



**JUSTICE**

**House of Lords Select Committee on the European Union  
Sub-Committee F (Social Affairs, Education and Home Affairs)**

**Inquiry on new approaches to the asylum process**

**JUSTICE's response**

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1. JUSTICE is an independent all-party law reform and human rights organisation. It is the British section of the International Commission of Jurists.
2. This submission has been prepared specifically for the Committee's inquiry into the European Commission's communication responding to the UK proposals for a new approach to asylum<sup>1</sup>. It will comment on the validity of the premises for the UK proposals and on alternative solutions that could be pursued. The question of the legality of the UK proposals is addressed by the legal opinion of Ian Macdonald and Nadine Finch, which is annexed to this submission. JUSTICE adopts the positions set out in the opinion.

### **Are the premises on which these proposals have been made valid?**

3. JUSTICE believes that the premises on which the UK proposals for new approaches to the asylum process have been made are incorrect. It is, for instance, misleading to suggest that the current protection system is failing because, amongst others, the system requires illegal migration and favours human smuggling. The evidence is rather that human trafficking and illegal entry are the direct result of strict pre-entry policies and border controls regimes<sup>2</sup>. The Home Office itself has recognised that people cannot legally enter the country to claim asylum<sup>3</sup>. This implies that the only way to enter and claim asylum is to break the law and to rely on the services of human traffickers and smugglers.
4. JUSTICE would also disagree with the assertion that the current system is failing because between half and three quarters of those claiming asylum in Europe are not recognised as refugees. Official data frequently overstate the lack of success of asylum seekers. They often do not include those who are allowed to remain under a subsidiary status, such as Humanitarian Protection and Discretionary Leave currently available in the UK. Figures for convention status refugees' can also be misleading. In the UK, for instance, statistics of positive status determination do not account for asylum seekers

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<sup>1</sup> Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, COM(2003) 315 final, 3 June 2003.

<sup>2</sup> Roger Zetter, David Griffiths, Silva Ferretti and Martyn Pearl, *An Assessment of the Impact of Asylum Policies in Europe 1990-2000*, Home Office Research Study 259, 2003.

<sup>3</sup> Angela Eagle during Standing Committee, Hansard, 14 May 2002, col.227. See also 2002 White Paper, *Secure Borders, Safe Haven*, para.4.16: "The Government accepts that it is often very difficult for those who do have a well-founded fear of

who are successful on appeal. According to data published by the Home Office, in 2002, around ten per cent of initial decisions led to refugee status and another 24 per cent to Exceptional Leave to Remain (ELR), but some 22 per cent of refused cases went on to a successful appeal. The statistics do not show whether negative decisions that are reversed on appeal lead to a grant of refugee status or exceptional leave to stay.

5. Moreover, the fact that asylum seekers may fail to make their case for protection is not necessarily evidence of abuse, since individuals may believe they need protection; have good reason to think so; but yet not fall within the narrow legal definitions. There is widespread evidence of a narrowing interpretation of the scope of the definition of who can be protected under the Refugee Convention. Examples of this are attempts to exclude those persecuted by 'non-state actors', on the basis of their gender, or as a result of localised events<sup>4</sup>. There is further evidence of an increasingly narrow definition of who qualifies for subsidiary protection. In the UK, this is shown by the dramatic drop of those who, since the change of exceptional leave policy in April 2003, have been granted Humanitarian Protection (HP) and Discretionary Leave (DL): in the first quarter of 2003, grants of Exceptional Leave to Remain amounted to 19 per cent of initial decisions<sup>5</sup>. Data available for the second quarter (when HP and DL replaced ELR) show that, the grant of HP or DL on initial decisions has dropped to an all-time low of just seven per cent<sup>6</sup>.
6. JUSTICE believes that the current protection system is failing because asylum policies in the UK and other western countries are construed around principles of deterrence and restriction, with the result of attacking the very act of seeking asylum. The lack of public support for asylum across the developed world is, therefore, not surprising. In the UK, there have been four major pieces of legislation in just ten years – with another bill allegedly in preparation. They are all predicated upon the somewhat dubious assumption that the vast majority of asylum seekers are abusive or 'bogus' and exploiting the asylum process as a way to gain entry for economic reasons.
7. Since the late 1970s, all western states have resorted to increasingly restrictive measures in an attempt to reduce the number of asylum claims they receive. In

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persecution to arrive in the UK legally to seek our help. The absence of such provision provides succour to the traffickers and exposes the most vulnerable people to unacceptable risks".

<sup>4</sup> Stephen Castles, Heaven Crawley and Sean Loughna, *States of Conflict: Causes and patterns of forced migration to the EU and policy responses*, IPPR, 2003, p.45.

<sup>5</sup> Home Office, Asylum Statistics: 1<sup>st</sup> Quarter 2003 United Kingdom.

<sup>6</sup> Home Office, Asylum Statistics: 2<sup>nd</sup> Quarter 2003 United Kingdom.

particular, they have used a range of common practices specifically to deter those who enter the EU illegally and claim the protection of the 1951 Refugee Convention. These measures include visa controls; carrier sanctions; ‘safe third country’ arrangements; and airport liaison officers. They have progressively blurred the distinction between migration control and refugee protection. Yet, these policies undermine obligations under the 1951 Refugee Convention, which specifically protects the right of refugees not to be penalised for entering a country of asylum illegally in recognition of the difficulties faced by people being persecuted in obtaining travel documents<sup>7</sup>.

8. The UK proposals represent the inevitable culmination of these restrictive practices towards asylum. But by suggesting new approaches the UK is also admitting to their failure. Deterrence, prevention and other punitive measures, while increasing the hardship on people fleeing violence and persecution, have had little discernable effect in terms of reducing the numbers of asylum applications. Hence, the shift of emphasis, in the UK proposals, on policies designed to place responsibility for processing claims and providing protection on countries of origin or transit. There is further evidence of an increasing drive towards sub-contracting protection duties to third countries in the context of the EU legislative process, where attempts are being made to secure a broad interpretation of the ‘safe third country’ concept, which allows to transfer responsibility for the determination of asylum claims.
9. ‘Safe third countries’ are countries through which an asylum seeker has passed before reaching an EU member state and where they will be returned for the substantive determination of their claim. UNHCR argues that a transfer of such responsibility can be accepted in certain circumstances, where there exists a meaningful link or connection which would make it reasonable for an applicant to seek asylum in that state, and where the state is safe, that is capable and willing to determine needs for international protection and to provide effective protection if needed<sup>8</sup>. Mere transit through a third country would generally not constitute such a meaningful link.
10. The concept of ‘safe third country’ is the focus of specific attention in the context of negotiations on the amended Commission proposal for a Directive on minimum

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<sup>7</sup> 1951 Convention Relating to the Status of Refugees, Article 31.

<sup>8</sup> Summary Conclusions on the concept of “effective protection” in the context of secondary movements of refugees and asylum-seekers, Lisbon Expert Seminar, 9-10 December 2002.

standards on procedures in member states for granting and withdrawing refugee status<sup>9</sup>. JUSTICE is particularly concerned at proposals, which appear to emanate from the UK, to expand the application of the 'safe third country concept' to include countries to which the applicant does not necessarily have a link and has not even transited through but where he or she "*would have an opportunity*" to seek protection and would be "*admitted*".<sup>10</sup> Such a concept of 'safe third country' would arguably enable member states to turn around any asylum seeker who arrives to the UK (or the EU) to third countries listed as 'safe', in line with the core idea behind the UK proposals. This would represent a serious challenge to the institution of asylum.

11. JUSTICE is further concerned that the UK government proposals throw into question the establishing of a Common European Asylum System (CEAS), as called for at the Tampere European Council<sup>11</sup>. This is particularly evident in suggested amendments to the asylum provisions in the draft EU constitutional treaty, laying down the basis for the second stage of work on a common asylum system, which should consist of converting minimum standards into common rules (the so-called Tampere II agenda). The UK suggests that the CEAS should not be concerned with common rules, but rather have the objective, amongst others, to "managing efficiently mixed flows of persons in need of international protection and persons migrating for other reasons, reducing secondary movements within the European Union and, ensuring that asylum procedures are not open to misuse." Measures to facilitate this objective would include "partnership and co-operation with third countries, and in particular the provision of protection in the region of origin where appropriate."<sup>12</sup> The current draft EU constitutional treaty contains a provision which, unless its meaning is clarified, would appear to have the same purpose<sup>13</sup>.

12. JUSTICE is concerned that these amendments to the draft EU constitution would, in line with the UK proposals, gear the CEAS towards processing and protecting in the region of origin or transit rather than within the EU, thus introducing a paradigm shift in EU asylum and immigration policies.

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<sup>9</sup> OJ C 291 E, 26 November 2002.

<sup>10</sup> See the additional UNHCR comments on the amended proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status (July 2003).

<sup>11</sup> Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, para.13.

<sup>12</sup> Suggestion for amendment of Article III-162 by Mr Hain.

<sup>13</sup> Article III-167(2)(g) providing for "partnership and co-operation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection".

## **Why do people apparently not in need of protection have recourse to the asylum system?**

13. People who do not qualify under the strict criteria for refugee or subsidiary status are not *per se* fraudulent asylum claimants (see para.5). However, it may well be the case that in the absence of viable, legal migration routes to EU countries, persons who are not refugees are seeking to enter countries of their choice through the asylum channel, it being often the only entrance effectively open to them. We concur with the Commission's communication that access to legal immigration channels, in particular the facilitation of legal entry of third country nationals into the EU for employment and family reunification purposes, will assist in discouraging migrants to use the asylum channel for non-protection related reasons<sup>14</sup>.
14. JUSTICE believes that it is unrealistic to think that a change in the protection system, such as envisaged by the UK, would limit inward migration to qualified cases. The likely effect of such proposals would be to displace the targeted caseloads into illegal immigration, thus blurring the distinction between asylum seekers and economic migrants even further.
15. The UK government itself flagged up the risk that persons who would have otherwise sought asylum might simply become illegal immigrants. This is, indeed, likely and casts doubts on whether the pursuit of the UK proposals is an adequate means to bring about more effective forms of migration control. Migrants might as well move to the UK in the same way and numbers, but abstain from filing an asylum application.

## **Are the proposals compatible with international obligations, in particular the 1951 Refugee Convention and the European Convention on Human Rights?**

16. The UK claims that their proposals would allow participating countries to uphold their obligations under the 1951 Refugee Convention and the European Convention on Human Rights (ECHR). It is argued that there is no obligation under the 1951 Convention to process claims for asylum in the country of application. The obligation, under the 1951 Convention and ECHR, is to ensure that decisions under the asylum process do not expose applicants to inhuman or degrading treatment. The process of decision-making in

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<sup>14</sup> COM(2003) 315 final, p.12.

regional or transit centres would have to conform to this requirement to avoid a successful challenge in the courts.

17. The attached legal opinion states that automatic removal of asylum seekers to a location outside of the EU before substantive consideration of their application for asylum would not conform to internationally recognised human rights and refugee protection standards and it likely to be in breach of the UK's international obligations under the Refugee Convention. Counsel also held that the removal of asylum seekers to such areas was likely to give rise to a serious possibility of a breach of the ECHR.

**Are there alternative solutions to the problems presented by the current asylum system?**

18. JUSTICE notes that the European Commission's communication outlines two areas which could be further explored as a means for facilitating the orderly and managed arrival of persons in need of international protection, namely by setting up protected entry procedures<sup>15</sup> and enhanced resettlement schemes. Such proposals are, in principle, welcome as they may alleviate the impact of immigration control measures on refugees and can contribute to providing legal and safe access to protection in the EU to those in need of it, whilst simultaneously deterring human smugglers and traffickers. However, these options must be complementary and without prejudice to the proper treatment of individual requests expressed by spontaneous arrivals.

19. JUSTICE also welcomes the argument set forth by the Commission<sup>16</sup> that EU member states should focus on improving the quality of decisions as a way of restoring the credibility and integrity of the asylum system. JUSTICE has long advocated that work should be intensified on improving national procedures for deciding asylum claims, i.e. by frontloading the decision-making process. Procedures which operate on the basis of improved quality of initial decision-making, combined with properly funded and competent legal representation at all stages of the asylum process, would attract fewer challenges and delays and be able to deal effectively with unmeritorious claims.

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<sup>15</sup> Protected entry procedures are those which enable refugees to claim asylum in embassies and diplomatic missions in their country or region of origin.

<sup>16</sup> Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for Protection, COM(2003) 152 final, 26 March 2003, p.8.

20. JUSTICE further believes that any new approach to asylum should be based on the premise that addressing the root causes of forced migration in countries of origin and transit offers the only long-term solution to the problem of forced migration. This was recognised by the European Council at its meeting in Tampere on 15 and 16 October 1999, which called for a comprehensive approach to migration, in partnership with countries and regions of origin and transit. Combating poverty, improving living conditions, job opportunities, preventing conflicts, consolidating democratic states and ensuring respect for human rights were mentioned as key policy areas that would need to be addressed in tackling the root causes of migration<sup>17</sup>.

21. JUSTICE regrets that the 'root causes approach' has not been followed up and that the political engagement of EU member states with countries of origin and transit has so far focused on the sole objective to stop migration from and through them. As the conclusions of the June 2002 Summit in Seville make clear, the levers of trade and aid are to be used explicitly in this process, particularly in the pursuit of readmission agreements<sup>18</sup>. These agreements detail the obligation to readmit citizens and persons who are not citizens of the requested state but who have merely passed through that state on their way to the EU. They are notorious for their lack of safeguards against refoulement of rejected asylum seekers, therefore hugely increasing the risk that they may be sent back to countries, which are not safe for them.

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<sup>17</sup> Tampere Conclusions, para.11.

<sup>18</sup> Seville European Council, 21 and 22 June 2002, Presidency Conclusions. The Conclusions highlight "the importance of ensuring the co-operation of countries of origin and transit in joint management and border control as well as on readmission" (para.34) and call for a "systematic assessment of relations with third countries which do not co-operate in combating illegal immigration" (para.35). Readmission agreements are defined as vital instruments and retaliation measures could be taken in case of persistent and unjustified denial of such co-operation.