

Special Immigration Status

October 2007

The government is planning to introduce a new Special Immigration Status for foreign criminals and their dependants whom it cannot remove from the country as to do so would breach their human rights. This is contained in the Criminal Justice and Immigration Bill due for its second reading in the House of Commons on the 8th October 2007. This briefing describes the details of the new status and outlines the Refugee Council's concerns.

1. Background

a) The Stansted Afghans

The government has longstanding concerns about foreign nationals it is unable to remove from the UK because to do so would be a breach of their human rights. It has clearly articulated its desire to find means of circumventing the absolute protection against removal to face torture or inhuman or degrading treatment provided by Article 3 of the European Convention on Human Rights (ECHR).¹

In 2000 a group of Afghans hijacked a Boeing 727, flew to the UK and sought asylum from the rule of the Taliban. Following a series of legal cases, including the quashing of criminal convictions by the Court of Appeal, their case for asylum was considered by the Immigration Appellate Authority. A panel of three adjudicators decided that they risked being killed if they were returned and said they should be allowed to stay. The Immigration Appeal Tribunal refused the Home Secretary permission to appeal.

The Home Secretary chose not to exercise his right to seek permission for an appeal from the High Court but nevertheless he refused to grant discretionary leave in accordance with the Home Office policy in force at the time. Instead he attempted to apply a new policy which would keep the men on temporary admission with no entitlement to work or to benefits. The High Court declared the policy unlawful and ordered the Home Secretary to grant them discretionary leave, which he duly did. The Secretary of State then appealed to the Court of Appeal challenging the High Court's decision that the new policy was unlawful.

¹ For example via the Memoranda of Understanding regarding torture of returnees signed with Libya, Jordan and Lebanon <http://www.fco.gov.uk/Files/KFile/Libya%20MOU.doc> and the intervention in the European Court of Human Rights in the case of *Ramzy* which seeks to overturn previous rulings and allow security considerations to outweigh an individual's ECHR right to be protected from torture or inhuman treatment.

b) The Court of Appeal judgment

In August 2006 the Court of Appeal confirmed that the Home Secretary's actions were unlawful. Temporary admission is linked to the power to detain and there are no grounds to detain these individuals. The government's actions thus lacked parliamentary authority. Lord Justice Brooke commented "So far as the powers of the Home Secretary are concerned, the challenges created by the respondents' presence in this country have been apparent ever since they landed here over six years ago. There has been ample time for the Home Secretary to obtain appropriate Parliamentary authority, if he wished to be clothed with the powers he gave to himself without parliamentary sanction."²

c) The Home Secretary's statement of intentions

The Home Secretary responded to the Court of Appeal's judgment, saying "I continue to believe that those whose actions have undermined any legitimate claim to asylum should not be granted leave to remain in the UK....I plan to bring forward legislation to do this as part of the early Bill to strengthen our immigration laws."³

2. Proposed legislation: Special Immigration Status

Subsequently, the government announced a provision in the Criminal Justice and Immigration Bill to establish a new form of immigration status to be used for this category of people.

3. Outline of Special Immigration Status proposal

a) The people to whom this status would apply

Clause 115 gives the Home Secretary the power to designate persons to whom the SIS provisions will apply. This means foreign criminals (as defined in Clause 116) and members of their family, who are liable for deportation but who cannot be removed because of the UK's obligations under the Human Rights Act 1998. It also includes those, like the Stansted Afghans, who are not convicted foreign criminals but have been excluded from the protection of the Refugee Convention under Article 1(F) (see below). It will also include their families.

A person cannot be designated if they have the right of abode, or if to designate them would breach the UK's responsibilities under the Refugee Convention or the person's rights under the Community treaties.

b) The meaning of "foreign criminal"

Clause 116 defines foreign criminals as non-British citizens to whom either Article 1(F) of the Refugee Convention (the exclusion clause) applies or who have been convicted of a crime that would exclude a refugee from the protection of Article 33(2) of the 1951 Refugee Convention.

c) The effect on immigration status

The impact of Special Immigration Status upon a person's immigration status is defined in Clause 117. A designated person:

² S & Others v SSHD [2006] EWCA Civ 1157 <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1157.html>

³ Reported on BBC News 4th August 2006 <http://news.bbc.co.uk/1/hi/uk/5244936.stm>

- does not have leave to enter or remain in the UK
- is subject to immigration control
- is not to be treated as an asylum seeker or former asylum seeker
- is not able to use time spent as a designated person towards nationality claims
- is not to be granted temporary admission
- is not in breach of UK immigration law

Note that whilst a designated person does not have leave to be in the UK and cannot be granted temporary admission, they are not in breach of UK immigration law.

d) Conditions

Clause 118 lists the conditions that may be imposed on a designated person. These conditions may relate to residence, employment and reporting including the possibility of electronic monitoring. People in breach of a condition may be subject to a fine and a prison sentence.

e) The impact on support entitlements

Clause 119 specifies the support entitlements of a person with Special Immigration Status.

Designated persons, who would otherwise be destitute, will be restricted to support similar to asylum seekers under Section 95 of Part VI of the 1999 Immigration and Asylum Act.

Whilst they are entitled to basic support comparable to asylum seekers, this will be in the form of accommodation and vouchers, not cash, except in exceptional circumstances.

The standard of accommodation and the level of support given to designated people only need be at a level that the Home Secretary considers “adequate” and “essential” respectively. The Bill therefore gives the Home Secretary powers to vary the entitlements of designated persons away from those of asylum seekers under Section 95.

Designated persons will not be entitled to housing or homelessness assistance. Their position regarding access to health care is not covered in the Bill.

f) The end of designation

Designation lapses if a person

- is granted leave to enter or remain
- is recognised as having the right of residence under Community treaties
- leaves the UK
- is made the subject of a deportation order

Designation is not subject to a limited shelf life. There is no provision for review or renewal nor any right of appeal. However, it may be expected that the status will be reviewed with a view to removing or deporting the designated person.

Support as a designated person also ends when the designation lapses but may continue if, for example, there is an appeal against a deportation order. Interim transitional support can be provided for those granted leave or residency comparable to that given to asylum seekers granted status.

4. Proposed implementation of Special Immigration Status

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Special Immigration Status may be applied to any foreign national that has been convicted of, and imprisoned for, a listed crime or one for which he has received a two years sentence. In addition it may be given to those who have been excluded from the Refugee Convention, under Article 1(F).

These people would normally not be allowed to stay in the UK and would be removed to their country of origin. However there are situations where to do so would expose individuals to a breach of their human rights under Article 3 of the ECHR. Such removals are prohibited because of the absolute nature of Article 3. It is to people in this situation to whom the Home Secretary is proposing to give Special Immigration Status.

In addition Clause 115 (2) (b) refers to people who cannot be removed because of Section 6 of the Human Rights Act 1998 (the general duty on public authorities to act in accordance with the ECHR) and it therefore equally includes people who cannot be removed because of rights under Article 8 – the right to respect for private and family life. This creates the anomalous situation that a foreign criminal who had successfully appealed a decision for his deportation on the basis that deportation would be disproportionate to his family life in the UK, could nevertheless be subjected to Special Immigration Status.

Article 1(F)⁴

Some people who would otherwise qualify as refugees are not considered deserving of refugee protection and are prevented from being recognised as refugees under the 1951 Convention. Article 1F of the Refugee Convention (the 'exclusion clauses') specifically excludes from refugee protection "any person with respect to whom there are serious reasons for considering that:

- (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."

It should be noted that the Stansted Afghans were excluded under Article 1F (b) as the facts in their case were not in dispute and the Tribunal found that, although there were mitigating factors, they could have attempted to flee Afghanistan by other means. However the Tribunal also found that as "there is a real risk that the appellants' rights under Article 3 would be violated on return and that there is an insufficiency of protection, the appeals of all the appellants under the European Convention are allowed."⁵

However the implications of Article 1(F) go much wider especially in relation to Article 1F(c). In its guidance UNHCR emphasises that the exclusion clauses should be interpreted narrowly, in particular Article 1F (c) which "is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category".⁶

What is the position under UK law?

⁴ 1951 Convention and Protocol Relating to the Status of Refugees Article 1(F).

⁵ See *S & Others v SSHD* [2006] EWCA Civ 1157 <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1157.html> Para 19

⁶ Application of the Exclusion Clauses: Article 1F of 1951 Convention relating to the Status of Refugees UNHCR Sept 1951 P 5

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Article 1F(c) is interpreted by statute in the UK. Section 54 of the Immigration, Asylum and Nationality Act (IAN) 2006 is headed "Refugee Convention Construction" and incorporates the very broad definition of terrorism in UK anti-terror law into the interpretation of article 1F (c).⁷ This includes acts such as encouraging criminal damage in order to coerce the state, and may readily include many political refugees who have opposed repressive regimes in their home countries.

The Joint Committee for Human Rights considered the terrorism legislation in its Report on Counter Terrorism Policy and Human Rights in December 2005.⁸ It observed that it significantly widens the scope of exclusion from protection under Article 1F (c) as the "definition includes a very wide range of conduct. It also covers acts wherever they are committed". The Committee feared "that it will be used to deny asylum to individuals who may have been engaged abroad in resistance to an oppressive regime but are caught by the UK's very broad definition of terrorism."

In addition "the provisions significantly widen the scope of the exclusion from protection in Article 1F (c) by the inclusion of the phrase whether or not the acts amount to an actual or inchoate offence. The effect of these words is to make the applicability of the exclusion from asylum wider than the actual commission of terrorist offences. Again this is the government's explicit intention. The scope of the exclusion from asylum is intended to be wider than the new encouragement offence in clause 1 of the Terrorism Bill, and to include the unacceptable behaviours in the Home Secretary's published list which include behaviours which are not criminal offences. The new clause would therefore operate to exclude from asylum individuals who have not committed any terrorist crime under UK law".⁹

These concerns were echoed by UNHCR in their briefing on Special Immigration Status. They "expressed concerns as to the way in which Section 54 was intended to interpret Article 1F (c), particularly insofar as it would apply to acts of terrorism. It was and remains UNHCR's concern that Section 54 may result in an overly broad application of Article 1F (c) with the result that certain persons, who do not fall within the scope of the exclusion clauses, are denied the benefit of international protection. It has been long-standing practice of many States party to the 1951 Convention to maintain a restrictive interpretation and application of Article 1F (c), especially given its vague nature. It thus remains UNHCR's position that Article 1F (c) must be read narrowly".¹⁰

Proposed application of Article 33(2) "Particularly serious crimes" criteria

Article 33(1) of the Refugee Convention requires signatory states not to return individuals to situations where they face possible persecution. However it is possible to return people in the circumstances described in Article 33(2) where the individual is regarded as a danger to security or to the community.¹¹

⁷ Immigration, Asylum and Nationality Act 2006: Section 54: Refugee Convention Construction: (1) In the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular-
(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

⁸ Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters JCHR December 2005

<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf>

⁹ See *ibid* paras 175-177

¹⁰ See Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading UNHCR July

¹¹ 1951 Convention and Protocol Article 33: Prohibition of expulsion or return ("refoulement")

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee 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 judgement of particularly serious crime, constitutes a danger to the community of that country.

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Article 33(2) is also interpreted in UK law. Section 72 of the Nationality, Immigration and Asylum (NIA) Act 2002 provides a mechanism by which certain individuals convicted in the UK of “particularly serious crimes” are excluded from the process of refugee status determination.¹² Particularly serious crimes (which need not have been committed in the UK) are defined either as those which have incurred a prison sentence of more than two years, or as those specified by the Home Secretary.

The Secretary of State produced a list of specified offences in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004.¹³ This extensive list of offences includes theft (including shoplifting) and criminal damage (including graffiti).

The Refugee Council has had a long standing concern that Articles within the Refugee Convention that are intended to relate to matters that are so serious they are of national importance, are in fact being interpreted in UK law as applying to relatively minor offences. These concerns are shared by UNHCR¹⁴ and the JCHR¹⁵. It is this questionable standard that is now the one to be applied to those foreign criminals that are not covered by Article 1F (c), who cannot be removed on human rights grounds and hence are to be given Special Immigration Status.

6. Treatment of the Afghan families to date.

Some of the history of this was referred to in section 1. The treatment of these families since 2000 provides a graphic demonstration of the reality of what is being proposed.

In the case of family A the man himself was given six months’ Discretionary Leave in May 2006 following the High Court case. He has made an application to renew his leave which has not yet been decided. His leave continues until his application is finally determined. Meanwhile his wife had put in a separate asylum claim on behalf of herself and her children in 2000. To this day she does not have a decision on this asylum claim and the family remains living in asylum support accommodation in Hounslow and she and the children (but not her husband) are required to report weekly. She is not entitled to work or claim benefits. She played no part in the highjacking nor did her children, three of whom were born in this country. Mr. A himself had his conviction quashed by the Court of Appeal in 2003. Thus a family that has not been convicted of any criminal charges, that nobody believes are a threat to national security, that are at risk if returned and that the government acknowledges it will not be able to remove are to be consigned to an indefinite limbo of restriction, poverty and stigma. This extends even to their children that were born in the UK.

Family B is in a similar position with a family of parents and nine children who still have not had a decision, who still cannot work and are required to report. Mr. C has a wife and two children who arrived in the UK five years after the hijack and with absolutely no involvement at all in the events. They joined their husband/father but made separate asylum claims which have yet to be decided. Since then a further child has been born in the UK. This family would also be placed on Special Immigration Status as the family of an excluded person although they had nothing whatsoever to do with the events that led to the exclusion.

¹² See <http://www.uk-legislation.hmsso.gov.uk/acts/acts2002/20041--e.htm#72>

¹³ See <http://www.opsi.gov.uk/SI/si2004/20041910.htm>

¹⁴ See Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading UNHCR July 2007 Para 5 “UNHCR has expressed its serious concerns that both Section 72 NIA Act and the Order set thresholds for an exception to the *non-refoulement* principle that are not in accordance with the letter and spirit of the 1951 Convention, and do not meet the criteria as set out in Article 33(2) of the 1951 Convention”.

¹⁵ See JCHR 22nd Report November 2004 paragraph 27 ‘In our view, the crimes included in the Order go far beyond what can be regarded as “particularly serious crimes” for the purposes of Article 33(2)’.

<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/190/19002.htm>

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7. Conclusion

The Refugee Council believes that the creation of this additional form of status is a wholly unnecessary, disproportionate and inappropriate response. The government accepts that the people to whom this status will be applied either cannot be removed safely or that to do so would be disproportionate to their family life. Nevertheless it seeks in effect to punish them by placing them in a form of legal and economic limbo. They should be given leave and treated equally with UK citizens.

Furthermore support given to asylum seekers under Section 95 of the 1999 Act is still only equivalent to 70% of UK benefit levels and makes no allowance for meeting longer term needs such as clothing and shoe repair. This proposal will condemn people with Special Immigration Status to an indefinite state of progressive poverty with only "essential" support provided as determined by the Home Secretary.

The use of vouchers as a form of support for asylum seekers was ended following considerable concerns about its stigmatising and impoverishing impact. Currently it is only used for refused asylum seekers in receipt of Section 4 (hard cases) support. Now it is proposed to reintroduce the use of vouchers for a whole class of people who have no prospect of this form of support coming to an end.

The government claims that it needs the Special Immigration Status as a measure to apply to a very limited number of people – up to 50 – who are known to them and for whom there are no alternatives.

Whilst this may be the government's current intention, Special Immigration Status, once in force, is capable of far wider application. It could for example be applied to the far larger number of people whom it is difficult to remove and who fall within a wide interpretation of the "behaviours" in terrorism legislation or the comparatively minor offences brought under the umbrella of "serious crimes".

Both UNHCR and the Joint Committee for Human Rights have expressed their concerns about the UK's interpretations of Articles 1(F) and 33(2) of the Refugee Convention.

In addition the introduction of this additional status, with its complex provisions, comes precisely at the time that the government has announced plans to simplify immigration legislation. Instead it is adding an additional and unnecessary level of complexity.

The means already exist to carry out the government's objectives. Clause 16 of the new UK Borders Bill introduces new powers for restrictions on residence and reporting that could be applied. Other restrictions relating to access to public funds and restriction on employment or occupation are already allowed for under existing legislation¹⁶.

Recommendations

1. The government to abandon the idea of introducing this new special status.
2. If it is introduced: a) there should be a right of appeal against designation.
b) it should not be applied to the person's family.
c) support should be in cash, not vouchers, and set at a level to reflect long term needs.

Contact for more information

¹⁶ Section 3(1)(c) of the Immigration Act 1971

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