceeding with prosecutions for immigration offences.
- Provide for an in country right of appeal for all asylum applicants and access for appellants to the higher courts.
- Ensure support is provided in cash and levels be reviewed to adequately reflect people's needs. Asylum seekers should be allowed to work.
- Ensure entitlement and access to primary and secondary health care for all asylum seekers and refugees.

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