

Refugee Council

policy response



Refugee Council response to Simplifying Immigration Law: an initial consultation.

29th August 2007

About the Refugee Council

The Refugee Council is the largest organisation in the UK working with asylum seekers and refugees. We not only give help and support to asylum seekers and refugees, but also work with them to ensure that their needs and concerns are addressed by decision-makers. We work closely with many individuals struggling to make sense of a complex system and therefore welcome the intention to rationalise existing legislation and make it more comprehensible and transparent. We are concerned however that these proposals seek to go considerably further than straightforward consolidation and may in the process create a system that is far more inflexible and bureaucratic, lacks adequate safeguards and fails to provide protection to refugees who need it.

GENERAL OBSERVATIONS

The Refugee Council welcomes any proposal that will lead to the consolidation of immigration legislation – it is long overdue. It is clearly undesirable that there have been a succession of laws which have become progressively more difficult to follow as each builds on and amends its predecessors. However it should be noted that much of the complexity has been caused by the increasingly restrictive approach of government to fulfilling its obligations under the Refugee Convention, the European Convention on Human Rights (ECHR) and related Conventions regarding, for example, torture and the rights of children.¹ Indeed at the very time that this Consultation is published for comment the government has before parliament two measures which add further complex distinctions with onerous requirements for certain groups it has decided to target.²

In outlining the principles upon which any rationalisation process is to be built the Refugee Council would expect to see a commitment to a protection system that will protect the fundamental principles underpinning these Conventions, such as non-refoulement; prevention of torture;

¹ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. UN Convention on the Rights of the Child 1990.

² Clause 16 of the UK Borders Bill (reporting/residence conditions for those with limited leave) and clauses 115 *et seq* of the Criminal Justice and Immigration Bill (new special immigration status) are examples of wide powers being given to immigration caseworkers to impose further intrusive conditions on persons subject to immigration control.

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protection from inhuman and degrading treatment; proportionality and non-discrimination. There is no mention of these in the principles listed.

Secondly, the aim to develop a single piece of primary legislation with much detail contained within the Immigration Rules raises concerns about the level of parliamentary scrutiny and control. There appears to be the aim to create a system with a general statutory base which may then be subject to constant change through the Immigration Rules. This does not seem to be a way in which to ensure that fundamental commitments to protection may be fulfilled.

Thirdly, we are concerned about the desire to remove the capacity to exercise discretion and concessions outside the rules. Discretion and concessions are not in themselves bad things – much depends on the framework within which they are exercised. In particular asylum and human rights touch on matters that do not lend themselves to easy compartmentalisation or to be subject to a list of checks allowing the “clarity and predictability” that is desired. Dealing with asylum claims involves areas of judgement and discretion, indeed may raise issues of proportionality, that do not allow the same approach as may be possible in other areas of immigration law.

It follows from this that we strongly advocate the role of advisers in assisting people with their asylum claims and believe cases should be legally represented throughout their claim. We do not therefore support the aim of reducing the role of advisers.

The simplification exercise proposed seems to be an enormous enterprise that requires greater scrutiny than the proposed process allows. If the proposal is to substantially reduce the existing legislation to one overarching statute then this is going to require detailed scrutiny of all the existing provisions. We would therefore strongly suggest two things:

- i) that as soon as possible after the closure of this current Consultation the Project Team should produce an outline of what is being proposed in general legislative terms in order to focus discussion prior to the publication of the proposed Consultation document in November 2007.
- ii) that to facilitate such dialogue working groups of officials and stakeholders should be established to examine discrete areas in detail. We do not believe that it is appropriate to have a single approach to such a large area of legislation and what may be appropriate for immigration may not be the case for asylum. We believe it is important to have dialogue with Stakeholders in relation to specific areas such as Nationality and Immigration so that this process might inform the content of the paper due in November.

We will now turn to the specific questions.

Q1. ARE THE SIMPLIFICATION PRINCIPLES WHICH ARE SET OUT IN THE PREVIOUS SECTION THE RIGHT ONES?

No. As outlined above we would expect that a statement of key principles would include a commitment to ensuring protection and to promote the right to seek and to enjoy asylum from persecution; adherence to international obligations; proportionality and the elimination of arbitrary decision making.

The principles that are to be maximised are essentially process driven with an emphasis on speed, clarity and efficiency. Whilst clearly not objectionable in themselves we would question how applicable they are across the board. Asylum cases can be very complex and require elements of judgement that do not lend themselves to simplification and codification. The definition of who is a

refugee itself should not be simplified or codified in a way that either breaches the minimum standard³ or prohibits its progressive development.

Transparency is highly desirable and this means that policy needs to be clearly enshrined in primary legislation and supported by detailed policy guidance.

We welcome the reference to plain English and would urge that the principle of ensuring that people have access to procedures and are able to understand them is extended to ensuring appropriate translation and interpreting services and this should also be a clear principle.

It is of course important for there to be public faith in the system but it is equally important that the public understands the duties of the government in protecting people's rights. The promotion of an understanding of the government's duties in protecting rights and educating the public and the media about these should also be a clearly stated principle.

The principles to be minimised also raise some questions. The accelerating process of introducing new immigration legislation has been clearly undesirable and has often had the feel of a work in progress. On the other hand it is a reflection of an attempt to cope with a changing world which has led to a vast array of legislation. The Refugee Council believes that it is a mistake to seek to move to a single focused piece of primary legislation in the first instance. It would be more prudent to consolidate all the existing legislation so that it is more accessible and then examine opportunities for amalgamation and simplification.

The Refugee Council is also concerned about the aims of reducing discretion and concessions. Concessions mitigate the harshness and unintended consequences of often inflexible rules and these have in the past provided an essential safeguard in extending protection to people who do not readily fit into one box or other within the procedures. This is especially important in children's cases where the best interests of the child must be considered.

Inconsistencies, duplication or gaps are undesirable but there is a limit to the extent to which all eventualities can be set out in definitive procedures. The exercise of discretion is not intrinsically a problem and in the difficult world of asylum it is hard to see how it can be eliminated. What is important is that its exercise should be transparent, accountable and subject to appeal.

It would be helpful to know what duplication and gaps the proposed exercise is intended to eliminate.

Q2. WHAT SPECIFIC PROBLEMS WOULD YOU HOPE THAT THE SIMPLIFICATION PROJECT CAN RESOLVE?

The process of building successively on the original 1971 Immigration Act has led to a position where the thread of legislation is far too complex. It obviously requires consolidation so that there is a single coherent version of the current legislation. That is a problem that needs solving but it should be done by consolidation of existing legislation first with possible simplification emerging as a secondary stage.

We are also not clear how it is intended to incorporate in this review the large range of related primary and secondary legislation relating to wider issues such as benefit, housing, health, employment and so on. (see also Q 7).

³ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

Q3. WHAT PARTICULAR ISSUES NEED TO BE ADDRESSED IN REDUCING RELIANCE ON CONCESSIONS AND THE EXERCISE OF DISCRETION?

See Q1.

Q4. DO YOU AGREE WITH THE PROPOSED THREE TIER STRUCTURE OF PRIMARY LEGISLATION, IMMIGRATION RULES AND OPERATIONAL GUIDANCE?

There is already a three tier structure and what seems to be being proposed is that primary legislation should play a reduced role in the development of law and policy. The intention seems to be to have a simple "focused" single piece of legislation underpinned by rapidly changing immigration rules open to change by the Secretary of State to provide "flexibility". This suggests a system essentially for legislating by changing the rules without the level of scrutiny by Parliament that primary legislation normally receives. The Refugee Council is opposed to this. Primary legislation ought not to give powers that are widely drawn on the grounds that they will be later restricted by rules or guidance as then Parliament is left without any effective scrutiny of what powers are being granted to the Executive. Powers should state their purposes in primary legislation and general limitations and restrictions should be written into the statute.

We are also concerned that operational guidance will only be provided "where that is necessary". It is far from clear how it would be assessed as "necessary" and any reduction of published guidance will clearly reduce levels of transparency.

Q5. ARE THERE PARTICULAR MODELS FOR SIMPLIFICATION, INTERNATIONALLY OR IN OTHER REGULATORY AREAS, WHICH HAVE BEEN SUCCESSFUL AND COULD PROVIDE A MODEL?

We are not aware of any.

Q6. NATIONALITY LAW IS LARGELY SEPARATE FROM IMMIGRATION LAW. THE GATEWAY FROM MIGRATION PROCESSES TO CITIZENSHIP IS CLEARLY PART OF THIS PROJECT. BUT SHOULD THE TECHNICAL DETAILS OF NATIONALITY LAW BE INCLUDED IN THE PRESENT SIMPLIFICATION PROCESS, OR LEFT ALONE? OR WOULD IT BE BETTER TO CONSOLIDATE NATIONALITY LAW SEPARATELY?

The Refugee Council is of the view that the BIA should consolidate the existing law, following detailed discussion as suggested above, by tackling it in the discrete areas of Nationality and Immigration.

Q7. CAN WE USE THE SIMPLIFICATION PROCESS TO HELP MAKE CLEARER THE DISTINCTION BETWEEN TEMPORARY RESIDENTS IN THE UK, THOSE SEEKING SETTLEMENT, THOSE SETTLED HERE WITH NO TIME LIMIT ON THEIR STAY AND THOSE WHO GO ON TO BECOME BRITISH CITIZENS? CAN WE MAKE CLEARER THEIR RESPECTIVE OBLIGATIONS AND RIGHTS, AND HOW THESE DIFFERENT STATUSES NEED TO BE EARNED?

In this context the Refugee Council is concerned about the confusions caused between the position of refugees in the UK and other people subject to immigration control. There is particular confusion amongst employers for example about the employment rights of refugees which can lead to discrimination as employers concentrate only on the points based type of scheme.

Also we do have concerns about the citizenship tests applied to refugees after five years of leave and their confusion with nationality requirements.

Q8. DO YOU HAVE ANY OTHER COMMENTS ON, OR SUGGESTIONS FOR THE PROCESS?

No

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We are happy for response to be published.

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