



Nationality, Immigration and Asylum Bill
JUSTICE Briefing for the House of Lords Second Reading
June 2002

JUSTICE, 59 Carter Lane, London EC4V 5AQ
Tel: 020 7329 5100 Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Nationality, Immigration and Asylum Bill
JUSTICE Briefing for the House of Lords Second Reading

INTRODUCTION

1. JUSTICE is an all-party law reform and human rights organisation, whose purpose is to achieve greater fairness, effectiveness and advancement of human rights in the legal system. It is the British section of the International Commission of Jurists.

2. This paper highlights some of the most pressing issues raised by the Nationality, Immigration and Asylum Bill 2002. It considers issues of human rights compatibility, as well as some practical issues in relation to:
 - The separate education of the children of asylum seekers in accommodation centres (clause 31)
 - The measures restricting the form of support available to asylum seekers, and allowing for all support to be withdrawn in specified circumstances (Part 3)
 - Removal of rights of appeal in unfounded / safe country cases (clause 82)
 - Procedural changes which restrict the grounds of appeal to the Immigration Appeals Tribunal (clause 89)
 - Restriction of bail rights for immigration detainees (clause 57)
 - Imposition of immigration control responsibilities on carriers through carriers liability and "authority to carry" schemes (Part 6)

A detailed briefing, dealing more fully with JUSTICE's concerns with the Bill, will be circulated in advance of Committee stage.

3. The Nationality, Immigration and Asylum Bill 2002 is the fourth review of immigration and asylum legislation in the last ten years. It introduces a significant number of changes to the existing legislative framework governing asylum policy, some of which are welcome. The Bill, however, continues to base asylum policy largely on the principles of deterrence and restriction, which inadvertently results in targeting the act of asylum seeking itself. JUSTICE, therefore, believes that another

opportunity has been missed to ensure a fair and effective system that pays due regard to the overriding imperative of refugee protection.

4. A fair and effective asylum system rests on the quality of the determination process in asylum claims¹. It is unfortunate, in JUSTICE's view, that the Bill makes no proposals for improving the basis of making individual decisions on asylum applications. There is no provision for the need to improve the quality and standard of initial decisions or to guarantee access to good quality legal advice and representation from the beginning of the process. Procedures which operate on the basis of improved quality of initial decision-making, combined with properly funded and competent legal representation at an early stage, would attract fewer challenges and delays and be able to deal effectively with unmeritorious claims.
5. In particular, JUSTICE is alarmed by the changes proposed in the Bill which severely undermine the basic right to effective access to asylum determination procedures and to the courts. Certain of these measures raise serious issues in relation to compliance with international human rights and refugee protection standards, and with rights under the European Convention on Human Rights (ECHR) which the Human Rights Act 1998 (HRA) incorporates. We therefore seek re-assurance from the government that the human rights implications of these measures have been fully addressed and that the Minister will give a full explanation in relation to each issue as to why a section 19 statement is appropriate in respect of the Bill.

PART 2: EDUCATING CHILDREN IN ACCOMMODATION CENTRES

6. Clause 31 of the Bill provides for the children of asylum seekers housed in accommodation centres to be educated outside of the mainstream education system, in special facilities within the accommodation centre. Children living in accommodation centres may be educated within the wider education system only in exceptional circumstances, for example where a child has special needs, or where a teacher in an accommodation centre recommends that an individual child be educated in a local school (clause 32).

¹ See JUSTICE, ILPA, ARC, *Providing Protection – Towards Fair and Effective Asylum Procedures*, 1997.

7. The education system proposed by clause 31 raises clear human rights concerns in relation to rights of equal access to education. Whilst children within these centres would receive an education in accordance with their rights under Article 2 of Protocol 1 to the ECHR, it is questionable whether the discrimination against these children in the realisation of their right to education can be justified as proportionate to a legitimate aim under Article 14 ECHR.² International human rights obligations of non-discrimination and the right to education, under the Convention on the Rights of the Child (Article 2, Article 28) and the International Covenant on Economic Social and Cultural Rights (Article 2, Article 13) will also be placed in issue by the scheme.
8. The proposed system also raises concerns that the social exclusion of asylum seekers will be reinforced, and that their integration within the community will be inhibited. In JUSTICE's view, whilst particular provision should be made for the education of the children of asylum seekers, in order to ensure that their particular needs are catered for, these resources would be more appropriately directed into the mainstream education system.

PART 3: RESTRICTING SUPPORT AND ASSISTANCE

Choice of Form of Support

9. Part III of the Bill limits the choice of form of support available to asylum seekers. The result of this is that asylum seekers may be required to live in accommodation centres, rather than, for example, with family in the community. Under clause 45, the Secretary of State may, in individual cases, prescribe a particular form of support for an asylum seeker. Therefore, where a place in an accommodation centre has been offered, an asylum seeker who chooses to remain in the community may lose all support. Clause 45 (3) states that the Secretary of State may, in making this decision, have regard to administrative or other considerations, and may regard those matters as conclusive.

10. JUSTICE is concerned that, under these provisions, consideration of the individual circumstances of asylum seekers' cases may be overridden by administrative convenience. Asylum seekers allocated places in accommodation centres, but who wish to reside with friends or family in the community, should not be compelled to choose between social isolation or extreme poverty. In assessing the form of support made available to an asylum seeker under clause 45, account will have to be taken of the individual's rights to family and private life under Article 8 ECHR as incorporated by the Human Rights Act 1998. In JUSTICE's view, in order to give expression to these obligations, it should be made express in clause 45(3) that the Secretary of State may have regard, in determining the form of support, to the personal circumstances and needs of the asylum seeker.
11. An even more restrictive measure is contained in clause 37, which would allow the Secretary of State, by order, to make more general prescription for the accommodation of all asylum seekers, or classes of asylum seekers, in accommodation centres. The government signalled at report stage debate in the House of Commons that these provisions would not be used immediately, but would be kept in reserve in case there were problems with the functioning of the new system.³ Nevertheless, in JUSTICE's view, these proposals merit careful parliamentary scrutiny at this stage. A blanket requirement that all asylum seekers must reside in accommodation centres would be likely to constitute a disproportionate interference with private and family life rights (Article 8 ECHR) in certain cases, since it would preclude consideration of the individual circumstances of each case.
12. The restrictions the Bill places on choice of form of support also raise concerns under the UK's international obligations to protect economic social and cultural rights. The UN International Covenant on Economic Social and Cultural Rights, to which the UK is a party, protects the right to adequate levels of social security benefits (Article 9), the right to a decent standard of living (Article 11) and family life rights (Article 10). The Covenant requires that States should guarantee minimum

² Belgian Linguistics Case, (1970) 1 EHRR 252

³ Hansard, HC Report Stage debate, 12 June 2002, col 917, Beverly Hughes: "We do not envisage taking the power in the short term".

levels of these rights, and that they should not adopt any retrogressive measures which cut back on the protection already afforded to these rights. In JUSTICE's view, the new restrictions introduced in this Bill, which will require many asylum seekers to choose between isolation from family and community on the one hand and destitution on the other, represent a retrogressive encroachment on rights under the Covenant, in breach of the UK's international obligations.

Withdrawal of Support

13. Under Part 3 and Schedule 3, asylum seekers (with the exception of those under 18) will lose the right to all State benefits in certain circumstances. These include where an asylum seeker has refugee status abroad, where he or she is a national of another EEA state, where his or her application for asylum has already been determined and failed, and where he or she is unlawfully in the UK in breach of immigration laws and is not seeking asylum. People who are deprived of benefits in this way are not entitled to any support or accommodation, though accommodation pending removal may be provided in certain cases to those with dependent children.

14. The scheme proposed for the withdrawal of benefits under the Schedule raises clear human rights concerns, acknowledged by paragraph 3 of the schedule, which states that the provisions do not prevent action necessary for avoiding a breach of Convention rights. However, it must be questioned whether the scheme can in general be operated in conformity with Convention rights, as well as with the UK's international human rights obligations. The withdrawal of all benefits clearly raises issues under Article 8 ECHR (the right to private life, which includes the right to physical integrity), as well as under the UN International Covenant on Economic Social and Cultural Rights, which protects the right to adequate food and housing and to an adequate standard of living (Article 11). In particular, it is a cause for concern that only those persons with dependent children are eligible for accommodation pending removal from the jurisdiction under paragraph 8. It is unclear how others deprived of benefits under the Schedule are to meet their most basic needs whilst they remain in the UK.

Support for children of asylum seekers

15. Under paragraph 2 of Schedule 3, the provisions of the schedule on loss of benefit do not apply to children. The exception in relation to children means that, in a family judged ineligible for support under the Schedule, whilst support is withdrawn from the adults, the children will be taken into care in order to provide support for them.⁴ This raises issues of family life rights under Article 8 ECHR, since it involves the State actively removing a child from his or her parents, in cases where this may not be in the best interests of the child.

16. This provision also raises issues under the Convention on the Rights of the Child (CRC) to which the UK is a party. The CRC states in Article 3 that in all actions concerning children, the best interests of the child shall be the primary consideration. Article 9 states that children shall not be separated from their parents against their will, except when necessary in the best interests of the child. As a result of the United Kingdom's reservation to the CRC, in respect of children subject to immigration status, these rights are not immediately applicable to the Bill. However, in JUSTICE's view the issues that arise under these provisions demonstrate the incompatibility of the reservation with the spirit of the CRC, and underline the need to withdraw the reservation.

Criminalising second applications for support

17. Under the schedule (Paragraph 13) a person removed on the grounds that he or she has refugee status abroad or is a citizen of another EEA state, commits an offence if he or she returns to the country and requests arrangements to be made for a second removal, or for accommodation pending removal, under paragraph 8. The offence is punishable on summary conviction by six months' imprisonment.

18. In JUSTICE's view, it is an inappropriate use of the criminal law to criminalise application for a benefit. The provision is particularly draconian, since the offence is one of strict liability, which does not take into account individual circumstances.

Although many second applications for repatriation may seek to abuse the system, the Bill should take account of individual cases where such applications may be justified.

CHALLENGING RESTRICTIONS: ISSUES RELATING TO ACCESS TO JUSTICE

Removal of appeal rights in unfounded/safe-country cases

19. Under the new arrangements - introduced belatedly during Second Reading in the House of Commons – appeals to an adjudicator from within the United Kingdom, on grounds including breach of the HRA or breach of the Refugee Convention, have been removed in cases which the Home Secretary has certified as clearly unfounded or where the claimant can be returned to a safe third country (clause 82). Appeal in these cases could be exercised only from outside the UK. Asylum seekers, who have been certified so, may be removed speedily. It will be open to them to make an appeal against certification under judicial review but it would not automatically suspend the removal process. No appeal is available against removal directions.

20. JUSTICE is concerned by the way these clauses seek to restrict the jurisdiction of the courts and the appellate authorities over matters which address fundamental human rights. When claims are certified by the Secretary of State on the grounds that they are unfounded or can safely be dealt with in another country, no avenue of appeal is available and the risks of refoulement contrary to Article 33 Refugee Convention, or removal contrary to Article 3 ECHR or other ECHR rights, are significantly increased. The absence of appeal rights in these cases prevents a full merits review of executive decisions exercised on the basis of non-specified criteria and without any guarantee that those returned will be able to obtain a secure status elsewhere.

21. The Home Office has explained that claims which may be certified under these provisions are those (a) where people produce no evidence of having been at risk or that the country from which they came was unsafe for them; (b) where people have come through a country where they would not have been at risk but where they failed

⁴ Hansard, HC Report Stage debate, 12 June, 2002, col. 898 Beverly Hughes

to make a claim⁵. Assurances were given in the House of Commons that certification allowed under these clauses would be discretionary and would not be made in relation to any country regarded as unsafe⁶. This is clearly not enough to dispel concern over the lack of safeguards against erroneous decisions. Out-of-country appeals do not constitute adequate safeguards in cases where erroneous decisions may lead to unfair removals that put people's life at risk. Out-of-country appeals are widely known to be problematic and involve so many hurdles that they are barely exercised.

22. Safeguards against erroneous decisions are all the more important as it is likely that countries of origin will become one of the main deciding factors in whether a case is clearly unfounded. It will result in the introduction of what is in fact a 'white list' in another form. There is no confirmation that clearly unfounded claims will not be categorised depending on which country asylum seekers come from. Thus, it may well be that first-instance decision-makers will concentrate on countries rather than on individual cases. This would raise concerns under the Refugee Convention which requires that each application be considered on its merits. As envisaged, the system may be effective in speeding up the process of determination, but it does so indiscriminately for unmeritorious and meritorious applications.
23. The system is problematic also from a practical point of view. In the absence of an independent country risk assessment, it is predictable that many such certifications will attract judicial review, thereby defeating what is the officially stated objective of fast-track procedures: the unclogging of staff and resources so as to deal speedily and fairly with 'genuine' claims for asylum.
24. JUSTICE notes that critical views on accelerated procedures have recently been expressed by the House of Lord European Union Committee in a report on minimum standards in asylum procedures. There it is stated that evidence received from appellate authorities and witnesses points to ineffectiveness and adverse effects of fast-track or accelerated procedures, in terms of diverting resources, delaying other

⁵ Home Office Press Notice n. 144/02.

⁶ House of Commons *Hansard*, 11 June 2002 Col.800.

proceedings and placing burdens on the judicial process. JUSTICE agrees with the Committee's conclusion that:

*"[a]ll cases, including manifestly unfounded ones, should be dealt with on their merits speedily within an efficient 'regular' procedure. That would also apply to manifestly well-founded cases."*⁷

Restriction of appeals

25. The Bill introduces procedural changes to the appeals process with the aim of reducing the number of judicial reviews. An application for permission to appeal against the adjudicator's decision can still be made to the Immigration Appeal Tribunal (clause 89). The Bill, however, narrows the grounds of appeal to the IAT to point of law only, and removes judicial review against refusal to grant leave to appeal to the Tribunal. The decision by the IAT refusing an application for permission to appeal can now only be reviewed by the High Court, where a single judge makes a final decision on the basis of written submissions only (clause 89.3 (a)).
26. These changes reduce the scope for remitting appeal to adjudicators by removing judicial review that challenges decisions to remit. JUSTICE believes that it is imperative for the IAT to retain discretion to grant leave to appeal on factual grounds and that provision should be retained for challenging decisions to refuse leave to appeal.
27. As stated in the introduction, it is JUSTICE's view that delay caused by asylum appeals would be better addressed by frontloading the initial decision-making system, thus alleviating the need for appeal. Limiting judicial review to cut down barriers on removal is a questionable policy and one that may lead to breaches of the prohibition of refoulement under Article 33 Refugee Convention, or removal under Article 3 ECHR.

Restriction of bail

28. The Bill repeals Part III of the 1999 Immigration and Asylum Act which provided for routinely automatic bail hearings for those detained under Immigration Act powers (clause 57(6)). Immigration detainees will still have the right to put a case for a bail hearing but it may prove extremely difficult to obtain a hearing without relevant assistance and advice.
29. The government sees these provisions of the Bill as simply repealing another barrier to removal⁸. JUSTICE, however, believes that the importance of automatic bail hearing in the light of the high degree of executive discretion involved in immigration detention cannot be underestimated. Automatic bail hearing would be a valuable way of ensuring that such detention is not excessively prolonged, and that the procedure for arranging removal were being conducted with due diligence, so as to comply with ECHR Art. 5(1)(f).
30. Judicial review, habeas corpus and bail applications depend on effective and accessible legal advice, which may not be provided if the applicant is ignorant of his or her rights or the case does not satisfy the merits test for public funding. In the light of habeas corpus and the right to liberty guaranteed by Article 5 ECHR, as incorporated by the Human Rights Act, it is important that the presumption at all stages is that persons who are detained have an automatic chance to make a bail application.
31. The ability to ensure detainees effective access to courts and challenge the legality of their detention will be dependent upon the availability of competent legal advice, where necessary provided by the State. The proposed arrangements in the Bill do not guarantee this and therefore raise issues of due process requirements under Article 5 (4) and Article 6(1) ECHR.

⁷ Quoted in House of Commons *Hansard* 11 June 2002 Col.814.

⁸ House of Commons *Hansard* 24 April 2002 Col.358.

PUNISHING ASYLUM SEEKERS: ISSUES RELATING TO ACCESS TO ASYLUM DETERMINATION PROCEDURES

Carriers' liability and 'authority-to-carry' schemes

32. The Bill introduces a revised carriers' liability scheme for those bringing clandestine entrants into the UK (clause 108 and schedule 8). It amends the carriers' liability provision in the 1999 Immigration and Asylum Act under which those carrying clandestine entrants by road or rail are liable to a penalty. In the light of the *Roth* judgement⁹, the changes would have to ensure compliance with the due process requirements of Article 6 ECHR, and with property rights under Article 1 of Protocol 1.

33. Carriers' liability schemes transfer significant responsibility to carriers and replace conventional immigration controls with a new form of control, but without the same safeguards – albeit restricted under the present Bill - as when immigration officers act to enforce immigration and asylum legislation. They are likely to undermine the UK's international obligations to provide protection under the Refugee Convention, as well as the right to seek asylum guaranteed in Article 14 of the Universal Declaration of Human Rights. In practice, because asylum-seekers cannot easily obtain documentation or leave overtly, such sanctions act to prevent those being persecuted from leaving their countries of origin to seek protection. They also engage the UK's Article 3 ECHR obligations, insofar as they may result in a refusal to carry a person who is in imminent danger of torture or inhuman or degrading treatment.

34. The authority to carry scheme in the Bill further extends immigration controls to airports outside the jurisdiction. Under these schemes (clause 107) which are to be provided for in detail by statutory instrument, it is envisaged that carriers may be required to check the details of passengers against a Home Office database to confirm that they pose no known security or immigration risk before they embark for the UK. People in relation to whom the Home Office has information that suggests that they are an immigration or security risk will not be allowed on to an aircraft.

35. This scheme may deny a considerable number of people - including asylum seekers - the opportunity to leave the country to pursue an application for asylum. There is also a question of sensitivity and handling of information. The measures would permit information about individuals to be disclosed in some circumstances for the purpose of immigration-related proceedings. The collection, use and disclosure of data under the scheme would engage privacy rights under ECHR Article 8(1). The government should explain how the disclosure and use of data under carriers liability schemes as envisaged by the Bill can be justified as proportionate to a legitimate aim under Article 8.

⁹ *International Transport Roth GmbH and others v SSHD* [2002] EWCA Civ 158, CA