

Refugee Council briefing on the Second Reading of the Immigration Bill in the House of Lords

December 2015

Introduction

1. The Second Reading of the Immigration Bill takes place in the House of Lords against the backdrop of the greatest refugee crisis since the end of the Second World War. Globally, the United Nations High Commissioner for Refugees reports there are 20 million refugees, with a further 40 million people displaced within their own countries. The outpouring of concern shown by the British public in response to the crisis has been considerable, with people up and down the country offering their spare rooms to refugees, donating clothing and money, and making public declarations that refugees are welcome in the UK.

2. The Refugee Council has welcomed the Government's commitment to resettle 20,000 Syrian refugees in the UK by the end of the current parliament. We urge the Government to ensure this commitment is frontloaded and to also explore other policy options for ensuring refugees fleeing war and persecution from around the world have access to safe and legal routes to find protection.

3. However, while acknowledging the commitment the Government has made in providing protection for refugees currently outside the UK, this cannot be at the expense or detriment of those who apply for asylum after reaching the UK. When the Immigration Bill was published in September 2015 we were very concerned that its provisions, in particular the changes to asylum support, will result in refused asylum seekers, particularly refused asylum seeking families, being left destitute. Unfortunately, these concerns have not been addressed by the House of Commons. Indeed, Government amendments at both the Committee and Report Stages in the House of Commons have only deepened these concerns.

Clause 32 – Immigration Bail

4. Clause 32(1) gives effect to Schedule 7, which the explanatory notes to the bill describe as providing a "new consolidated framework" for people who could otherwise be held in immigration detention to either be released from detention or not be detained in the first place. One ramification of this consolidated framework is that it will no longer be possible for an individual awaiting a decision on their asylum case to be granted "temporary

admission” to the UK. Instead, individuals awaiting a decision will be on “immigration bail”. This is a wholly inappropriate term to use for those seeking asylum in the UK. The right to seek asylum is set out in the Universal Declaration of Human Rights and the 1951 Refugee Convention protects those claiming asylum from being treated as criminals. Associating the process of applying for asylum with the criminal terminology of “bail” is unacceptable.

5. During the committee stage in the House of Commons, a series of amendments that sort to address these concerns were tabled and debated.¹ Responding to the amendments, the Immigration Minister James Brokenshire said that the changes made by the bill leave the administration of the system “largely unaffected” and argued that the language of “bail” is commonly understood among practitioners within the system and rejected the view that it introduced a criminal context. However, while the change in language may not affect the administration of the system, for both those who seek asylum and the wider public the criminal connotations of the use of “bail” are not allayed by the Minister’s response.

Clause 34 – Support for certain categories of migrant

6. Clause 34 gives effect to Schedule 8 of the bill, which concerns support provided to refused asylum seekers. On 4 August, the Home Office launched a consultation that contained proposals for the reform of support available to refused asylum seekers.² The consultation closed on 9 September and the Immigration Bill was published six days later. It was disappointing the response to the consultation was only made available after the bill had made considerable process through the House of Commons.

7. Currently, there are two systems of support for asylum seekers under the Immigration and Asylum Act 1999 (‘the 1999 Act’), known as Section 95 and Section 4 support. Asylum seekers are not eligible for mainstream benefits whilst waiting for a decision on their asylum application. Instead, if they would otherwise be destitute, they can apply to the Home Office for accommodation and/or financial support under Section 95 of the 1999 Act. Since 10 August 2015, the financial support available has been £36.95 per adult or child.

8. Asylum seekers whose application for asylum is unsuccessful and who become appeal rights exhausted cease to be eligible for section 95. Section 95 support is terminated 21 days after the claim has finally been determined. In certain circumstances, destitute refused asylum seekers can apply for section 4 support (under the provisions of section 4 of the 1999 Act). Unlike section 95 support, section 4 support is not paid in cash but instead an ‘Azure’ payment card is provided. The card is credited with £35.39 per person per week and can only be used in a number of specified retail outlets to buy food and essential toiletries.

¹ Immigration Bill Deb 3 November 2015 c346

² See <https://www.gov.uk/government/consultations/reform-of-support-for-failed-asylum-seekers-and-other-illegal-migrants>

Stopping support to asylum seeking families with children

9. Under the 1999 Act, refused asylum seeking families with children under the age of 18 who were part of the family before the final decision was made on the asylum application can continue to receive section 95 support until the youngest child turns 18 or the family leaves the UK. Schedule 8 will remove this entitlement for refused asylum seeking families. As a result, support under section 95 for families with children will be stopped once they have been refused and had any appeal rejected.

10. These families may be eligible for a new form of support created by this bill, section 95A, which replaces section 4 support. The bill allows for section 95A support to be paid either in cash or in vouchers. To qualify for support under section 95A, individuals and families who have had their asylum application refused will need to demonstrate that they are destitute and face "a genuine obstacle to leave the United Kingdom". Much of the detail of what section 95A support will look like will be set out in regulations, including what constitutes a genuine obstacle to leaving. However, the Home Office's Memorandum on the European Convention on Human Rights accompanying the bill states that the criteria for provision under 95A will be "very narrowly drawn" and will be more narrowly defined than section 4.³ Given that section 4 operates in a very restrictive way currently, failing to recognise the many barriers former asylum seekers face in planning a safe and sustainable return to their country of origin, this would potentially leave many families and individuals without support.⁴

11. The Government state that the aim behind this policy is to encourage people, including families, to leave the UK if they become appeals rights exhausted. However, there is no evidence to support the assertion that removing support from families will result in their leaving the UK. The proposed new system of support is very similar to section 9 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. In 2005, the Government ran an unsuccessful pilot of clause 9. The government's own evaluation of the pilot states there "was no significant increase in the number of voluntary returns or removals of unsuccessful asylum seeking families. It shows that in the form piloted section 9 did not influence behaviour in favour of co-operating with removal".⁵

12. Additionally, evaluations of the pilot by organisations such as Refugee Council, Refugee Action and Barnardos clearly showed the detrimental impact the policy and the shift of responsibility to meet the basic needs of children to local authority children's social

³ Paragraphs 103 and 104, Immigration Bill European Convention on Human Rights, Memorandum by the Home Office
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf

⁴ For example, even when the Iranian Embassy to the UK was closed, leaving Iranian nationals unable to obtain travel documents, the Home Office still refused support to a number of destitute Iranian asylum seekers.

⁵ Home Office, The Section 9 Implementation Project
<http://webarchive.nationalarchives.gov.uk/20140110181512/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf>

services.⁶ The Joint Committee on Human Rights shared these concerns, concluding “The section 9 pilot has caused considerable hardship and does not appear to have encouraged more refused asylum seeking families to leave the UK... We believe that using both the threats and the actuality of destitution and family separation is incompatible with the principles of common humanity and with international human rights law and that it has no place in a humane society. We recommend that section 9 be repealed at the earliest opportunity.”⁷

13. Responding to these points during the committee stage of the bill in the House of Commons, James Brokenshire, the Immigration Minister, argued there were some key differences between the section 9 process and the approach taken in the current bill. He said that:

*“the new approach will involve a managed process of engagement with the family, in tandem with the local authority, following the end of the appeal process, to discuss their situation and the consequences of not leaving the UK”.*⁸

14. However, removing support for families is likely to hinder this process. Without support there is little incentive for such individuals to remain in constructive dialogue with the Home Office with the aim of resolving their situation and may lack any practical means to do so. All available evidence suggests that people whose support is cut off following a refusal of asylum are not more likely to return to their country of origin as result. The key factor for those considering return will be the situation to which they will be returning. The Refugee Council’s research report *Between a rock and a hard place* explores in detail why many people whose claims have been refused fail to return, despite facing the alternative of being destitute in the UK.⁹

15. During the committee debate, the Immigration Minister also highlighted the family returns process, which has received considerable investment since its introduction in 2011. The family returns process was rolled out on 1 March 2011 as a key component of the Coalition Government’s aim of ending the detention of children for immigration purposes. The aims of the process were to increase take up of voluntary return opportunities; ensure that enforcement action takes into account the welfare interests of children; to better prepare families for return and give them the opportunity to take responsibility for their return; and to give families the opportunity to make further representations and seek judicial reviews before enforcement action takes place.¹⁰ The process is based around a

⁶ Refugee Council and Refugee Action, 2006, Inhumane and Ineffective – Section 9 in Practice http://www.refugeecouncil.org.uk/assets/0001/7040/Section9_report_Feb06.pdf; Barnardos, 2005, The end of the road http://www.barnardos.org.uk/end_of_the_road_asylum_report.pdf

⁷ Paragraph 97, Joint Committee on Human Rights, The Treatment of Asylum Seekers, Tenth Report of Session 2006-7

⁸ James Brokenshire MP, Immigration Bill Deb 5 November 2015 c408. The Minister also made the same argument at during the report stage in the House of Commons (HC Deb 1 December 2015 c226).

⁹ Refugee Council, 2012, Between a Rock and a Hard Place http://www.refugeecouncil.org.uk/latest/news/177_between_a_rock_and_a_hard_place

¹⁰ See Home Office, Evaluation of the new family returns process https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264658/horr78.pdf

more co-operative approach between the family and the Home Office, including the use of family return conferences, where barriers to return, family welfare and options such as assisted voluntary return are discussed.

16. During the debate in committee, the Minister used the family returns process as an example of “effective family engagement”, saying it had “successfully achieved the return of 377 families” between 1 April and 2 October this year.¹¹ The Home Office’s evaluation of the process found that the vast majority of families took longer than two months to return, with six in 10 families taking longer than three months.¹² Removing support from families will undermine a process the Immigration Minister clearly views as a success.

Grace Period

17. The consultation on the reforms to asylum support indicated that families who become appeals rights exhausted would be given a 28 day “grace period” before their support under section 95 is cut off, including losing any accommodation they are provided with. The grace period will be set out in regulations, and during the committee stage in the House of Commons, James Brokenshire indicated that the length of the grace period was still under discussion.¹³ It is clear that 28 days will not provide enough time for families to review their options, make decisions about what to do next, and to possibly make arrangements to return to their country of origin. For example, under the family returns process discussed above, the vast majority of families took longer than two months to return, with six in 10 families taking longer than three months.¹⁴ Any support should be available for as long as it is needed.

18. The current grace periods, for those granted asylum as well as those refused, do not allow for any planning or transition to other forms of support. The Refugee Council has long asked for these to be reviewed, most recently in our research report *28 Days Later*, and therefore support the notion that a longer grace period may be appropriate but this should apply to those without dependant children as well as families with minor children.¹⁵

Lack of Support for Pregnant Women

19. In our response to the Home Office’s consultation on asylum support, we raised concerns about the apparent loss of a route back onto support for pregnant women who are appeal rights exhausted.¹⁶ Currently, such women can access section 4 support six weeks before their due date (on the basis of being unfit to travel), and even earlier than this if

¹¹ James Brokenshire MP, Immigration Bill Deb 5 November 2015 c413

¹² Home Office, Evaluation of the new family returns process, p.21
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264658/horr78.pdf

¹³ Immigration Bill Deb 5 November 2015 c409

¹⁴ Home Office, Evaluation of the new family returns process, p.21
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264658/horr78.pdf

¹⁵ Refugee Council, 28 Days Later: Experiences of New Refugees in the UK
http://www.refugeecouncil.org.uk/assets/0003/1769/28_days_later.pdf

¹⁶ See
http://www.refugeecouncil.org.uk/assets/0003/5884/Refugee_Council_response_to_asylum_support_consultation.pdf

there is evidence they are unable to travel earlier in their pregnancy. The publication of the bill has not allayed these concerns. It is unclear from the face of the bill that there will be a time frame when applications for the new s95A support should be made. However, the Memorandum on the European Convention on Human Rights states that "it is envisaged that applications for the new form of section 95A support will need to be made within the grace period", adding "there will be provision for an application to be made out of time where certain criteria are met".¹⁷ We are concerned there is no indication what these criteria will be. It is essential there is proper support for women at all stages of their pregnancy and, at the very least, the new section 95A provisions must replicate the existing section 4 provisions in respect of pregnant women and ability to travel.

No right of appeal against a decision to refuse or discontinue support

20. Families and individuals who are refused section 95A support, or who have that support stopped, will have no right of appeal against that decision. Given the Home Office's poor record of decision making on asylum support applications, this is a worrying loss of judicial oversight. According to the Asylum Support Appeals Project, the latest Asylum Support Tribunal statistics indicate that in 65 per cent of appeals against decisions to refuse or withdraw support, the decision was either withdrawn by the Home Office or the appeal was allowed or remitted.¹⁸ Given the high success rates of appeal in the Asylum Support Tribunal, removing this safeguard will leave many families and individuals who are eligible for support destitute.

21. During the committee stage of the bill in the House of Commons, James Brokenshire said there was no need for a right of appeal as deciding whether an individual or a family face barriers to leaving the UK, and so qualify for section 95A, "because that should be a straightforward matter of fact".¹⁹ Yet even if this was the case, this ignores the first part of the test for eligibility for section 95A support, that of whether or not the individual of the family is destitute or will become destitute within 14 days. According to the Asylum Support Appeals Project, the Home Office frequently gets decisions on destitution wrong, with three in five appeals against decisions not to award section 4 support on the grounds that the applicants aren't destitute being successful.²⁰

22. The Immigration Minister also argued during the committee stage that the rate of appeal success was not a good indication of the quality of decision making. He backed this up by citing a report from the then Chief Inspector of Borders and Immigration, John Vine, published in July 2014.²¹ That report looked at the whole system of asylum support, and on decisions not to award support, the Chief Inspector said "we found that in 92 of 103 cases

¹⁷ Paragraph 115

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf

¹⁸ Asylum Support Appeals Project, ASAP's response to 'Reforming support for failed asylum seekers and other illegal immigrants' <http://www.asaproject.org/asaps-response-home-office-consultation-asylum-support/>

¹⁹ Immigration Bill 5 November 2015 c422

²⁰ Asylum Support Appeals Project, 'A decade of disbelieving destitution' <http://www.asaproject.org/wp-content/uploads/2015/11/ASAP-Summary-A-Decade-of-disbelieving-destitution-Oct-2015.pdf>

²¹ Immigration Bill 5 November 2015 c422

(89%) the decisions made by Home Office staff were reasonable.” The decisions taken by Home Office staff may be reasonable in that they follow the guidance given to them, but this does not explain away the high number of successful appeals. It may be that the guidance provided is not suitable. Given the high success rates of appeal in the Asylum Support Tribunal, removing the safeguard of appeal will leave many families and individuals who should be receiving support but are not due to a Home Office error destitute.

Clause 38 - Local Authority Support for destitute families and care leavers

23. Clause 38 and Schedule 9 restrict local authority support for destitute refused asylum seeking families and care leavers. In response to concerns that removing support from appeal rights exhausted families would result in an increased number of those families being supported by local authorities, thereby increasing costs for local authorities, the Government amended the bill during the committee stage to make changes to Schedule 3 of the Nationality, Immigration and Asylum Act 2002. Schedule 3 of the 2002 Act limits access to local authority support for migrants without status in the UK, including those who have had unsuccessful asylum claims. The Government’s amendments during the committee stage create two new forms of support, one for destitute families and another for former looked after children who do not have status.

24. In a letter to the chairs of the public bill committee, the Immigration Minister explained that the amendments were designed to simplify and strengthen the provisions within Schedule 3 of the 2002 Act.²² Yet the amendments fail to do this. Instead, what is created is a patchwork of various forms of support, some administered by the Home Office, others by local authorities, each with complex eligibility tests for which the full details will only be made apparent when the Government publish the relevant regulations. The resulting system creates the very real risk that destitute families and care leavers will face gaps in their support as various authorities decide who is responsible for providing support.

25. At report stage in the Commons the Government tabled further amendments, which did nothing to make the picture clearer. Instead, they excluded certain groups from the new systems of support and created further caveats to when support will be provided under the new systems. For example, the new system of local authority support for destitute families created by the amendments introduced during committee cannot be provided by local authorities to any family in receipt of section 95A support. The Government’s amendments have now broaden this so that such support cannot be paid to any family who has either made an application for 95A support or who could be “reasonably expected” to receive that support if they applied for it, no matter how desperate the situation of such a family might be.

²² Letter from James Brokenshire MP to Peter Bone MP and Albert Owen MP, 11 November 2015, <http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib44.pdf>

Family Reunion

26. Given that the world is facing the greatest refugee crisis since the end of the Second World War, it is disappointing that the bill does nothing to provide those fleeing war and persecution with safe and legal routes to find protection in the United Kingdom. One of the safe and legal routes the UK currently operates is refugee family reunion. However, the rules on refugee family reunion are so restrictive that many people don't qualify. Under the Immigration Rules, people granted refugee status or humanitarian protection (like those Syrian refugees currently being resettled) in the UK can apply to be joined by their family members who are still living in other countries. However, there are a number of restrictions about which family members qualify for family reunion.²³

27. For adult refugees in the UK, only partners and dependent children under the age of 18 will usually come under the definition of "family". As a result, families can be left with the invidious choice of whether to leave some members behind. For example, the rules mean that a Syrian father granted asylum in the UK would be allowed to bring his wife and younger children, who may have previously been sleeping several families to a house in Lebanon, to join him. Yet his eldest child, a 19 year old daughter, would not ordinarily be able to also come. Her parents would be faced with the choice of either leaving her behind or seeking to pay smugglers to bring her to the UK. In either scenario, she is at grave risk.

28. This issue was raised during the Report Stage in the House of Commons of the Immigration Bill on 1 December 2015. Responding to concerns that had been raised about the restrictive definition of family used, the Immigration Minister, James Brokenshire MP, said that expanded criteria were considered in exceptional cases. He said that the family reunion rules "are examined case by case, including by looking at whether leave falling outside the rules may be appropriate in certain circumstances."²⁴ However, the trend in recent years has been for fewer and fewer family reunion visas to be granted outside the rules. In 2011, 77 visas were granted outside the rules; by 2014 this had fallen to 12.²⁵

29. The UK, unlike other EU countries, also does not allow children who have travelled alone and then been granted refugee status or humanitarian protection to bring even their very closest family members to join them. This is despite them having been through the asylum system in the same way as an adult. As a result of this rule, children living in the UK are unable to be reunited with their parents. There is no justification for this. A much wider range of family members should be able to be reunited through the family reunion process.

30. Additionally, refugee family reunion rules do not allow people identified as refugees living abroad to be reunited with family members in the UK, if the family members in the UK do not have either refugee or humanitarian protection status. For example, a British citizen who is married to a Syrian man, who is living in Turkey and recognised as a refugee by

²³ There are further provisions within appendix FM to the Immigration Rules for family reunion of other family members or post flight family members, but the requirements are much more difficult to meet and there is a charge to make an application.

²⁴ HC Deb 1 December 2015, c229

²⁵ House of Lords Written Question 3957, 2 December 2015

UNHCR, would not be allowed to bring her husband to the UK through the family reunion rules, but would instead need to meet the income and other requirements of the spousal visa route.

Not such a simple process

31. Even for those who do, in theory, qualify for family reunion, the process is long and complicated. The report by the British Red Cross, 'Not So Straightforward', sets out the many bureaucratic and practical barriers families face.²⁶ To make an application for family reunion, the family members wishing to join their relative in the UK need to go to their closest British embassy. However, in their report, the British Red Cross highlight examples where families are risking their lives to travel to an embassy, required to travel conflict zones. Additionally, a number of people were turned away upon reaching the embassy, even though they have made appointments. For example, children who attempted to submit their applications in Rwanda were turned away from the British High Commission because they didn't have passports, even though such practice runs contrary to Home Office guidance.

32. The complexity means that some families are forced to wait months, even years, before being reunited. A recent answer to a written parliamentary question showed that in 2015 at least one family has had to wait nearly a year (357 days) to have their application processed. In 2013, one case took more than three times as long to conclude, taking 1184 days.²⁷

33. Despite the complexity of the process, since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force in April 2013, legal aid has not been available to support families going through the refugee family reunion process. During the course of that bill through Parliament, Government Ministers made it clear that they considered family reunion an immigration rather than an asylum matter.²⁸ This echoed a point made in the Government's response to the consultation that preceded LASPO, where they said "Applications to join family members are treated as immigration cases, and are generally straightforward because they follow a grant of asylum."²⁹ In the experience of many families seeking to reunite, the process is anything but straightforward.

Right to work for asylum seekers

34. Currently, almost all asylum seekers who are awaiting a decision on their asylum application are denied the right to work. The only exception is for people who have been waiting for more than 12 months for a decision, who can then apply to the Home Office for permission to work. Even then, asylum seekers granted permission are only allowed to work in national shortage occupations.

²⁶ British Red Cross, 'Not So Straightforward: the need for qualified legal support in refugee family reunion'

²⁷ Written Question 11525, 13 October 2015.

²⁸ See, for example, Lord Wallace of Tankerness' response to an amendment tabled by Lord Thomas of Gresford, HoL 18 Jan 2012, c675

²⁹ Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response', June 2011

35. As highlighted in the House of Commons Library briefing on the right to work for asylum seekers, most EU countries allow asylum seekers to work after shorter periods than the UK.³⁰ Since 20 July 2015, all EU countries (with the exceptions of the UK, Ireland and Denmark) have been required under the Reception Conditions Directive to allow asylum seekers to work after they have been waiting for nine months for a decision on their application. A number of member states are more generous. Since November 2014, Germany has allowed asylum seekers to work after three months, with some conditions, while in Belgium and Denmark (the later not being bound by the Reception Conditions Directive) permit work after six months.

36. That the vast majority of asylum seekers are not allowed to work means that many experienced and professional asylum seekers are unable to develop and maintain their skills. It also means that for those who do go on to get status, the time spent unable to work is a missed opportunity to gain experience of working in the UK as well as securing references for future employment. Allowing asylum seekers to work would also reduce the cost to taxpayers as those able to find employment would no longer need to be supported through the asylum support system.

37. Amendments tabled during the Public Bill Committee and at Report Stage in the House of Commons would have allowed asylum applicants who had been waiting for longer than six months for a decision on their asylum application to work, unless that delay was due to actions by the applicant. According to the latest immigration statistics, over 3,600 applications had been without an initial decision for longer than six months.³¹ When the dependents of applicants are taken into account, that's nearly 5,000 people living on little over £5 per day who are unable to work.

38. During the debate in the bill committee in the Commons, the Immigration Minister James Brokenshire opposed the amendment arguing that it would "blur the distinction between economic migration and asylum."³² He said that individuals could apply for asylum, then frustrate the process so that after six months they were able to work. However, this failed to recognise that the amendment tabled directly addressed this point as permission to work would only be granted where the delay was not due action taken by the applicant.

About the Refugee Council

The Refugee Council is one of the leading organisations in the UK working with asylum seekers and refugees. We give help and support to asylum seekers and refugees, and also work with them to ensure their needs and concerns are addressed by decision-makers.

For further information, please contact Jon Featonby, Parliamentary Manager, on 0207 346 1038 / 07780 664 598 or jonathan.featonby@refugeecouncil.org.uk

³⁰ House of Commons Library, Briefing Paper 1908, 10 June 2015, 'Should asylum seekers have unrestricted rights to work in the UK?' <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01908#fullreport>

³¹ Table as_01_q, Immigration Statistics July to September 2015

³² Immigration Bill 10 November c460-463