House of Commons

Home Affairs Committee

Asylum and Immigration (Treatment of Claimants, etc.) Bill

First Report of Session 2003–04

Report, together with an appendix, formal minutes, oral and written evidence

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Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies; the administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office.

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Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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1 Introduction

1. On 27 November 2003 the Government published the Asylum and Immigration (Treatment of Claimants, etc.) Bill. Most of the proposed measures in the Bill had been announced by the Government on 27 October. The Government had invited views in a consultation exercise which ended on 17 November.[1]

2. On 19 November we took oral evidence on the proposals from Beverley Hughes MP, Minister of State (Citizenship, Immigration and Counter-Terrorism) at the Home Office, Mr Bill Jeffrey, Director-General of the Immigration and Nationality Department (IND), and Mr Ken Sutton, Deputy Director, Asylum Support and Casework, IND. We had earlier received written evidence from individuals and organisations including Citizens Advice, Mr Peter Gilroy (Strategic Director of Social Services, Kent County Council), the Immigration Advisory Service, JUSTICE, the Law Society, Mr Ken Livingstone (Mayor of London), the Medical Foundation for the Care of Victims of Torture, MigrationwatchUK, the Refugee Legal Centre and the Refugee Children's Consortium.[2] We are grateful to all who submitted evidence at such short notice.

3. Our aim in the following report is to highlight the most significant and controversial elements of the Bill, in time for the Second Reading debate which is expected in mid-December. In carrying out this scrutiny we have not had the benefit of a draft bill, nor—in common with other interested parties—were we given more than a few weeks' notice of the proposals even in outline. In view of the fact that since March 2003 we have been conducting a major inquiry into asylum applications, we find this regrettable. We agree with the comment we received from the Immigration Advisory Service, that "the consultation document is so lacking in detail that it is impossible to respond to many of the proposals in an intelligent way".[3] We are also surprised that two of the provisions in the Bill, those for a new criminal offence in relation to people trafficking and for electronic tagging of certain asylum seekers, were not mentioned in the announcement on 27 October. Whilst we appreciate the Government's desire to legislate urgently on the measures in the Bill, we believe that it is unsatisfactory that a Bill has been introduced with insufficient advance information to enable proper consultation or prior parliamentary scrutiny of the principles involved. It is now essential that Parliament is able to give full and detailed scrutiny to these far-reaching measures.

4. In view of these time constraints, we have not been in a position to take evidence on the text of the Bill or to carry out any detailed scrutiny of that text. For this reason, the views of witnesses cited below relate to the proposals announced on 27 October, not to the text of the Bill. In the report we have focussed on the principle of the main proposals for which the Bill makes provision. We deal with these under the following headings:

1 See HC Deb, 27 October 2003, col 1WS, and joint letter of the same date from Beverley Hughes MP, Home Office, and David Lammy MP, Department for Constitutional Affairs, headed *New legislative proposals on asylum reform* (printed as an appendix to this report, on pp 25-28, 30 below).

2 A full list of those who submitted written evidence is set out at p 30 below.

3 Ev 19

- Undocumented passengers
- Reform of the appeals process
- Removal to a 'safe third country'
- Restricting family support
- New powers for the Immigration Services Commissioner
- Other measures in the Bill.

5. We intend to publish our main report on asylum applications early in 2004.

2 Undocumented passengers

Proposed new criminal offences

6. The Government aims to tackle the problem of asylum seekers deliberately destroying or disposing of their travel and identity documents and refusing to co-operate with the re-documentation process in order to prevent removal. The new measures are intended to ensure that:

> "those asylum seekers who fail to provide documents without a good explanation and/or have travelled through a safe third country and/or who claim late, would have this taken into account when considering the credibility of their claim."

7. The Government argues that this would clarify an existing requirement, and extend it to the category of those who have travelled through a safe third country. Two new criminal offences would be created:

- arriving at a UK port without valid travel documentation; and
- in the case of those with no right to remain in the UK, failing to co-operate with the re-documentation process (where "a person did or did not do something that had the effect of frustrating, obstructing or otherwise interfering with the re-documentation process").[4]

8. Provision is made in the Bill to enact these proposals as follows. *Clause 2* creates a criminal offence if, when a person is first interviewed by an immigration officer after his arrival in the UK, he does not have a valid passport or equivalent document with him and he does not have a reasonable excuse for not being in possession of such a document. The offence will carry a maximum penalty of a six months (Magistrates' Court) or a two year (Crown Court) prison sentence, and/or a maximum fine.

9. *Clause 6* sets out various behaviours which a "deciding authority" (i.e. an immigration officer, adjudicator, appeal tribunal or the Secretary of State) is required to take account of when assessing the credibility of an asylum seeker. This behaviour is any which the deciding authority thinks:

4 Appendix, p 26 below

- is designed or likely to conceal information
- is designed or likely to mislead
- is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant, or
- otherwise damages the claimant's credibility.

The non-production of passports without reasonable explanation, the production of false passports as if they were valid, and the failure to answer questions without reasonable explanation are all defined as "behaviours designed to conceal or mislead".

10. *Clause 14* creates a new offence of failing to comply, without reasonable excuse, with steps that the Secretary of State may require someone to take so as to enable their deportation or removal from the UK. These steps include necessary action to re-obtain valid travel documents for asylum-seekers who have lost or destroyed their original documents. The offence will carry the same penalties as under Clause 2.

11. Several of our witnesses opposed the Government's proposals in regard to undocumented passengers. JUSTICE opposed the proposal to create a statutory presumption affecting the credibility of asylum seekers who fail on arrival to provide adequate documentation. They argued that "visa controls make the possession of false documents virtually inevitable for asylum seekers". JUSTICE pointed out that Article 31 of the 1951 Refugee Convention provides that refugees should not have penalties imposed on them as a consequence of illegally entering or being present in the country of refuge, provided that they come "directly from a territory where their life and freedom was threatened", "present themselves without delay to the authorities and show good cause for their illegal entry or presence".

12. In a court case in 2000, that of *Adimi*, it was held that the policy of prosecuting refugees travelling on false documents was contrary to Article 31.[5] Section 31 of the Immigration and Asylum Act 1999 subsequently offered a defence against prosecution in compliance with international obligations, but JUSTICE commented that this is "narrowly drafted" and "there have continued to be high levels of prosecutions of asylum seekers for false documentation as a result of lack of or inadequate procedural guidance" to the Immigration Service, the CPS and criminal duty solicitors.[6]

13. JUSTICE also claimed that—

> "A recent court case, awarding compensation to two asylum seekers who were prosecuted and jailed for travelling on forged passports, brought to light the fact that up to 5,000 asylum seekers appear to have been wrongfully convicted and imprisoned for using false documents without considering whether or not Article 31 provided a defence."[7]

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5 *R v Uxbridge Magistrates Court ex parte Adimi (and others)* [neutral citation number CO-1167-99]

6 Ev 24–25

7 Ev 25, citing Clare Dyer, 'Couple with forged passports win £130,600 for wrongful jailing', *The Guardian*, 1 October 2003.

14. This claim was denied by the Minister of State, who told us that, although central statistics were not kept on how many people were prosecuted for travelling on false documents,

> "I am confident that the figure of 5,000 supplied by JUSTICE is a very significant over-estimate of the true figure. … The actual number of convictions would be lower than … 1,000 and the number of convictions of asylum seekers would be lower still. Also, as a further indication of scale, since the *Adimi* judgement, fewer than 20 people have successfully claimed compensation for wrongful conviction."[8]

15. The Law Society expressed concern that the Government's new proposal will lead to breaches of Article 31. They argued that even deliberate destruction of documentation does not mean that an asylum application is without merit: "asylum seekers often destroy their documents because they are advised to by traffickers or because they fear that those documents will put others in the country they are fleeing in danger".[9]

16. Citizens Advice opposed both proposed new offences. They stated that "the Home Office is still paying out large sums in compensation to some of the hundreds of individuals prosecuted and imprisoned in the 1990s, in breach of Article 31, for using *forged* travel documents to transit the UK". They also opposed the proposed offence of failing to co-operate with redocumentation, on the grounds that those who do so are already liable to indefinite detention under existing powers "and it is difficult to see how the prospect of a (relatively short) prison sentence will be any more effective as an inducement to co-operation".[10]

17. Mr Peter Gilroy, Strategic Director of Social Services at Kent County Council, noted that "care will need to be taken that this system does not seem to criminalise people justifiably fleeing persecution".[11]

18. In response to these comments, the Minister of State at the Home Office, Beverley Hughes MP, told us that:

> "The very large majority of people who arrive at our ports who are going to claim asylum arrive undocumented. Secondly, a large majority of those actually arrive at airports, where, patently, they will have had documents in order to board the plane. So we are convinced that a large proportion of people who claim asylum at ports, particularly at airports, have documents when they board, but destroy them, or they are taken away from them by facilitators. It is very important, both in terms of assessing a person's claim, but also in terms of removing somebody if their claim is refused, to be able to document people. ... It is also important in terms of trying further to break the power of the facilitators, the criminal gangs who are often providing people with fraudulent documentation, that we do so."[12]

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8 Ev 17–18

9 Ev 29

10 Ev 17

11 Ev 27

12 Q 824

19. The Minister of State also told us that the principal purpose of the new measures was to attempt to break the hold of the criminal facilitators, and that she did not think that the position of genuine refugees would be made worse by the measures.[13]

20. The Minister of State confirmed in response to a question that where a genuine refugee has no practical way of obtaining legitimate travel documents, and then travels on false documents and arrives at a port, provided he does not destroy those documents, he will not be committing any new offence by travelling on false documentation.[14] In respect of this latter point, we note the provision in Clause 2 that "a reasonable excuse for not being in possession" of a valid passport or equivalent document will be a defence for a person charged with the offence created by the clause. We assume, in the light of the Minister's comments, that a "reasonable excuse" will include circumstances where a person fleeing persecution has no practical way of obtaining valid documents. **We recommend that the Government make this clear explicitly in the text of the Bill.**

21. We note the Minister's assurance that:

> "If somebody has a credible reason for destroying their documents, that will be taken into account. The measure is to take the factors into account in making an assessment, and if the person at the point of interview is open and transparent, gives us full information about their situation and reasons why, and that makes a credible account, then there will not be any adverse consequences for that person."[15]

22. We understand the intention behind these new measures. As we pointed out in our previous report on asylum removals, the deliberate loss or destruction of valid documentation is a major impediment to the removal of failed asylum seekers from the UK.[16] It is important to tackle this problem, and to strike at the operations of the criminal gangs who organise the passage of many asylum seekers. However, we are concerned that, despite the Minister's assurances, genuine refugees who through necessity travel on false documents and who use the services of illegal facilitators may be convicted under this proposed legislation. We note that under Clause 2 of the Bill, a "reasonable cause" for not producing valid documents "does not include the purpose of … complying with instructions or advice given by a person who offers advice about, or facilitates, immigration into the United Kingdom".

23. **We support in principle the Government's new measures to penalise, in certain circumstances, those who deliberately lose or destroy their travel documentation. However, to avoid disadvantaging genuine refugees, we recommend that the Government should take steps to ensure, as far as is reasonably possible, that the potential consequences of deliberately losing or destroying their documentation is drawn to the attention of people arriving in the UK, both immediately on arrival at a port, and (by requiring carriers to provide this information) prior to arrival.** In our

13 Q 826

14 Q 825

15 Q 827

16 Home Affairs Committee, Fourth Report of Session 2002–03, *Asylum Removals* (HC 654-I), paras 56–58. The report was published on 8 May 2003, and the Government's reply was published on 18 July 2003 as the Committee's Second Special Report of Session 2002–03 (HC 1006).

main report on asylum applications we will make further recommendations about provision of information to asylum seekers.

24. One further possibility we explored with the Minister and her officials was that of immigration officers meeting passengers on selected flights as they disembarked from the plane; if that were done, even if passengers destroyed or lost their documents during the flight, it would be immediately apparent where they had come from.[17] The Director-General of IND, Mr Bill Jeffrey, told us that this was occasionally done, but for manpower reasons, and to avoid inconveniencing legitimate passengers, it was not done very often.[18]

25. Mr Jeffrey also said that IND was "looking at more covert ways of ensuring that we can in fact link people back to the flights that they arrived from". The Minister of State told us more about this in writing: aircraft are met by immigration officers specially trained in overt surveillance and document examination, and since August 2003 a dedicated CCTV system has been used at Heathrow Airport to support the work of these officers. This has been successful in increasing the linkage rate of inadmissible passengers to their flight of arrival (averaging 84% at Heathrow in November 2003). In addition, immigration officers at Heathrow have recently received training in the use of covert surveillance in the restricted zones of airports, targeted at illegal 'facilitators'.[19]

26. **We support the use of surveillance techniques to assist in linking passengers who lose or destroy their travel papers with their flight of arrival. We recommend that consideration be given to extending such schemes to airports other than Heathrow, and to seaports. We also recommend that the tactic of deploying immigration officers to meet passengers as they disembark from selected flights should be used more often, both to establish where people who have disposed of their travel documents have arrived from, and to send a discouraging message to the criminal 'facilitators'.**

Requirement for carriers to copy documents before travel

27. The Government announced on 27 October that it was considering the creation of a power to require carriers to take copies of passengers' identity documents before they travel. The Government stated that it was discussing the practicalities of this with industry representatives.[20]

28. In oral evidence to us the Minister of State said that she did not envisage this proposed new power applying to all incoming passengers:

> "It would be a waste of resources to simply have a blanket requirement, and we are not proposing a blanket requirement; we are proposing the idea of an enabling power in the Bill that would allow us to make that request of carriers on selected and very targeted routes. Also, for specific periods of time. The risk from certain routes actually changes quite a lot, and we monitor that very closely, and we have the

17 Qq 843–46

18 Q 845

19 Ev 18

20 Appendix, p 26 below

> intelligence to be able to ask a carrier for a specific period of time to photocopy documents on a particular route."[21]

29. Although the Minister of State disavowed any intention on the part of the Government to bring in a "blanket requirement", the Home Secretary, speaking in the House on 2 December, said:

> "If we introduce a measure to require copying, it should be universal so that all carriers that transport people into the country would be on equal terms, thus ensuring that it would not disadvantage any carrier."[22]

The Home Secretary's comments appear to contradict the position stated by the Minister of State. **We recommend that the Government should clarify its intentions as to whether or not, if it were to introduce a power to require carriers to copy travel documents, this would apply to all carriers and all flights.**

30. The Minister said that she was aware of one example of another country which imposed an equivalent requirement: the Netherlands, which had legislated to require all carrier to produce copies of documents in respect of all passengers from a list of about 20 specified countries. She said that she was not aware of any problems arising from this.[23]

31. The Medical Foundation for the Care of Victims of Torture told us that this proposal might—

> "interfere with [an asylum seeker's] attempt to flee persecution and unnecessarily expose them to additional danger. The deterrent effect may only be to push even more people into the backs of lorries and to make even more perilous journeys."[24]

Mr Bill Jeffrey, Director-General of the Immigration and Nationality Department, asked to comment on this claim, said that "the purpose of the provision would not be to cause carriers to refuse to board people whom they otherwise would board, so I do not think the point in that sense is well made."[25]

32. The Bill published on 27 November does not in fact make provision for a power to require carriers to copy travel documents. The Home Office press release which accompanied the Bill stated that "the Government is still considering introducing" such a requirement.[26]

33. The Minister candidly acknowledged to us that "there are logistical and practical issues … to be resolved". **We recognise that a power such as the Government envisages may be useful if used in the targeted manner described by the Minister. We believe that the Government should demonstrate that the proposal would not cause undue delays to legitimate passengers and that the costs imposed on airlines would be commensurate**

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21 Q 841

22 HC Deb, 2 December 2003, col 386

23 Qq 835–36

24 Ev 36

25 Q 837

26 Home Office press release 326/2003, *Final phase of asylum reform*,issued 27 November 2003

with the benefits to be gained in tackling abuse of the asylum system. We hope that the Government will not seek to amend the Bill to introduce this provision without first publishing the results of its consultations with carriers and other interested parties. We believe that it would be desirable for the Government to publish an assessment of the operation of similar powers in the Netherlands.

3 Reform of the appeals process

34. The Government proposes to move to a single tier of appeal for asylum seekers whose initial claim has been refused (*Clause 10* of the Bill makes provision for this). It argues that the current system is too long and complicated, and provides too many opportunities for people to abuse the process in order to cause delay or abscond. The current two-tier appeal system (adjudication/Immigration Appeal Tribunal) will be replaced by a single appeal to a new tribunal, the Asylum and Immigration Tribunal, headed by a President. The vast majority of appeals would be heard and decided by a single immigration judge. Applicants would be expected to raise all their grounds of appeal at one hearing. On 27 October the Government stated that it was also "looking at ways to restrict access to the higher courts".[27] Clause 10 of the Bill specifies a range of decisions and activities of the new tribunal which will not be challengeable by way of judicial review or otherwise in the higher courts. These include judicial review of removal decisions flowing from a tribunal decision.[28]

35. Several of our witnesses expressed hostility to the Government's proposals. JUSTICE commented that previous recent reforms of the asylum appeals process had "singularly failed to address inefficiency, inaccuracy and incompetence within the initial decision-making process which directly cause inefficiency and delays at the appellate stage". They argued that in the absence of efficient decision-making at the initial stage, it is often only at the stage of first appeal that the substantive merits of an applicant's case are given a proper hearing, and that a second level of appeal is therefore desirable in the interests of fairness. JUSTICE also expressed concern at the Government's proposals to seek ways of restricting access to the higher courts.[29] The Law Society expressed similar views.[30]

36. Citizens Advice stated that they understood the rationale behind the Government's proposals, and might support them if there were grounds for confidence that every appellant would be assured of access to good-quality legal advice and representation before the single-tier tribunal. However, they added that given the existing shortage of good-quality legal advice and uncertainty over the future of legal aid, they could not be confident of this.[31]

37. Mr Peter Gilroy, Strategic Director of Social Services at Kent County Council, commented that moving to a single tier "appears to be a very effective way" of safeguarding the asylum appeals system from misuse. However, he expressed concern as to whether the

27 Appendix, p 26 below

28 Explanatory notes to the Bill, para 44

29 Ev 23–24

30 Ev 28–29

31 Ev 16

new system would be properly resourced, and whether it would be compliant with the Human Rights Act 1998.[32]

38. The Constitutional Affairs Committee is currently inquiring into asylum appeals. On 31 October it published a report on the Government's specific proposals to reform legal aid in respect of asylum cases, on which a consultation paper had been issued last June, and it intends to issue a report dealing with wider issues relating to appeals in early 2004.[33]

39. In the explanatory notes published with the Bill on 27 November, the Government addresses the question of compliance with human rights legislation. It argues that:

> "Clause 10 raises issues under article 13 of the [European Convention on Human Rights (ECHR)] in relation to the removal of appeal rights. People may also wish to challenge whether their substantive Convention rights under articles 3 and 8 will be jeopardised by the absence of a further tier of appellate rights. However, article 13 does not require the provision of multiple tiers of appeal. What it requires is access to an independent national authority with powers to provide effective redress. The single tier Tribunal will meet this test. It is wholly independent of the initial decision-making body. The single tier tribunal will provide an effective remedy as article 13 requires and will safeguard appellants' Convention rights including those referred to in articles 3 and 8."[34]

40. The issues raised by the Government's proposals to strip out one tier of the asylum appeals system are ones we will wish to consider further in our forthcoming report on asylum applications, and which the Constitutional Affairs Committee will be dealing with in its forthcoming report on asylum appeals. At this point we will confine ourselves to saying that we support a simplification of the appeals procedure *in principle*. However, in the course of our asylum applications inquiry we have received considerable evidence that the quality of initial decision-making on asylum claims is poorer than it should be. This is indicated not only by anecdotal evidence but by the statistics showing the rate of successful appeal. In 2002, 34% of initial asylum applications were granted (10% given refugee status and 24% exceptional leave to remain), and 66% were refused. Of those refusals, 77% (i.e. 51.3% of the initial applications) were appealed against, to adjudicators of the Immigration Appellate Authority. At this first level of appeal, 22% of appeals were successful.[35]

32 Ev 27

33 Constitutional Affairs Committee, Fourth Report of Session 2002–03, *Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work* (HC 1171-I).

34 Explanatory notes to the Bill, para 138

35 Home Office, *Asylum Statistics United Kingdom 2002*, paras 25–30; Tables 7.1–2

41. Trends in appeal outcomes at the initial stage of appeal over the past nine years are as follows:

Appeals determined by IAA adjudicators, 1994–2002[36]

Year	Total determined	Total allowed	Percentage allowed
1994	2,440	95	4%
1995	7,035	230	3%
1996	13,790	515	4%
1997	21,090	1,180	6%
1998	25,320	2,355	9%
1999	19,460	5,280	27%
2000	19,395	3,340	17%
2001	43,415	8,155	19%
2002	64,405	13,875	22%

The table shows that the steep rise in initial-level appeals in recent years has been accompanied by a rise in the proportion of appeals which are successful, from one in 25 in 1994 to one in five in 2002.

42. In the case of those whose appeals were dismissed at the first level, but who were given leave to appeal to the second level, the Immigration Appellate Tribunal—which is not an automatic right but has usually been granted only where a point of law is involved[37]—11% of these further appeals were successful, 36% were dismissed and 49% were remitted back to the adjudicators.[38]

43. We note that opponents of the Government's proposals cite the high level of cases that are successful at first appeal as grounds for retaining a higher level of appeal. While there is no reason why, in principle, initial mistakes cannot be corrected at a single level appeal, we recognise that, if the current high level of successful appeals continues, it will be difficult to allay fears that some further cases might have been successful at a second appeal. Implementation of the Government's proposals must, therefore, be accompanied by a demonstrable improvement in the quality of initial decision-making. **We recommend that, in considering the Government's proposed simplification of the asylum appeals system, the House should consider whether the Government has made sufficient commitment to investing the necessary resources, and making other improvements to the quality of initial decision-making on asylum cases. The real flaws in the system appear to be at the stage of initial decision-making, not that of appeal. We recommend that the implementation of the new asylum appeals system should be *contingent* on a significant improvement in initial decision making having been demonstrated. In particular, the relevant sections of the Act should not be brought into force until the statistics show a clear reduction in the number of successful appeals at the first-tier, adjudication level.**

36 *Asylum Statistics United Kingdom 2002*, from Table 7.1

37 Section 101 of the Nationality, Immigration and Asylum Act 2002 restricts appeals to the Tribunal to points of law only.

38 Home Office, *Asylum Statistics United Kingdom 2002*, paras 25–30; Tables 7.1–2

4 Removal to a 'safe third country'

44. On 27 October the Government announced its intention to legislate so that a person will not be able to challenge their removal to "certain safe third countries" on the basis of the way they will be treated. The designated countries "will be those where we are satisfied that an individual will be neither persecuted nor subjected to torture or inhuman or degrading treatment or punishment, nor one which would remove a person in breach of the principles of the Refugee Convention or the ECHR".[39]

45. Commenting on the proposal, JUSTICE told us that the Government is vague in respect of the criteria for designation of 'safe third countries', which is a concept unknown to the 1951 Refugee Convention. They argued that, in order not to breach the principle on 'non-refoulement' (i.e. that refugees should not be returned to a territory in which they would be at risk), it would be necessary for the UK to "undertake a proper assessment as to whether the third country concerned is indeed safe". JUSTICE maintained that the evolving concept of 'safe third countries' is evidence of a marked trend towards regionalisation of refugee movements, i.e. their containment in their regions of origin, and represents "a total abdication of states' responsibility under the Refugee Convention".[40]

46. Mr Peter Gilroy of Kent County Council told us that the Government's proposal "makes good sense". He suggested that the EU directive on minimum standards of reception for asylum seekers, which is due to come into force in February 2005, could be used to encourage 'safe third countries' to welcome asylum seekers in a way that would not breach international conventions.[41]

47. *Clause 12* of the Bill replaces and extends the existing provisions on 'safe third countries' contained in sections 11 and 12 of the Immigration and Asylum Act 1999. It provides for circumstances in which a person can be removed to such a country without substantive consideration of his asylum claim. Under the provisions in the 1999 Act, a person can challenge his removal to a 'safe third country' on the grounds that it would be unlawful under the Human Rights Act as a contravention of his rights under the ECHR. Under the new provisions that right will be removed. *Part 2 of Schedule 3* to the Bill lists the countries that will be deemed 'safe': they are the members of the enlarged European Union as from May 2004 plus Norway and Iceland. Additional countries may be added by Order under (except in cases of urgency) the affirmative procedure. 'Safe third countries' are to be treated as places:

- where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
- where a person will not be treated in a manner which is inconsistent with his rights under the Human Rights Convention (whether by removal from that State or otherwise), and

39 Appendix, pp 26–27 below

40 Ev 25–26

41 Ev 27

- from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.[42]

It should be observed that the list set out in part 2 of Schedule 3 is a list of 'safe *third* countries', i.e. countries in which, in the view of the Government, asylum seekers could have safely claimed asylum when passing through them on their way to the UK. It is not a list of countries of *origin* to which unsuccessful asylum seekers may be returned.

48. The Government notes that under Strasbourg case law, States have a responsibility to ensure that a person is not, as a result of their decision to expel them, exposed to treatment contrary to Article 3 of the ECHR (prohibition of torture and inhuman and degrading treatment). The Government states that it "is satisfied that in relation to those countries included on the relevant list it will be meeting its obligations in relation to Convention rights".[43]

49. The Minister of State told us that the Government's proposal in relation to 'safe third countries' "is not going terribly much further than where we are at the moment".[44] When asked about the suggestion, made by some organisations, that the proposal might be "a back-door way of giving legal authority to the concept of regional processing zones", and that such zones might be listed as 'safe third countries', the Minister replied, "No. It has no relevance to that at all".[45]

50. The Government's proposal raises some issues similar to those we considered in our earlier report on asylum removals in connection with the provision for 'non-suspensive appeals' under section 94 of the Nationality Immigration and Asylum Act 2002. That provision allows removal from the UK to take place when an appeal is still pending, in cases where the Secretary of State (in practice, an immigration officer) is satisfied that the asylum claim is "clearly unfounded", and has been made by a person entitled to live in particular states deemed to be safe.[46]

51. In our earlier report we commented that—

> "We accept that in most, if not all of the countries so far designated, it is reasonable for there to be a presumption against a well-founded fear of persecution. Even in these countries, however, there may well be occasional exceptions, usually arising from the inability of the State to protect the citizen from non-State persecution."[47]

We think that this comment is applicable also to the countries listed in Schedule 3 to the present bill.

52. In our earlier report, we recommended in relation to non-suspensive appeals that—

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42 Schedule 3, part 2, para 3 (2)

43 Explanatory notes, para 140

44 Q 864

45 Q 868

46 The states originally listed were Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. In March 2003, Parliament approved a Statutory Instrument adding to the list the Republic of Albania, Serbia and Montenegro, Jamaica, Macedonia, the Republic of Moldova and Romania.

47 HC (2002–03) 654-I, para 41

> "if the Secretary of State wishes to add further countries to the list in Section 94 of the Nationality, Immigration and Asylum Act, he should append a written memorandum to the relevant Statutory Instrument, explaining the rationale for believing those countries to be safe."[48]

The Government rejected this recommendation, on the grounds that the Secretary of State would take any decision to add a country on the basis of information which is already publicly disclosable, and that "any specific concerns that might exist in relation to the designation of a particular country can be raised during the debates on the draft Order".[49]

53. We do not regard these arguments as persuasive. The fact that information is publicly disclosable does not mean that it is readily available. A decision to designate a country as 'safe' may have profound implications for the rights of asylum seekers returned there, and in taking such a decision it is reasonable to expect that Parliament should have access to the same information—at least in summarised and digested form—as that available to the Secretary of State. **We repeat our earlier recommendation, in respect of non-suspensive appeals, and make a similar recommendation in respect of the proposals relating to 'safe third countries' in the present Bill , i.e. that if the Secretary of State wishes to add further countries to the list in Schedule 3 to the Bill, he should append a written memorandum to the relevant Statutory Instrument, explaining the rationale for believing those countries to be safe.**

54. **We also recommend that the Government should make a clear statement of the circumstances which might trigger a decision to seek parliamentary authority for the removal of a country from the list of 'safe third countries'. In particular, we expect that satisfactory mechanisms will be set up within Government to keep the human rights situation in 'safe third countries' under review, so that they do not remain on the list if that situation significantly deteriorates and they cease to be safe.**

5 Restricting family support

55. The Government proposes that the law should be amended so that National Asylum Support Service (NASS) support for families with dependent children whose claim for asylum has been rejected and who have no avenue of appeal left, will end as soon as it is confirmed that the family is in a position to leave the UK, either via the Immigration Service or via a voluntary assisted return. Under the provisions in *Clause* 7 of the Bill, no other forms of support would be available to a family in these circumstances, other than under Section 20 of the Children Act 1989—which would entail separating the children from their parents.[50] Section 20 provides that:

> "Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of … the person who has been caring for him being prevented (whether or not permanently,

48 *Ibid.*, para 42

49 HC (2002-03) 1006, p 4

50 Appendix, p 27 below

> and for whatever reason) from providing him with suitable accommodation and care."

56. Most of the organisations which submitted evidence to us strongly opposed this proposal. Citizens Advice, for example, claimed that it would leave families destitute in-between their asylum claim being rejected and their eventual removal. They argued that this will leave families with no incentive to co-operate in their own removal, and that if they are made homeless it will make the process of removal more difficult because the Home Office will have no address at which to contact them.[51]

57. JUSTICE argued that in cases where the Home Office is unable to enforce removal owing to conditions in the country of origin or documentation difficulties, voluntary return may not be a realistic option. In such circumstance, they claimed, withdrawing support "would *de facto* amount to enforced removal by threat of destitution and separation from their children", which would be "immoral and unlawful".[52]

58. Mr Peter Gilroy of Kent County Council describes this as the "most problematic" of the Government's proposals from a local government perspective. He states:

> "I do not understand why if families have no avenues of appeal left they cannot simply be moved by the Immigration and Nationality Directorate. It seems inappropriate to involve the local authority in invoking Section 20 of the 1989 Children Act. This would seem to be generally against the best interests of the children as it would separate them from their parents and would also involve the local authority in substantial costs. The proposal does not address the role of the local authority should the parent refuse to agree to Section 20 care for their children whilst remaining homeless and putting the children at risk."[53]

59. The Refugee Children's Consortium argues that if the proposal were implemented, "the Children Act is undermined, children are placed at risk, and social workers are put in an impossible ethical position".[54] Mr Ken Livingstone, the Mayor of London, claimed that the proposal would weaken the integrity of voluntary return programmes "by using them as surrogate forms of coercive removal". He argued that the separation of children from their parents under the Children Act would cause "real distress" to them, and might motivate families to try and stay together illegally or 'underground'.[55]

60. When we put these criticisms to the Minister of State, she explained the rationale behind the Government's proposals as follows:

> "The proposals are not at all intended to make families destitute. They are intended both as a deterrent but also as an incentive. … I want to try and persuade as many families as possible, when they come to the end of the road, to go back in a dignified way, with support, on a voluntary basis. It may seem contradictory to some people to

51 Ev 17

52 Ev 26

53 Ev 28

54 Ev 42

55 Ev 33

> say we are going to restrict family support when we get to that point, but that is our intention. It actually says to people, 'Look, there are some alternatives here. We hope that you will take the best alternative for yourself and your children, that is, to go voluntarily, but if you do not, you will be removed forcibly and you will not continue to get support until we have done that.' "[56]

61. Commenting on the possibility of the children of asylum-seekers being separated from their parents and taken into care under the new proposals, the Minister of State acknowledged that "I do not think that is in the best interests of those children, and I hope it would not come to that in any individual circumstance at all".[57] She later expanded on this comment:

> "the children of families who are with their parents and due to be removed, if it came to it that in a particular case the children were taken into care, then we would act very quickly in those circumstances to remove the whole family completely, because clearly they would be with their parents. We would not be leaving those children with local authorities for long periods of time."[58]

62. The Minister of State subsequently wrote to us clarifying the Government's position.[59] She reiterated that the purpose of Clause 7 is "to ensure that people who are under a legal duty to leave the country have no incentive to frustrate and draw out the process". She said that the Immigration Service would be issued with detailed guidance about how to implement the measure, but in basic terms they would be looking for clear evidence that a family had refused or intended to refuse an opportunity to leave the country and had no reasonable excuse (such as the serious illness of a family member); or that they were failing to co-operate with steps to resupply them with travel documents to enable them to leave. When the Immigration Service had reached that view, it would seek to interview the family, to make clear the consequences of their non-compliance. Only in the event of continued refusal by the family to co-operate would benefit be withdrawn.

63. The Minister of State said that the Government did not seek the compulsory removal of all families illegally present in the UK because of the expense and difficulty of this option. However, some families might decide not to leave the country even at the risk of destitution for themselves and their children. The Minister went on:

> "We cannot know what proportion of families would act in such an irresponsible way: I hope it will be small. Indeed, we have no reason to believe that asylum-seeking parents are any more likely to prefer to abandon their children than any other parents. What I do want to make clear, however, is that even where this does happen it does <u>not</u> follow that the children will need to be taken into local authority [care] under the provisions of the Children Act …; indeed, we are determined that the number of cases in which children are taken into local authority care will be as low as possible. We will achieve this by ensuring that families who are refusing to co-

56 Q 869

57 Q 870

58 Q 872

59 Ev 44–45

> operate with voluntary departure processes will be targeted for compulsory removal so that we can ensure that all its members leave the country together."

64. The Minister also informed us that the Home Office is not in a position to give estimates of the number of families to whom Clause 7 might apply. **We believe that this is unsatisfactory and that the Home Office should at least be able to publish figures showing the number of families, including the number of children, who are currently in the asylum system and to whom Clause 7 could apply.**

65. The Government sets out its view of the human rights implications of its proposal as follows:

> "Clause 7 creates a fifth class of person (failed asylum seeker with family) who are ineligible for support under Paragraph 1 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002. This raises an issue under Article 3 [of the ECHR] (prohibition of torture and inhuman and degrading treatment) and Article 8 (right to respect for private and family life) in relation to removal of asylum support. However, the provision is aimed at encouraging those who can leave but are not doing so, to leave the United Kingdom. Any potential treatment contrary to Article 3 or Article 8 is therefore avoidable. In any event, there is a saving provision in Schedule 3 which would permit support to be provided to avoid a breach of a person's Convention rights in so far as necessary."[60]

66. We are very uneasy about this provision in the Bill. We support the Government's objective, which is to encourage people who have failed in their asylum claim to leave the UK voluntarily when they are able to do so. However, the proposal in Clause 7 seems to us flawed, on several grounds:

- First, it may well have the effect of driving failed asylum-seekers underground, and actually making it harder to remove them.
- Second, for some families it will introduce an incentive for them to do so while leaving their children in the care of local authorities at public expense.
- Third, holding the threat of destitution over failed asylum seekers raises the same ethical difficulties as those raised by the existing section 55 of the Nationality, Immigration and Asylum Act 2002 (which prevents the provision of support to asylum seekers unless the Secretary of State is satisfied that their asylum claim was made as soon as reasonably practicable after arrival in the UK). This has been the subject of much criticism, not least from members of the judiciary. We will comment further on section 55 in our forthcoming report on asylum applications.
- Fourth, there is a real prospect of multiple legal challenges to the deprivation of support and the enforced separation of children from parents under the powers conferred by Clause 7.
- Fifth, we are concerned that the 'saving provision' in Schedule 3, enabling support to be provided if necessary to avoid a breach of ECHR rights, may in fact—notwithstanding

60 Explanatory notes to the Bill, para 137

the recent court judgement that destitution may not in all circumstances be a breach of human rights[61]—vitiate the purpose of the proposal. (The Joint Committee on Human Rights will be reporting on the human rights implications of Clause 7 in due course.)

- Sixth, the Minister's comment that if children *were* taken into care, the Government would act immediately to remove them together with their parents from the UK seems to commit the Government to removing all families with children when their asylum claim has failed, and when they can safely be returned to a country with which the UK has a repatriation agreement. However, the unwillingness of some failed asylum-seekers to leave the UK would be more satisfactorily tackled by a vigorous government policy of swift compulsory removals, of the kind we advocate in our earlier report on asylum removals.

67. We note that the difficulties the Government face stem from a failure to integrate the removal system with the asylum decision-making system. **We believe that the priority should be to improve the removal system so that it is understood by all parties that a failed claim will lead to swift action to effect a removal.** In our report on asylum removals, we commented on the disturbingly low rate of removals. Since the publication of that report, in May 2003, the rate of removals has increased: the Minister of State told us that the current rate of removals of failed asylum seekers, as at November 2003, was around 1,500 a month, or 18,000 a year.[62] We welcome this improvement. Nonetheless, the rate of removal is still unacceptably low in proportion to the numbers of people eligible to be removed.

68. We share the Government's view that it makes no sense for those families who cannot establish a right to asylum, and who can be safely returned to their countries, to continue to be supported at the taxpayers' expense. To do so undermines the integrity of and public confidence in the asylum system. However, we believe that, for the reasons given above, the Government's proposals may be counter-productive.

69. **The principle behind Clause 7, of removing taxpayers' support from those with no right to asylum, is justified, and we do not recommend that Clause 7 be removed from the Bill. However, we recommend that the Government should give assurances that Clause 7 will not come into effect until the House is satisfied that in practice it will not lead to significant numbers of children being taken into care.** We note the Minister's comment, on the possibility of asylum seekers' children being taken into care as a result of Clause 7, that "I hope it would not come to that in any individual circumstance at all".[63] **We recommend that in its consideration of the Bill, the House should give particular attention to the way in which the Government plans to implement Clause 7.**

70. **If the provisions in Clause 7 are brought into effect, we recommend that the Government should submit a written report to Parliament once a year on the number of families from whom benefit has been removed under the terms of the clause, and the**

61 R ('T') – v – The Secretary of State for the Home Department, on appeal from Maurice Kay J, before Lord Justice Kennedy, Lord Justice Peter Gibson and Lord Justice Sedley, 23 September 2003.

62 Ev 18

63 Q 870

number of children who have been taken into care as a result of the operation of the clause.

71. Benefit will only be withdrawn from asylum seeking families under the provisions of Clause 7 where return to their country of origin is, in the Secretary of State's opinion, an option, i.e. where the country is deemed 'safe'. We have noted in paragraph 47 above that the Government publishes, with statutory authority, a list of 'safe third countries'. **We believe that it would be an important safeguard if the Government were to publish and regularly update a list of those countries for which a voluntary resettlement programme is in place.**

6 New powers for the Immigration Services Commissioner

72. The Immigration and Asylum Act 1999 set up a system of regulation of asylum and immigration advisers. This system is supervised by an independent Immigration Services Commissioner (currently Mr John Scampion CBE). The Commissioner has defined the aim of the new system as being "to root out unscrupulous advisers … believed to be preying on the vulnerable and to promote good practice in the immigration advice sector". This is to be achieved by "intervention to improve the standard of advice given and by offering clients a forum for complaints about poor service".[64]

73. Since 1 May 2001 it has been unlawful for any person to provide immigration advice by way of business in or from the United Kingdom, unless they are registered to do so by the Office of the Immigration Services Commission (OISC), or are solicitors, barristers or legal executives regulated by their own designated professional body or European equivalent, or have otherwise been exempted from registration. When considering applications for registration or exemption, the Commissioner will look at organisational standards, levels of knowledge, competence and the character of those involved.[65]

74. The Government proposes to increase the powers of the Immigration Services Commissioner to investigate and take action against unqualified legal advisers and others who flout the existing regulatory scheme. This extension of powers was requested by the Commissioner in discussions with the Government following publication of his most recent annual report.[66] He expressed (in the words of the Government's summary) "particular concern about the activities of those non-legally qualified advisers who do not come forward for regulation", about "unqualified advisers evading regulation by setting up false supervision arrangements with solicitors", and about the handling of complaints by and lack of co-operation from certain designated professional bodies.[67]

75. The Bill provides that:

64 OISC Annual Report and Accounts 2002–03 (HC (2002–03) 741), published 3 July 2003, p 6

65 Appendix, p 27 below; Ev 18

66 Q 879

67 AA 98, Annex A

- the Commissioner's staff will be empowered to enter the private or business premises of anyone suspected of providing immigration advice or services when unqualified to do so, subject to obtaining a court warrant (*Clause 16*)

- there will be a new criminal offence of advertising or offering to provide immigration advice or services when unqualified to do so (*Clause 17*)

- there will be a duty on designated professional bodies to co-operate with the Commissioner (*Clause 19*).

76. Citizens Advice "welcome and support these proposals, which should improve the effectiveness of the … regulatory scheme".[68] The Medical Foundation for the Care of Victims of Torture and Mr Peter Gilroy, Strategic Director of Social Services at Kent County Council, also supported the proposals.[69] However, the Law Society expressed concern that the proposed extension of the Commissioner's powers "is wholly disproportionate to the perceived problem".[70] The Mayor of London supported the principle of strengthening the effectiveness of the Commissioner, but called for more consultation on the details to ensure that legitimate refugee support groups are not discouraged from offering advice.[71]

77. **We consider that the proposed new powers for the Immigration Services Commissioner, which have been requested by the Commissioner himself, are sensible and proportionate, and we urge the House to support them.**

7 Other measures in the Bill

78. Other significant provisions in the Bill include:

- *Clause 4*, which introduces a new criminal offence of trafficking people into, or out of, the UK for the purpose of exploitation (defined in the explanatory notes as including "slavery or forced labour, organ removal, or the use of force or threats to induce the victim to provide services")[72], and

- *Clause 15*, which allows for the electronic tagging or tracking of persons subject to immigration control, including asylum-seekers, as an alternative to detention for those who cannot offer suitable sureties.

79. The above provisions were not announced in advance of the publication of the Bill on 27 November, and accordingly we have not had an opportunity to take evidence on them or explore their implications with the Minister. **We therefore recommend that the Standing Committee on the Bill should give particular attention to these provisions, with a view to exploring and testing the Government's justification for them.**

68 Ev 17

69 Ev 36–37, 28

70 Ev 30

71 Ev 34

72 Explanatory notes to the Bill, para 18

Conclusions and recommendations

Undocumented passengers

1. We assume, in the light of the Minister's comments, that a "reasonable excuse" will include circumstances where a person fleeing persecution has no practical way of obtaining valid documents. We recommend that the Government make this clear explicitly in the text of the Bill. (Paragraph 20)

2. We support in principle the Government's new measures to penalise, in certain circumstances, those who deliberately lose or destroy their travel documentation. However, to avoid disadvantaging genuine refugees, we recommend that the Government should take steps to ensure, as far as is reasonably possible, that the potential consequences of deliberately losing or destroying their documentation is drawn to the attention of people arriving in the UK, both immediately on arrival at a port, and (by requiring carriers to provide this information) prior to arrival. (Paragraph 23)

3. We support the use of surveillance techniques to assist in linking passengers who lose or destroy their travel papers with their flight of arrival. We recommend that consideration be given to extending such schemes to airports other than Heathrow, and to seaports. We also recommend that the tactic of deploying immigration officers to meet passengers as they disembark from selected flights should be used more often, both to establish where people who have disposed of their travel documents have arrived from, and to send a discouraging message to the criminal 'facilitators' (Paragraph 26)

4. We recommend that the Government should clarify its intentions as to whether or not, if it were to introduce a power to require carriers to copy travel documents, this would apply to all carriers and all flights. (Paragraph 29)

5. We recognise that a power [to require carriers to copy travel documents] such as the Government envisages may be useful if used in the targeted manner described by the Minister. We believe that the Government should demonstrate that the proposal would not cause undue delays to legitimate passengers and that the costs imposed on airlines would be commensurate with the benefits to be gained in tackling abuse of the asylum system. We hope that the Government will not seek to amend the Bill to introduce this provision without first publishing the results of its consultations with carriers and other interested parties. We believe that it would be desirable for the Government to publish an assessment of the operation of similar powers in the Netherlands. (Paragraph 33)

Reform of the appeals process

6. We recommend that, in considering the Government's proposed simplification of the asylum appeals system, the House should consider whether the Government has made sufficient commitment to investing the necessary resources, and making other improvements to the quality of initial decision-making on asylum cases. The real

flaws in the system appear to be at the stage of initial decision-making, not that of appeal. We recommend that the implementation of the new asylum appeals system should be *contingent* on a significant improvement in initial decision making having been demonstrated. In particular, the relevant sections of the Act should not be brought into force until the statistics show a clear reduction in the number of successful appeals at the first-tier, adjudication level. (Paragraph 43)

Removal to a 'safe third country'

7. We repeat our earlier recommendation, in respect of non-suspensive appeals, and make a similar recommendation in respect of the proposals relating to 'safe third countries' in the present Bill, i.e. that if the Secretary of State wishes to add further countries to the list in Schedule 3 to the Bill, he should append a written memorandum to the relevant Statutory Instrument, explaining the rationale for believing those countries to be safe. (Paragraph 53)

8. We also recommend that the Government should make a clear statement of the circumstances which might trigger a decision to seek parliamentary authority for the removal of a country from the list of 'safe third countries'. In particular, we expect that satisfactory mechanisms will be set up within Government to keep the human rights situation in 'safe third countries' under review, so that they do not remain on the list if that situation significantly deteriorates and they cease to be safe. (Paragraph 54)

Restricting family support

9. The Minister also informed us that the Home Office is not in a position to give estimates of the number of families to whom Clause 7 might apply. We believe that this is unsatisfactory and that the Home Office should at least be able to publish figures showing the number of families, including the number of children, who are currently in the asylum system and to whom Clause 7 could apply. (Paragraph 64)

10. We believe that the priority should be to improve the removal system so that it is understood by all parties that a failed claim will lead to swift action to effect a removal. (Paragraph 67)

11. The principle behind Clause 7, of removing taxpayers' support from those with no right to asylum, is justified, and we do not recommend that Clause 7 be removed from the Bill. However, we recommend that the Government should give assurances that Clause 7 will not come into effect until the House is satisfied that in practice it will not lead to significant numbers of children being taken into care. (Paragraph 69)

12. We recommend that in its consideration of the Bill, the House should give particular attention to the way in which the Government plans to implement Clause 7. (Paragraph 69)

13. If the provisions in Clause 7 are brought into effect, we recommend that the Government should submit a written report to Parliament once a year on the number of families from whom benefit has been removed under the terms of the

clause, and the number of children who have been taken into care as a result of the operation of the clause. (Paragraph 70)

14. We believe that it would be an important safeguard if the Government were to publish and regularly update a list of those countries for which a voluntary resettlement programme is in place. (Paragraph 71)

New powers for the Immigration Services Commissioner

15. We consider that the proposed new powers for the Immigration Services Commissioner, which have been requested by the Commissioner himself, are sensible and proportionate, and we urge the House to support them. (Paragraph 77)

Other measures in the Bill

16. [*Clause 4* and *Clause 15*] were not announced in advance of the publication of the Bill on 27 November, and accordingly we have not had an opportunity to take evidence on them or explore their implications with the Minister. We therefore recommend that the Standing Committee on the Bill should give particular attention to these provisions, with a view to exploring and testing the Government's justification for them. (Paragraph 79)

Appendix

Joint letter from the Home Office and the Department for Constitutional Affairs inviting responses to the Government's consultation exercise

The Nationality, Immigration and Asylum Act 2002 enabled us to make significant progress in reforming the UK's nationality, immigration and asylum systems. For asylum this has meant that the number of claimants has halved, removals are at record levels and the number of claims awaiting an initial decision is at the lowest for a decade. The Government is determined that there should be a balanced approach in asylum and immigration policy, so that we bear down on those who would seek to enter the UK illegally and who make unfounded claims, whilst ensuring effective help for refugees who need our protection. Our policy on asylum has to be seen in the wider context of managed migration, through which we are opening up routes for people to enter the UK legally. That is why we are committed to continued reform, as necessary, of the asylum system to ensure that those in need of protection are identified quickly and those who try to exploit the system are prevented from doing so.

The Government has made it clear that we seek to tackle two remaining problems in the asylum system: applicants who lodge groundless appeals to delay removal and the problem of asylum seekers who deliberately destroy or dispose of their documents to make unfounded claims.

We reformed the appeals process in the Nationality, Immigration and Asylum Act 2002 and the changes made are already producing real improvements. However, we must increase the speed and finality of the appeals system still further. An efficient and speedy system which provides an effective remedy but discourages dishonesty is in the interests of all.

We also need to tackle the problem of asylum seekers who deliberately destroy or dispose of their documents and refuse to co-operate with the re-documentation process in order to frustrate removal after making unfounded claims. This can lead to delays in removal, pressure on detention space and is an unacceptable exploitation of the system.

We believe that these are important and urgent reforms and intend to introduce legislation to enact the measures we have announced today as soon as parliamentary time allows. We are therefore seeking your comments on these proposals as a matter of urgency. Our proposals are set out at Annex A.

BEVERLEY HUGHES MP
Minister of State, Home Office

DAVID LAMMY MP
Parliamentary Under-Secretary, Department for Constitutional Affairs

27 October 2003

Annex A

NEW LEGISLATIVE PROPOSALS ON ASYLUM REFORM

We are writing to outline new legislative proposals on asylum reform and to seek your comments on these proposals. Responses are requested by 17 November 2003.

Asylum and Immigration Appeals System

The Government is determined, through incremental change, to safeguard the appeals system from misuse and protect the credibility of the process. The Government is also concerned to ensure that community

relations are not adversely affected by what may be seen in many quarters as continuing evasion and exploitation of immigration and asylum controls at significant cost to the taxpayer.

The changes made in the Nationality, Immigration & Asylum Act 2002 are already showing real improvements in the appeals process. However, more still needs to be done to improve the system. That is why we are proposing to move to a single tier of appeal. Such a change would continue to safeguard the right of appeal and provide an effective remedy for those whose application has been refused by IND or an Entry Clearance Officer. A single tier would simplify the appeals system and reduce the risk of people seeking to play the system by making unfounded appeals to frustrate final resolution of their case.

The current appeals system is still too long and complicated. It provides people with opportunities to abuse the system in order to cause delay or abscond. We therefore propose to replace the current structure with a single appeal to a new single-tier Tribunal, the Asylum & Immigration Tribunal (AIT), headed by a President.

The new judiciary will generally be titled Immigration Judges or Senior Immigration Judges, but the precise hierarchy remains to be determined. The vast majority of appeals would be heard and decided by a single immigration judge, working closely with more senior judiciary. Appellants, as now, would be expected to raise all of their grounds of appeal at their one hearing.

The judicial oversight provided by the designated senior judge will ensure high-quality justice without allowing cases to drag on for many months through the legal process. Fairness, finality and speed would be the hallmarks of our new appeals system. Together with the creation of a single tier of appeal, we are looking at ways to restrict access to the higher courts.

Undocumented passengers

We have already taken tough measures to tackle illegal immigration. The deployment of high-tech freight screening equipment at French and Belgian ports and moving UK border controls to France are already preventing undocumented and inadequately documented people from travelling to the UK. However, we also need to tackle the problem of asylum seekers deliberately destroying or disposing of their documents and refusing to co-operate with the re-documentation process in order to prevent removal. We therefore propose to introduce measures which would ensure that those asylum seekers who fail to provide documents without a good explanation and/or have travelled through a safe third country and/or who claim late, would have this taken into account when considering the credibility of their claim. These measures would require the decision-maker and appellate bodies to take account of the above situations when assessing the credibility of statements made by such persons in support of their asylum claim. Immigration rules already make a similar requirement for undocumented arrivals and those who delay making their application, but the proposed measures would make this requirement clearer and enable us to extend the policy to include those who have travelled through a safe third country.

In support of this proposal, we also propose to create two new criminal offences. The first offence of being undocumented without reasonable explanation would apply to anyone, subject to certain exceptions (EEA nationals for instance), arriving at a UK port without adequate documentation to satisfy immigration control. The second offence of failing to co-operate with re-documentation would impose a duty on those with no right to remain in the UK, including failed asylum seekers, to co-operate with the re-documentation process. Prosecution would follow where it could be established that a person did or did not do something that had the effect of frustrating, obstructing or otherwise interfering with the re-documentation process.

We also wish to consult on the introduction of measures to diminish the benefit of passengers destroying or disposing of documents in transit and before reaching passport control. While we have at this stage taken no decision on this, we will consider including powers that would allow us to require carriers to take copies of passengers' identity documents before they travel. We will be discussing the proposal with industry representatives to obtain further information on the practicalities of such a proposal ahead of taking a decision on the policy.

Safe Third Country

A further proposal would deal with situations where it is decided that a country other than the United Kingdom is best placed to consider someone's asylum or human rights claim substantively. We intend to legislate so that a person will not be able to challenge their removal to certain safe third countries on the basis of the way they will be treated. The designated countries will be those where we are satisfied that an individual will be neither persecuted nor subjected to torture or inhuman or degrading treatment or punishment, nor one which would remove a person in breach of the principles of the Refugee Convention or the ECHR. This would facilitate their faster removal from the UK, consistent with our international obligations.

Restricting family support

Since Section 54 of the Nationality, Immigration and Asylum Act 2002 came into force, it has been possible for us to withdraw NASS support from families with dependent children who have had their asylum claim determined (either because their claim has been determined and they choose not to appeal or because they have exhausted all appeal routes), if they have failed to comply with a removal direction. We propose that the law should be amended so that support for families whose claim for asylum has been rejected and who have no avenue of appeal left, will end as soon as it is confirmed that the family is in a position to leave the UK. This would provide an additional incentive to leave the UK promptly either via the Immigration Service or via a voluntary assisted return and would reduce the waste of public funds when such a family fails to comply with a removal direction. Support would continue in cases where the family would require a travel document to leave and they are complying with the re-documentation process. The process for removing support from those without dependant children when their claim is determined would remain unchanged. If asylum support is withdrawn from a family in this way, other forms of support, including that provided under section 2 of the Local Government Act 2000, would no longer be available except to the children under Section 20 of the Children Act 1989.

The Office of the Immigration Services Commissioner

The Immigration Services Commissioner's Annual Report for 2002-3 suggested there was scope for improving the effectiveness of the regulatory scheme he administers. The Commissioner expressed particular concern about the activities of those non-legally qualified advisers who do not come forward for regulation. He was also concerned by these unqualified advisers evading regulation by setting up false supervision arrangements with solicitors. Furthermore, the Commissioner in his Annual Report, continued to be concerned about the handling of complaints by certain designated professional bodies (DPBs). In addition, the Commissioner's statutory duty to provide the Secretary of State, in his Report, with his opinion as to the extent to which each DPB had provided effective regulation of its members in the provision of immigration advice/services was limited by their lack of co-operation in providing necessary information. Following dialogue with the Commissioner, we are minded to introduce the following measures. We are considering making provisions extending the Commissioner's current powers under paragraph 7 of Schedule 5 to the Immigration and Asylum Act 1999 so that, when investigating a complaint, a member of his staff would be able to enter a solicitor's office, require the production of relevant documents and an explanation of them. We are also looking at making provisions enabling the Commissioner, when investigating a complaint of suspected sham supervision of an unqualified immigration adviser by a solicitor, to enter the solicitor's office and seize material, subject to obtaining a court warrant.

We are also considering placing a duty on designated professional bodies to provide timely information to the Commissioner and to co-operate fully with any reasonable request from his staff so that he can fulfil his statutory duties.

Under these proposed measures, in order to deal with those who are suspected of flouting the regulatory scheme, thereby committing a criminal offence under section 91 of the Immigration and Asylum Act 1999, the Commissioner would be empowered to enter the private or business residence of anyone suspected of providing immigration advice or services from those premises when unqualified to do so, subject to obtaining a court warrant. There would also be a new criminal offence of advertising or offering to provide immigration

advice or services when unqualified. The investigatory powers set out in paragraph 7 of Schedule 5 to the 1999 Act would be extended to those advisers to whom the Commissioner has granted an exemption certificate. The Commissioner would be empowered to enter a private residence being used by a registered or exempted adviser for the purposes of providing immigration advice or services, subject to obtaining a court warrant.

Race Equality Impact

We are currently in the process of assessing the race equality impact of these proposals, in line with our statutory obligations under Section 71 of the Race Relations Act 1976 (as amended). These assessments will consider to what extent the proposals have due regard to the need to eliminate unlawful discrimination and promote good relations between persons of different racial groups. As part of this process we would therefore welcome comments on the proposals from a race equality perspective. The Government is concerned to ensure that community relations are not adversely affected by what may be seen in many quarters as continuing evasion and exploitation of immigration and asylum controls at significant cost to the taxpayer. A strengthened and credible immigration and asylum system that treats all applicants fairly and with integrity will increase public confidence in the system and help to preserve good community relations.

Responses

We firmly believe that we need to take action in these areas as a matter of urgency and intend to introduce legislation at the earliest opportunity. We would therefore welcome your comments on these proposals as soon as possible, to be received by 17 November 2003. Your comments should be emailed to INDLegislation@homeoffice.gsi.gov.uk or alternatively addressed to the IND Legislation Unit at the following address:

IND Legislation Unit
Room G19
Horseferry House
Dean Ryle Street
London
SW1P 2AW

A copy of this letter can be found on the IND website at www.ind.homeoffice.gov.uk and the DCA website at www.lcd.gov.uk. Copies of this letter are also being placed in both Houses of Parliament. Please notify us if you would prefer your comments to remain confidential as all comments may otherwise be published. A list of consultees can be found at Annex B.

Home Office
Department for Constitutional Affairs
October 2003

Formal minutes

Tuesday 9 December 2003

Members present:

Mr John Denham, in the Chair

Mr James Clappison
Mrs Janet Dean
Mr Gwyn Prosser
Bob Russell
Mr Marsha Singh
Mr John Taylor
David Winnick

The Committee deliberated.

Draft Report (Asylum and Immigration (Treatment of Claimants, etc.) Bill), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 79 read and agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No. 134 (Select committees (reports)) be applied to the Report.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

A paper was ordered to be appended to the Report.

Several memoranda were ordered to be reported to the House.

[Adjourned till Thursday 11 December at 2.15 pm

Witnesses

Wednesday 19 November 2003

Page

Beverley Hughes MP, Minister of State, Home Office, **Mr Bill Jeffrey,** Director General, Immigration and Nationality Department (IND), **and Mr Ken Sutton,** Deputy Director-General, Asylum Support and Casework, IND. Ev 1

List of written evidence

Citizens Advice Ev 15
Home Office Ev 17, Ev 44
Immigration Advisory Service Ev 18
Jesuit Refugee Centre Ev 20
JUSTICE Ev 23
Mr Peter Gilroy, Kent County Council Ev 27
The Law Society Ev 28
Mr Ken Livingstone, The Mayor of London Ev 31
Medical Foundation for the Care of Victims of Torture Ev 34
Migration Watch UK Ev 37, Ev 39
Refugee Children's Consortium Ev 40
Refugee Legal Centre Ev 43

List of unprinted written evidence

Additional papers have been received from the following and have been reported to the House but to save printing costs they have not been printed and copies have been placed in the House of Commons library where they may be inspected by members. Other copies are in the Record Office, House of Lords and are available to the public for inspection. Requests for inspection should be addressed to the Record Office, House of Lords, London SW1. (Tel 020 7219 3074) hours of inspection are from 9:30am to 5:00pm on Mondays to Fridays.

Beverley Hughes MP, Minister of State, Home Office
Bail for Immigration Detainees
Hammersmith and Fulham Community Law Centre
Immigration Law Practitioners' Association
The Refugee Council

Oral evidence

Taken before the Home Affairs Committee

on Wednesday 19 November 2003

Members present:

Mr John Denham, in the Chair

Janet Anderson	Mr Marsha Singh
Mr James Clappison	Mr John Taylor
Mrs Claire Curtis-Thomas	Miss Ann Widdecombe
Mr Gwyn Prosser	David Winnick

The previous sessions of oral evidence (HC 692-i-viii) will be published with the Committee's main Report on Asylum Applications

Witnesses: **Beverley Hughes,** a Member of the House, Minister of State (Citizenship, Immigration and Counter-Terrorism) Home Office, **Mr Bill Jeffrey,** Director-General, Immigration and Nationality Department (IND), and **Mr Ken Sutton,** Deputy Director-General, Asylum Support and Casework, IND, examined.

Q817 Chairman: Could I thank you very much for coming, Minister. The Committee has noted that this is the sixth time you have come in front of this Committee in the current calendar year. We did discuss making you an honorary member of the Committee as you come here so often! We are grateful to you. Could you, for the record, introduce yourself and your colleagues.
Beverley Hughes: Yes. I think these gentlemen have been here almost as many times as I have! On my left is Bill Jeffrey, the Director-General and on my right Ken Sutton, the Deputy Director-General.

Q818 Chairman: Obviously, we are particularly interested in the new legislative proposals that were announced by the Government just after the last time you came to the Committee as part of this inquiry. Can I start by asking you about the consultation around the proposals? The response we received from the Immigration Guidance Service is not untypical; they say, "The consultation document is so lacking in detail that it is impossible to respond to many of the proposals in an intelligent way." A number of consultees that we contacted when the proposals were published suggested that the short consultation period is well short of Cabinet Office guidance. I wonder, Minister, if you could justify both the alleged lack of information in the consultation proposals and also the very short period of time for consultation on them.
Beverley Hughes: I do appreciate the situation that places consultees in, and I would like to make clear that any responses we receive up to and around the deadline, and indeed even just past the deadline if they can get to us quickly, we would certainly want to consider. The situation was, though, that the Home Secretary announced in May that he was asking for further policy work to be done on some of these very difficult and very technical areas, which have involved a lot of consultation anyway, both within government and with the judiciary, and it is simply the case that we were not in a position, certainly on some of the main planks of the proposal, to give sufficient detail until that point in time.

Q819 Chairman: But the response that we have had from consultees is that there is still insufficient detail, for example, on the operation of the single-tier appeal system, or what might happen to judicial review for expert organisations like the Immigration Advisory Service, to, as they put it, "respond to the proposals in an intelligent way." Do you accept that there are some real difficulties for agencies in responding to the proposals that you have put forward?
Beverley Hughes: What I accept is that there are real difficulties in making sure that we develop in detail a system that is workable operationally and actually achieves the policy objectives here, and indeed, we are still discussing some of that detail with colleagues in the Department of Constitutional Affairs, and indeed, they are discussing the detail with some of their stakeholders. So we have not finalised the detail of that. There are some very technical issues to be considered, and we will receive gratefully any ideas people send back to us of how they think the policy objectives that we are trying to achieve can be achieved in practice, without building in the kind of loopholes that it is all too easy to build in unless you pay real attention to that detail.

Q820 Chairman: That is helpful. To some extent, of course, the detail is still in flux.
Beverley Hughes: No. The policy objectives are clear. The operational details, yes.

Q821 Chairman: Can you tell the Committee what the next stages are? I know you cannot anticipate the Queen's Speech, but this seems to be more relaxed these days than it used to be a few years ago, and we may be anticipating the confirmation of legislation

on this area in the Queen's Speech. How long do you think it will need before the proposals, which will then be in detailed form, will be published as a Bill, and are you intending to give time, including time for this Committee, to discuss the Draft Bill before it is introduced, whether in the Commons or the Lords, at Second Reading?
Beverley Hughes: There has not been a decision about the Queen's Speech, as you say, Chairman. That is the case. That is up to the Prime Minister. We are preparing legislation, obviously, in case we can get it in. You mentioned a Draft Bill; there has not been a decision on the status of the Bill in terms of draft status. It may well not be a Draft Bill if we manage to get one in. But certainly we will want to publish that as soon as possible, if we get permission to include it in the Queen's Speech, and go to Second Reading as soon as we can.

Q822 Chairman: Would you accept though, Minister, given the lack of detail in the proposals at this stage, that it would be desirable for people inside and outside the House to see the Bill some time before Second Reading so that they can comment on whether the policy objectives that you have set out have been adequately expressed?
Beverley Hughes: I do accept that general point. We have two competing imperatives here though. This is urgent legislation. The main planks of this we do regard as important to get on the statute books as soon as possible, and so the best balance that we can create between those two objectives we will do.

Q823 Chairman: Perhaps I can turn to the proposals about travel documentation. Is it not the case that some genuine refugees have no option but to travel on false documentation, because it is the only way that they can get on an aeroplane? What exactly is going to be the position of somebody who obtains false documentation because that is simply the only way in which they can make their way to this country in order to claim asylum?
Beverley Hughes: It is perhaps helpful if I start with the current situation and what we are trying to achieve with this set of proposals.

The Committee suspended from 2.36 pm to 2.51 pm for a division in the House

Q824 Chairman: Minister, you were setting out the position and the aims regarding the documentation.
Beverley Hughes: Firstly, the situation that we are trying to deal with with some of these provisions. The very large majority of people who arrive at our ports who are going to claim asylum arrive undocumented. Secondly, a large majority of those actually arrive at airports, where, patently, they will have had documents in order to board the plane. So we are convinced that a large proportion of people who claim asylum at ports, particularly at airports, have documents when they board, but destroy them, or they are taken away from them by facilitators. It is very important, both in terms of assessing a person's claim, but also in terms of removing somebody if their claim is refused, to be able to document people. So the fact of a significant number of people who destroy documents is something that we have to address. It is also important in terms of trying further to break the power of the facilitators, the criminal gangs who are often providing people with fraudulent documentation, that we do so. For those reasons, what we are proposing are three separate measures; firstly, that the deliberate destruction of a document will be taken into account in the assessment of the claim. That does not mean that claims will automatically be refused, but it is a factor that is going to be incorporated into the assessment process. Secondly, to create two new offences, both of destroying documents and failing to cooperate with the new documentation at the end of the process in the event of a failed claim; and thirdly, considering asking carriers to take copies of documents so that we can track back if and when people do present without documents, having destroyed them.

Q825 Chairman: In the position that I was outlining earlier, where a genuine refugee has no practical way of obtaining legitimate travel documents, and then travels on false documents and arrives at a port, are you saying that, provided they do not destroy that documentation that they travelled on, they will not be committing any new offence by travelling on false documentation?
Beverley Hughes: No. That is correct.

Q826 Chairman: Do you feel that in any way the position of genuine refugees will be made worse by the proposal that you are putting forward?
Beverley Hughes: I really do not because, as I have made clear, it is in respect of people who deliberately destroy their documents. If people do not destroy them, they will not be affected by these measures. It is particularly to try and break the hold of the facilitators who, as I say, often, we think, collect those documents up from people in order to be able to use them again. So it is very important that we do have these measures, but I would be concerned if I felt that they might catch the small number of people who are travelling on false documents because they have genuine asylum claims, and I do not think that they will.

Q827 Chairman: If a person had good reason to get false documentation, they may be advised by traffickers to destroy them. How will you ensure that no-one is left in any doubt about the consequences of destroying their documents? What do you say to the view put forward by the Law Society that some people might wish to destroy documents because it would put others in the country that they are coming from at risk?
Beverley Hughes: Those factors will all be gone into in some detail if and when a person claims asylum as part of the interview. If somebody has a credible reason for destroying their documents, that will be taken into account. The measure is to take the factors into account in making an assessment, and if the person at the point of interview is open and transparent, gives us full information about their

situation and reasons why, and that makes a credible account, then there will not be any adverse consequences for that person.

Q828 Chairman: You said in the consultation that your measures to make the requirement on decision makers to take the lack of documentation into account would make that requirement clearer. In what way are you intending to change the legislation to make that requirement clearer if there is already a requirement to take lack of documentation into account?
Beverley Hughes: There is not a specific requirement. As I say, this is in relation to what would be assessed as, as a result of that process, deliberate destruction of the documents. There is not a specific reference to that in the provisions at the moment.

Q829 Chairman: We had evidence at an earlier session from three people who have been accepted, either with full refugee status or with indefinite leave to remain, all of whom came here, they openly admitted, under the auspices of people traffickers. If the aim of what you are trying to do is to put those people traffickers out of business, so far as you can, does that not mean there will be some genuine refugees for whom it will no longer be possible to gain access to the UK, even though, if they had managed to get here, their claims would have been supported?
Beverley Hughes: We have always taken the view—and I think this is in the spirit of the Convention—that if people are fleeing persecution, if they fear for their lives, they go to the closest safe place, and in fact, that is what the vast majority of the world's refugees do, therefore I do not think this is a disadvantage to people fleeing persecution. There are many places that they can go to, sometimes including the UK but very often countries much closer to where they are than the UK, in order to claim asylum, if they really are in fear for their lives.

Q830 Chairman: Finally, if somebody fails to cooperate in respect of re-documentation at the moment they can be subject to indefinite detention. What do you add to the system by threatening them with a short prison sentence for the same offence?
Beverley Hughes: It is not strictly the case that people can be subject to indefinite detention. It depends on the circumstances. The courts in this country have decided that unless we have a reasonable prospect of removing somebody, then we cannot detain them indefinitely. There have been a number of cases that have consolidated that case law. So if the person is not cooperating, and if the state concerned, either because of its processes or because we yet do not have, as I think I outlined to the Committee, with certain countries the systems in place to re-document people quickly—and there are some instances in which, China for instance, demands not only to know that somebody is their national but also their very specific identity—so if for any of those reasons, either to do with the person's cooperation or difficulties in getting states to accept people as their nationals, then we cannot hold people indefinitely because we have no prospect of removing them.

Q831 Mr Taylor: Minister, can you tell us how many asylum seekers have been successfully prosecuted in recent years for travelling on false documentation?
Beverley Hughes: I cannot give you the exact figure, but the advice to me is that the figure claimed by JUSTICE of 5,000 is wholly inaccurate. It is a very small figure.

Q832 Mr Taylor: You have anticipated my supplementary question. If you would like to return to my first question, perhaps you could write to the Chairman when you have done a little more research. I understand your position; you cannot have every detail at your fingertips.
Beverley Hughes: The figure I do have is that fewer than 20 cases have achieved compensation as a result of wrongful conviction for that, but I do not have the actual figure of people convicted. It gives you a sense of the order of things compared to the JUSTICE figure. But I will certainly write you a note.[1]

Q833 Mr Taylor: Turning to JUSTICE's claim, where they say up to 5,000 asylum seekers appear to have been wrongly convicted and imprisoned for using false documents, would you say that that was mistaken, or a wild exaggeration, or somewhere between those two points?
Beverley Hughes: The problem is that the statistics are not available centrally. Those figures are not collated. We will certainly try and do better than we can do here and now. But we are clear that the figure of 5,000 has no substance as far as we can see, and that the actual number is far less than that.

Q834 Mr Taylor: May I move on to ask you what progress you have been able to make in discussing with carriers a power to require them to copy passengers' identity documents before they travel? Are there practical difficulties with this? Have you made headway?
Beverley Hughes: We are still in consultation with the carriers. Officials met some of the representatives from the industry earlier this month, and we are still in discussions with them and receiving their responses at the moment.

Q835 Mr Taylor: Is it within your knowledge that other countries impose such a requirement, and do you think it would be feasible for the UK to do it on its own, without other national precedents?
Beverley Hughes: We understand that The Netherlands already do this, that their scheme is based on carriers' liability legislation, and that they have a scheme requiring all carriers to produce copies of documents in respect of all passengers from a list of specified countries. I think there are about 20 countries on their list. So there is at least one precedent.

[1] *See* Ev 17–18.

Q836 Mr Taylor: Anecdotally, does it seem to work in The Netherlands?
Beverley Hughes: We have not been aware of any problems they have had. Clearly, there are logistical and practical issues that would have to be resolved, and that is one of the points of discussion at the moment.

Q837 Mr Taylor: Finally, how would you respond to the body called the Medical Foundation for the Care of Victims of Torture, who argue that such a requirement may place genuine refugees in additional danger?
Beverley Hughes: That the requirement on carriers would do that? I do not see how that would happen.
Mr Jeffrey: The purpose of the provision would not be to cause carriers to refuse to board people whom they otherwise would board, so I do not think the point in that sense is well made. Its purpose is more that when, as the Minister was saying earlier, people destroy their documents in the course of travelling here, if we have some record of the identity under which they boarded and the documents they presented when they boarded, we will have more chance of establishing their identity further on in the process.

Q838 Mr Taylor: Mr Jeffery, I am new to this Committee, and new to this inquiry. May I ask you something that probably everybody else knows: what is the motive for a refugee destroying their documents? Why would they?
Mr Jeffrey: We believe that in many cases it is done in order to make it more difficult, if we do end up refusing their asylum claim, for us to arrange for them to be properly documented and returned to their country of origin.
Beverley Hughes: It is also done because the facilitators tell people to do it. We are clear about that. They tell people to do it because it is a way of preventing us gathering the kind of intelligence that we need to disrupt many of these gangs.

Q839 Mr Prosser: Minister, following on from that last question, we hear anecdotal reports about cleaners and ancillary workers at airports and sea ports coming across large numbers of passports and travel documents torn in half and stuffed down the backs of seats. That would be useful evidence to use in coming to a decision on a claim or for removing people. Is there any process you have in place to handle this evidence? My fear is that is almost being ignored by the powers that be and by Immigration. Are you aware of this, and is there a means of dealing with it?
Beverley Hughes: I am certainly aware that sometimes documents are found in various places, in lavatories in airports and such like. Where a document is found and it is possible to link it to a person, then that would be used. It would be linked to the whole process of assessing the claim. The difficulty is that that does not happen often enough and systematically enough for that linkage to be able to be made and to be made at the right time. It is not that large numbers of torn-up documents are being found and dumped in a sack and burned, and not being used where they can be used at all.

Q840 Mr Prosser: But you would expect the finder of the documents, whoever that might be, to declare them to Immigration?
Beverley Hughes: Yes.
Mr Jeffrey: I would certainly expect that if such a thing came to the attention of our immigration staff at the airport, they would follow it up and attempt to link the documents with people with whom they may otherwise have had dealings.

Q841 Mr Singh: Minister, have you given any thought to the scope of this idea of photocopying identity documents? For example, would it only apply to people travelling from certain countries? Would it apply to every passenger on that plane or boat? If it applied to every passenger, the genuine passengers, British tourists coming from abroad on their British passports, might get very annoyed if they have to go through this process, yet I cannot see it working unless it did apply to everybody. Have you given any thought to that practical side?
Beverley Hughes: Yes, and you are quite right. It would be a waste of resources to simply have a blanket requirement, and we are not proposing a blanket requirement; we are proposing the idea of an enabling power in the Bill that would allow us to make that request of carriers on selected and very targeted routes. Also, for specific periods of time. The risk from certain routes actually changes quite a lot, and we monitor that very closely, and we have the intelligence to be able to ask a carrier for a specific period of time to photocopy documents on a particular route, to help with bearing down on what we think is an increased risk.

Q842 Mr Singh: Would that involve everybody travelling on that route?
Beverley Hughes: It would involve everybody on that plane, yes, but probably for a limited duration and, as I say, on selected routes.

Q843 Miss Widdecombe: Can I put to you another possibility? We know the scene very well: people have to have documents in order to get on the plane in the first place. They arrive without them. They have lost them. They stay air side for hours on end, they present to the desks, and the immigration officers have no idea where they have come from. This is the whole point of the exercise. Why not have immigration officers meeting the planes from those countries which produce precisely this sort of problem, so that when people come off the planes, you check immediately there and then? If they do not have documents, you know exactly where they have come from.
Beverley Hughes: We have certainly discussed that as a possibility. One of the difficulties is the logistics of doing that and having the capacity, the resources, to do that on the number of flights required. We felt that this would be a secure way if we actually had

copy documents, as I say, on a targeted basis, to have a really secure link between the individual and the document.

Q844 Chairman: Can I tease that out a bit further? Over a period of six hours or so there must be a significant number of flights coming in, for example, from east Africa. You might be targeting flights from, say, Ethiopia, but not from Kenya, but actually, given the evidence we had last time, if the Immigration Services find it difficult to distinguish between a Somalian refugee, an Ethiopian national and somebody from Kenya, how on earth can you, by the time they get to the desk, match the individual up with the documentation that they gave the airline at the point of departure? That is the issue we do not quite understand.
Beverley Hughes: If we had a copy of the document, even if it were a false document, there would be a photographic record on that photocopy, and it would be of the person standing before us, even if, as I say, that was a photograph that had been inserted into a document belonging to another person. That would help us to identify at least where that person had come from. If you can imagine some of the logistics around the possibility that you raise, Miss Widdecombe, I am sure you in your previous role will have been at some of our busiest airports when large numbers of planes holding large numbers of passengers are all arriving at the same time. If you just imagine what it would involve to have immigration staff standing at the steps of a number of planes, all of whom you wanted to target, and somehow shepherding those people through the system and keeping a hold on them in some way, you can see it is logistically very difficult.

Q845 Miss Widdecombe: It might show them we are serious.
Beverley Hughes: Potentially, depending on how it were done, it would also inconvenience a large number of straightforward, *bona fide* passengers, who would need to be shepherded through as well, whereas photocopying the documents does not have an impact on the passengers. I accept it is an issue for the carriers, and that is why we are talking to them about it, but it seemed to us a mechanism that had least impact on the vast majority of genuine travellers.
Mr Jeffrey: Can I just add that we do occasionally meet flights where there is a specific reason for doing so, but for the logistical reasons the Minister has mentioned, and also manpower reasons, it is not done on a very large scale. The other thing we are keen on is looking at more covert ways of ensuring that we can in fact link people back to the flights that they arrived on. We are having more success than we were in the past, even when the kind of subterfuge that Miss Widdecombe mentions is resorted to. We are having more success in linking people who present themselves without documents with the flight we believe they originally came in on. Even so, this provision which we are discussing with the industry now, if it were carefully targeted and intelligence-led, so that it did not disrupt the industry's ordinary business too much, it would bring significant benefits for us.

Q846 Chairman: I can understand why you would not say it in Committee, but on the usual confidential basis, if there is information about those covert measures, we would appreciate if we could receive it by letter.
Beverley Hughes: Certainly.[2]

Q847 David Winnick: The Government intends, Minister, as I understand it, to reduce the right of lodging an appeal against the decision of the executive. Is that correct?
Beverley Hughes: What we are consulting on is reducing the number of layers of appeal that are currently still in the process.

Q848 David Winnick: Can I interrupt you? You say "consulting"; do you mean you have not made a firm decision?
Beverley Hughes: We have issued a consultation document on the major provisions that we want to introduce when we can, and one of the main provisions in relation to appeals is to reduce the current system to a single tier of appeals, not just for asylum but also for immigration appeals. Whilst we have greatly simplified the appeals process with previous legislation, requiring people, as Members will know, to put all their reasons for appeal at the same time in a one-stop approach, there are still a number of layers left which we feel, on the basis of the information that we have, we can safely reduce. That will mean, if our proposals go forward, that the current two-layer process, in which an appeal decision is made by an adjudicator, the person can then appeal to the Immigration Tribunal. If granted a hearing, obviously that would be heard there. If they are not granted a hearing at the Tribunal, they can then appeal to higher courts, and if that is refused, they can appeal to the Administrative Court for a statutory review. We think, because of the fact that 97% of adjudicators' initial decisions are actually ultimately upheld, that there is a strong argument for reducing the number of opportunities for further judicial scrutiny, and obviously the further delays in the system. So we are proposing to collapse the first two of those into a single tier and to look at a means by which we can reduce access to the higher courts.

Q849 David Winnick: You gave the impression—I am sure not deliberately—that if an appellant has lost a case before an adjudicator, the next stage, automatically, if that is the wish of the appellant and the adviser, is to go to the Immigration Appeals Tribunal. Is it not a fact that only if permission is given by the Tribunal or by the adjudicator, as the case may be, on a point of law, could the case be taken to the second tier?

[2] *See* Ev 18.

Beverley Hughes: Yes. About 40% of people who are refused by the adjudicator whose appeals are dismissed actually apply to go to the Tribunal.

Q850 David Winnick: Presumably the tribunal would not allow the case to be heard by then unless there was a point of law involved?
Beverley Hughes: That is probably so, but if you actually track what then happens to those cases, as they then go through, the 40% of refusals who apply, of those, just over 30% are granted a substantive hearing, and of those, when get to the end of the day, of the original number of appeals in the first place, only 3% of the original adjudicator's decisions are actually overturned at some point in that process. In other words, there is a strong argument that the adjudicators are making very sound decisions, and that the various points that we have in the system at the moment for people to ask for further scrutiny of that are not necessary, and are introducing delay to the system, which is largely what I think those devices are used for, and so we can safely simplify the process.

Q851 David Winnick: It does not look like consultation; it looks like a firm decision has been made.
Beverley Hughes: I was explaining before you came in, Mr Winnick, that a firm policy decision has been made that we need to simplify the process. We are consulting on the mechanics of how we achieve that, because it is very technical and it is very detailed.
Mr Jeffrey: Mr Winnick is absolutely right to say, obviously, that access to the Tribunal is by means of a leave procedure, but if leave is refused, there is then, under the legislation which was passed in the last session, an opportunity to seek statutory review of that decision in the Administrative Court. So arguably, what we have now, with a proportion of the cases actually reaching the Tribunal for hearing, is a three-tier system rather than a two-tier system.

Q852 David Winnick: On Legal Aid, the intention is to introduce limits. Am I right?
Beverley Hughes: Again, the Department for Constitutional Affairs has had a wide consultation on its original proposals, which were initially to set a maximum amount of hours of Legal Aid, to have an accreditation system, and to give people a number so that that maximum could not be compromised, and they are still considering the responses that they received from that consultation. I am afraid I am not in a position to give the Committee any further advice as to what those considerations will be.

Q853 David Winnick: The Constitutional Affairs Committee suggested there should be a moratorium on the plans to introduce such limits.
Beverley Hughes: I think it made a number of proposals, and it is those proposals in particular that the Constitutional Affairs Ministers are considering at the moment.

Q854 Mr Clappison: On the appeals, is it your intention that the Immigration Appeals Tribunal which people go to if they want to appeal from the adjudicator, should be a tribunal which can deal with all the issues and all the appeals at one and the same time?
Beverley Hughes: What we are considering is having one body. Instead of having the appellate authority and a separate body at the moment, as you rightly say, the Tribunal, we would have a single body, which we would refer to as "the Tribunal," and they would deal with both the initial decision and, subject to decisions we have yet to take on whether internally there might be a review of certain cases at that level as well, but it would be done within the confines of a single judicial body.

Q855 Mr Clappison: Are there cases which are taken on human rights grounds besides the system which you describe? Does somebody have a right to appeal on human rights grounds in addition to the appeal on asylum?
Beverley Hughes: At the moment, under the one-stop process, no; they have to put all grounds in at the same time. They cannot appeal on Convention grounds, have that determined, and then come again on human rights grounds. That was the case, and that is what our previous legislation actually stopped. That has helped a great deal, but we think we can go further.

Q856 Mr Clappison: When you refer to "statutory review," is that the same as judicial review?
Beverley Hughes: No, it is not. It is something that was introduced in the last Act that went through last year as a mechanism for, I suppose, in a way, an alternative, faster process, similar to the judicial review but one in which the judiciary undertook to progress in a certain way so as not to result in the kind of delays that we have with judicial review through the normal High Court process.

Q857 Mr Singh: Minister, you said that 3% of appellants to the second stage succeeded in their appeals. That is a significant number of people. Even if it were only 1%, it would be important. I am worried that the simplification will take away the rights of the obviously genuine 3% of appellants from the figure you have mentioned. How would their rights be protected in the reforms that you are going to undertake?
Beverley Hughes: That is an important question. In a sense, you have struck the core of the really difficult issue and the difficult balance that we have to try and strike here. It is not the case that we do not want to protect the certainty that people who are fleeing persecution, who have a good claim, come through that system with that claim recognised. On the other hand, as all of us know, there are many claims that are not well-founded, where people are using the asylum system as a means of regularising their stay here for a while for economic reasons. As I said before, I am not pejorative about people, but it is a misuse of the system, and that is the difficult balance we have to strike.

Q858 Mr Singh: What you are saying is you are looking at the abuse of the many and it will undermine the rights of the few.
Beverley Hughes: No, I am not saying that. I am saying we have to try and develop a system which in the detail of its operation protects the few for whom this system was actually established, but make sure that people who want to use the system and delay their progress through the system so that they actually remain here longer and get more difficult to remove cannot do so.

Q859 Mr Taylor: I accept that this is a slightly mathematical, even a pedantic question, and if you would like to take notice and tell me later, I do not mind. If I understand you correctly, of the original body of people who bring their cases for adjudication—shall we call that the 100%—I think you said 40% of those appeal.
Beverley Hughes: 40% apply to the Tribunal for a hearing.

Q860 Mr Taylor: Then at the end of that process, 3% have their initial disappointment overturned. Is that correct?
Beverley Hughes: Yes. I said that 3% of the initial adjudicator decisions at the initial stage of the appeal are changed at some point during that process.

Q861 Mr Taylor: Minister, this is not in any way a trap.
Beverley Hughes: No. I am trying to be clear, because it is complicated.

Q862 Mr Taylor: It is complicated. What I am really getting at is: the 3% who get some kind of reversal of their original decision, is that 3% of the original 100% or is it 3% of the 40%?
Beverley Hughes: It is 3% of the original 100.

Q863 Mr Prosser: I want to ask you some questions about removal to safe third countries. JUSTICE has been critical about the criteria you set to define a safe country. What process will you put in place to determine whether a safe third country is actually safe?
Beverley Hughes: We have commissioned some independent research, which is being undertaken jointly by the Home Office and the Foreign Office to look at both the conditions and the processes in certain countries. Secondly, it is actually lawyers who will judge whether the processes in the countries we are interested in designating are sufficient to be described as safe. Most of those countries will be on the face of the Bill, but we will obviously also include a power to add or subtract countries should conditions or circumstances change.

Q864 Mr Prosser: How will you make a judgment of those countries responsive to changes in political control, changes in human rights issues as time goes by?
Beverley Hughes: We need to be clear about the kind of countries we are talking about here. We are not really talking about countries where there is a fine line, or where processes of that kind—criminal justice and so on—are being developed. We are talking, in addition to EU countries, about non-EU countries that I do not think most of us would have any difficulty in describing as safe countries. Indeed, there is provision in previous legislation to designate, and we have designated one or two countries, such as the USA and Norway. The difficulty with the current legislation is that it does not cover issues on human rights; it only covers Convention issues. Secondly, it is not really robust enough to prevent legal challenge, so by designating the countries as safe on the face of the Bill, it really enables us, if we want to remove a person to that country, to cut down the possibility of legal challenge. But it is not going terribly much further than where we are at the moment. It is just an extra safeguard.

Q865 Mr Prosser: You would also want to be confident that the third country understands its liabilities and responsibilities with regard to receiving asylum seekers.
Beverley Hughes: Yes. We still have to do that in individual cases. That process will still have to be gone through in an individual case where we wanted to remove a person to that country.

Q866 Mr Prosser: In cases where you are considering an individual, and that individual had relations and some footing in this country, and no relations or friends at all in the receiving safe third country, would that be an argument for allowing him or her to stay?
Beverley Hughes: Not necessarily, I do not think, although I should make clear if what you mean by that is could somebody challenge that on, say, Article 8 grounds as opposed to Article 3 grounds, then yes, that would be possible. Designating the safe country does not make any difference to the potential of the person to argue that as a basis of a legal challenge, the Article 8 family life provision, but it would tend to help us if they were trying to argue on Article 3 grounds, in other words, that they might be at risk of their lives if they were returned home. It would not block off the other human rights potentially.

Q867 Chairman: In the light of what you have said, can you give us an assurance that this is not, as some organisations have claimed, a back-door way of giving legal authority to the concept of regional processing zones, and that there is not an intention to start listing zones of that sort on the face of the Bill as acceptable third countries?
Beverley Hughes: No.
Mr Jeffrey: What this springs from is the point the Minister made at the beginning. If someone has come from an evidently safe country, there is no reason for them to claim asylum here rather than in that country. There is a provision in the 1999 Act that on its face allows us to return people to such safe

countries, within and outside the EU. In practice, it has not been possible to use it much, partly because it is still open to certain kinds of legal challenge, which we believe we would overcome by having a certification process of the kind that we have been discussing.

Q868 Chairman: We have heard speculation for example about regional processing zones in east Africa or the Balkans.
Beverley Hughes: No. It has no relevance to that at all.

Q869 Mr Prosser: I want to turn now to changes in support for asylum seekers and families. Your proposals would have the effect of removing support from individuals and families who are able to be removed to a third country or go back home, but refuse to go. The criticism is that they would be left starving and destitute, and we would have a re-run of the people who fall foul of the Section 55 conditions. What is your view of that criticism?
Beverley Hughes: The proposals are not at all intended to make families destitute. They are intended both as a deterrent but also as an incentive. At the moment there are a number of ways in which a family that comes to the end of the road and whose claim has failed and whose appeal rights are exhausted, can be removed from the country, although you will appreciate—and I get many representations from Members about this—that it is difficult when you have children involved. But at the moment, people can return voluntarily, and they will get assistance to do that, from us and also often from the voluntary organisation that we work with to help us do that. They can be in very small numbers, if they have had a poor immigration history, have been detained and removed from detention, but most families live in the community, and if they do not return voluntarily, they are removed forcibly. I think all Members know what that involves in practice, in order to effect an enforced removal. I have been out with the arrest teams. I did not actually see any families, but it is not an easy process for anybody, even individual adults, because of course, arrest teams arrive early in the morning—that is necessary—and that is an experience I would prefer families not to have, if I could. I want to try and persuade as many families as possible, when they come to the end of the road, to go back in a dignified way, with support, on a voluntary basis. It may seem contradictory to some people to say we are going to restrict family support when we get to that point, but that is our intention. It actually says to people, "Look, there are some alternatives here. We hope that you will take the best alternative for yourself and your children, that is, to go voluntarily, but if you do not, you will be removed forcibly and you will not continue to get support until we have done that."

Q870 Mr Prosser: Nevertheless, there will be those, I am sure, who will decline that offer. Will they then have recourse to support from their local authorities?
Beverley Hughes: As I say, I hope it will not come to that, and I do not intend that it should come to that, but if, in the extreme situation that you are putting to me, a family was not willing to go voluntarily and we, for whatever reason, could not remove them forcibly—and I think that is what we try to do; we try to remove them immediately forcibly—and disappeared and appeared somewhere else, I do not know. Then obviously there is provision—because those children are covered by the same legislation as any child in this country—for the children to be cared for by the local authority, but not the adults. I do not think that is in the best interests of those children, and I hope it would not come to that in any individual circumstance at all.

Q871 Mr Prosser: I am sure you would agree that some of the worst instances and reactions we have had in communities in various parts of the country over the issue of asylum have been caused largely by perception, and false perception perhaps, rather than reality. On that basis, is it not the case that, putting together the issue we have just been discussing and the possibility of children going under the care of the local authority, adding to that the new criteria under which they will be supported, Section 20 instead of Section 17, which means their local authority would have responsibility to support that child or adult until he or she is 25, that would be a significant increase in the burden on a local authority. I am sure I do not need to recall to you, Minister, the effect in gateway areas like Kent, when it was the case in 1998 and 1999 that not only were there large numbers of asylum seekers being thrust together in one small, inappropriate area, but that the local individuals were paying extra Council Tax in order to support them. Adding those two issues together, it caused an almost inflammable situation. Is that not a problem that you should be looking at?
Beverley Hughes: With respect—and I know, Mr Prosser, you are very knowledgeable about these issues—I do not think it is correct to collapse those two issues. What we are talking about with the Hillingdon judgment is unaccompanied asylum-seeking children. Clearly, we would not be talking, by definition, about unaccompanied asylum-seeking children.

Q872 Mr Prosser: There are two elements. There is the element of a local authority under the new legislation picking up the support for children or parents who refuse to be removed, and you can add that then to the Section 20 children, the unaccompanied children.
Beverley Hughes: On the question of the Hillingdon judgment and the implications of that, I am actually talking at the moment with Ministers in the Department for Education and so on as to how we deal with that, because although the numbers of unaccompanied asylum-seeking children in line with the overall fall in intake has also reduced by half—so the numbers actually coming in have fallen by half as well in proportion, so the impact on local authorities of numbers is less—clearly, I am very aware that that judgment, for young people already

in the system, being cared for under Section 20 as opposed to Section 17, is significant, and I am aware of local authorities' concerns about that, and I share them, and we are trying to work out how we deal with that situation. But the children of families who are with their parents and due to be removed, if it came to it that in a particular case the children were taken into care, then we would act very quickly in those circumstances to remove the whole family completely, because clearly they would be with their parents. We would not be leaving those children with local authorities for long periods of time.

Q873 Chairman: How do you prevent a situation where you would try to apply the new provision and the parents simply disappear, go illegal, leaving the children in the care of and at the expense of the local authority care under Section 20?
Beverley Hughes: That would be a difficult situation, because we would not, unless we could satisfy ourselves, want to return the children, but we could return them to other members of their family, and that might be a possibility.

Q874 Chairman: Is it not the most likely response of people who have their support withdrawn, for the parents to disappear in that way?
Beverley Hughes: I do not know. That is a very important generalisation about how people might regard their children as pawns in that game and be prepared to abandon them to a local authority. I am not sure that that would be something that many people would do on a big scale.

Q875 David Winnick: Would it be fair to describe the policy as "starve them out"?
Beverley Hughes: No. It is about trying to say to people, "You have some choices here. You have come into the system. Unfortunately, that claim has failed. You now have to return to the country you came from. But you have choices. You can go voluntarily, we can enforce that removal, which will not be a pleasant experience, and one which I hope you would want to avoid for the sake of your children if not of yourselves. But if you do not go voluntarily, you will not continue to be supported at the expense of the people here, because that is not right." We say similar things to families and individuals on benefits here now, do we not? None of the benefits we give to people in this country are completely unconditional, certainly not for able-bodied people, and so I do not think it is unreasonable that we say the same thing to other families when they have come to that point in the process.

Q876 David Winnick: We would deny them every form of support even if they have children?
Beverley Hughes: It is not denying people every form of support.

Q877 David Winnick: What support would they have?
Beverley Hughes: They have the option, at our expense, of returning home to the life that they left, and often to the family, the extended family.

Q878 David Winnick: But as long as they are in the UK, until you remove them, you are saying in the categories which we are discussing that all forms of financial support, even though they have children, will be denied, and their children can be taken into care.
Beverley Hughes: Yes, that is what we are proposing.

Q879 Mr Clappison: Can I turn to the proposals for new powers for the Immigration Services Commissioner? Could you say firstly exactly why the Immigration Services Commissioner now needs more powers, and secondly, are you confident that these new powers will not have the unintended effect of affecting those who provide good advice to people in need of advice?
Beverley Hughes: On the second point, I think people in that category will welcome the extension of provisions. I should perhaps make clear that it was actually as a result of the Commissioner's own analysis and comments he made in his Annual Report and in subsequent discussions with myself and the Home Secretary that he put forward proposals as to how he felt the regulatory scheme that he is responsible for could be improved, and all of the five measures that we are proposing here have come from the Commissioner, and we think they are sensible.

Q880 Mr Clappison: I put that second question to you because the Mayor of London has called for more consultation on the details to ensure that legitimate refugee groups are not discouraged from offering advice. But you feel confident that groups who give good advice will not be affected?
Beverley Hughes: I think that is true.

Q881 Mr Singh: I want to raise the issue of the new criminal offence that you are proposing if people advertise or offer immigration advice when they are not qualified to do so. What is the definition of being qualified to provide advice in the immigration field?
Beverley Hughes: I will have to pass on that.
Mr Jeffrey: I think it is essentially something that the Commissioner himself makes the judgment on, but it might be sensible if we ask the Minister to write to you about it afterwards.[3]

Q882 Mr Singh: I think there should be some criteria.
Beverley Hughes: There are criteria, but I cannot give you them at this point.
Chairman: I hope it does not apply to Members of Parliament giving immigration advice in their surgeries! Minister, since you last came to see us, there have been two or three other government announcements that are relevant to our inquiry.

[3] *See* Ev 18.

Q883 Janet Anderson: Minister, I know that you have been taking increased measures recently to crack down on illegal working. I wonder if you could perhaps tell us a bit about that. Also, the Home Secretary is on the record as saying he would like to work to build tolerance and enthusiasm for legal migration. Will it be possible to persuade the general public of the benefits of managed immigration, when there is still widespread concern about the scale of illegal immigration? It is about getting the balance right.

Beverley Hughes: I think that is absolutely right, and that is what the Home Secretary was saying in his speech and in the follow-on to the speech last week. We have taken the view—and it is why we have started off so strongly on tackling the problems of asylum and illegal migration, of which asylum claims are but a symptom—that we believe profoundly that the public will not feel confident both about legal migration, better integration and resettlement of genuine refugees unless we can demonstrate that we have a system that is controlling illegal immigration and clamping down on illegal working that follows from that. That has been a core strand of what we have been trying to do. We have to demonstrate that. We have to do better on that side in order to argue the case for managed migration and for tolerance and acceptance of newcomers who come here either legally or because we do think they are refugees.

Q884 Janet Anderson: Do you think identity cards would help?

Beverley Hughes: We do think identity cards not only will help but with some parts of those problems they are actually essential. I know we have been criticised for not being able to say who is in the country at any one time and so on, but you cannot do that unless you have got some means of identifying people coming in but also going out. You cannot check people going out of the country unless you have got electronic means of doing so. Just on that point alone I think identity cards are a very important step we have got to take if we want to have embarkation controls and back again and the Home Secretary has said he is looking at that. I have been working with a group from across the industry for the last 12 months to see if we can strengthen Section 8 of the previous Act and it is very difficult because there is no single document that employers can ask to see that establishes whether somebody has got the right to work. It is very difficult in that situation, as I have said to the Committee before, to bring prosecutions against employers if the statutory defence that they have got is just so loose that it makes conviction very difficult, whereas establishing the right to work very clearly would enable us to crack down much more forcibly on the employers' side of that. Having said that, although the conviction of employers is difficult at the moment for reasons I have outlined, on the enforcement side we have improved dramatically the activity that is going on there, and I wrote to the Chairman with an account of the various operations that have taken place, the number of disruptions, of gangmasters and the number of removals of people immediately following some of those higher level operations (and by higher level I mean those who only think we are going to find a significant number of illegal workers) and something like 50% this quarter compared to last quarter and substantial numbers of people were removed immediately after the operation.

Q885 Miss Widdecombe: Minister, shortly after this Government took power it announced an amnesty for 23,000 asylum seekers who have not had their cases examined. The Home Secretary has recently announced an amnesty for 15,000 asylum seekers whose cases have been refused, which together with their dependents is likely to be anything up to 50,000 asylum seekers. It was described as a one-off administrative convenience to clear the backlog. There are now reports, which I would be grateful for confirmation of denial of, that the Home Secretary is proposing to legalise people who are now working in the black economy and so long as they declare themselves they will be legalised, which is another name for an amnesty. Do you accept that the message that you are sending out is if you come to Britain and you can delay things for long enough or you can disappear for long enough it is okay, old chap, because in the end there will be a one-off administrative action to clear the backlog?

Beverley Hughes: No, I do not accept that at all. Firstly, there are absolutely no plans at all to allow illegal workers to somehow regularise their position in this country.

Q886 Miss Widdecombe: So the reports are false?

Beverley Hughes: What the Home Secretary was speculating on then was actually in the context of a discussion around ID cards. The point he was making is that thinking ten years ahead, when the whole population is registered on the national database and has an ID card, the government of the day at that point, whoever that might be, will have to answer the question what do we do about the people who are here illegally who cannot, unless we do something, come forward and register.

Q887 Miss Widdecombe: Is not the whole purpose of ID cards to discover those people?

Beverley Hughes: Exactly, but the government of the day will then have to answer the question what do we do about them because they will not be able to apply for an identity card. So it is not a policy or an intention he was posing in that discussion and I was there, he was simply saying when we get to that point in time the government of the day will have to address that issue and it may be at that point that the government of the day might take the view that one of the options is to invite people who have been here contributing and working and are not causing a problem to come forward to be regularised.

Q888 Miss Widdecombe: Contributing tax and national insurance.

Beverley Hughes: Exactly.

Q889 Miss Widdecombe: In the black economy.
Beverley Hughes: That would be one option but it is not the only option and that was the point he was making. As I have just said in reply to Mrs Anderson, it is absolutely imperative that we continue with the policy that we have had over the past few years of making it the number one priority to bear down on the issue of immigration and illegal working and we will not reduce the pressure on that at all, we think it is absolutely fundamental to doing what we also want to do, which is argue a case for managed migration where the economy needs it, and secondly, having better solutions for genuine refugees worldwide and it is an essential part of that three strand policy. On the ILR exercise, the previous exercise of this Government in 1998 was a completely different exercise and it was the clearing of a backlog of people who for reasons we have discussed before at this Committee had been in the system for a very long time. This particular exercise was very targeted, it was for a particular reason, it was to regularise the position of people who had arrived here before the implementation on 2 October 2000 of the new legislation that we have talked about today, the one-stop appeal. Whilst these people—I do not know if it is all, certainly many of them—will have had their claim refused, they have not exhausted all the rights of appeals that they had under the previous Conservative Government's arrangements, they can still appeal again and again on human rights grounds and it was as much a cost-benefit analysis of what we do about those families, do we continue supporting them at a cost on average of £15,000 a year, add to that the cost of their continued process through the courts and successive appeals that your Government allowed people to have, or do we say from 2 October onwards those families arriving after that have not got those rights, they are in a different position, we want to introduce more legislation to simplify further the rights of appeal of families. It makes sense and it is in the interests of the British taxpayer to regularise the position of families who have been here before that date and that is the main reason we took that step. The other reason is one that I am often reminded of by Members of Parliament, including most members of this Committee at one point or another, which is the situation of families with children who have been here for some time making a contribution, settled in schools, many of whom came as a result of disruptions in Kosova and elsewhere and the question also arises is it right, in the light of the cost-benefit analysis, to try and send those families back and give those children a further disruptive experience. We took the view that in this particular targeted and focused way, concentrating on a group of people for whom those criteria exist, it was in everybody's interests to draw a line before we go on to bring in new simplifications to the appeals process. Miss Widdecombe forgot to mention the clearing out exercise that took place before 1998 under her administration, which was not announced and which only came to light when the huge rise in the number of people given exceptional leave to remain on an administrative basis had to be produced in the statistics and it was only at that point, some time after all those administrative decisions were taken, we found that what the Tory ministers had been doing was quietly granting thousands and thousands of families the right to stay but not telling anybody about it.

Q890 Miss Widdecombe: And, of course, since we are in this sort of territory and it is unusual in a Select Committee, doubtless the Minister will recall that one of my first statements as Shadow Home Secretary was to say that I thought that was a mistake and that there would be no further amnesties and that has always been my policy. I am now asking you to account for your amnesties and I am going to ask you this very simple question: do you agree with that statement I made when I said that every time you grant an amnesty to people who have not got permission to stay here in the normal way you create an incentive for people to play the system in the hope of a future amnesty? Could you just tell me whether you agree with that statement or not?
Beverley Hughes: I do not agree with that statement in its entirety because I think it depends on how you do it, it depends what you say and how rigidly you enforce the conditions that you apply, but I think that quietly granting thousands of people permission to stay is something that clearly got round into those communities of people wanting to come here and had a very insidious effect on the subsequent intake of people from certain countries. I do not think that is the way to do it. I do not know, Miss Widdecombe, whether you were a minister in the Government or in the Home Office at the time those decisions were being taken, but whatever you may then have said subsequently and retrospectively as Shadow Minister—

Q891 Miss Widdecombe: The Committee is asking you to qualify your decisions, Minister.
Beverley Hughes: I have justified it.

Q892 Miss Widdecombe: I am asking you if you agree—and if not why not—that every time you create an amnesty, never mind which government does it, you create an incentive to come here in the hope of a future amnesty and that when you describe one as a one-off administrative convenience and then a few years later you come along and do another and describe it as a one-off administrative convenience nobody is going to take that terribly seriously, are they?
Beverley Hughes: I have answered that question, Chairman. I have said I think it depends exactly what you do, what conditions you attach, how you do it and how strictly you enforce them. I think the worst thing you could possibly do is insidiously be seen to grant thousands of people permission to stay without saying any of those things to Parliament or the general public.

Q893 David Winnick: By the present Leader of the Opposition.
Beverley Hughes: That is what undermines confidence in the system, when the public cannot see clearly what is being done and they feel they have been deluded by the administration and see a system that is not working.
Chairman: We have all enjoyed that exchange but I think we need to make some progress.

Q894 Mr Clappison: We do not want to go back over the arguments of the 1990s because I think we could find things that were said on all sides which have now been contradicted quite thoroughly. Can you answer this question specifically which this was part of Ann Widdecombe's original questions to you. The option which you described the Home Secretary might be looking at in the future, what message do you think that is giving to people who are now illegally working in this country or are thinking of coming to this country to work illegally? What message do you think they will receive from what you have said about this as a possibility for the future?
Beverley Hughes: Mr Clappison, I did not say—in fact I said the opposite—that this Home Secretary is saying that that is an option for the future. I outlined the circumstances in which he was asked a question and in a reflective mode, because that is the situation he was in, he looked ten years ahead and said that a future government would have to address this question, if we have ID cards, that is the situation in which he was conjecturing.

Q895 Mr Clappison: Can you say how he would interpret what you have just described?
Beverley Hughes: One thing I think I can say for certain is that wherever David Blunkett is in ten years' time, he will not be Home Secretary and we may well still have a Labour Government, but it will be for a future government and Home Secretary to decide what to do in the situation in which we have all population ID cards and what then is done by the people who by definition cannot register.

Q896 Mr Clappison: Can I take at face value your own words on that? How do you think people who are illegally working in this country or are thinking of coming here to work illegally will interpret what the Home Secretary said?
Beverley Hughes: He has not made any position on that particular question. He knows he will not be the one having to answer that question ten years down the road, but somebody will. He is not posing that as his belief, he is simply saying that will be a problem, it will be a situation that the government of the day will have to consider and it will come forward with its own policies on that. He was asked a specific question about possible regularisation by the questioner. He did not raise that himself, he was asked it.

Q897 Mr Singh: I have asylum seekers in my constituency who are nationals of accession states to the EU, I do not know how many there are in the country, but what happens to their asylum applications for their position *vis-à-vis* this country and their immigration status when those countries accede next May to the European Union?
Beverley Hughes: If their claims are still in process at that point then their claims will fall. We will have to work through those people and write and advise them of their changed status.[4]

Q898 Janet Anderson: You have mentioned a cost-benefit analysis. What is the impact of the amnesty going to be on public spending?
Mr Sutton: We have calculated that for every thousand of the population affected by the exercise that would move from benefits as a result of this change there will be a saving of £15 million to the taxpayer as a whole.

Q899 Janet Anderson: So a considerable saving to the public purse.
Mr Sutton: That is a considerable saving. The exact translation of that will depend on the process that we now have under way to look at how best these individuals can be aided from the benefits system into employment.

Q900 Chairman: Minister, last time you were here you expressed some frustration about the low penalties for those who knowingly employ illegal workers. Somebody who knowingly employs an illegal worker is committing a crime. Somebody who makes their living out of employing illegal workers is living a criminal lifestyle. Should it not then be possible to use the Proceeds of Crime Act to get at the assets of those people who are exploiting illegal labour, often paying them well below the legal wage and exploiting their very vulnerability here? Have you given consideration to using the Proceeds of Crime Act against the employers of illegal labour?
Beverley Hughes: I think we are certainly doing that at the moment. I think there are a number of issues which raise questions as to how feasible that is, not least in terms of—it depends who you are thinking about—your average gangmaster who is operating illegally.

Q901 Chairman: Who lives in a nice house and is perhaps an upstanding member of the community.
Beverley Hughes: It is that kind of person. Some are not that kind of person and there is a question about how much seizable assets some would have. Certainly, if people are in that situation that you describe then it is something that we ought to be looking at to be able to apply that Act.
Chairman: Thank you.

Q902 Mrs Curtis-Thomas: Minister, I want to ask you two lots of questions, one on working relationships with organisations dealing with people seeking asylum and a question about Liverpool Prison. We have received so many critical reports from agencies like the Refugee Council and many others that are familiar to you, all of whom share

[4] *See* Ev 18.

similar concerns and identify similar failures of your Department. The submissions we receive are well argued and are often supported by Home Office research which appears to be rejected when further legislation is being considered by your Department. These organisations typically only get one opportunity to respond to consultation documents but raise questions and arguments in their responses which are never answered. Having read these documents and submissions that we have received here I am minded to think that they have already considered the questions that we have presented to you and in many cases have formulated answers based on extensive experience. What opportunity do you give these particular agencies and these particular organisations to come and meet you on a regular basis, and where do you argue with them on the suggestions and the proposals that they put forward to tackle some of the endemic problems that you are experiencing in your Department?
Beverley Hughes: I have regular meetings with a number of those organisations myself.

Q903 Mrs Curtis-Thomas: Such as?
Beverley Hughes: Particularly the Refugee Council. I also chair the Refugee Integration Forum which brings together a large number of those organisations and I personally chair that meeting, and officials meet regularly with representatives of those organisations both in subgroups and in a forum but also routinely at very senior level with officials from particularly the Refugee Council but also a group of other voluntary organisations and the British Red Cross I have also met. I think we do need to make more systematic—and I have talked to Ken about this—the ways in which people meet at senior official level and I think we can bring people together with senior officials on a more regular basis than we have done in the past, but since Ken has been appointed he has put in train arrangements for that to happen, but since I was appointed I have always had regular meetings, both with and without officials present, with the chair and chief executive of whoever was in those positions in the Refugee Council and in that situation the Refugee Council acted as a conduit for a wide range of voluntary organisations and put issues to me on that basis.
Mr Sutton: We now have in the area of asylum support a committee who has looked at a number of very difficult issues in that area. We now have a formal stakeholder forum which brings together a wide range of the interested parties. That has recently had two very successful meetings and we are about to meet for the third time. So we are growing the range of formal exchanges and making sure that our contacts with these groups around the operational issues that are involved are guaranteed and systematic.

Q904 Mrs Curtis-Thomas: It would strike me as though we have got significant intelligence wrapped up in these organisations which we are not exploiting. They seem to come to common conclusions and in many cases have common conclusions which appear to me to be rational. I just want to ensure that we are trying to draw that together and I have your assurance that that is the case.
Beverley Hughes: Yes.

Q905 Mrs Curtis-Thomas: Will you be looking at the responses that this Committee has received from these organisations and addressing the points that they raise?
Beverley Hughes: Yes.

Q906 Mrs Curtis-Thomas: Good, because otherwise I shall be forced to raise them on their behalf myself.
Beverley Hughes: That is fine.

Q907 Mrs Curtis-Thomas: The next question I want to ask you is concerning the detention of asylum seekers. I have been in extensive correspondence with the Department about people who have been detained in Liverpool Prison. These asylum seekers are normally detained well after their sentences come to an end and in many cases that can stretch to hundreds of days and I want to know what the purpose is in detaining people who cannot be repatriated to their own country.
Beverley Hughes: Can we just be clear what categories of person this is. These are people who will have committed a criminal offence and are serving a sentence?

Q908 Mrs Curtis-Thomas: The typical crime they have committed is normally to resubmit an application in somebody else's name after they have failed to gain asylum. They are then sentenced to prison, they go to prison and after their prison sentence has been concluded they are then retained and they can be retained for weeks. I have the list in front of me if the Minister wishes to see it.
Beverley Hughes: This is with a view to deportation?
Mrs Curtis-Thomas: They come from countries where they cannot be deported to. What are we doing about detainees?

Q909 Chairman: Perhaps you could answer the general question and the more detailed case could be followed up outside the Committee.
Beverley Hughes: I did make clear to the Committee earlier the current situation with case law and the way that is interpreted by our courts which does not allow us, even if we wanted to, to detain people indefinitely unless we have the reasonable prospect of removing people. We actually do have to release people if we cannot re-document them within a reasonable period of time or the situation in a particular country is such that we have no chance of returning them. Without further clarity about the particular group of people you are talking about it is difficult for me to comment further than that.

Q910 Mrs Curtis-Thomas: You need to know that dozens of people are being detained in Liverpool Prison after their period of prison comes to an end

and they cannot be removed from this country because we do not approve of sending them back to countries from whence they came.

Beverley Hughes: If you could send me the details, a couple of particular cases would be helpful.

Q911 Mrs Curtis-Thomas: Finally, I have one small question which is in relation to these detainees accessing Legal Aid and legal representation being very difficult. Moreover, they are supposed to receive monthly reviews and these monthly reviews of their status do not generally take place. Are you aware of that?

Beverley Hughes: Again I am not clear what you are referring to there, Mrs Curtis-Thomas.

Chairman: What I will invite you to do is give the information to the Clerk who can write on behalf of the whole Committee about these cases and then we can share the advice. It is slightly difficult for the Minister to know exactly the circumstances, but if we can pursue it that away then their replies will be on the record.

Mrs Curtis-Thomas: Chairman, this is common practice and known to the Department.

Chairman: I think the best way for the Committee to pursue it is to give chapter and verse to the Minister and for her to reply to us as a whole and then it will it be on the record as part of our deliberations. Minister, thank you very much indeed for being with us this afternoon. We shall try not to invite you again before Christmas! Thank you.

Written evidence

Submitted to the Home Affairs Committee

1. Memorandum submitted by Citizens Advice

INTRODUCTION

1.1 This paper represents the second supplementary submission by Citizens Advice to the Home Affairs Committee's inquiry into Asylum Applications. It updates, in the light of recent developments, our previous written evidence to the inquiry, as set out in our original submission of 21 March 2003 and our first supplementary submission of 22 May 2003.

1.2 In this second supplementary submission, we address the following issues: the provision of welfare support by the National Asylum Support Service (NASS); the denial of such support under section 55 of the NIA Act 2002; delay in the processing of asylum appeals; the recent "amnesty" for some families; and the Government's proposed new legislative measures on asylum.

THE PROVISION OF WELFARE SUPPORT BY NASS

2.1 In July, we warmly welcomed the conclusion of the independent review of NASS (established by Ministers in March) that NASS "needs urgently to improve its operational performance and standards of customer care", and "get better at working with its partners and stakeholders, and much slicker at sorting out basic processing errors". The acceptance of these key findings, and the associated development of an action plan for a "major programme of work" to improve the performance of NASS, represents a sea change in Ministers' stated perception of the organisation and we await the promised action plan with great interest.

2.2 However, the regionalisation of some NASS functions from 1 April 2003 does not appear to have had any beneficial impact on the asylum support-related work of CAB advisers, who continue to rate NASS as the worst government bureaucracy they have ever had to deal with. Nearly all operational decision-making and post-dispersal casework remains centralised in Croydon, and processing errors in these functional areas continue to form the bulk of the NASS-related work of CABx. The following comments by CAB advisers are typical of the reports received by Citizens Advice from CABx in recent weeks:

> An adviser at a CAB in the North West of England reports trying to assist a non-English speaking Turkish man, his wife and their two babies: "Over the past few months, the client has experienced repeated interruptions of his regular voucher supply. Although I and other advisers have contacted NASS repeatedly, we have not received any explanation for these administrative errors. Following the most recent of these interruptions, the family has now been without money for food for several weeks—they are in a desperate state and are becoming very despondent. I have tried to speak to a figure of authority at NASS, without success, and NASS does not seem to have a complaints procedure. This client is very low and does not know where to turn. Someone somewhere should be accountable."
>
> An adviser at a CAB in the North East of England reports trying to assist a single (Iraqi) Kurdish man: "The client has been awaiting a decision on his asylum claim for several years; he is a fully qualified nurse but is not allowed to work. Every few months, his supply of NASS vouchers ceases for no apparent reason. On each occasion, we have to contact NASS to get his vouchers restored. This leaves a gap in payments, usually of six to eight weeks, when he has no money. We then repeatedly try to get these missing payments backdated, but to no avail. We cannot get through to any department dealing with back payments, and calls to the voucher helpline—which is simply a call centre—do not get returned or acted upon. There seem to be no rules or Regulations in respect of missing payments, and no procedure for claiming back payments."

2.3 In particular, in recent months CABx have reported dealing with a large number of incorrect terminations of support by NASS, most commonly where the individual is in fact still awaiting a hearing of his or her appeal (against an initial refusal of asylum) to the Immigration Appellate Authority. In one such case, Stoke-on-Trent CAB reports having to send documentary evidence of the client's outstanding appeal to NASS on five separate occasions, as on the first four occasions the evidence somehow failed to reach the file; eventually NASS conceded that it had "lost" the client's file two months previously, and that the re-instatement request was "in a queue with hundreds of other cases". In recent weeks, a number of CABx have reported being told by NASS officials that NASS is currently taking *eight months* to process such re-instatement requests, even where the termination was patently incorrect. And, as indicated above, CABx are currently finding it difficult if not impossible to get NASS to issue back payments in respect of the support not paid between the incorrect termination and the eventual re-instatement of regular support payments. It is not clear how NASS expects such individuals to exist during such lengthy interruptions of their voucher supply, but it is evident that, in many such cases, it is only the kindness and generosity of other asylum seekers that has saved the individual from extreme hardship. In our view, it is unacceptable to expect people to beg or borrow from others living on a low income.

2.4 In this context, we note that the Annual Report 2002–03 of the Asylum Support Adjudicators (ASA), published in September, reports that the reliance by NASS on errors in the IND database has "resulted in substantial numbers of appeals [to the ASA] being successful where NASS have wrongly discontinued support on the basis that an asylum seeker has exhausted their appeal rights". More generally, the Annual Report expresses the ASA's concern "about the quality of the NASS decision-making process and poor preparation by NASS of their evidence . . . [and] a tendency on the part of some NASS caseworkers to have little or no regard for NASS published policies when making their decisions".[1]

2.5 With regard to the Government's proposed replacement of the NASS-administered system with a new, "seamless" system of induction and accommodation centres—a move that, subject to serious reservations about the proposed *rural* location of the accommodation centres, we have welcomed—we note that only one (small) induction centre has opened in 2003, and that since March there has been little real progress towards the establishment of the proposed pilot accommodation centres in Oxfordshire and Nottinghamshire.

Denial of NASS Support under Section 55 of the NIA Act 2002

3.1 In recent months, CABx have reported being approached by a growing number of asylum seekers refused NASS support under section 55 of the Nationality, Immigration & Asylum Act 2002. In the absence of any right of appeal against such a refusal of support to the Asylum Support Adjudicators, and faced with the seemingly automatic rejection by NASS of any re-application or request for reconsideration of the original decision in the light of subsequent developments, CABx can do little more than try and find a solicitor willing and able to consider making an application for judicial review in the High Court. In common with other organisations, CABx are aware that the vast majority of the hundreds of such legal challenges to date have been successful (and with costs being awarded against the Treasury Solicitor).

3.2 To our mind, this is an extremely inefficient and costly way in which to determine an individual's entitlement to NASS support. We continue to believe that the provisions of section 55 should be applied sparingly, and that all section 55 decisions should be subject to a right of appeal to the Asylum Support Adjudicators (who, apart from anything else, are well placed to give feed-back to NASS on the quality of such decision-making). During the 2002 Act's passage through Parliament, Ministers indicated both that section 55 would be applied only to those making an asylum claim, after long periods in the UK, simply to delay deportation, and that all section 55 decisions would be subject to a right of appeal to the Asylum Support Adjudicators.

Delay in the Processing of Asylum Appeals

4.1 Further to our supplementary submission of 22 May, delay on the part of the IND Appeals Processing Centre (previously known as the appeals support section of IND) in issuing the "appeal bundle" to both the IAA and the appellant continues to be the appeal-related issue of most concern to those CABx that offer advice and representation in relation to asylum appeals. Since that date, we have again raised this issue with officials in both the Home Office IND and the IAA, to no avail.

The "Amnesty" for Families who Applied before October 2000

5.1 We welcome the "amnesty" exercise, announced by the Home Office on 24 October, for those families who applied for asylum before 2 October 2000. It is particularly welcome that the exercise covers both families whose asylum claim has not yet been finally resolved, and those in respect of whom final decisions have been made but removal has not been affected.

5.2 However, given that the exercise covers the latter group, it is disappointing—and in our view unjust—that the exercise appears not to cover those families who applied for asylum before 2 October 2000 and have since been granted *temporary* leave to remain.

The Proposed New Legislative Measures on Asylum

6.1 We are somewhat surprised by the emergence of these proposed legislative measures so soon after the 2002 Act. The consultation paper issued on 27 October has very limited content, and too little time has been given for responses. Indeed, the three-week consultation exercise does not comply with the Cabinet Office code of practice on written consultation. This suggests to us that the consultation is little more than a paper exercise.

The asylum and immigration appeals system

6.2 We understand the rationale behind the proposal to merge the current two tiers of the asylum and immigration appeals system into a single-tier system, and might well be sanguine about this proposal if we were confident that every appellant would be assured of timely access to *good quality* legal advice and representation before the proposed, single-tier Asylum & Immigration Tribunal (AIT). However, given the existing shortage of good quality legal advice and representation, especially in the regions, and the current confusion and uncertainty over the future of legal aid for immigration and asylum work, we cannot be confident of this.

[1] Asylum Support Adjudicators, Annual Report 2002–03.

Undocumented passengers

6.3 We strongly oppose the proposed new criminal offence of being "undocumented without reasonable explanation". This measure is clearly intended to be a deterrent (to the destruction of one's documents during the journey to the UK), but to be effective as such it would necessitate significant numbers of prosecutions and (costly) terms of imprisonment. Apart from anything else, this might well prove to be in breach of Article 31 of the 1951 UN Convention on Refugees (which prohibits the punishment of refugees for illegal entry). We note that the Home Office is still paying out large sums in compensation to some of the hundreds of individuals prosecuted and imprisoned in the 1990s, in breach of Article 31, for using *forged* travel documents to transit the UK.[2]

6.4 In our view, the second proposed new criminal offence of "failing to co-operate with re-documentation" is unlikely to prove to be an effective remedy to the problem of failed asylum seekers refusing to co-operate with the re-documentation process. Under existing policy and practice, such individuals already face indefinite detention under Immigration Act powers, and it is difficult to see how the prospect of a (relatively short) prison sentence will be any more effective as an inducement to co-operation. And, of course, upon completion of any such prison sentence, the individual will still be in the UK. Will a person who continues not to co-operate with the re-documentation process be prosecuted a second, third or fourth time?

Safe third country cases

6.5 In our view, all such matters should be determined on a case by case basis, in the light of all the circumstances of the individual case, rather than on the basis of pre-determined lists of supposedly "safe" third countries.

Restricting family support

6.6 We strongly oppose the proposed early termination of support for families, as soon as their asylum claim is finally rejected rather than, as now, if and when they fail to comply with a removal direction. This would simply result in families being left homeless and in destitution pending removal. Apart from our concern about the individual hardship and wider health and social problems that this would inevitably cause, we note that the families concerned would have no incentive at all to co-operate with the authorities with regard to their eventual removal. How will the Home Office communicate removal directions to homeless families for whom it has no address?

6.7 This proposal raises wider questions about the lack of any coherent Government policy in respect of the rapidly growing population of finally refused asylum seekers left homeless and in destitution without any real prospect of removal. Inevitably, some such individuals are exploited through illegal employment or forced into criminal activity. And, as the Home Office no longer holds an identifiable address for the vast majority of these individuals, any likelihood of their timely removal is simply much reduced. As the Committee has noted previously, this makes little sense.

The Office of the Immigration Services Commissioner

6.8 We welcome and support these proposals, which should improve the effectiveness of the OISC regulatory scheme.

November 2003

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2. Memorandum submitted by the Home Office

When I gave evidence to the Committee on 19 November I agreed to write to provide further information on a number of areas.

The Committee asked about the number of asylum seekers who have been successfully prosecuted in recent years for travelling on false documentation. As I said at the evidence session, the statistics are not collected centrally for the number of people successfully prosecuted for travelling on false documents, nor how many of those are asylum seekers. The reason for this is that prosecutions could be brought under different offences (under the Forgery and Counterfeiting Act 1981 and the Immigration Act 1971), which also include other types of behaviour, so it is not possible to distinguish between the reasons for the conviction. Further, information is not collected for defendants based on whether they have made a claim for asylum or not.

Although for these reasons, I cannot provide definitive information on the number of convictions, I am confident that the figure of 5,000 supplied by JUSTICE is a very significant over-estimate of the true figure. At Gatwick, internal records were kept of charges brought in the 1990s for travelling on false documentation—there were 306 recorded. We do not have equivalent records for other parts of IND but based on the Gatwick records a very rough estimate would be a total of 1,000 charges for the relevant

[2] "Asylum error to cost UK millions", *The Guardian*, 2 October 2003.

offence. The actual number of *convictions* would be lower than this figure of 1,000 and the number of convictions of asylum seekers would be lower still. Also, as a further indication of scale, since the *Adimi* judgment, fewer then 20 people have successfully claimed compensation for wrongful conviction.

At the evidence session Bill Jeffrey said that we are keen on looking at more covert ways of ensuring that we can link people back to the flights they arrived on and that we are having more success in linking people who present themselves without documents with the flight we believe they originally came in on. Indeed, in addition to the meeting of aircraft by immigration officers specially trained in overt surveillance and document examination, we have been using a dedicated CCTV system at Heathrow Airport since August 2003 to support the work of these officers. This has proved successful in increasing the linkage rate of inadmissible passengers to their flight of arrival (averaging 84% at Heathrow in November 2003). In recent weeks a number of immigration officers at Heathrow have received training in the use of covert ("Directed") surveillance for use in the Restricted Zones of airports and the immediate environment. This new resource will be targeted at those who facilitate the arrival of those with no documents or false documents. The officers will work closely with the Heathrow Immigration Prosecution Unit and other border agencies. These activities will be fully compliant with the Regulation of Investigatory Powers Act (RIPA).

The Committee also asked about the definition of being qualified to provide advice in the immigration field and related criteria. Section 84 of the Immigration and Asylum Act 1999 prohibits the provision of immigration advice or immigration services, in the course of a business, unless a person is qualified. A person is qualified if they are authorised to practise by a designated professional body (eg The Law Society) or are registered with the Immigration Services Commissioner. Those authorised by, or registered with, EEA equivalents are also qualified, as are those employed or supervised by a qualified person. The Commissioner may certify a person as exempt from the general prohibition and such an exemption will apply to anyone employed or supervised by that person. Anyone acting in breach of Section 84 is committing a criminal offence under Section 91 of the 1999 Act.

An immigration adviser acting for profit who is not authorised to practise by a designated professional body must apply to register with the Commissioner. Those acting not for profit (eg CABx, charities or voluntary groups) must apply for exemption. When considering applications for registration or exemption, the Commissioner will look at organisational standards, levels of knowledge, competence and the character of those involved.

I would like to take this opportunity to clarify my comments at the evidence session about the status of asylum claims from nationals from the new Member States after accession. Such claims will not automatically lapse on accession, but we expect most asylum seekers to withdraw their claims once we make them aware that they can remain in the UK by virtue of their EU citizenship. This is what we did in previous accessions and the vast majority of asylum seekers withdrew their claims.

I should like to clarify some information concerning removals in my letter of10 November. On page two I advised that provisional statistics indicated thatwe were now removing around 1,500 failed asylum seekers each month. This isnot the complete picture and I should have added that the provisional statistics show that we are also removing around 1,300 non-asylum seekers each month who have no right to remain in the UK. In addition the provisional statistics show that we are consistently making over 3,000 port removals each month. This adds up to a total of approximately 5,800 removals each month.

Beverley Hughes MP
Minister of State

3 December 2003

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3. Memorandum submitted by the Immigration Advisory Service

1. The 15,000 Family Backlog Clearance Exercise

IAS welcomes the Home Secretary's announcement that 15,000 families will be granted Indefinite Leave to Remain as part of an asylum decision backlog clearance exercise. As the Home Secretary has noted, the savings to the public purse will be considerable. More importantly, many of these families have become settled in the United Kingdom—it has become their new home. For many of these families, this was because of administrative and management failures on the part of the Home Office. To have removed these families after they had established new lives for themselves through Home Office maladministration would have been cruel and inhumane.

We note that the Legal Aid bill will be substantially reduced by this measure and that this has not been factored into the equation by the Department of Constitutional Affairs and Legal Services Commission, who are currently consulting over serious restrictions on Legal Aid for asylum seekers and immigrants. This is yet another example of lack of co-ordination and failure of inter-departmental communication.

2. New Legislative Proposals

IAS is extremely concerned at the nature of the so-called "consultation" exercise. The consultation document is so lacking in detail that it is impossible to respond to many of the proposals in an intelligent way. IAS expects that, as with previous major immigration and asylum legislation, the Home Office will present a half-baked, incomplete Bill to the House of Commons before making major amendments and introducing significant new measures late in the Bill's passage.

IAS has written to the Home Office legislation unit to request clarification but has received no response. A full copy of the letter is attached as an appendix to this paper. Our questions were as follows:

Asylum and Immigration Appeals System

1. Please provide details of hierarchy within the proposed new AIT. For example, is it proposed that there will be any opportunity for a review or appeal from manifestly absurd decisions (of which, unfortunately, there are many—we will provide examples in our full response) or decisions that can be shown to be incorrect because of an administrative or procedural error by the AIT? Will there be any opportunity to challenge decisions if the conduct of the AIT judge is questioned?
2. What will be the ratio of Senior Immigration Judges to Immigration Judges, what will be the criteria for selecting Senior Immigration Judges and what will be the difference in their roles? In particular, what will be the role of Senior Immigration Judges? There is nothing at all in the consultation paper on which we can base a response.
3. What does "judicial oversight" mean, in the context of the "designated senior judge"? Is this likely to be active oversight of substantive decisions or purely administrative, as currently the case with the Chief Adjudicator and President of the IAT? Will it involve sampling of judgments or determinations?
4. What restrictions are proposed on appeals to the higher courts? Does this mean a total ban, making it more difficult to appeal to the higher courts in some way, the expansion of Statutory Review or some other option? It is impossible to respond intelligently to such a vague statement of intent.

Undocumented passengers

5. Where will the burden of proof lie for establishing that a person has destroyed their documents?
6. How will new measures to ensure decision-makers take account of travel through an alleged safe third country and the other suggestions differ from the current measures already in place in the Immigration Rules?
7. What is meant by "reasonable explanation" for failing to produce documents? Is this likely to be defined in statute?

Without clarification to these points any response has to be so generalised in nature as to be virtually worthless. For example, IAS is opposed to a reduction in judicial oversight and/or creation of a single-tier appeal structure when the quality of initial and adjudicator decision-making is so transparently poor. Those who would claim that the quality of Home Office initial decisions is high are few in number. It is less well recognised that the quality of adjudicator decision-making can also be extremely poor. IAS has experience of many examples of manifestly absurd or perverse adjudicator decisions that have been overturned by the higher courts. Removing this oversight would be disastrous for individual claimants. However, we cannot second-guess exactly what is proposed by the Home Office and therefore cannot say whether the proposals would fail to take account of our concerns.

IAS has concerns about any proposals to designate "safe" third countries, in part because of the inclusion of unsafe countries on such lists in the past. Any "white list" undermines the consideration of the facts of the individual case. For example, we have serious concerns about the inclusion of countries such as Bangladesh and Jamaica on the existing white list because there are undoubtedly specific minorities in those countries who are subject to serious human rights abuses. IAS recently published a detailed examination of the Home Office's country information reports, on which asylum policy and individual asylum decisions are made, and found them to be remarkably selective in their use of source material. A summary of the report can be located on the IAS website.[3]

We are extremely concerned about the proposal automatically to end support for families after their appeal rights have been exhausted. The danger posed by this measure is illustrated by the example of the many, many Zimbabwean families living in this country. The Home Office accepts that it cannot remove failed asylum seekers to Zimbabwe (although the Home Office steadfastly refuses to explain why) yet it persists in refusing even temporary asylum to Zimbabweans, resists Zimbabwean appeals and maintains that Zimbabweans can make voluntary returns. This measure would at a stroke remove support from families who are victims of a Home Office non-removal policy such as that over Zimbabwe.

12 November 2003

[3] Under *Media Releases* see *Home Office country information dangerously inaccurate and misleading,* or see link: http://www.iasuk.org/document—store/Doc308.doc

4. Memorandum submitted by Jesuit Refugee Service

Mission Statement of Jesuit Refugee Service UK

The Jesuit Refugee Service (JRS) is an international Catholic non-governmental organisation, at work in over 50 countries, with a mission to accompany, serve and defend the rights of refugees and forcibly displaced people.

The purpose of JRS UK is to accompany, to serve and to advocate on behalf of all asylum seekers from their first arrival until they are satisfactorily settled. This work is carried out in collaboration with other JRS offices round the world, other Church and secular organisations, voluntary and governmental, which are active in the same field.

Values

JRS is grounded in Catholic social teaching and draws on the principles of Ignatian spirituality in discerning with whom we work. All Members share a common set of values and principles concerned with justice, the dignity of the person and a responsibility to carry out the social mission of the Church.

With a priority to working wherever the needs of displaced people are urgent and unattended by others, JRS offers a human and pastoral service to refugees and the communities who host them through a wide range of rehabilitation and relief activities. Services—pastoral care, education for children and adults, social services, counselling, and health care—are tailored to meet local needs according to available resources.

The main focus of JRS UK's work is with asylum seekers in detention through visits, phone calls and letters. We produce news sheets to keep them in touch with events in their country. This lessens their sense of isolation and may strengthen their claims for asylum. When they are released we keep in touch with them and offer practical support.

JRS has been given the opportunity to update its evidence to the Home Affairs Committee of 25 March 2003 with particular reference to the Government's announcement that up to 15,000 families who had lodged asylum claims more than three years ago will be considered for permission to live and work in the UK and with reference to the Government's proposed new legislative measures.

Inquiry into Asylum Applications

1. *The Government's announcement on 24 October 2003 that up to 15,000 families who sought asylum in the UK more than three years ago will be considered for permission to live and work here.*

JRS welcomes the government's announcement that the cases of up to 15,000 families will have their cases considered for permission to live and work in the UK on an Indefinite Leave to Remain basis if:

- The families sought asylum before 2 October 2000;
- The families had children before that date;
- Where the final appeals process has not been exhausted or where final decisions have been made but removal has not been effected.
- People who have committed a criminal offence, lodged multiple asylum applications or whose cases are the responsibility of countries elsewhere in Europe will be excluded from the exercise. In addition the Home Secretary believes that the 15,000 families are likely to comprise of 12,000 families receiving financial support from the government and 3,000 families who are self-supporting.[4]

We welcome the announcement because it is a recognition that the current asylum system has failed many individuals and families who have lodged asylum claims in the UK. We hope that the measures to be taken with regard to families who meet all the Government's criteria will allow the family members concerned a degree of security and an ability to and the confidence to build a life in the UK.

We also welcome the recognition by the Home Secretary that there are delays in the system. We are not as confident as he is that the delays are "historic". They have been certainly. But delays continue to occur in many cases we come across. Many of our clients have waited over a year for their first interview. In our experience these delays continue.

JRS does, however, have some grave concerns.

It is to our mind extremely unfortunate that this exercise is being portrayed as one of "Clearing the decks for tough new asylum measures"[5]. While there is nothing wrong with acknowledging the costliness of the asylum process as it stands for families and using this as one of the reasons for introducing the announcement on 24 October, this was a missed opportunity. The Government could have phrased its arguments more humanly and positively, pointing out the humanitarian effects of its announcement: the increased security for the families involved and the addition to and the enrichment of British society which they will bring by being allowed to live and work here and by feeling able to integrate.

[4] These details are given in the Home Office Press Release 295/2003, issued 24th October 2003.
[5] Title of the Home Office Press Release 295/2003, issued 24 October 2003.

We are also concerned that the announcement conveys a tone that this is the last step the Government will take to improve the situation for asylum seekers caught up in a situation and in a process over which they have no control. It is unfortunate that the announcement did not go farther to cover for example other particularly vulnerable groups, such as unaccompanied minors, victims of torture and individuals with special health needs. The historic delays have affected these others as much as they have affected families. While we recognise that families are deserving of special consideration due to the fact that children are involved, these other groups are equally deserving of such consideration.

We are concerned that the Home Office is not encouraging families to enquire directly, but will write to those eligible for leave to remain. Given our experience of the poor administration record in asylum cases (for example we find that the Home Office often has not updated its address records for asylum seekers properly and sometimes loses case files), we are not confident that all those who are eligible will be informed. We also feel that unless the Home Office proposes to employ a new team dedicated to consider these cases their estimate of considering and determining the 15,000 family cases within a six month period is over ambitious.

We would also like to point out that not encouraging families to get in touch with their case details raises hopes and expectations that they will be contacted. We have already had two clients ask us about this announcement in the past week. Both were very hopeful and were looking for answers and reassurance from us that they will be among the 15,000 chosen. Of course, we were unable to give this reassurance or to answer any of their questions. While the press release had some details it did not have many, including how the decisions would be taken; what the cut off date might be as to when a family might hear if they have been successful; and crucially what appeals may be possible against a decision taken not to give a family indefinite leave to remain under this scheme. If a family is not encouraged to enquire, how might they hear if their case has even been considered under this scheme?

2. *The Government's proposed new legislative measures on asylum announced on 27 October 2003.*

JRS is dismayed at the possibility of yet more deterrent legislation regulating the asylum process in the UK. Instead of looking at the asylum process as being one based on protection needs the government continues in its short-sighted attempts to deter people from coming to the UK to claim asylum and to make things as difficult as possible for those seeking asylum in the UK.

The Home Secretary has declared the strategy to be "not anti-immigration", stating that he has "greatly expanded the opportunities for hard-working immigrants to come to the UK through legal routes". [6]

However in the opinion of JRS, the adoption of these measures, deterrent in character, would be anti-human rights and would seriously undermine the Convention relating to the Status of Refugees 1951, by which the UK is bound.

The new legislative proposals deal with the asylum and immigration appeals system; undocumented passengers; safe third country; the regulation of legal advice; and the restriction of family support.

Asylum and immigration appeals system. JRS is seriously concerned by the proposal to introduce a new single tier of appeal for refused asylum applications. The emphasis in this announcement of proposed new legislation on the cumbersome nature of the current appeals process is misleading.

As pointed out in our previous submission to the Home Affairs Committee,[7] at the initial application level in asylum cases decision making is often poor. There is a high rate of positive decisions given at appeal level. In addition the problem of the high refusal rates on non-compliance grounds continues. It still remains the case that for many individuals who have received a refusal at the initial application level, the appeal is often the first opportunity they have for their case to be heard properly. To reduce appeals to a single tier will in effect deny these applicants of an effective appeal if they are refused.

This will be all the more the case if the government introduces other measures to restrict access to the higher courts, a move being considered.[8]

Too much emphasis is being put on abuse of the current appeals system rather than on getting initial decision making by the home Office right. This would also cut costs, remove delays from the process, and reduce the risk of absconding.

Undocumented passengers. The UK proposes to introduce sanctions for those who destroy or discard their documents before claiming asylum. In addition the UK proposes that being undocumented should lead to a tougher assessment of the credibility of their statements in support of their asylum claim.

[6] Joint Home Office/Dept for Constitutional Affairs Press Release—Asylum Measures, 27 October 2003, 296/203.
[7] 25 March 2003, JRS Response to the Home Affairs Committee Inquiry into Asylum Applications.
[8] Annex A to Joint Home Office/Dept for Constitutional Affairs Press Release—Asylum Measures, 27 October 2003, 296/203.

In the opinion of JRS this would be wrong. At the moment the Immigration Rules allow for questions as to credibility to be raised as regards undocumented asylum applicants who make a delay in claiming asylum after entry, which is a cause of great concern to us already, as there are many reasons why an individual may be undocumented[9] and many reasons which can delay an application for asylum.[10] The extension to cover all undocumented asylum seekers is unnecessary and would seriously undermine Article 31(1).[11]

To our mind this is another blatant example of deterrent measures to deny access to the asylum process in the UK. The UK already invests heavily in border control measures, including freight screening equipment at Belgian and French ports, the use of airline liaison officers in Prague, and the moving of UK border controls to France.

The emphasis in the Home Office announcement is one of tackling illegal immigration. This misses the point entirely to our mind. The point should rather be one of assessing protection needs, not of deterring individuals from getting to the UK.

In addition it is unreasonable in the extreme to not only disadvantage an undocumented individual as regards to the credibility of his or her claim for asylum but to criminalise that individual by creating two new criminal offences: the offence of being undocumented without reasonable explanation and the offence of failure to comply with the re-documentation process. There are already many immigration offences which can be—and have been—used to prosecute individuals (asylum seekers among them) for illegal entry into the UK due to the use of false or no documentation. The new offences are unnecessary and to our mind contravene the duty not to impose sanctions in Article 31(1).

JRS is also very concerned about the possibility of requiring carriers to take copies of passengers' identity documents before they travel on certain routes. This is instituting another secondary form of immigration control to deter those with protection needs from getting to the UK. We also have grave concerns over issues of privacy and confidentiality which this measure would entail. How would the carriers be regulated over their holding of what would be very private and potentially sensitive information.

Safe third country. Under the requirement of non refoulement,[12] the UK government must be absolutely certain before returning an asylum seeker to a safe third country that that individual will not be sent back to his or her own country of residence when he or she had faced persecution. Criteria must be established regarding how a country is designated safe and what makes a country safe. Annex A to the announcement goes some way to alleviating our concerns as to criteria establishing what makes a country safe: "designated countries will be those where we are satisfied that an individual will be neither persecuted nor subjected to torture or inhuman and degrading treatment or punishment, nor one which would remove a person in breach of the principles of the Refugee Convention or the ECHR". We remain however concerned that the UK government may designate countries as safe which do not recognise an individual as a refugee if he or she has not suffered persecution at the hands of a government or state agency. The UK has a history of recognising persecution by non-state actors. To return someone to a "safe" third country which does not recognise persecution by non state actors is tantamount to refouling that individual, as he or she will returned to his or her country of origin or residence from that "safe" country, whether that country is a signatory of the ECHR or the 1951 Convention relating to the status of refugees or not. This would be unacceptable to our mind. Further safeguards must be put in place to any such proposal allowing the removal of asylum seekers to safe third countries.

Regulation of legal advice. JRS does not provide legal advice to asylum seekers, but rather "signposts" the services and advice available elsewhere. In our opinion, effective regulation of legal advice is essential especially given the vulnerability of the clients (asylum seekers), the complexity of the asylum process and the results which could occur if incompetent or inadequate advice is given (possibly removal to persecution). The establishment of the Office of the Immigration Services Commissioner (OISC) has in our opinion improved the quality of legal advice in the voluntary sector. The accreditation by the OISC allows us a measure of confidence in recommending an agency and the system of accreditation provides an easy reference of what level of work the advisers in the organisation concerned are entitled to carry out. There is also an easy procedure to follow should a complaint be necessary. We would welcome increased powers for the OISC to ensure that legal advisers are qualified, have the necessary supervisory structures in place. We would also welcome an accreditation scheme that offered a similar measure of confidence when it comes to looking for a solicitor to provide immigration advice to one of our clients.

However our views are those of non-practitioners and we would hope that the Home Affairs Committee also takes into account views of those who do carry out immigration case work regarding the practical effects which these proposals will have on them and their cases.

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[9] Eg inability to present oneself to the necessary authorities to get a travel document due to fear of persecution, unsafe conditions in a country, etc.

[10] Not least of which are trauma, language difficulties and not knowing how to make a claim for asylum and wanting to find this out first.

[11] Article 31(1) of the 1951 Convention relating to the status of refugees provides that: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory without authorisation provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

[12] Not returning an asylum seeker to a country to face persecution (Article 33(2) of the 1951 Convention relating to the status of refugees).

Restriction of family support. The Government's proposal to withdraw support from families who are at the end of their cases having exhausted their appeals and have not had a positive decision in their cases, unless they are willing to take a paid voluntary route home is morally indefensible. It is questionable whether their decision will indeed be voluntary if faced with the alternative of being left with no means of support (no financial assistance from the government, no permission to work) in the UK or returning to a country in which they fear they will be persecuted or be otherwise unsafe, eg Afghanistan, Iraq or Zimbabwe.

Louise Zanré

14 November 2003

5. Memorandum submitted by JUSTICE

Introduction

1. JUSTICE is an independent all-party law reform and human rights organisation. It is the British section of the International Commission of Jurists. Our central concern with asylum issues is that international human rights standards are upheld in the UK government's policy and practice.

2. We welcome the Committee's call for further evidence in relation to the government's announcement of new measures and legislation on asylum. We offer below our critical views on the proposed legislation on asylum. In respect of the proposed new powers of the Office of the Immigration Services Commissioner, we believe that they address in a large measure ongoing problems of quality of representation and abuse of the legal aid system without the need to impose restrictions on publicly-funded immigration and asylum work, as proposed by the Department for Constitutional Affairs (DCA). JUSTICE is a part of the coalition calling upon the government to abandon this proposal that would deny essential legal representation to asylum seekers and their access to justice, as guaranteed by Article 6 ECHR. We have set out our concerns in relation to the DCA's proposals in our response to the consultation paper issued in June 2003.[13]

Grant of Status to Families

3. We welcome the government's decision to give 15,000 families the right to stay without resolving their claim to asylum. This is a long overdue measure and should be extended to all those who have been caught in the backlog for a considerable amount to time.[14] Chronic administrative inefficiency and the more recent emphasis on meeting targets for deciding new applications within two months has resulted in older cases being deprived of resources and subjected to prolonged delays.[15] Those concerned are, thus, kept in a protracted legal limbo causing considerable hardship and anxiety. The Home Office should operate a concession whereby people are granted leave to enter or remain on the basis of criteria such as length of time since application, humanitarian and other connections with the UK.

New Asylum Measures

(i) *Introduction of a single tier of appeal*

4. JUSTICE notes that the asylum appellate system has been subject to frequent overhauls as part of the wider reform of asylum policy brought about by the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum (NIA) Act 2002. The new Acts have comprehensively restructured the appeals process but have not dealt with any of the underlying or procedural problems of the appeals process. In particular, they have singularly failed to address inefficiency, inaccuracy and incompetence within the initial decision-making process which directly cause inefficiencies and delays at the appellate stage. The Committee may be aware of poor initial decision-making and administrative inefficiency within the Immigration and Nationality Directorate (IND) from evidence received in the course of this inquiry by JUSTICE and other concerned organisations and practitioners in this field.

5. JUSTICE believes that in the absence of a sound, robust initial decision-making process, provisions for due process review by an independent appellate body if the claim is rejected are of fundamental importance. As the Immigration Appeals Tribunal (IAT) has noted, "the lack of skilled and professional care in reaching the initial decision necessarily places extra burdens on adjudicators".[16] All too often the adjudicator is, in effect, the first person to provide a serious analysis of the factual and legal situation presented by the applicant.[17] The increasing complexity of the decisions that adjudicators have to make is

[13] *See* JUSTICE's response to proposed changes to publicly-funded immigration and asylum work, August 2003.

[14] At the end of June 2003, the backlog in IND amounted to around 31,800 cases; of these around 23,000 applications had been outstanding for more than six months. Moreover, there were an estimated 20,000 appeals lodged with the IND which had not been sent to the IAA. Home Office, Asylum Statistics: 2nd Quarter 2003 United Kingdom.

[15] For a recent case commenting on Home Office delay in determining claims see *Shala* v *SSHD* [2003] EWCA Civ 233. A Kosovan Albanian applied for asylum on arrival in June 1997 yet the Home Office did not determine his application until July 2001. As the Court of Appeal noted, the difficulties arose because "the relevant procedures were designed to take months . . . yet have in practice . . . taken the Home Office several years".

[16] *Horvath* v *SSHD* [1999] Imm.A.R. 121, at 129–130.

[17] E.g. in the case of non-compliance refusals.

illustrated by the number of cases in which the Tribunal grants leave to appeal.[18] A two-stage appeal process is desirable where adjudication involves complex factual issues, all the more so in asylum cases where country conditions change frequently or further evidence comes to light which was not before the adjudicator but which could have a major impact on the case.

6. JUSTICE notes recent statements to the effect that policy on asylum appeals is developed jointly between the DCA and the Home Office. The DCA is responsible in government for "upholding justice, rights and democracy".[19] It is the guardian of the judiciary, which should operate freely as an arbiter, against clearly defined canons of law, and without favour. However, the DCA is increasingly involved in designing procedures geared towards implementation of the Home Office's policy on asylum seekers. Many aspects of the appeals process appear to be driven by the operational needs of immigration control, particularly by focusing on the disposal of asylum appeals rather than serving the interests of justice. This creates a regrettable tension in seeking to reconcile the policies of the Home Office and the demands of justice.

7. We have already expressed concern at the succession of unfair and potentially unsafe due process provisions under recent reforms to the appeals system, such as the statutory closure date, the non-suspensive appeals process, the fast-track appeals procedure etc.[20] We would not favour the flattening out of the two-tier appeal system without a fair and effective asylum procedure underpinning the system, and increased guarantees of procedural fairness and independence of the review process within a new framework where responsibility for tribunals and their administration does not lie with those whose policies or decisions it is the tribunals' duty to consider. Retaining a two-tier appeals structure would also ensure that asylum law is developed in a consistent way. The second-tier tribunal has in recent years improved its ability to set precedents and provide consistent and clear interpretative guidance for adjudicators, thanks to a new system of selecting decisions which would normally be treated as binding (starred decisions).

8. We would further question the need for yet another radical overhaul of the appeals system in the absence of a thorough evaluation of the impact of the reforms introduced by the 2002 NIA Act, such as the restriction of the IAT's jurisdiction to appeals on points of law[21] and the introduction of a statutory review process.[22] Moreover, the decision to introduce a one-tier appeal system in the field of asylum and immigration is not consistent with the unified tribunal service, which the government has favoured in response to Sir Andrew Leggatt's review of the tribunal system.[23] The appeal system for all tribunals must be seen as a common issue.

9. JUSTICE has commented upon the various reforms to the system of appeal and review and consistently expressed concern over their focus on speed of process and on limiting avenues for challenges to decisions of the executive. Our view is rather that, in the absence of a natural constituency whereby the interests of asylum seekers can be represented through the political process, there is a particular need for scrutiny of the law governing asylum seekers by the courts. The courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk.[24] The high degree of politicisation of this issue makes the case for a dispassionate assessment by the courts even more compelling.

10. We are, therefore, concerned by the suggestion in the consultation letter that the Home Office/DCA are looking at ways to restrict access to the higher courts. Resort to judicial review against refusal of leave to appeal to the IAT has already been denied by provisions in the 2002 NIA Act, which introduced a special and more restrictive remedy, ie statutory review—a procedure that does not offer the same degree of judicial protection as judicial review, as time limits are dramatically curtailed (from 3 months to 14 days) and oral argument is specifically excluded. Placing further restrictions to judicial review would erode an important mechanism for maintaining the rule of law and subjecting executive decision to proper scrutiny. Such a move would be of particular concern in cases where judicial review constitutes the only remedy against removal, such as currently under the non-suspensive appeals process when the Home Secretary certifies a case as "clearly unfounded"[25] and in the case of "safe third country" certificates (ie in respect of EU or other designated countries).[26] Attempts to oust the review jurisdiction of the courts would be regarded with some concern by the courts themselves and, as a matter of general principle, should be avoided.

[18] In 2002, around one third of applications for leave to appeal to the Tribunal were successful. Home Office, Asylum Statistics: United Kingdom 2002.

[19] *See* the Department for Constitutional Affairs website: www.dca.gov.uk.

[20] *See* JUSTICE's response to the Committee on the Lord Chancellor's Department inquiry into Asylum and Immigration Appeals, April 2003.

[21] 2002 NIA Act, s101(1).

[22] 2002 NIA Act, s101(2) and 101(3) implemented by the Civil Procedure (Amendment) Rules 2003, new section II Part 54.

[23] Sir Andrew Leggatt's report on the tribunal system, *Tribunals for Users—One System, One Service,* March 2001, Part I, Ch.3, para.3.8. The report made a far-reaching set of recommendations for the structural reform of tribunals.

[24] *Bugdaycay v SSHD* [1987] AC 514.

[25] 2002 NIA Act, ss94 and 115.

[26] 1999 Act, ss11 and 12. A statutory presumption of safety operates in respect of EU member states (s11), which precludes challenges by way of judicial review in almost all cases, whereas in other third country cases the Home Office must directly consider the question of safety in each case.

(ii) *Sanctions for undocumented passengers*

11. Attempts to reduce and remove independent and effective judicial scrutiny of administrative decisions are also evident in the proposal to create a statutory presumption affecting the credibility of those asylum seekers who fail on arrival to provide adequate documentation to satisfy immigration control. The use of false documents (visa and passports) as a method for determining credibility is a fundamentally flawed policy since visa controls make the possession of false documents virtually inevitable for asylum seekers.

12. The Refugee Convention recognises that people trying to escape persecution may not be in a position to comply with the requirements for legal entry into the country of refuge, such as possession of a national passport and/or visa, and may often rely upon the use of false documents and unusual means of travel and/or place themselves in the hands of agents with a vested interest in retaining and recycling documents or covering their tracks. Article 31 provides that refugees should not have penalties imposed on them as a consequence of illegally entering or being present in the country of refuge in order to seek sanctuary, provided that they come "directly from a territory where their life and freedom was threatened", "present themselves without delay to the authorities and show good cause for their illegal entry or presence". According to UNHCR, "good cause" is a matter of fact, and may be constituted by apprehension on the part of the refugee or asylum seeker, lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party.[27]

13. In *Adimi* the Divisional Court held that the policy of prosecuting refugees travelling on false documents was contrary to Article 31 of the Refugee Convention.[28] Simon Brown LJ observed that the need for Article 31 had by no means diminished since it was drafted: the combined effect of visa requirements and carriers' liability has made virtually impossible for refugees to travel to countries of refuge without false documents. The Court identified the broad intended purpose of the provision as being "to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law", adding that it applied as much to refugees as to "presumptive refugees", and as much to those using false documents, as to those entering clandestinely.

14. The Court also looked at the administrative process by which prosecutions are brought. It found that no consideration was given at any time to the refugee elements, but only to the evidential test of realistic prospect of conviction; the "public interest" offered no defence to prosecution, but rather the contrary. Simon Brown LJ also had no doubt that a conviction constituted a penalty within the meaning of Article 31, which could not be remedied by granting an absolute discharge. Although the government subsequently introduced section 31 of the 1999 Act to offer a defence against prosecution in compliance with international obligations, there have continued to be high levels of prosecutions of asylum seekers for false documentation as a result of lack or inadequate procedural guidance to immigration service, the Crown Prosecution Service, and criminal duty solicitors. A recent court case, awarding compensation to two asylum seekers who were prosecuted and jailed for travelling on forged passports, brought to light the fact that up to 5,000 asylum seekers appear to have been wrongfully convicted and imprisoned for using false documents without considering whether or not Article 31 provided a defence.[29]

15. The narrowly defined statutory defence under section 31, has not provided sufficient protection of Article 31 rights and miscarriages of justice are only likely to increase as a result of the new criminal offences for undocumented arrival being proposed in the consultation letter.[30] Refusal of the authorities to consider the merits of claims or their inability to do so by reason of a general policy on prosecutions will almost inevitably constitute a breach of the UK's international obligations.

(iii) *Safe third countries removals*

16. The Refuge Convention makes no reference to the notion of "safe third country" although the concept has gained acceptance among states in Western Europe. UK asylum law makes provision for the removal of asylum seekers, without substantive consideration of their claim, to EU member states under existing standing arrangements (ie the Dublin Regulation), and other safe third countries designed by order.[31] Under current UK and other EU member states' practice, "safe third countries" are countries through which an asylum seeker has passed before reaching an EU member state and had an opportunity to claim asylum and where they will be re-admitted without risk of being returned to their country of origin.

17. 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.[32] Mere transit through a third country would

[27] *See* UNHCR, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, 2003, p. 217.

[28] *R* v *SSHD ex parte Adimi and others* [2000] 3 WLR 434.

[29] Clare Dyer, Couple with forged passports win £130,600 for wrongful jailing, *The Guardian,* 1 October 2003.

[30] One for being undocumented without reasonable explanation; the second for failing to co-operate with re-documentation.

[31] These are at present the USA, Canada, Norway and Switzerland only. See Asylum (Designated Safe Third Countries) Order 2000.

[32] 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.

generally not constitute such a meaningful link. The consultation letter is vague in respect of the criteria for designation of "safe third countries" but we note that there is no requirement of any form of contact, let alone a meaningful link, with the designated "safe third country" where the person concerned would have had an opportunity to seek protection.

18. The aim of the proposed measure would appear to be to place responsibility for processing claims and providing protection on countries closer to the region of origin of asylum seekers. 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 parallel attempts are being made to secure a broad interpretation of the "safe third country" concept, which allows the transfer of responsibility for the determination of asylum claims to other states. These can be states which do not have the resources, structures, and procedures required to assess asylum claims adequately.

19. In the context of European case law, non-refoulement precludes "the indirect removal . . . to an intermediary country" in circumstances in which there is a danger of subsequent refoulement of the individual to a territory where they would be at risk.[33] The state concerned has a responsibility to ensure that the individual in question is not exposed to such a risk. The concept of "safe third country" requires, therefore, that a state proposing to remove a refugee or asylum seeker undertake a proper assessment as to whether the third country concerned is indeed safe. UNHCR argues that this should include an assessment as to whether the refugee or asylum seeker can access effective protection, ie have access to fair and efficient procedures and be able to stay in acceptable conditions which match basic human rights standards.[34]

The evolving concept of "safe third country" is clear evidence of a marked trend towards "regionalisation" of refugee movements, ie their containment in their regions of origin. Within the context of a general policy aimed at deterrence and restriction, there is a certain logic in trying to "regionalise" forced migration. This can be achieved directly by use of carrier sanctions and visa controls but also indirectly by deploying convenient concepts – such as "safe third countries", "safe countries of origin" etc – which narrow the applicability of refugee law. Ultimately, they represent a total abdication of states' responsibility under the Refugee Convention.

(iv) *End of support for families able, but unwilling, to return home*

21. As stated in the consultation letter, the new power to withdraw support from families who fail to take up the offer of a paid, voluntary route home builds on existing powers to remove support from those who do not comply with enforced removal directions. These powers are provided for in the 2002 NIA Act in respect of those with refugee status abroad and their dependants, citizens of other EEA states, failed asylum seekers and persons unlawfully in the UK.[35] Only persons with dependant children are eligible for accommodation pending removal.

22. JUSTICE questioned whether the withdrawal of all benefits from the four classes of ineligible persons listed under the Act could be operated in conformity with Convention rights (such as the right to private life, which includes the right to physical integrity, under Article 8 ECHR), as well as the UK's international obligations.[36] We were particularly concerned that the exception in relation to children meant that, in a family judged ineligible for support under the Act, whilst support is withdrawn from the adults, the children will be taken into care in order to provide support for them.[37] We argued that this raised 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 interest of the child.

23. The new measures might be used to argue that such families will not qualify for the safety net provided by "hard case" support under section 4 Immigration and Asylum Act 1999 unless they sign up to a voluntary return programme. However, in cases where the Home Office itself is unable to enforce removal due to conditions prevailing in the country of origin or difficulties with documentation, voluntary return may simply not be an option for the families concerned. Withdrawing support in such circumstances would de facto amount to enforced removal by threat of destitution and separation from their children. We believe that such a policy would be both immoral and unlawful.

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[33] *T.I. v United Kingdom* [2000] INLR 211, at 228. It is clear from the decision in T.I. that the responsibility of one contracting state is still engaged in principle despite the fact that it proposes to send the claimant to another contracting state. International agreements, such as the Dublin Regulation, cannot remove the liability of states for the causal consequences of their expulsion decisions. The primary consideration will be on the evidence of actual practice in the other member state. This argument is even stronger in relation to removals to "safe third countries" with which no agreements on transfer of responsibility are in place.

[34] *See* House of Lords European Union Select Committee, Sub-Committee F, inquiry into new approaches to asylum, Uncorrected Evidence, 22 October 2003, para.35 (Ms Erica Feller, Director of International Protection, UNHCR).

[35] 2002 NIA Act, s54 and schedule 3.

[36] *See* Nationality, Immigration and Asylum Bill, JUSTICE Briefing for the House of Lords Second Reading, June 2002.

[37] *Hansard,* 12 June 2002, co.898 (Beverley Hughes).

6. Memorandum submitted by Mr Peter Gilroy, Kent County Council

1. The Recent Government Announcement in Relation to Interim Families

This announcement came without any consultation with local government and showed yet again that central government fails to take into account the strategic and operational needs of their local government partners. Kent County Council currently has 300 families who receive support from us but we were not consulted in any way before the announcement. The major implications of the announcement for Kent are:

(a) There may be some financial implications depending on how the changes are phased as we currently have families housed on leases which are the responsibility of Kent County Council.

(b) As a two-tier authority, we have sought to warn our partners in district councils that this process may result in increased demand for social housing. Members of the committee will be aware that there is a current drive within government to cut down both the numbers of homeless and of those resident in bed and breakfast. If these initiatives are not to be sabotaged by the new arrangements, the arrangements will have to be phased in sensibly and on a local basis. The committee may like to take a view too as to whether central government can help in resourcing this increased demand on housing authorities.

(c) I am concerned about the exclusions mentioned in the press release on this subject. David Blunkett made mention that people with criminal records or those who have already claimed asylum in a safe third country will be excluded from these arrangements. Care needs to be exercised about how this will be achieved in a way that does not separate families and does not lead to local government being left with the responsibilities because the families have dependant children. Members will be aware that current legislation (Nationality, Immigration and Asylum Act) under Section 54, 55 and 57 left local authorities in invidious positions with regard to a number of destitute asylum seekers. It is my hope that the implementation of these proposals will avoid such ambiguities.

You will be aware that Kent County Council has been in the forefront of asylum issues for some considerable time and has gained some experience in working within this area. I also chair an association of directors of social services task force on asylum issues and therefore have a national perspective as well as a local one.

Asylum and Immigration Appeals System

I can understand the government's determination to safeguard the appeals system from misuse. I also understand that the past history of managing the asylum process has affected the credibility of this system at the present time. Moving to a single tier of appeal appears to be a very effective way of dealing with this issue and I am pleased to see that the proposal talks of ensuring high quality justice by the use of designated judges. I remain, however, concerned about two issues.

1. Is the Home Office entirely certain that there are sufficient judicial resources to give to this issue? If this new appeals system is under-resourced, it may lead to great delays within the system.

2. The proposals do not mention the role of the Human Rights Act 1998 in immigration procedures at the present time and I think it is important that consideration be given to how this proposed legislation will marry with this Act.

Undocumented Passengers

The issue of photocopying documents prior to travel on airlines was raised in the Home Affairs Committee on asylum some months ago and this seems to me a very sensible and pragmatic approach to the problem of destroyed documents. I can understand the desire to make this a criminal offence but care and thought needs to be given to the penalties subsequently enforced as this could also lead to unnecessary bottlenecks within the legal system. You will also be aware, that local government has responsibility for currently over 6,000 unaccompanied minors and I think particular consideration should be given to their situation in any attempt to criminalise those who use false documentation. As it has also been acknowledged by the Home Office that many people who come into the country on false passports subsequently go on to successfully claim asylum, care will need to be taken that this system does not seem to criminalise people justifiably fleeing persecution. This is why I am keen to see the implementation of photocopying documents at the point of departure as I suspect this will be a more effective way of deterring this method of coming into the country.

Safe Third Country

This proposal makes good sense. The Home Office will be aware that the EU directive on minimum standards of reception for asylum seekers is due to come into force in February 2005. I wonder whether this directive could be used to encourage safe third countries to welcome returnees in an appropriate way that will not breach existing conventions.

Restricting Family Support

I must confess that this proposal is probably the most problematic one from a local government perspective. You will be aware that Section 54 has already involved many local authorities, including my own, in a great deal of cost and has led to many legal uncertainties for our organisation. I do not understand why if families have no avenues of appeal left they cannot simply be moved by the Immigration and Nationality Directorate. It seems inappropriate to involve the local authority in invoking Section 20 of the 1989 Children Act. This would seem to be generally against the best interests of the children as it would separate them from their parents and would also involve the local authority in substantial costs. The proposal does not address the role of the local authority should the parent refuse to agree to Section 20 care for their children whilst remaining homeless and putting the children at risk. This would obviously be a very difficult situation for local authorities to manage. I feel this measure needs to be discussed at greater length with local authorities before being put into place.

The Offices of the Immigration Services Commissioner

I welcome the attempt to improve the effectiveness of this regulatory scheme. I continue to have concerns about some designated professional bodies and welcome these further measures aimed at ensuring that their work becomes more transparent.

I hope that the above comments on the consultation are helpful. In ending, I would like again to stress that local government needs to be fully consulted particularly about those pieces of legislation that will directly impact on their role.

7. Memorandum submitted by The Law Society

Early Access to Good Quality Legal Advice

The Society is convinced that early access to good quality legal advice can serve only to assist in the proper and speedy determination of an asylum seeker's application. We endorse the conclusion in the then Legal Aid Board's report "Access to Quality Services in the Immigration Category" that:

> "The availability of good quality legal advice and assistance at the earliest opportunity will have benefits throughout the system—for clients, for the Board and for the Home Office."[38]

The joint report by Justice, ILPA and ARC "Providing Protection; towards fair and effective asylum procedures" states that fair and effective determination systems:

> ". . . rely on good quality initial decision-making. Whenever processes are developed which allow space for the asylum claim to be presented and examined as fully as possible, this results in a greater number of positive decisions being made earlier in the process, and in negative decisions which are better reasoned and more sustainable . . . This involves front-loading of resources . . . Concentration on speed and cost-cutting at this stage will tend paradoxically to add to the length and expense of the system as a whole . . .".[39]

The Society agrees.

In his evidence to the Constitutional Affairs Committee, Lord Newton, the Chair of the Council on Tribunals, favoured early advice to eliminate risks of things going wrong at a later stage and resulting in greater expense in the long term.[40] The Society agrees that resources, including legal advice, should be front-loaded in order to achieve a credible and rigorous system, and to reduce costs and delay. Whilst asylum applicants should be dealt with speedily and efficiently, this must not be done at the expense of full and good quality decision making at an early stage, which will have the knock-on effect of leading to fewer appeals which will free up the appeals system.

Single Appeal Tier

While the proposal to create a single tier of appeal is designed to simplify the system and avoid delay, we have real concerns that this will conflict with the interests of justice.

We agree with the comments of the Constitutional Affairs Committee (made in relation to recent Government proposals regarding maximum time limits for publicly funded immigration and asylum cases) that stringent constraints on time could only:

> "have impacted adversely on quality, and might, in turn, have lead to greater cost and inefficiencies further up the appeals process."[41]

[38] Page 2, Access to Quality Services in the Immigration Category, Exclusive Contracting, Recommendations to the Lord Chancellor. Legal Aid Board, May 1999.

[39] Page 10, Providing protection, towards fair and effective asylum procedures, Justice, ILPA & ARC, July 1997.

[40] Page 14, Constitutional Affairs Committee, Fourth Report of Session 2002–03 HC1171-1, 31 October 2003.

[41] Paragraph 35, page 16, Constitutional Affairs Committee, Fourth Report of Session 2002–03 HC1171-1 31 October 2003.

This is a general principle which should be kept in mind in relation to all attempts to speed up the asylum process.

The Society believes that a second tier appeal is essential in view of the poor quality of Home Office decision-making at the initial stage. Recent figures from the Refugee Council show that one in five appeals are successful, rising to around 35% for some nationals, such as Somalians and Zimbabweans.[42]

The poor quality of initial decisions means that the hearing carried out before a special adjudicator is often the first proper factual assessment of the case. As a result, the IAT appeal becomes the first appeal level. If the IAT second tier appeal is removed, it is absolutely essential that improvements to Home Office initial decision-making are made concurrently.

In our response to the Department of Constitutional Affairs' consultation on proposed changes to public funding for immigration and asylum cases, we set out the current problems with Home Office decision making and ways in which it could be significantly improved. This included the provision of identified Home Office caseworkers, advisers being able to intervene at substantive interviews and the setting up of an independent document centre. We also made suggestions to improve the operation of the IAA.[43]

Moreover, we note the Committee's widespread concern about poor quality decision-making by the Home Office in the first instance and the low level of Home Office representation (around 35%) which can result in unnecessary appeals to the IAT.[44, 45] We are concerned that the Government is considering ways to restrict access to the higher courts. It is essential that asylum appeals, which deal with life and death issues, are subject to full and proper judicial scrutiny. Furthermore, it is right that there should be oversight of the operation of all specialist tribunals, including the immigration tribunal. Indeed, if a single tier appeal system is introduced, access to the higher courts will become more vital than ever, in order to ensure that asylum applications are being properly determined.

We note that the consultation states that there will be new judiciary, with the vast majority of appeals being heard by a single immigration judge, working closely with more senior judiciary. We would welcome clarification about how the new judiciary will be appointed and trained, and how the close working relationship with senior judiciary will work in practice.

Independent Document Centre

We remain disappointed that the Government has failed to take this opportunity to establish an independent document centre, which we believe is an essential component of a credible asylum system. We welcome the establishment by the Government of the Advisory Panel on Country Information, but do not think that this is a substitute for a fully independent and properly resourced document centre. We have concerns about the quality of country information used by the Home Office and believe that the Canadian model would improve the situation by provide publicly accessible and independent country of origin information.

Undocumented Passengers

The Law Society is concerned that the proposal to sanction asylum seekers for arriving without travel documents will lead to a breach of Article 31 of the 1951 Refugee Convention (acknowledged in domestic law by section 31 of the Immigration and Asylum Act 1999). This provides that:

> "The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, come directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry and presence."

Lack of documentation or even the deliberate destruction of documentation does not mean that an application for asylum is without merit. As the Government accepts, many people who arrive without documents are granted refugee status. By the very nature of their circumstances those fleeing prosecution arrive at the UK in a distressed state.

Therefore, they may not have acted in a comprehensible or composed fashion or be in a position to give a fully coherent explanation of their actions. Asylum seekers often destroy their documents because they are advised to by traffickers or because they fear that those documents will put others in the country they are fleeing in danger. We believe that to destroy documents in such circumstances should amount to a "good explanation". In addition, asylum seekers may be genuinely unaware that they have passed through a safe third country. We are therefore very concerned that these proposals will penalise the victims of trafficking, rather than traffickers.

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[42] Refugee Council Press Release, 27 October 2003.

[43] Pages 17–21,The Law Society's response to the Department of Constitutional Affairs' consultation on proposed changes to public funding for immigration and asylum cases, August 2003.

[44] Page 14, Constitutional Affairs Committee, Fourth Report of Session 2002–03 HC1171-1, 31 October 2003.

[45] Refugee Council Press Release, 27 October 2003.

We also have specific concerns about the drafting of criminal offences in relation to the proposals. An offence of being undocumented without reasonable explanation must include knowledge on the part of the accused that it was an offence to destroy documents and to do so in the UK having relied on that documentation to get into the UK. We are also concerned about the extra territorial nature of this proposed offence, as the basis of the offence will be an action carried out in another jurisdiction before that person has any links with the UK.

In addition, we are concerned that any offence should not breach the right to not self incriminate. Any offence of failing to incriminate and give evidence against a third party would be a new precedent for the UK. If this is pursued, such an offence must contain a without reasonable excuse clause, to protect those who are afraid to incriminate a carrier because of the risk this might pose to family members at home.

Safe Third Country

The Law Society opposes the use of blanket assumptions in relation to the safety of certain countries, particularly when based on evidence of questionable quality. The Law Society agrees with the Refugee Council that:

> ". . . it can never be said that any country is safe for all people at all times."[46]

We also support the conclusions of the Joint Committee on Human Rights that:

> ". . . a presumption of safety, even if rebuttable, would present a serious risk that human rights would be inadequately protected."[47]

In relation to European accession countries, the Joint Committee on Human Rights concluded that:

> "in view of the well authenticated threats to human rights which remain in the states seeking accession to the EU, we consider that a presumption of safety is unacceptable on human rights grounds".[48]

The Society agrees. The assumption that all applicant countries to the European Community are "safe" to return asylum seekers to is therefore highly questionable.

We are concerned that the use of the "safe third country" concept will result in a failure to consider the particular facts of each individual case. This is particularly so in view of our concerns about the quality of country information available to the Home Office.

Article 33 of the 1951 Geneva Convention prohibits the return in any manner whatsoever of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. We are gravely concerned that to prevent applicants from challenging their removal to a "safe third country" on the basis of how they will be treated will lead to refoulement (ie the return of persons to a country from where they have fled persecution) and will thereby be a fundamental breach of the Refugee Convention.

UNHCR has suggested that in all cases, the authorities of the third country should be informed in advance of the return of an asylum seeker whose application has not yet been substantively examined so that the appropriate notification can be given to the border officials and the necessary protection guaranteed. Without such procedures, there is a real risk that the "safe third country" may be unaware of its responsibility for the asylum seeker and may not have in place appropriate asylum procedures and systems to provide adequate protection. The receiving country may also erroneously assume that the person returned has been rejected by the UK after a substantive examination of their asylum application.

As a result of its emphasis on deterrent and by the creation of further barriers against the legal access to the UK, we are concerned that the Government is likely to be indirectly increasing the numbers of those who do not have legal status in the UK and that it will be providing added impetus to the illegal trafficking of people.

UNHCR Executive Committee's Conclusions clearly state that the intentions of the asylum seeker as regards the country in which they wish to request asylum should as far as possible be taken into account. Furthermore, the Executive Committee states that asylum should not be refused solely on the grounds that it could be sought from another State.

UNHCR has also noted that, in line with the relevant Executive Committee Conclusions, that due regard should be given to any links which the applicant has with them, as compared with a third country, with which they have no such links. UNHCR has also stated that special regard should be given to situations where the applicant has close family ties to the country concerned.

The Office of the Immigration Services Commissioner

26. The Law Society will respond in detail to the proposals put forward in the consultation document. Our immediate concern is that the proposed extension of OISC's powers is wholly disproportionate to the perceived problem identified by the ISC in his second annual report.

November 2003

[46] Refugee Council Press Release, 7 October 2002.
[47] Joint Committee on Human Rights, Twenty-third Report of Session 2001–02, 23 October.
[48] *ibid.*

8. Memorandum submitted by Mr Ken Livingstone, The Mayor of London

PROPOSED NEW LEGISLATION ON ASYLUM AND IMMIGRATION ISSUES

1. *Introduction: the Mayor's perspective*

1.1 UK asylum and immigration policy is likely to succeed only if it takes London's experience as a central point of reference. London is—on available evidence—home to more new immigrants than any other UK region, and home to most who have reached the UK seeking asylum. The arrival of migrants from abroad, whether voluntary or driven by persecution, is accordingly a key factor in London's development in the 21st century as it has been thoughout the city's history.

1.2 Mayor of London, Ken Livingstone, recognises that asylum and immigration policy is thus interlinked with many areas of his statutory responsibility: for London's social, economic and cultural development, for promoting equality of opportunity, health of Londoners, and policing and community safety. In the interests of all Londoners, he seeks an asylum and immigration regime that will

- promote social inclusion not exclusion;
- help diverse communities to live in harmony, not demonise some of them; and
- enable the city to gain from new migrants' skills and energy—asylum seekers and refugees included—as readily as it does from international trade and investment.

1.3 From this perspective, the Mayor views with concern the package of asylum measures announced by the Home Secretary on 27 October. He draws the Select Committee's attention in particular to the following proposals:

- reduction of appeals process to a single tier;
- new criminal offences in relation to documentation;
- withdrawal of support from rejected asylum seeking families;
- enhanced powers to act against unqualified legal advisers.

1.4 His concern is deepened by the exceptionally limited nature of Home Office consultation on this package. Plans for legislation with substantial social and judicial consequences call for more than a three-week consultation on a four-page sketch of what is proposed. If the Government seriously wants to find policies that work, in an area as complex and sensitive as asylum, it will allow time for genuine dialogue with those involved in the area.

1.5 The Home Secretary's announcement also highlighted moves by the Department for Constitutional Affairs to limit access to legal aid in asylum and immigration cases. It made clear that these legal aid curbs, though introduced separately by administrative action, were closely tied to the Home Secretary's legislative package and are part of its context. This submission refers also to their possible effects in London.

1.6 The Mayor's remarks on specific items in the new package are set out in section 4 onwards. First, he addresses what he feels are two basic misconceptions underlying the Home Secretary's legislative package: about the nature of forced migration, and about the link between asylum policy and community relations.

2. *Forced migration—a long-term process*

2.1 The Mayor sees the arrival of people seeking sanctuary not as a temporary or criminal phenomenon, but as a long-term historical process which—tragically—is likely to continue for the foreseeable future, driven by deep and chronic tensions in many countries of the South: economic dislocation, gross inequality and abuse of state power, and a dangerous degree of militarisation. Asylum-seeking is primarily a response to real and sustained "push" factors built into a highly dysfunctional global system, as recent research confirms.[49]

2.2 Policy-makers, in the Mayor's view, thus face a clear choice on the asylum issue:

- They can focus on control and deterrence in a bid to stem forced migration, treating it primarily as a threat to UK interests. The probable result will be social and humanitarian crisis, as controls collide with the externally-driven movement of vulnerable asylum seekers.
- Alternatively, policy can seek to turn that process into an opportunity by helping UK society (in particular its major cities) to adapt to the continued arrival of forced migrants and to benefit from it—whilst also seeking cooperation with countries of origin, in the spirit of the EU Council's 1999 Tampere declaration, to address "push" factors within their societies over the longer term.

2.3 The Mayor believes that the interest of all Londoners calls for a commitment to the second approach, working with basic processes of global change not against them.

[49] S. Castles, H. Crawley and S. Loghna, States of Conflict: Causes and patterns of forced migration to the EU and policy responses, (Institute of Public Policy Research, 2003).

3. *Asylum policy and the threat to community relations*

3.1 The Home Secretary's statement suggests community relations in Britain could be jeopardised by "what may be seen in many quarters as continuing evasion and exploitation of immigration and asylum controls at significant cost to the taxpayer". The inference is that community relations will be at risk unless the present reform package is adopted, further constraining asylum seekers' ability to pursue claims in the UK.

3.2 The Mayor questions this analysis. He notes that:

— there is no evidence that actual abuse of the asylum system has been a factor in any significant incident of inter-community conflict in the UK;

— the most determined challenge to good community relations in the UK today comes from racist groups whose arguments rely not on objective facts about asylum (such as cases of actual abuse), but on fictions about it;

— riots in northern metropolitan cities in 2001, to which subsequent Government proposals on building community cohesion have largely been a response, had virtually nothing to do with the asylum issue;[50]

— current guidance on community cohesion agreed between Home Office, ODPM, local government and other stakeholders proposes a range of practical actions at all levels (including central government) to maintain good community relations in areas receiving asylum seekers—most related to public awareness and values, and none of them related to abuse of the asylum process;[51] and

— the Home Secretary's own wording ("what may be seen in many quarters") acknowledges that the link if any between asylum and community relations lies not so much in abuse of asylum rules, as in public perception of abuse.

3.3 Concerns about specific measures in the current legislative package, set out in the remainder of this submission, follow from these points about forced migration and the real risk to community relations.

4. *Single tier of appeal*

4.1 Data for 2002 suggest that between 1,000 and 2,000 applicants succeeded in their asylum claim only at Tribunal or higher levels of appeal. Compression of the appeals process into a single tier, now proposed by the Home Office, must increase the risk that some people with a valid claim will in future be deemed to have failed. The risk is sharply increased by proposed curbs on legal aid for asylum applicants.

4.2 The probable result is some rise in the number of asylum seekers living in the UK illegally. On the one hand, those whose claim is erroneously rejected by a single-tier process are unlikely to accept its judgment and return to countries of origin where they will be in danger. On the other hand some applicants whose claim has not yet reached appeal (or even initial decision stage) may perceive the new, truncated determination process as so inadequate that they might as well abandon their claim. This outcome seems especially likely, again, if their DCA allocation of legal advice hours is exhausted.

4.3 On past experience most people dropping out of the asylum decision-making process are likely to end up in London. While numbers attributable to the change in appeal arrangements may be small, the net effect would be extra pressure on refugee communities and deeper social exclusion in the capital.

5. *Undocumented passengers*

5.1 Practitioners confirm that people genuinely escaping persecution will, of necessity, often have to travel without documentation. The proposal to create a new offence of "being undocumented without reasonable explanation" therefore seems likely to catch a high proportion of asylum applicants including many with a genuine need for protection. Such a proposal must rest on the assumption that would-be asylum seekers will hear about it before arrival and somehow get the documentation demanded by the Home Secretary. But since that is often impossible, a more likely outcome is that forced migrants who hear about the new criminal offence before reaching the UK will—rather than face the certainty of arrest and criminal prosecution—abandon the idea of seeking asylum and try instead to survive here illegally, without declaring themselves to public authorities.

5.2 The likelihood is, on past indications, that most would try to so in London. There are two disturbing implications for the city:

— increased demand for the services of people smugglers or traffickers, intensifying the damaging impact of these "services" on London communities and strengthening the networks of organised crime into which they are integrated; and

[50] Ted Cantle, Community Cohesion Review Team—Report (2001); Home Office Building Cohesive Communities: Report of Ministerial Group on Public Order and Community Cohesion (2001), para. 2.6 "Key issues"; and see also P. Statham "Understanding anti-asylum rhetoric" in S. Spencer (ed.) The Politics of Migration (Blackwell, 2003) on public perceptions in Bradford, one of the cities involved.

[51] Local Government Association, ODPM, Home Office, Commission for Racial Equality, Interfaith Network for UK Guidance on Community Cohesion (2002), pp.26–27.

— an increase in the scale of extreme social exclusion in the city, on top of the destitution created by ending support to in-country asylum applicants under the Nationality Immigration and Asylum Act 2002 s.55.

5.3 The Home Secretary further proposes to make it a criminal offence for a rejected asylum seeker to "fail to cooperate with re-documentation". The offence is drawn in particularly wide terms. A rejected asylum seeker could be liable for prosecution under this measure if they "did or did not do something that had the effect of frustrating, obstructing or otherwise interfering with the re-documentation process".

5.4 The Mayor is concerned that a rejected applicant could fall foul of this measure in many ways, other than mischievously trying to defy UK immigration law. Arrangements for re-documentation may go awry for a variety of reasons, especially given the poor record of some Home Office agencies in communicating with asylum applicants. Will the onus rest on the rejected applicant to demonstrate that s/he was not "frustrating the process"? Again, someone who had been deemed not to need protection in the terms of the Refugee Convention or human rights legislation may, nevertheless, have real and legitimate anxieties about their return. Would they face prosecution and imprisonment if they object to conditions for issuing new documents laid down by authorities in the country of origin?

5.5 An offence cast in the terms now proposed could rapidly criminalise a sizeable number of people in London for whom voluntary return would be, in the Mayor's view, the more reasonable option. It could put new pressure on the Metropolitan Police Service, including its overstretched custody facilities. The Mayor would urge that Parliament not proceed with this ill-conceived addition to the battery of powers already available to deal with immigration offences.

6. *Restricting family support*

6.1 The Home Secretary proposes that where asylum seekers with dependent children have had a final negative decision but fail to take up an offer of voluntary return, all forms of public support be withdrawn from adult family members. Provision would still be made for their children under the Children Act 1989. It is suggested that, besides saving money, this would create an extra incentive to leave the UK "voluntarily".

6.2 The Mayor agrees that if an asylum seeker's claim fails after fair and objective consideration, they cannot be supported indefinitely in the UK from the public purse. But he believes the present proposal is ill-conceived and could jeopardise the orderly and humane management of failed asylum cases, putting at risk not only the welfare of family members but also—ultimately—community relations in London.

6.3 By introducing financial compulsion, firstly, it would weaken the integrity of voluntary return programmes designated for rejected families. This would be a real setback. As the Mayor has repeatedly made clear, London's interests call for voluntary schemes to be given priority as the means of securing return of failed asylum seekers. Developing them for family returns is especially important because they prepare returnees before departure from the UK and should be more sustainable, exposing children to less trauma and instability. The present proposal on the contrary risks blighting such schemes by using them as surrogate forms of coercive removal.

6.4 Secondly the Home Secretary's proposal implies splitting children from parents (or other adult family members) pending departure from the UK, in breach of the Government's obligation under international law to put the the child's interests first. Section 20 of the Children Act 1989, cited as the means of catering for children in these families, provides explicitly for local authorities to accommodate children who are separated from parents or carers. The Home Secretary's cursory proposal does not explain whether this means that UK authorities, such as London boroughs, may then assume permanent Section 20 responsibility for the child—possibly including eventual duties under the Children (Leaving Care) Act 2000. In any case separating children from parents would be irresponsible and wholly unacceptable, almost certainly causing real distress to them and to local communities.

6.5 Thirdly the result of this measure may well be not a family departure from the UK, but an attempt to survive here illegally or "underground". The Home Office assumption that ending support to its adults will motivate the rejected family to leave the UK is, the Mayor notes, in direct contradiction to the view which the Home Office has put throughout the Section 55 debate – that adult asylum seekers with no public support can always find shelter and assistance in refugee communities. In fact these family members, having by definition spent some time in the UK, are particularly likely to have formed community links that might encourage them to try surviving by their own devices. In this case they may well, rather than leave children in Section 20 care, take their children with them into that "underground" existence outside all systems of public support and care.

6.6 The grim implications of such a development are reinforced by current Department of Health proposals on charges for NHS care. In its recent consultation on this issue, the Department envisaged levying charges on anyone in the UK "without proper authority" regardless of their length of residence here.[52] Assuming this change is implemented, rejected families who remained illegally after the end of NASS support would also be rigorously excluded from free NHS treatment.

[52] Proposed Amendments to NHS (Charges to Overseas Visitors) Regulations 1989: A Consultation (2003).

7. *Immigration advice – powers of Immigration Services Commissioner*

7.1 The Mayor shares the Government's concern to raise the standard of advice on immigration matters, including asylum claims. He strongly supports the work of the Office of the Immigration Services Commissioner (OISC) to improve the quality of this advice work, and agrees with the Home Secretary that obstacles identified in the Commissioner's annual report must be addressed.

7.2 The present proposals need careful clarification and explicit safeguards, however, if they are not to undermine the work of advisers and community agencies which are already under severe pressure. Added to the strains arising from curbs on legal aid, the proposals as they stand could do real damage to the crucially important work of these providers in London. The Mayor would urge the Home Secretary not to take them further until he has consulted much more fully with all those involved in immigration advice work, including community groups. Concerns to be explored with them include the following:

— enhanced powers for the OISC to enter premises may sharpen fears that it is an agency of immigration control, not just within refugee communities but also among wider BME communities;

— there must be firm guarantees that any information on individual immigration cases seized by OISC in raids on solicitors or non-OISC authorised providers will be subject to confidentiality clauses in Immigration and Asylum Act 1999 s 93, and will therefore not be passed to the Home Office's Immigration and Nationality Department or other agencies;

— the proposed criminal offence of advertising immigration advice could pose real risks for bona fide voluntary and community sector agencies which provide advice on benefits, immigration, and other welfare matters over which the OISC has no jurisdiction.

7.3 The risks to non-specialist, not-for-profit agencies including refugee community organisations (RCOs) are of particular concern. Cuts to legal aid may prompt some solicitors to quit this area of practice and will inevitably leave some asylum seekers with cases not concluded. RCOs are likely to face intense demand to step into this breach. They will need clear guidance as to what constitutes immigration advice, and what work they can do without OISC authorisation. The Mayor would warn against allowing them to become casualties of the proposed change to OISC powers.

November 2003

9. Memorandum submitted by the Medical Foundation for the Care of Victims of Torture

Introduction

1. The response of the Medical Foundation is generally limited to those issues directly related to survivors of torture and organised violence but it should not be inferred that we agree with those areas on which we remain silent.

2. The Medical Foundation wishes to express its concern at the deadline for comments. We trust that further consultation on more detailed proposals will be conducted in conformity with the Cabinet Office *Code of Practice on Written Consultation* (November 2000). In particular, the principle of transparency has not been applied. This requires policy makers to give stakeholders at least 12 weeks and sufficient information to respond to consultation documents.

3. There is no evidence to support any need for urgency, and this departure from consultation principles is made, in our view, solely to meet the Government's own legislative timetable. However, a hurried and hasty consultation period will do nothing to ensure that the proposed legislation is necessary, fair and effective.

Omissions

4. We regret that, in bringing forth proposals for new legislation, the government has not included proposals to address:

— the introduction of an Independent Refugee Board tasked with upgrading the current lamentably poor first decision making process;

— the introduction of an Independent Documentation Centre;

— mechanisms for ensuring that "manifestly well-founded" cases are fast tracked;

— the abolition of the detention of children;[53]

— the evaluation of the special needs of vulnerable persons (including children and torture survivors) during the period when they are in induction centres, as required by the EU Directive on the Reception of Asylum Seekers.[54]

[53] In the light of the HMIP reports since the 2002 Act and also the recommendation of the Home Affairs Select Committee in its report on Asylum Removals (HC 654 2003, 4th Report, paragraph 86).

[54] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

ASYLUM AND IMMIGRATION APPEALS SYSTEM

5. The proposals do not set out in detail how the single tier appellate authority would function, nor do the proposals describe the mechanism(s) by which it is proposed to restrict access to the higher courts.

6. It is not possible to discern from the proposals what scrutiny adjudicators' decisions would receive, nor the rights of recourse against a flawed decision. It is noted that Home Office Presenting Officers themselves accept that the quality of decision making by adjudicators is poor and requires the oversight of a second tier.

7. The Medical Foundation is concerned that attempts to restrict appeal rights increase the likelihood:

(a) that a flawed decision in an individual case will go undetected, and of a torture survivor being returned to a country in which s/he is at risk of torture or serious ill-treatment.

(b) of a general fall in standards of decision-making because scrutiny of decisions and rectification of errors are reduced.

8. The proposals give no indication of how consistency in decision-making is to be assured, in particular they do not explain how the rules of precedent will function, nor indeed, what will constitute precedent in a single tier system.

9. We urge the government, if amending the appeals provisions, to impose clear rules ensuring that persons alleging torture are prescribed as excluded from "non-suspensive" appeals procedures as was the position under the Asylum and Immigration Act 1993 schedule 2 para. 5(5) (as amended).

10. No torture survivor should be denied an in-country appeal, and no torture survivor should face an appeal without representation. Such situations risk breaching Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) both by the removal of torture survivors and by obstructing their ability to pursue such appeals where a real risk of torture is alleged.

CRIMINALISING UNDOCUMENTED PASSENGERS

11. There is no evidence to suggest that lack of documentation is a determining factor in whether or not a person has a well-founded fear of persecution for a Convention[55] reason. Furthermore, the bar on the removal of persons facing a serious risk of torture is made absolute and non-derogable by Article 3 of the ECHR.

12. In the case of Adimi[56] LJ Simon Brown said:

> As was stated in a 1950 Memorandum from the UN Secretary-General: "A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of a national passport and visa) into the country of refuge."

13. Article 31(1) of the Convention states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory without authorisation provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

14. The proposals do not explain how the new criminal offences would be framed to take account of Article 31(1). Article 31 was debated at the time of the Immigration and Asylum Act 1999, following the *Adimi* case, and addressed in s.31 of that Act. We understand that the operation of the s.31 defence in practice continues to cause concern. There is as yet no legal route into the UK to seek protection. By necessity an asylum seeker can only seek to enter by unlawful means, with or without documents.

15. The UK immigration authorities have deployed an increasing range of measures actively to prevent and deter both the departure of asylum seekers from their country of origin and their arrival in the UK. Whether such measures are a legitimate, proportionate response to a perceived threat to immigration control, the effect is to restrict further the means of entry into the UK of those *legitimately* seeking protection under the 1951 Convention.

16. These measures may, when applied in conjunction with other measures pending,

— significantly increase the risk of harm to individuals fleeing their countries of origin;

— punish unfairly those most in need of protection;

— reduce and remove independent and effective judicial scrutiny of government decision-making that would ensure that said decision making is in accordance with international legal obligations;

— and discourage other countries from acceptance of their own international obligations.

The suggestion that this requirement should be "made clearer" places an arbitrary fetter on the decision-maker.

[55] UN Convention Relating to the Status of Refugees 1951 ("The Geneva Convention").
[56] *R* v *Uxbridge Magistrates Court ex parte Adimi (and others)* [neutral citation number CO-1167-99].

17. The measures may, perversely, provide further opportunities for agents operating in the illegitimate economy of false documentation and people trafficking. Actions to combat the activities of those who make profits from smuggling/trafficking should be aimed at those traffickers and other racketeers, not at those whom they exploit.

18. Many of those brought to the UK are unlikely to have any control over the route taken, nor to question the agent's instructions as to final destination. Persons traumatised by torture and violence are not in a position to dissent. This has already been recognised by the Government during the passage of s.55 of the Nationality, Immigration and Asylum Act 2002 (NIA Act). Again, the proposed fetter on the person taking a decision on credibility is arbitrary and carries with it a risk of the *refoulement* of torture survivors.

Further Penalising Those who do not Claim Asylum on Arrival

19. Persons smuggled/trafficked into the UK may be told not to make a claim immediately upon arrival, or may quite simply be unaware of what an asylum claim is, or that they should be making one. They may not receive good advice, whether formal or informal, until a later date. In the particular circumstances of any case, the timing of the claim, the destruction of documents, and a delay in claiming asylum, may be relevant to a decision on credibility, but these matters should be assessed along with, and in the context of, all relevant facts, rather than made the hallmarks of an unfounded claim.

20. The training of decision makers and good quality country information are better ways to ensure high quality decision-making than attempts to isolate factors that may or may not be relevant. Indeed, such arbitrary factors may distort good quality decision making.

Requirement for Travel Operators to Make Copies of or Hold Travel Documents

21. The Medical Foundation considers that this measure is premature because the Roma rights case[57] is pending appeal to the House of Lords on the issue of juxtaposed immigration controls. This case will determine the powers of UK immigration officers to police asylum seekers prior to or in the process of attempting to leave a country of origin. The requirement that a potential asylum seeker's documents be copied at the point of departure may similarly interfere with that person's attempt to flee persecution and unnecessarily expose them to additional danger. The deterrent effect may only be to push even more people into the backs of lorries and to make even more perilous journeys.

Safe Third Country

22. We are unclear from the proposal what it is proposed to add to sections 11 and 12 of the NIA Act 2002, which already address this question.

Restricting Family Support

23. The Medical Foundation works with many families with children. It is our experience that *all* family members may be (and frequently are) survivors of torture and organised violence. Furthermore, when children are not themselves the victim they are often severely traumatised witnesses of such torture and violence.

24. The suggestion that a child can be protected from the effects of the denial of food and housing by cutting off their parents' support and then supporting the child under the provisions of s.20 of the Children Act 1989 is wholly at variance with the principles of the Children Act. The proposal also breaches the overarching principle of protecting the best interests of the child, which should govern how children are supported and whether they are taken into care or given support within the family. The Children Act is undermined, children are placed at risk, and social workers are put in an impossible ethical position by this proposal. There is a grave risk that, rather than risk separation, families will seek to survive without any support, thereby putting the child at potentially greater risk.

25. There is currently no clarity in the proposal as to how such withdrawal of support would be triggered. We are mindful of the extensive litigation that surrounds s.55 of NIA Act 2002 and expect similar confusion here.

The Office of the Immigration Services Commissioner

26. The Medical Foundation is concerned that torture survivors do not all have access to high quality advice and that many continue to be let down by incompetent or unscrupulous advisors. We support attempts to strengthen regulatory powers. A key element of protecting people against unscrupulous or incompetent advisors is ensuring that there is sufficient competent professional advice.

27. The Medical Foundation responded to the proposals from the Home Office and the Department of Constitutional Affairs (DCA) on public funding of immigration advice. We believe that the effect of the original proposals would be to reduce the supply of *competent* advice, which is already insufficient, and also to make it more difficult to distinguish the good advisors from the bad.

[57] *R (on the application of European Roma Rights Centre and others)* v *Immigration Officer at Prague Airport and others* [2003]ECWA Civ 666.

28. We support the proposal to place a duty on the designated professional bodies to provide timely information to the Commissioner and to cooperate fully with any reasonable request from his staff so that he can fulfil his statutory duties. This would not seem to go beyond what should be expected of these bodies in any event. We also support proposals to criminalise advertising of immigration advice by the unqualified.

RACE EQUALITY

29. Refugees are members of ethnic minorities. Hostility and aggression toward them is inseparable from hostility and aggression toward members of ethnic minorities. Getting "tough on asylum" sends a mixed message: while it may contribute to public sympathy toward people recognised as refugees, it may also send a message that asylum seekers are inherently undesirable and to be viewed with suspicion, fear and distrust. There is a real need for the government to be proactive in promoting positive images of asylum seekers as well as refugees. That this can have a dramatic effect on public perceptions was demonstrated at the time Kosovans arrived under temporary protection provisions.

12 November 2003

10. Memorandum submitted by Migration Watch UK

ASYLUM LAW REFORM: RESPONSE TO THE HOME OFFICE CONSULTATION PAPER OF 27 OCTOBER 2003

Immigration Appeals

1. These comments are submitted on behalf of Migration Watch, an independent think tank. Writing in the first person, I am a Queen's Counsel and spent most of my working life as a lawyer in industry, retiring from full time employment in 1992 from the position of Company Secretary of Wellcome plc, parent company of a major pharmaceutical group which was taken over by Glaxo in 1995 and is now part of GlaxoSmithKline. Shortly before retirement I took up a part time appointment as an immigration adjudicator which I held until I retired from the post in October 2002. I normally sat as an adjudicator for up to 50 days annually and during my service in that capacity heard some hundreds of appeals, mainly asylum from 1994 onwards but also many non-asylum appeals in marriage, fiancé, student, visitor and other cases

2. We particularly welcome the proposal to abolish the Immigration Appeal Tribunal, a reform which is long overdue and which we suggested some time ago. It has always been absurd that there should be four possible appeals against the original IND decision. We welcome also the proposal to rename adjudicators as Immigration Judges. This properly reflects the considerable responsibility placed on such judges, which will be enhanced when there is only a single tier of appeal.

3. The consultation document does not make it clear just what the role of the Senior Immigration Judges will be. We take it that their role will be similar to that of regional adjudicators under present arrangements. It is important that the independence of immigration judges should be preserved. We would be most concerned if senior immigration judges were given powers of review of junior judges which could well amount to reinventing the Immigration Appeal Tribunal. Presumably it will continue to be possible for judges to sit in a bench of three for appeals which raise particularly difficult questions of law.

4. The consultation paper says that the Government is looking at ways to restrict access to the higher courts. We assume that with the abolition of the Tribunal and of possibilities of appeal beyond the Tribunal to the Court of Appeal and House of Lords there will be concerns to prevent the High Court and Court of Appeal being flooded with an even greater number of applications for judicial review than hitherto. It seems reasonable to us that there should be provision for appeal against the decision of an immigration judge to the High Court with leave on a point of law, comparable to the provision made in section 101(1) of the Nationality, Immigration and Asylum Act 2002 in relation to appeals to the Tribunal. There should be no possibility of appeal beyond the High Court.

5. We have in the course of this year made two sets of submissions to what is now the Constitutional Affairs Committee of the House of Commons and at Annex A to this paper we append extracts from the first set dated March 2003.[58] The specific recommendation from the first set which we repeat here is that the legislation should specifically provide that the procedure in immigration and asylum appeals should be inquisitorial and not adversarial. The justification for this is set out in Annex A. It is not appropriate to regard an immigration appeal as analogous to normal civil litigation and its proper disposal is a matter of public concern. This is all the more important when it is borne in mind that in recent years the Home Office has frequently not been represented in appeal hearings. My understanding is that even now there is still a serious shortage of Home Office Presenting Officers. It is vital that immigration judges should not feel inhibited from asking questions and making enquiries aimed at ascertaining the truth.

[58] Not printed.

6. In the second set of submissions, dated September 2003, we have drawn attention in paragraph 3 to the need to define the continuing status of the more important decisions of the Immigration Appeal Tribunal after its abolition. Those submissions are appended as Annex B.[59] Most of Annex B is concerned with the phenomenon of a four fold increase in the percentage increase in successful appeals between 1997 and 2002. This ought to be a matter of considerable public concern and we have sought in Annex B to explain why we believe this has happened and to draw attention to the need for further investigation by the two departments of state involved. We have recently sent copies of Annex B to the two Secretaries of State and await their replies. This particular problem may not be immediately relevant to the prospective content of new legislation, but we believe that it is a serious matter which needs to be borne in mind by the persons responsible for preparing the new legislation.

Undocumented Passengers

6. We fully support the proposed new criminal offences. We would, however, like to express our concern about the possible consequences of the case of *R v Uxbridge Magistrates' Court ex parte Admi [1999] 4 All ER 520*. In that case the Divisional Court held that the CPS and Magistrates ought to have had regard to the provisions of Article 31.1 of the 1951 Geneva Convention:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

The case concerned three asylum applicants who were separately charged and convicted of offences under the Forgery and Counterfeiting Act 1981. The Divisional Court held that they had been wrongly convicted and that they should have been treated as entitled to the protection of Article 31. The court appears to have accepted that the applicants were to be regarded as refugees even though their asylum claims had not been determined. One of the applicants tried to enter the country using a forged Italian passport and claimed asylum only when the forgery was detected by the immigration officer. In the other two cases the claims were lodged only after the applicants had completed their prison sentences. The court appears not to have had due regard to the following facts when considering Article 31 in these cases:

1. The applicants did not establish that their lives or freedom were threatened in their countries of origin. They became belated asylum seekers when their offences were discovered and in two of the three cases their asylum claims had not been considered before the case came before the Divisional Court. It was wrong to treat them as refugees.
2. None of the three presented themselves without delay to the authorities. In all three cases they claimed asylum only after their attempts to pass through immigration barriers with false documents failed.

We suggest that it is necessary to insert in the legislation specific provision for the interpretation of Article 31, making it clear that the Article does not protect asylum seekers who try to enter the country on the strength of false documents and who at the time of conviction are unable to show that they are genuine refugees.

Late Claims for Asylum

7. Delayed and opportunistic claims for asylum are frequent and are almost invariably dishonest. It frequently happens that illegal immigrants such as some of those recently arrested near King's Lynn immediately claim asylum when they are arrested simply to avoid immediate deportation. It also frequently happens that people who are given leave to enter as visitors for a six months' period decide to claim when that period is drawing to a close. People here with student visas often do the same and there are other cases in which claims are made after the applicant has been in the United Kingdom for some considerable time with limited leave, or in some cases after that leave has expired, and has no proper explanation for the delay. We suggest that provision should be made in new legislation for such claims to be barred. We suggest that the legislation should provide that applications made more than 28 days after arrival in the United Kingdom would be barred. In cases where there may be some uncertainty as to the date of arrival, IND's best estimate of the date would suffice for this purpose. It might be appropriate to provide for claims to be allowed if the applicant can show good cause for delay, though the need to consider such claims could obviously be itself a delaying factor, particularly if provision were made for appeals against adverse decisions. Delay in applying for reasons such as those described above has always been a factor relevant to assessing credibility but decision takers have until now been obliged to deal with the substance of the claim even if they are disposed to disbelieve it because of the delay. Under such a provision as we propose, once it was decided at the application or appeal stage that (1) the applicant/appellant was making a claim more than 28 days after arrival and (2) he had failed to show good cause for delay, the claim would be barred and the decision taker would not be required to investigate the substantive claim.

[59] Not printed.

8. The Asylum and Immigration Appeals Act 1993 introduced the concept of "manifestly unfounded" appeals which in practice meant appeals from asylum seekers coming from a neighbouring European country (1) from which they had travelled to the United Kingdom, (2) in which their applications ought to be considered and(3) to which they could safely be returned in that they would not be refouled from that country to one where they might be at risk of persecution within the meaning of the 1951 Convention. These provisions were later repealed, but while they were in force it fell to adjudicators dealing with these appeals to consider evidence of the laws and practices on asylum of neighbouring countries to determine whether it was safe to return asylum seekers there. The laws of Belgium in particular often had to be considered and we heard well-rehearsed evidence of the 8 day rule in Belgium, contained in Article 50 of the law of 15 December 1980 relating to aliens and refugees. The effect of this was that an asylum application was barred unless made within 8 working days of arriving in Belgium. For a discussion of the content of this law and related issues, see the judgment of *Hidden J in R* v *Special Adjudicators ex parte Mehmet Turus and others* [1996] Imm AR 388, particularly at pages 393–4. I never heard it suggested that this law, if properly applied, was contrary to the letter or spirit of the Geneva Convention, though the practices of the Belgian immigration authorities sometimes were.

Harry Mitchell QC

1 November 2003

11. Supplementary memorandum submitted by Migration Watch UK

Summary

1. The following is Migration Watch UK's response to the request for further evidence from the Home Affairs Committee on 30 October. We have commented separately on the new legislative measures on asylum announced on 27 October.

2. The Home Secretary has described the granting of indefinite leave to remain as a "one-off exercise" and he believes that the reforms he has already made to the asylum system will prevent the need for a further exercise of this type.

3. However, the exercise is highly unlikely to be a one-off. The continuing failure to remove anything more than a small proportion of asylum-seekers whose claims have failed (we estimate that about 1 in 5 are removed or depart voluntarily) will cause a recurrence of the conditions which led to the current amnesty. In fact, we estimate that since October 2000, the cut-off date for the amnesty, a further 14,000 families will have applied for asylum who will, in time, meet the same criteria as those just granted an amnesty.

4. The proposals to withdraw benefits from those families whose claims have failed and who refuse to leave the country is likely to be challenged in the courts under Human Rights legislation. Even if the proposals do come into effect they are unlikely, on their own, to lead to a significant rise in removals. After all the majority of asylum seekers have no dependent children and are therefore not entitled to benefit once their claim fails, but we still fail to remove significant numbers from this group from the country.

5. Experience in Spain and in Italy strongly suggests that not only are amnesties not "one-off" occurrences but that they may also act a "pull" factor to attract more asylum seekers and illegal immigrants. In Italy, for example, the Amnesty Law of September 2002 was the fifth in recent years. Previous amnesties were granted in 1985 (105,000 beneficiaries), 1990 (200,000), 1995 (246,000) and 1998 (215,000). They are not directly comparable since the conditions differed in each case but the broad picture is abundantly clear—amnesties are no solution to the pressures of immigration.

Detail

6. An analysis of asylum decisions in the period 1997–2002 shows that only about 1 in 5 asylum seekers whose claims have failed are removed from the country. Although the absolute number of removals is increasing this corresponds with more cases being completed and the percentage of removals is staying pretty much constant or reducing. Also, the majority of removals (61% in Q1 2003) are to European countries. Poland and the Czech Republic alone accounted for 20% of Q1 2003 removals.[60]

7. For Africa, Asia and the Middle East, the source of most asylum claims, the removal rate of failed asylum seekers is about 1 in 10. So, the Government is failing to remove the vast majority of asylum claimants irrespective of whether they are single or have families or are entitled to benefits or not.

8. In 2001 and 2002 there were 155,000 applications for asylum in the UK (excluding dependants). In 2003 there are likely to be a further 45,000 applications (again excluding dependants)[61] bringing the total for the three year period to 200,000.

[60] Source: Hansard from data supplied by Beverley Hughes to a parliamentary question on 21.10.03.
[61] 2003 estimate based on Q1 and Q2 actual figures and numbers continuing at Q2 levels in Q3 and Q4.

9. An analysis of decisions in the period 1997–2002 shows that just under 37% of applicants will be accepted for asylum or be granted leave to remain in the UK. A further 13% will depart from the UK, leaving 50% of applicants, failing to be granted asylum or leave to remain, who will stay in the UK illegally. This equates to 100,000 principal applicants for the period 2001–03.

10. Of these principal applicants, we estimate that about 19% (19,000 people) will have families[62] and around 14% (14,000 people) will have a dependent child.[63]

11. The Government has granted an amnesty to 15,000 principal applicants who have families and who had a dependent child when they arrived in the UK. The amnesty will apply to those who sought asylum in the UK before October 2000.

12. So, although the Home Secretary, has described this as a "one-off exercise" it seems highly likely that there will be a demand for a similar exercise, involving a similar number of people, in the future.

13. The only way that this can be avoided is if the government finds a way of successfully removing asylum seekers, including asylum seeker families. There is no indication of this happening—indeed if they were able to do this there would have been no need for the current amnesty.

14. Other countries' experiences of granting amnesties indicate clearly that these are not one-off exercises. Spain has carried out programmes to regularise the status of illegal immigrants in 1985, 1991, 1996, 2000 and 2001. In Italy amnesty programme were implemented in 1986, 1990, 1995 and 1998 but Italy continues to attract illegal immigrants and, in 2002, the Berlusconi government had to adopt yet another decree to provide for the regularisation of undocumented immigrants already in the country.

8 November 2003

12. Memorandum submitted by the Refugee Children's Consortium

1. Introduction

1.1 The Refugee Children's Consortium is aware that one factor adversely affecting the quality and timeliness of advice to young refugees is the complexity of the form of the legislation. A consolidating Act is long overdue.

2. Omissions

2.1 We regret that in the proposals do not address:

- Abolition of the detention of children, in the light of the HMIP reports since the 2002 Act and also the recommendation of the Home Affairs Select Committee in its report on Asylum Removals (HC 654 2003, 4th Report, paragraph 86)
- Amendment of the provisions that would deny children in the proposed accommodation centres access to mainstream education, in the light of the OFSTED report *The Education of Refugee Children* (October 2002)
- Assessment of the needs of children when they are in induction centres;
- Central government grants to local authorities for the support of refugee children, including those leaving care, in the light of the judgment in R (on the application of Berhe and others) v Hillingdon London Borough Council (Administrative Court, 29 August 2003)

2.2 In its *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland* (2002) the UN Committee recommended that the UK Government:

> *"Carry out a review of the availability and effectiveness of legal representation and other forms of independent advocacy to unaccompanied minor and other children in the immigration and asylum systems."* (Paragraph 48(f)).

and stated that the Government should

> *"address thoroughly the particular situation of children in the ongoing reform of the immigration and asylum system to bring it into line with the principles and provisions of the Convention."* (Paragraph 48(g)).

We urge the government to use this opportunity to address these recommendations.

[62] A family is defined as a principal applicant with one or more dependants. The proportion with dependants has been calculated by reference to table 8.3 of the Asylum Statistics United Kingdom 2002 which analyses those seeking support through the NASS by numbers of dependants.

[63] Assumes 50% of families with 1 dependant and 100% of all families with two or more dependants have a dependent child.

3. Asylum and Immigration Appeals System

3.1 The proposals do not set out how the single tier appellate authority would function, nor the mechanism by which it is proposed to restrict access to the higher courts. It is not possible to discern what scrutiny the decisions of adjudicators would receive, nor the rights of recourse against a flawed decision.

3.2 We are concerned that attempts to restrict appeal rights increase the likelihood:

(a) that a flawed decision will go undetected, and a child be returned to a country in which s/he is at risk of persecution.

(b) of a fall in standards of decision-making because scrutiny of decisions and rectification of error is reduced.

3.3 The proposals give no indication of how consistency in decision-making is to be assured; how the rules of precedent will function, or what will constitute a precedent in a single tier system.

3.4 We urge the government to impose an outright ban on the use of the "non-suspensive" appeals procedure in cases of unaccompanied children, in accordance with international standards. We understand that, at the time of writing, no cases of unaccompanied children have been certified as "clearly unfounded" with the attendant denial of an in-country right of appeal, but that the Home Office have declined to rule out such certification in future (UASC Stakeholder Meeting 23 October 2003). In its *Guidelines on Policies and Procedures in dealing with Unaccompanied children* (Geneva 1997) UNHCR states:

> "Paragraph 4.1. . . an unaccompanied child seeking asylum should not be refused access to the territory and his/her claim should always be considered under the normal refugee determination procedure."

The Separated Children in Europe Programme in the 1999 *Statement of Good Practice* (Save the Children Alliance and UNHCR) says:

> "11.1 Separated children and young people. . . should go through the normal procedures and be exempt from all special procedures including those relating to 'safe third country', 'manifestly unfounded' and 'safe country of origin'. . ."

No child should be denied an in-country appeal, and no child should face an appeal without representation. This should be placed on the face of statute.

3.5 We draw attention to the lack of any provision for guardians for unaccompanied children claiming asylum, as recommended in *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland* (October 2002, UN CRC, paragraph 48(c)). Further changes to the appellate system, along the lines suggested in the proposals, increase the urgency of implementing this recommendation. Thinking along these lines would appear to be the source of the question in the Green Paper *Every Child Matters* as to how best to build on the role played by the Panel of Advisors to unaccompanied children based at the Refugee Council.

4. Undocumented Passengers

4.1 The vast majority of children do not make their own decision to come to the United Kingdom: they are either brought or sent. In many countries, a child has difficulty leaving the country alone, or in the company of a person who is not the habitual parent/carer. This is one reason why children do not travel on their own documents, where these exist. UNICEF estimate that some 50 million births go unregistered every year—over 30% of all estimated births worldwide (UNICEF, *Child Protection-Birth Registration* 30/10/03). Without birth registration obtaining other documents will frequently be impossible.

4.2 We understand that the government wishes to tackle the arrival of undocumented passengers. However, there is no evidence to suggest that documents are the touchstone of whether a person has a well-founded fear of persecutio or not. As the proposals note, the Immigration Rules already require the Secretary of State to take account of lack of documents in assessing credibility. The proposal that this requirement be "made clearer" suggests placing an arbitrary fetter on the decision-maker and carries with it the risk of *refoulement* of children who need protection. Actions to combat the activities of those who make profits from smuggling or trafficking human beings should be aimed at those traffickers and other racketeers, not at the children whom they exploit. The Committee of the Rights of the Child was concerned by the continuing problem in the UK of child trafficking for sexual exploitation. It recommended that the UK Government ensure that it provides adequate resources are allocated to policies and programmes in this are (*Concluding Observations,* paragraphs 55 and 56). The government should take this opportunity to address those concerns.

4.3 Children brought or sent to the UK are unlikely to have control over the route taken or to question the final destination. Again, the proposed fetter on the person taking a decision on credibility is arbitrary and carries with it a risk of the *refoulement* of a child. Similarly with the timing of the claim for asylum. Training andquality country information are the ways to ensure high quality decision-making, rather than attempts to isolate factors which may or may not be relevant.

4.4 The proposals do not explain how the new criminal offences would take account of Article 31 of the Refugee Convention, debated at the time of the Immigration and Asylum Act 1999, following the *Adimi* case, and addressed in section 31 of that Act. We understand that the operation of the section 31 defence in

practice continues to cause concern. We are further concerned at the prospect of children in these circumstances being subject to criminal penalties, or being separated from their parents in consequence of the prosecution of the parents.

5. Safe Third Country

5.1 We are unclear from the proposal what it is proposed to add to sections 11 and 12 of the Immigration and Asylum Act 1999. We recall that the question of whether a child will be persecuted in a country may differ from the question of whether an adult would be persecuted in that country (*Sarjoh Jakitay v SSHD* IAT 12658 15 November 1995). "Safe" country procedures based on a notion of what happens to adults in that country may be insufficiently sensitive to the risks to children.

6. Restricting Family Support

6.1 We have expressed our opposition to section 54 and Schedule 3 of the 2002 Act. The suggestion that children can be protected from denial of food and housing by cutting off support to their parents and then supporting children under the provisions of s.20 of the Children Act appears to us to be wholly at variance with the principles of the Children Act and of the best interests of child, which should govern whether a child is taken into care or given support within the family. The Children Act is undermined, children are placed at risk, and social workers are put in an impossible ethical position. There is a grave risk that, rather than be separated, families will seek to survive without any support.

6.2 It will therefore come as no surprise that we are opposed to the extension of s.54.

6.3 In contrast to the existing s.54, there is no clarity in the proposal as to what would trigger a withdrawal of support. We are mindful of the extensive litigation that has surrounded s.55 of 2002 Act and anticipate similar confusion here.

7. The Office of the Immigration Services Commissioner

7.1 We are concerned that children and their families do not all have access to high quality advice. Many continue to be let down by incompetent or unscrupulous advisors. We are aware of concerns that in some reports on the operation of networks trafficking children there have been cases where a link in the chain is a person holding themselves out as a legal representative. Thus we are supportive of attempts to strengthen regulatory powers. We are not in a position on the detail of the proposals to extend search powers.

7.2 We support the proposals to place a duty on the designated professional bodies to provide timely information to, and to cooperate with, the Commissioner, and to criminalise advertising of immigration advice by the unqualified.

7.3 A key element of protecting people against unscrupulous or incompetent advisors is ensuirng that there is a sufficiency of competent professional advice. The rights of unaccompanied children to legal representation are set out in *inter alia* the UNHCR *Guidelines* and the Council of Europe Resolution on Unaccompanied minors who are nationals of third countries (November 1997). In its *Guidelines on Policies and Procedures in dealing with Unaccompanied children* (Geneva 1997) UNHCR states:

> "4.2...Upon arrival, a child should be provided with a legal representative . . .
>
> 8.3 This principle should apply to all children, including those between 16 and 18 . . ."

The Separated Children in Europe Programme Statement of Good Practice (Save the Children Alliance and UNHCR, 1999) says:

> "11.2 At all stages of the asylum process, including any appeals or reviews, separated children should have a legal representative who will assist the child to make his or her claim for asylum. Legal representatives should be available free of charge to the child and, in addition to possessing expertise on the asylum process, they should be skilled in representing children and be aware of child-specific forms of persecution."

This has been reiterated in The Separated Children in Europe *Programme for Action* (2000 UNHCR and Save the Children).

7.3 Children require legal representatives if they are to participate fully in the legal proceedings concerning them, in accordance with Article 12 of the Convention on the Rights of the Child and best practice as expressed in the UNHCR/Save the Children Separated Children in Europe Programme *Statement of Good Practice* (2nd Edition October 2000), paragraph 8 and the European Council on Refugees and Exiles *Position on Refugee* Children (ECRE, November 1996) 24 to 26.

7.4 We responded to the proposals from the Home Office and the DCA on public funding of immigration advice. We believe that the effect of the original proposals would be to reduce the supply of competent advice, which is already insufficient, and also to make it more difficult to distinguish the good advisors from the bad. The support of a guardian for unaccompanied children would further protect them from falling into the hands of incompetent advisors.

8. Race Equality

8.1 Hostility and aggression toward refugees is hostility and aggression toward members of minority ethnic groups. Getting "tough on asylum" sends a mixed message: it may contribute to public sympathy toward people recognised as refugees, but can also send a message that people seeking asylum are bad, and to be viewed with suspicion and hatred. There is a desperate need for the government to be proactive in promoting positive images of people seeking asylum. That this can have a dramatic effect on public perceptions was demonstrated at the time when Kosovans came to the UK under temporary protection provisions.

12 November 2003

13. Memorandum submitted by the Refugee Legal Centre

We regret we are unable to provide a substantive response to the Government's legislative proposals on asylum reform. Unfortunately, there is generally insufficient detail on which to respond and, on a key aspect of the proposed changes, limiting access to the higher courts, the consultation paper issued by the Home Office is silent: there is no proposal to respond to.

We would add that the consultation process announced by the Home Office is deeply unsatisfactory. The proposals were announced on 27 October and the deadline for a response is 17th November. This is insufficient time to respond. The implications of the abolition of the Immigration Appeals Tribunal (IAT) are enormous, this representing perhaps the most significant change in the determination process over the last decade. The Government has considered but withdrawn similar proposals at least two times in the last five years. Most recently, the Government has considered increasing the status of the IAT to a superior court of record. As regards the possible ouster of judicial review, this would have a huge constitutional significance. In this context it seems extraordinary to reduce, without explanation, the normal time limit for consultation to a matter of days.

We do not consider the proposals satisfy the duty of fair consultation. We note that they breach Cabinet Office guidelines as regards the time limit for consultation proposals[64] and because, without more information on what is being proposed, it is impossible to assess their impact and respond meaningfully.

At the centre of the proposals is the question of the abolition of the IAT. A crucial element of this question is how the IAT's supervisory role will be replaced to ensure consistent, good quality decisions are made at the adjudicator level. In the RLC's experience far too many adjudicator decisions are inadequate. Former President of the IAT, Mr Justice Collins, has recently commented that the standard of adjudicator decision-making "is not as high as it should be". He states that as many as 25% of all adjudicator decisions are given leave to appeal to the IAT[65].

More important, no sense can be made of the abolition of the IAT as a consultation proposal unless we know how the Government intends to deal with judicial review. Clearly, the Government does not intend to replace the IAT with a far more expensive remedy to the High Court. The consultation paper merely signals that the Government is "looking at ways to restrict access to the higher courts". This phrase belies the huge constitutional significance of some kind of move (we don't know what) to oust the judicial review remedy. It also begs the question of what will happen to appellants who receive bad decisions.

It is difficult to characterise the suggested abolition of the IAT coupled with some kind of restriction on judicial review as a proposal. It is still more difficult to make any meaningful response.

We can only say that in the face of adjudicator decision-making that can be inconsistent and poor, the IAT plays a crucial role. The proposals are intended as a "crackdown" on "the multi-layered appeals system which is open to abuse" and a main aim of the proposal is to reduce the costs of the appeals process[66]. However, no evidence has been presented to suggest that the appeal right to the IAT encourages abuse. If an appeal lacks merit, leave to appeal will not be granted: such a case will not get off the ground. Further, the Government has recently stated that it is not even clear that these proposals will result in legal aid savings[67].

As to the other proposals, they are similarly lacking in detail. At this stage we offer the following brief comments.

We have concerns about proposals to deny support to families awaiting removal, particularly the children of such families. This will result in the infringement of basic human rights of both parents and their children (who we understand will be forced into care). The Government has been repeatedly criticised by the Courts for its Section 55 support assessments. Sir Stephen Sedley LJ has complained of the Courts having to "save asylum seekers from starvation". The administrative court has made over 800 orders for emergency support and this figure is increasing by 60 orders per week[68]. Mr Justice Maurice Kay has noted "the cases which

[64] These stipulate that 12 weeks should be the standard period.
[65] The Middle Templar, Trinity 2003.
[66] Home Office Press Release, 27 October 2003.
[67] Written evidence submitted by the DCA and LSC to the Constitutional Affair Committee, 23rd October.
[68] Judges "saving asylum seekers from starvation", the *Guardian* 4 November 2003.

are coming into court in almost unimaginable numbers are the tip of an iceberg" and that judges are making orders for emergency support in 90% of cases[69]. These figures illustrate the extraordinary scale of poor Home Office decision-making and the extreme suffering this is causing. We fear that these new measures will exacerbate an already deeply unsatisfactory position.

We have great concerns about criminalising undocumented passengers. It fails to address the realities of trafficking and people smuggling, nor of asylum seekers who have no legal route to the UK. In particular we fear it will merely punish the victims of trafficking and will lead to unjust convictions in breach of Art 31 of the 1951 Convention. We have similar concerns about such matters being taken into account in assessing the credibility of an asylum seeker. Also of concern is the proposal to criminalise those who fail to co-operate with the redocumentation process. Such concern would be exacerbated if the abolition of the IAT were to leave appellants with poor adjudicator decisions without any effective remedy.

The safe third country proposals represent a further degrading of the protection a refugee can expect under the 1951 Convention. Increasingly, it seems, the Government is looking to side step its international obligations. We doubt the legal protection offered to asylum seekers in zones of protection will match that enjoyed by those whose claims are processed in the UK. We fear there is a serious possibility that removals will breach the ECHR.

Finally we would again draw the Committee's attention to the threat to cut legal aid. We do not wish to rehearse the concerns expressed in our note to the Committee of 22 September. We do however believe two developments should be drawn to the attention of the Committee. First, the Report of Constitutional Affairs Committee that offers a welcome critique of the proposals. Secondly, the Government's memorandum to the Constitutional Affairs Committee of 24th October. This memorandum maps out revised proposals, which, although unhelpfully vague, offer some encouragement that the Government may temper some of the worst aspects of the proposals.

Nevertheless, it remains the Government's position that legal aid should not be available for most Home Office interviews. This is inimical to the need to front load the determination process, a matter on which the Committee has no doubt received much evidence. Of even greater concern, however, is the new threat to abolish legal aid for the initial decision making process[70]. This is said to be justified by improvements in initial decision-making. The Refugee Legal Centre has not seen any such improvement. Indeed, our success rate at appeal has shown a fairly steady increase over the last 10 years. That it now stands at 36% is not a testament to the quality of Home Office decision-making.

14 November 2003

Supplementary memorandum submitted by the Home Office

WITHDRAWAL OF SUPPORT FROM FAILED ASYLUM SEEKING FAMILIES

I am writing as requested with further information about the purpose and operation of Clause 7 of the Asylum and Immigration (Treatment of Claimants etc) Bill.

The purpose of Clause 7 is to end the absurdity under which families whose claims for asylum have been fully and fairly considered and found to be invalid, and are consequently in the country illegally, can nonetheless continue to live at public expense while refusing to co-operate with efforts to get them to leave. The sums involved are large. The average support to an asylum seeking family is worth about £1,340 a month, equivalent to a tax-free income of more than £16,000 a year.

What the clause does is to provide that support will not be paid to failed asylum-seekers with a family if the Secretary of State is satisfied that they are failing without reasonable excuse to take advantage of facilities for leaving the UK voluntarily, or to place themselves in a position in which they may take advantage of such facilities. This second limb is aimed at those who cannot return home because they have no travel documents and are refusing to co-operate in obtaining such documents. You will notice that there is absolutely nothing here that changes the legal position on taking children into care: I will say more about this below.

We intend by this measure to ensure that people who are under a legal duty to leave the country have no incentive to frustrate and draw out the process. What we envisage will happen in practice is that the Immigration Service will reach a preliminary view on whether the family is acting in a way that might lead support to be terminated. We will issue detailed guidance to the Immigration Service about this before the measure is implemented. But in basic terms the Immigration Service would be looking for clear evidence that the family has refused or intends to refuse an opportunity to leave the country and has no reasonable excuse (such as the serious illness of a family member); or that it is failing to co-operate with steps to obtain travel documents which will enable it to leave (for instance, by missing appointments or refusing to supply necessary information).

Again, we envisage that when the Immigration Service had reached that view it would seek to interview the family. At the interview it would explain the consequences of its non-compliance to the family and give it an opportunity to explain what has happened or to undertake to co-operate for the future. Failure by the

[69] *The Queen on the application of Q, D, KH and others v SSHD* [2003] EWHC 2507.
[70] See paragraph 22 *et seq* of the memorandum.

family to attend for the interview, or to give credible assurances about its future conduct, or subsequent failure to live up to those assurances, would lead to the ending of support. This would be done by the National Asylum Support Service acting at the behest of the Immigration Service.

It might be asked why, when a family is here illegally, we do not simply remove them under compulsion. Compulsory removal is an extremely expensive process, and individuals who wish to avoid removal have resorted to many ways of frustrating it. It may require the use of Immigration Service staff to locate and apprehend those concerned, to detain them and escort them to the airport, and sometimes, if for example there is reason to expect disruptive behaviour on the aircraft, to escort them during the flight. In cases where detention is not considered necessary but a Removal Direction has been issued in respect of the family, failure by the family to comply with it wastes the considerable resources which have been tied up in arranging the compulsory removal. While we will of course continue and intensify our programme of compulsory removals, if we rely solely on it we will not achieve the increase in the proportion of failed asylum seekers leaving the country which we are determined to bring about. Hence the need to eradicate the perverse incentives which lead failed asylum seeking families to refuse opportunities to leave voluntarily.

This brings me to the part of the policy which has created the most public concern: the possibility that some of those affected may still decide not to leave the country even at the risk of destitution for themselves and their children. We cannot know what proportion of families would act in such an irresponsible way: I hope it will be small. Indeed, we have no reason to believe that asylum-seeking parents are any more likely to prefer to abandon their children than any other parents. What I do want to make clear, however, is that even where this does happen it does **not** follow that the children will need to be taken into local authority under the provisions of the Children Act (or its equivalents in Scotland and Northern Ireland); indeed we are determined that the number of cases in which children are taken into local authority care will be as low as possible. We will achieve this by ensuring that families who are refusing to co-operate with voluntary departure processes will be targeted for compulsory removal so that we can ensure that all its members leave the country together.

I am not in a position to give estimates of the number of families to whom the new clause might apply. The concession on Indefinite Leave to Remain which we announced last month has reduced the number of families who need to leave the UK. We have made it clear that local authorities will be reimbursed for costs incurred in taking into their care any child as a consequence of the withdrawal of benefit. However, I wish to emphasise once again that it is not our intention that any child should come into care as a result of this measure and we will implement the policy in such a way as to prevent this happening as a consequence, as far as we possibly can.

Beverley Hughes MP
Minister of State

8 December 2003

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Fifth Report	Sexual Offences Bill	HC 639 (*Cm 5986*)

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First Report	The Anti-Terrorism, Crime and Security Bill 2001	HC 351
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