



JUSTICE

Inquiry into Asylum Applications

Home Affairs Committee

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Introduction

1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.
2. JUSTICE welcomes the Committee's inquiry, particularly in view of recent reaction to Home Office data showing an all-time high in numbers of asylum applications.¹ JUSTICE recognises that the demand on resources associated with processing and hosting large numbers of asylum-seekers clearly constitutes a significant challenge for any state. However, this challenge extends to preventing the undue politicisation of the asylum issue and the development of anti-refugee sentiments. It is of fundamental importance to draw attention to the fact that states are responsible for protecting the human rights of all those on their territory, irrespective of immigration or other status.

What are the reasons for the rise in asylum applications in the UK over the last 10 years?

3. In general, the primary factor in almost all asylum cases is the human rights conditions in an applicant's country of origin. The particular increase in applications over the last 10 years would seem largely attributable to the changes brought about by the end of the Cold War: democratization across much of the developing world was marked by a corresponding rise in ethnic tensions and political instability. At the same time, the relaxing of travel restrictions, and the declining cost of air travel in particular, allowed more people to leave their country of origin than was previously possible. As such, the rise in the number of applications to the UK in the past 10 years simply reflects an increase in the number of people prepared to escape a poor human rights situation in their country of origin.
4. This view is born out by the latest Home Office data, which shows that applications from Iraq and Zimbabwe accounted for nearly all the increase from 2001.³ By 2002,

¹ Home Office, Asylum Statistics: 4th Quarter 2002 United Kingdom

² *Ibid.*

³ *Ibid.*

Iraqis replaced Afghans as the largest group of those claiming asylum in the UK. Similarly, data released by UNHCR shows the changes in asylum applications experienced by the UK in 2002 were the same as those for industrialised countries taken as a whole for the same period: Iraqis again topped the list of asylum-seekers and Zimbabwean nationals accounted for the biggest increase in percentage terms⁴. Taken together, such data strongly suggests that changes in asylum applications trends are driven primarily by human rights conditions in the country of origin and show no significant relationship with changes in asylum laws in any individual country.

5. The UK has attracted a greater number of asylum applications than other EU countries. However, there is nothing in this fact alone that would support an inference that the UK is somehow a 'soft touch' for asylum-seekers. On the contrary, research commissioned by the Home Office concluded that the key factors informing an asylum-seeker's choice of destination - where such a choice exists - are language, existing family and community ties, cultural and historical ties, together with a general perception that Britain is a fair and democratic society.⁵ As such, the reasons for the UK attracting a greater number of asylum-seekers than other EU countries are not difficult to identify. In 1903, approximately 23% or something close to 1 in 4 of the world's population lived under British rule.⁶ The fact that 100 years later the UK, as the world's 4th largest economy,⁷ should continue to attract a disproportionate number of applicants from countries such as Pakistan, Sri Lanka or Zimbabwe can hardly come as much of a surprise. Additionally, English is now a global language in a way that other European languages are not. By contrast, surveys of asylum-seekers tend to find that they know little about immigration or asylum procedures in the country of destination, nor do they generally know how one country compares with the others in terms of reception conditions and support provisions.⁸

6. Such findings call into question the logic of adopting deterrent measures in order to make the UK less 'attractive' to asylum-seekers. On the contrary, there is little evidence to show that progressively harsher asylum laws and policies adopted by

⁴ UNHCR, *Asylum Trends in Industrialised Countries* – January 2003

⁵ Home Office Research Study No.243, *Understanding the decision-making of asylum seekers*, July 2002

⁶ Roberts, JM *The Short Oxford History of the Modern World*, (OUP: Oxford, 1996).

⁷ See e.g. Patricia Hewitt, speech to Institute of Directors, 8 October 2002.

⁸ Home Office Research Study No.243, *supra* note 5.

successive UK governments across the 1990s have had any discernable effect on the number of applications. Measures such as visa restrictions and carriers' liability provisions, while successful in imposing hardship on asylum-seekers, have not had the effect of reducing the overall numbers. Rather, their most practical effect has been to oblige asylum-seekers to resort increasingly to the use of smugglers, forged documents, and similar clandestine behaviour in order to gain entry to the UK to seek asylum.

7. In JUSTICE's view, policies which seek to deter asylum-seekers from entering the UK undermines the UK's international obligations to provide protection to claimants under the Refugee Convention as well as the right to seek asylum guaranteed in Article 14 of the Universal Declaration of Human Rights.
8. JUSTICE is particularly alarmed by the proposition, most recently voiced by the Shadow Home Secretary on 18 March 2003, that the problem of raising numbers of asylum-seekers could be effectively dealt with if the UK were to withdraw from the 1951 Convention or otherwise review its international obligations to refugees.⁹ Denunciation of the 1951 Convention would require a change in domestic statutory provisions as well in the new consolidated version of the Treaty Establishing the European Community, as Article 63, para.1, explicitly requires that measures on asylum be developed in accordance with the 1951 Convention. Although embedded in treaty, the principle of non-refoulement - i.e. that nobody should be sent back to face persecution or other prohibited treatment - has also developed as a rule of customary or general international law¹⁰. Therefore, a renegotiation or changed interpretation of the Convention is unlikely to provide an immediate practical solution, as states' obligations to the international community at large would persist. Indeed, there are other instruments besides the 1951 Convention which would in any event prevent the arbitrary refusal or removal of persons from the UK in contravention of their legal rights.¹¹

⁹ See e.g. "Blunkett Asylum Appeal Rejected", BBC Website, 18 March 2003.

¹⁰ See Declaration of States Parties to the 1951 Convention, adopted at the Ministerial Meeting in Geneva on 12/13 December 2001, recognising that the principle of non-refoulement is embedded in customary international law and that the 1951 Geneva Convention is rooted in the broader framework of human rights, of which it is an integral part.

¹¹ For instance, Article 3 ECHR and Article 3 of the UN Convention against Torture 1984 each impose an obligation on the UK not to return asylum seekers to a country where they face a real risk of torture, inhuman or degrading treatment.

9. In the same way, JUSTICE believes that proposals to return those who arrive in the UK seeking asylum to transit-processing centres outside the European Union, without providing them access to procedures for determining their asylum claims under UK law, would similarly violate the UK obligations under the Refugee Convention and international human rights law.¹²
10. JUSTICE welcomes the recent government plan to expand the resettlement programme, in cooperation with UNHCR, provided such a programme operates alongside domestic asylum procedures and is not used to deter asylum-seekers from arriving spontaneously to the UK. Nor should any such programme lead to undermining refugee status granted under the 1951 Geneva Convention.
11. JUSTICE recognizes that increasing numbers of asylum applications presents the government with challenges of policy and resource allocation, it remains convinced that any strategy adopted to meet these challenges must be based on the UK's full recognition of its international obligations under the Refugee Convention and international human rights instruments.

How adequately and fairly are asylum applications managed today? How did the backlog of asylum applications arise? Is it being dealt with satisfactorily?

12. It is apparent that many of the current delays and backlogs are a result of inadequate resources and ineffective administrative procedures. Numerous judicial decisions in relation to asylum have made reference to evidence of poor interviewing and decision-making in immigration procedures.¹³ A principal reason for poor decision-making would appear to be the lack of sufficient training in the relevant law (including the Human Rights Act 1998) given to decision-makers. This is particularly apparent in the heavy reliance on stock paragraphs in decision letters, denoting both a lack of individual consideration given to cases and a limited understanding of the relevant law. It is also apparent that the Home Office has difficulty in recruiting graduates of sufficient calibre to work as caseworkers and immigration officers. Those responsible for initial decision-making in immigration matters require a greater level of expertise

¹² See e.g. "Asylum 'havens' considered by UK", BBC website, 19 February 2002.

¹³ See e.g. *Arben Shala v Secretary of State for the Home Department* [2003] EWCA 233 (Civ) per Keene LJ at para 14; *R (Mambakasa) v Secretary of State for the Home Department* [2003] EWHC 319 (Admin) per Richards J at para 53.

and access to better information than is presently the case if their decisions are to be sustainable.

13. The relatively poor quality of initial decision-making demonstrated by the number of successful appeals against initial decisions. In 2002, the authorities processed 64,405 applications appealing against initial decisions. Incorrect initial decisions were found to have been made in 22% of cases.¹⁴ In other words, just over one in five initial decisions are reversed on appeal.
14. Another reason for delays in asylum applications would appear to be the failure to allow asylum-seekers early access to legal advice and qualified interpreters so that they can properly articulate reasons for their claim. There is an important argument that the sooner competent legal advice is available to participants in legal procedures, the more effective those procedures become – particularly in reducing the potential for subsequent challenge.
15. Thus, if it is correct that poor first-instance decisions result in large numbers of appeals and extend the period before a final decision can be reached, the case for increasing resources to initial decision-makers and affording asylum-seekers early access to legal advice would appear to be a compelling one.
16. JUSTICE takes particular objection to the practice of designating applications as clearly unfounded according to country of origin. As members of the current government recognised whilst in opposition,¹⁵ this approach is inconsistent with the obligation under the Refugee Convention to consider each case individually on its merits. Allowing the dismissal of claims by reference to such blanket criteria without proper scrutiny is palpably unfair. It is also of questionable effectiveness, since the use of such sweeping criteria can only attract the anxious scrutiny of the higher courts, leading to further and protracted challenge. JUSTICE has also serious concerns with respect to the broad power given to the Home Secretary under the 2002 Nationality, Immigration and Asylum Act to add to the list of designated countries, which will be presumed safe. Such designations should be a matter of the closest parliamentary scrutiny and any addition assessed against the background of thorough and reliable country information.

¹⁴ Home Office, Asylum Statistics: 4th Quarter 2002 United Kingdom

¹⁵ See e.g. Mr Straw, *Hansard*, HC debates, 15 October 1996 at column 698.

17. More generally, JUSTICE believes that purely procedural approaches to refugee claims are wrong in principle and in practice undermine the fairness and credibility of the asylum system. The adoption of such procedural approaches is especially controversial where the procedures themselves are compromised by administrative failures, as was the case with non-compliance refusals in 2001 – the net effect being merely to defer the substantive consideration cases to the appellate level. Home Office data show that 15% applications were rejected on non-compliance grounds in 2002.¹⁶
18. Ironically, JUSTICE notes that while asylum cases are increasingly subject to fast-track procedures in order to effect the swift removal of applicants, there is no corresponding fast-track procedure in place to identify those asylum-seekers likely to have a well-founded claim or who are for practical reasons irremovable, e.g. Iraqi Kurds. As JUSTICE has indicated in previous evidence to the Home Affairs Committee,¹⁷ it is somewhat irrational to allow hundreds of asylum-seekers to proceed through the appellate system to determine their status, only to remain in the UK on the exhaustion of their appeals because there was never a realistic prospect of removing them.
19. JUSTICE welcomes the opportunity offered by this enquiry to reiterate the importance of front-loading the decision-making process, i.e. creating a determination system which is capable of making fair and sustainable decisions at an early stage. Crucial to that is the early provision of competent legal advice so that salient points of the application can be properly presented and fully considered at first instance; the availability of competent and well-informed initial decision-makers; and clear provision of sufficient safeguards against refoulement. The key to an effective asylum system is prompt, good-quality decision-making.

¹⁶ Home Office, Asylum Statistics: 4th Quarter 2002 United Kingdom

¹⁷ JUSTICE submission to the Home Affairs Committee of the House of Commons, Inquiry into immigration and asylum removals, October 2002.

How adequately is support provided to asylum-seekers by NASS?

20. JUSTICE recognizes that the preponderance of asylum-seekers in London and the South East entitles the government to take special measures to ensure that local authorities in these areas are not overwhelmed. It has grave concerns over any system of asylum support that would reduce the level of support available to asylum-seekers beneath that available to UK nationals. If income and welfare support in the UK represents the minimum level of support available to ensure human dignity and basic subsistence, it is incompatible with the principle of equal treatment to differentiate between nationals and non-nationals in respect of basic human needs. It is also crucial that support provisions fully comply with the rights protected by the ECHR, such as the right to a private and family life (Article 8 ECHR) and the right not to be subjected to inhuman or degrading treatment (Article 3).

21. Similarly, the provision of asylum support should not prevent or hinder people's ability to seek protection, as this would undermine the protection guarantees of the Geneva Convention and Article 3 ECHR. In particular, JUSTICE is concerned at measures such as section 55 of the Nationality, Immigration and Asylum Act 2002 (which seeks to discourage asylum applications by removing asylum support where an asylum-seeker fails to apply "as soon as reasonably practicable"). Wholly apart from the question of whether withdrawing asylum support from an asylum-seeker who has no other means of support would amount to a breach of their right to be free of inhuman and degrading treatment contrary to Article 3,¹⁸ such treatment is also of concern because of the likely effects of destitution on an applicant's ability to pursue their asylum claim effectively – which would amount in our view to constructive non-refoulement contrary to Article 33 of the Refugee Convention.

¹⁸ See judgment of the Court of Appeal in *R (Q and others) v Secretary of State for the Home Department*, 18 March 2003 at para 63: "It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself".

How appropriately is detention used in respect of asylum applications?

22. Notwithstanding the decision of the House of Lords in *Oakington*,¹⁹ JUSTICE remains concerned at the increasing use of detention in asylum cases, specifically its compatibility with the right to liberty under Article 5 ECHR.
23. Article 5(1)(f) does allow an exception to the general right to liberty *inter alia* in respect of persons 'against whom action is being taken with a view to deportation or extradition'. *Oakington* was decided on the basis of the Home Office's own evidence that decisions to detain were not based on fear of absconding but in the interests of 'speedily and effectively dealing with asylum claims'.²⁰ Their Lordships concurred with the finding of Lord Slynn that 'detention to achieve a quick process of decision-making for asylum-seekers is not of itself necessarily and in all cases unlawful',²¹ and that administrative convenience was a lawful objective within Article 5(1)(f).²²
24. However, their Lordships also made clear that it is not enough merely to establish that administrative convenience is itself a lawful goal – the use of detention also has to be justified as a *proportionate* response to the reasonable requirements of immigration control.²³
25. While the particular policy of detention operated at Oakington was shown to be lawful, JUSTICE maintains that administrative convenience is not, by itself, a sufficient reason for depriving an asylum-seeker of their liberty. As such, JUSTICE takes the view that if administrative convenience is going to continue to be used as a justification for detention, it must be subject to the strictest scrutiny.
26. The short period of detention - between 7 and 10 days - in the policy operated at Oakington was critical in determining its lawfulness. After that period, almost all detainees were released on temporary admission. By contrast, the new fast-track pilot at Harmondsworth envisages detaining asylum-seekers for the entire length of

¹⁹ See *R v Secretary of State for the Home Department ex parte Saadi and others* [2002] UKHL 41

²⁰ See *ibid*, para 18, statement of Mr Ian Martin of the Immigration and Nationality Directorate

²¹ *Ibid*, para 32.

²² *Ibid*, para 43.

²³ *Ibid*, paras 44, 47.

the appeals procedure. In light of the fact that the average length of time for the determination of an asylum appeal is 17 weeks,²⁴ JUSTICE is concerned that such an extension would clearly amount to unlawful detention.

27. The abridgment of liberty involved in such detention policies requires the justification of administrative convenience to be subject to regular review employing the most anxious scrutiny. Nor is purely judicial scrutiny sufficient. While the courts are well-placed to determine the lawfulness of detention policy, they are – by their own admission – ill-suited to assess the practical workings of government departments and the effectiveness of their procedures.²⁵

28. It therefore falls to Parliament and its committees to ensure that the use of detention in asylum cases remains at all times strictly proportionate to the need to deal effectively with asylum applications. In particular, Parliament must take pains to ensure that administrative shortcomings within the Immigration and Nationality Directorate do not become the perennial justification for abridging the liberty of large numbers of asylum-seekers.

29. JUSTICE is also particularly concerned that provisions for mandatory bail hearings and a right to bail without sureties established by the Immigration and Asylum Act 1999 have now been repealed by the Nationality, Immigration and Asylum Act 2002. This repeal appears to have occurred without ensuring that detainees enjoy effective access to courts and the right to challenge the legality of their detention, consistent with Article 5 ECHR.²⁶ This issue is particularly acute in the case of asylum-seekers who lack early access to effective representation and, unlike most British nationals, are likely to be ignorant of their right to make a bail application unless it is made automatic. Without such provision, an asylum-seeker could conceivably remain in detention for a substantial period of time without either representation or judicial oversight.

²⁴ Home Office, Asylum Statistics: 4th Quarter 2002 United Kingdom

²⁵ See e.g. *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 635 (per Lord Wilberforce), and at 636 and 644 (per Lord Diplock); *R v SSHD ex p Arbab*, [2002] EWHC 1249 Admin (per Jackson J), paras 44-47.

²⁶ Nationality, Immigration and Asylum Bill, JUSTICE briefing for the House of Lords Second Reading, June 2002.

What will be the effect on the management of asylum applications of changes made in the Nationality, Immigration and Asylum Act 2002 and the Prime Minister's pledge to halve the number of asylum-seekers by September 2003?

30. JUSTICE believes that the current asylum 'crisis' (so-called) is rather a crisis of poor administration, brought about by the fact that rapidly-growing numbers of applications have not been matched with sufficient resources and by the undue preoccupation of first-instance decision-makers with procedural compliance, with the result that substantive decision-making is regularly deferred to lengthy appellate proceedings.
31. Successive reforms to the asylum system, including those brought about by the 2002 Act, have consistently failed to address the need to improve the asylum determination process. Unless there is substantial institutional reform within the Home Office, including better staff resources, adequate training and proper consideration of evidence from independent and reliable sources, there will be no real improvement to the management of asylum applications and the system will continue to be vulnerable to accusations of being out of control.
32. JUSTICE is particularly concerned that many of the changes introduced by the 2002 Act appear to be wholly reactive or even punitive measures designed to stem the flow of asylum-seekers to the UK, e.g. section 55. As noted above, the adoption of such measures entirely cuts across the notion that asylum procedures ought to be based on a fair and impartial assessment of the individual merits of each claim. Rather, it must be recognized that basic principles of refugee protection and human rights cannot be compromised for the sake of managing political targets. In the final analysis, claims to the UK for asylum are claims upon the principles of justice and fairness for which the UK stands. The goal of deterrence cannot be pursued together with that of justice, for justice deterred is justice denied.