

**NORTHERN IRELAND
HUMAN RIGHTS COMMISSION**

BRIEFING PAPER

IMMIGRATION AND ASYLUM BILL 1999

House of Lords, Second Reading
June 29th 1999

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BRIEFING PAPER ON THE IMMIGRATION AND ASYLUM BILL 1999 SUMMARY

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This briefing paper highlights the concerns of the Northern Ireland Human Rights Commission about the provisions of the Immigration and Asylum Bill 1999 regarding the **detention** of asylum seekers as well as those regulating the **provision of support** to asylum seekers. The Commission believes that these provisions are neither in compliance with the Human Rights Act 1998 nor with international human rights standards. The Commission is particularly concerned about the possible impact of the Bill on the growing number of asylum seekers in Northern Ireland.

Detention of asylum seekers [Part III of the Bill]

The Commission believes that the provisions of this part of the Bill do not comply with national and international human rights standards provided for in the following human rights instruments:

- ❑ The right to liberty and security of the person under Article 5 of the European Convention on Human Rights & the equivalent provisions of the Human Rights Act 1998
- ❑ The right to liberty and security of the person and the prohibition of arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights
- ❑ The prohibition of punishment of refugees on account of illegal entry, and the requirement of necessity of restrictions upon refugees under Article 31 of the 1951 Refugee Convention
- ❑ The right to a fair trial under Article 6 of the European Convention on Human Rights

The Commission recommends that urgent attention be given to the following:

- ❑ The inclusion of clear and accessible **criteria for detention** in the Bill.
- ❑ The entrenchment of a **presumption of liberty** in all asylum cases. The Minister's late concession in this regard needs to be cemented into legislation
- ❑ The determination that detention will only be resorted to where it is **strictly necessary** in light of all the circumstances of the case and where all other alternatives have been considered.
- ❑ The protection of the right of asylum seekers to **challenge the lawfulness** of their detention promptly, as promised by the Minister.
- ❑ The provision of **legal aid** to guarantee a fair hearing at all stages of the asylum process.

- The inclusion of measures which would ensure that asylum seekers were detained in **appropriate centres**.
- The entrenchment of **a legal maximum limit** of time for which asylum seekers can be detained.

Provision of support for asylum seekers [Part VI of the Bill]

The Commission believes that this part of the Bill falls short of the human rights standards in the following domestic and international human rights instruments:

- The right to respect for private and family life under Article 8 of the European Convention on Human Rights & the equivalent provisions of the Human Rights Act 1998
- The standards of care that apply to children under Articles 3, 22, 19, 24 and 26 of the United Nations Convention on the Rights of the Child
- The right to social and economic protection under Articles 7, 17 and 30 of the European Social Charter
- The right to non-refoulement under Article 33 of the 1951 United Nations Refugee Convention

The Commission recommends that urgent consideration should be given to the following matters:

- ❑ The inclusion of asylum seekers under mainstream benefit schemes
- ❑ The provision of a higher level of support to all asylum seekers
- ❑ The payment of income support to asylum seekers at urgent cases rate - 90% for adults and 100% for children
- ❑ The inclusion of all children under the protection of the Children's Act
- ❑ The removal of the voucher scheme of support, which is not only inefficient and costly, but undermines the effective integration of asylum seekers in society and does not ensure their well-being.

In addition, the Commission is concerned that the Government has not considered these provisions in light of the equality duties that are conferred upon all public authorities in Northern Ireland in terms section 75 and Schedule 9 of the Northern Ireland Act 1998.¹ In this regard, the Commission urges the Government to conduct an **urgent audit** of the possible impact of the proposed policy on the equal opportunity of people in Northern Ireland.

**A. DETENTION OF ASYLUM SEEKERS &
THE RIGHT TO LIBERTY AND SECURITY OF THE PERSON**

1. The Background

1.1 The Immigration Act 1971 allows for the detention of asylum seekers under the authority of an immigration officer, pending an examination of an asylum claim or a decision regarding leave to enter, in the context of deportation or pending removal.² Although an asylum seeker can therefore be detained while his/ her asylum claim is being considered under the existing Act, the proposed Bill contains no legal basis for detention of asylum seekers. The 1971 Act itself contains blanket powers of detention for immigration officers and provides no criteria for the exercise of the discretion to detain. Immigration Service Instructions do exist to provide guidelines to officers in the exercise of their discretion, but do not have any statutory force. It is also clear from rising statistics of asylum seekers detained by immigration officials that the stated aim of the government to only authorise detention where there is no alternative, has not been realised in practice.³

¹ See also §14 of the Policy Appraisal and Fair Treatment Guidelines for Northern Ireland.

² Paragraph 16-18 of Schedule 2 of the Act

³ Government Instructions of 20 September 1994. See also the joint briefing of Amnesty International, Justice, the Refugee Council and the Refugee Legal Centre for the Second Reading of the Immigration and Asylum Bill, which determines that

1.2 The Northern Ireland Immigration Practitioners Group has found that approximately 20% of asylum seekers who apply through the Belfast Immigration Office are detained in the region. In light of the fact that detention is intended to be an extraordinary device within immigration procedure, this represents a disproportionate number of asylum seekers.⁴ This number includes asylum seekers who were detained despite voluntarily presenting themselves at the Immigration Office.

1.3 Although the purposes for detention stated in the Immigration Act are ostensibly of a short term nature, the 'examinations' referred to in the Act can, however, take months, with the result that asylum seekers in Northern Ireland can be detained for a very long time. Concerns about maximum time limits for detention, access to bail, appeal and judicial review proceedings and conditions of detention gain added urgency when persons are deprived of their liberty in terms of measures that have long ceased to be temporary. The written evidence of the Immigration Practitioners Group in Northern Ireland has drawn attention to a recent case where an asylum seeker was detained for fourteen months.

1.4 The UK practice of detention of asylum seekers was criticised by the *UN Working Group on Arbitrary Detention*,⁵ which noted concerns about the following issues after their visit to the UK in 1998:

- *Detention conditions*, including detention of asylum seekers in criminal detention centres, and absence of a maximum limit of time for which asylum seekers could be detained.
- *The arbitrariness of detention*, which the working group often found to be contingent upon availability of space rather than the quality of cases. The problem of arbitrariness is compounded by the fact that no written rules or statutory grounds for detention exist.
- *Access to courts* and the absence of a quick and effective judicial remedy to challenge the detention decision. The group was particularly concerned about the giving of reasons for detention and the fact that free legal representation was not provided at all stages of the judicial process.

1.5 As the Working Group reported in December 1998, it would have been expected that their concerns would be addressed by the legislative changes that the government has since proposed. This

approximately 800 asylum seekers are detained under the Immigration Act at any one time.

⁴ Written Evidence to the Special Standing Committee, 15 March 1999

⁵ *Report of the Working Group on Arbitrary Detention*, Addendum: Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, Commission on Human Rights 55th Session, E/CN.4/1999/63/Add.3

does not, however, seem to be the case, as many of the issues raised by the UN Working Group are still unsatisfactorily met by the proposals in the Bill.

2. Issues of particular concern in Northern Ireland

Asylum and immigration practice in Northern Ireland gives rise to particular concern in the context of the Bill's provision on detention of asylum seekers with regard to the following issues:

1. Whereas an attempt is made in the rest of the United Kingdom to accommodate asylum seekers in special detention centres designed for immigration purposes, no such special accommodation exists in Northern Ireland.⁶ Male asylum seekers detained in Northern Ireland are held at HMP Magilligan and women at HMP Maghaberry. The Law Centre (NI) have pointed out that these detainees are often held with prisoners convicted of particularly serious offences, including violent and sex offenders, despite the fact that the asylum seekers themselves have neither been charged with, nor found guilty of any crime.⁷ The UN Committee against Torture and the UN High Commissioner for Refugees have condemned this practice of non-segregated detention of asylum seekers.
2. The conditions of detention in Northern Ireland also do not facilitate effective access to asylum application processes and other legal proceedings, including bail and appeal procedures. The prison where male detainees are held is in an isolated location outside Belfast, making access to legal advice, support from families, friends and communities very difficult. The Law Centre (NI) points out that asylum seekers may not receive incoming phone calls, and have recorded reports of racist attacks against and bullying of asylum seekers.⁸
3. As no permanent adjudicator is situated in Belfast, both appeals against asylum decisions and bail applications by detained asylum seekers are slow processes. The adjudicator based in Glasgow visits Belfast once or twice per month, and although special hearings can be organised at shorter notice, this does not seem to address the need for a swift judicial remedy, especially in cases where asylum seekers are detained while this process takes its course.

⁶ Although the Home Office's own rules determines that detention centres are more appropriate facilities than prisons, it was found that in October 1996, 343 asylum seekers were held in prisons in the UK. See Hughes, J and Liebaut, F (eds.) Detention of Asylum Seekers in Europe: Analysis and Perspectives, Kluwer Law International, The Hague, 1998 pp 35-8 for further discussion.

⁷ Tennant, V 'Asylum Procedures in Northern Ireland,' in *The Writ, Journal of the Law Society of Northern Ireland*, May 1999, p11

⁸ The Northern Ireland Immigration Practitioner's Group (NIIPG) Written evidence to the Special Standing Committee, 15 March 1999

4. The lack of financial support for legal proceedings conducted by detainees in Northern Ireland seems particularly acute. Legal aid for asylum seekers is currently not available for legal representation at asylum appeal hearings or bail hearings. The kind of financial grants to voluntary organisations that provide advice or assistance for detained persons that is envisaged in clause 45 of the Bill has already been provided under section 23 of the 1971 Act. No such grant has, however, ever been paid to an organisation in Northern Ireland. As neither the Refugee Legal Centre nor the Immigration Advisory Service effectively provides representation at hearings in Northern Ireland, the Home Office does not fund any legal or welfare advice for asylum seekers who reside in Northern Ireland. In light of the history of financial support for advice organisations in the region, it seems clear that the extent of financial support proposed in clause 45 would be wholly insufficient to fulfil the needs of asylum seekers for specialist immigration advice throughout the whole of Northern Ireland.⁹ This provision cannot replace comprehensive legal aid at all stages of the asylum application process.

3. Detention of Asylum Seekers: International and domestic human rights standards

3.1 Regional Instruments and Domestic Standards

The Commission believes that the provisions on detention of asylum seekers contained in the Bill are in conflict with Article 5 of the European Convention on Human Rights.

1. Although the ECHR does not prohibit the detention of asylum seekers, it creates strict conditions with which such detention must comply. The non-compliance of the Bill with the ECHR is of particular concern in light of the coming into effect of the Human Rights Act 1998 in October 2000, which will create domestic remedies for infringement of ECHR rights. These rights are available *for all persons within the jurisdiction of the State Parties to the Convention*, therefore also providing protection to asylum seekers and others within the immigration process.¹⁰ Article 14 of the ECHR additionally provides that the enjoyment of Convention rights shall be secured without discrimination on grounds of race, national or social origin or birth, *inter alia*.
2. Article 5 of the Convention provides a general right to liberty and security of the person to all persons. Paragraph 1(f) authorises the *'lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or*

⁹ The NIIPG written evidence refers to the fact that only three agencies provide specialist immigration advice to the whole of the region. *Op cit. fn 7* at p10

¹⁰ Article 1 ECHR. See also Article 14 ECHR which prohibits discrimination in the protection of Convention rights on grounds of race, colour, national origin and other grounds.

extradition.' This clearly does not cover the position of persons who have been granted permission to remain temporarily whilst their applications are being processed.

3. Unauthorised entry does *not* include attempts to seek international protection.¹¹ This seems especially clear in cases where the application for asylum is lodged upon entry or where asylum seekers voluntarily present themselves at Immigration Offices.
4. Detention of asylum seekers must, according to Article 5 be 'prescribed by law.' This requirement has been interpreted by the European Court of Human Rights to require not only that domestic law must authorise detention, but that general requirements of *fair and proper procedures* must be followed and that the *detention may not be arbitrary*.¹² Furthermore, the law regulating detention must be sufficiently *accessible and precise*. It is clear from the UN Working Group report that they considered the immigration practice in the UK, prior to the introduction of this Bill, to be prone to arbitrary decision-making. The current Bill does not, however, address the wide discretionary power given to Immigration Officials in deciding whether to detain asylum seekers. Such an approach - regulated by government guidelines and not statute - is not only open to arbitrary implementation, but also does not provide for a clear and accessible determination of the rights of detainees.
5. The Court indicated in the *Amuur* judgement that the *quality* of law authorising detention is also at issue in the context of Article 5, and indicated that the necessary elements that should be contained in such legislation are the following:
 - * speedy judicial review of the decision to detain
 - * time limits for detention
 - * access to legal, social & humanitarian assistance

The Bill does not, as has been pointed out especially in the context of Northern Ireland, ensure speedy access to court for the determination of the legality of the detention, and does not sufficiently secure access to legal assistance - partly because of conditions of detention in Northern Ireland, and partly because of lack of funding to voluntary immigration advice organisations and the complete absence of legal aid for representation at appeal procedures.

A very disturbing defect of the Bill is the absence of a legal limit to the time that an asylum seeker may be detained. This

¹¹ See *Amuur v France* Judgement No. 17/1995/523/609 of 25 June 1996

¹² *Winterwerp judgement*, 24 October 1979, Series A No 33, p.19, §45. See also *Amuur v France op. cit. fn 10*

omission causes the Bill to fall short of the standards set by the European Convention on Human Rights as interpreted in *Amuur*.

6. In determining the lawfulness of detention it is imperative that not only the requirements of national law, but also the requirements of the Convention as well as other international standards must be considered.

3.2 International Instruments and standards

The Commission believes that the provisions on detention of asylum seekers contained in the Bill are in conflict with Article 9 of the International Covenant on Civil and Political Rights

1. Article 9 of the International Covenant on Civil and Political Rights provides:

'Every person has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.'

2. The General Comment of the UN Human Rights Committee on article 9¹³ clearly states that *'paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases, such as... immigration control'* and that the *'important guarantee in paragraph 4, namely the right to court control of the legality of detention, applies to all persons deprived of their liberty by arrest or detention.'* The Commission added that, if detention is used as *'so-called preventative detention'*, as is the case with detention of asylum seekers while investigations are conducted, it must be controlled by the same provisions in Article 9.

3. Article 9 of the ICCPR does not distinguish between nationals and non-nationals (including asylum seekers) in its protection of detained persons. Article 2 of the ICCPR also requires each state party to ensure rights within its territory without distinction of any kind, including race, national or social origin etc.¹⁴

4. Article 9 prohibits arbitrary detention, which includes detention that contains elements of *inappropriateness, injustice and lack of*

¹³ General Comment 8/16

¹⁴ See also the General Comment 15 (Twenty-seventh Session, 1986) on the position of aliens under the Covenant, paragraph 2:

'[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.'

and paragraph 7:

'Aliens shall have full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person.'

predictability. Apart from the weaknesses in the Bill with regard to arbitrariness pointed out in context of the ECHR in §3.2 above (which would also fall short of the requirements of Article 9 ICCPR), the ICCPR provision has been found to require an additional element of *proportionality* between the use of detention and the ends achieved thereby. The UN Human Rights Committee has found that the requirement of non-arbitrariness could be infringed if the detention is not '*necessary in all the circumstances of the case*'.¹⁵

5. The use of detention to deter asylum seekers or to use preventative detention where difficulty is experienced in obtaining the necessary travel documents from the asylum seekers' consulates, could arguably amount to a disproportionate measure in conflict with the protection granted under the ICCPR.
6. The Human Rights Committee found in *A v Australia* that, in considering the proportionality of the detention of an asylum seeker, detention should not be allowed to continue:
'beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate the need for investigation and there may be other factors particular to the individual... which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.'

The Human Rights Committee clearly envisaged a procedure whereby the individual merits of the position of the asylum claimant are taken into consideration when evaluating the lawfulness of detention. With regard to the automatic bail hearings for detainees provided for in the Bill, the Home Secretary has pointed out that these hearings will not be a forum where the lawfulness of detention can be challenged, but that habeas corpus proceedings would have to be employed for this purpose.¹⁶ This position is also reflected in the fact that under clause 38 the chief immigration officer and asylum adjudicators and tribunals only have the jurisdiction to release detainees on bail.

7. These provisions do not conform to the standard demanded by the ICCPR and do not ensure *effective* judicial control of detention.
8. The current Bill neither contains a presumption of liberty nor a requirement that detention should only be allowed in a limited set of circumstances after all other alternatives were considered and therefore does not comply with the human rights standards set by the ICCPR.

¹⁵ *A v Australia* (1997) §9.2

¹⁶ *Hansard, House of Commons*, 22 February 1999, col. 40

9. Particular attention should be given to these concerns in the light of the fact that the UK report to the Human Rights Committee, required under the ICCPR, regarding compliance with the ICPPR is due in June 1999.

The Commission believes that the provisions on detention of asylum seekers contained in the Bill are in conflict with Article 31 of the 1951 Refugee Convention

Article 31(1) of the Convention relating to the Status of Refugees determines that:

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...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'

Although the possibility of detention of asylum seekers is not excluded by this provision, the aim of detention cannot be punitive in nature. In addition, the requirements for detention in paragraph 2 must be fulfilled. These include the requirement that the restrictions placed on the freedom of movement of asylum seekers must be strictly '*necessary*.' Commentary on the Convention is consistent in interpreting necessity narrowly. It has been authoritatively stated that illegal entry alone cannot legitimise the detention of asylum seekers.¹⁷ It is clear that the current Bill envisages precisely such a possibility and that, as it stands, the Bill therefore does not comply with the UK's obligations under the 1951 Convention.

B. THE RIGHT TO A FAIR TRIAL AND ASYLUM SEEKERS

The Commission believes that the provisions on detention of asylum seekers contained in the Bill are in conflict with Article 6 of the European Convention on Human Rights

1. Article 6 of the ECHR provides that everyone shall have the right to a fair hearing within a reasonable time by an independent and impartial tribunal. Although public law matters do not generally fall under the protection of Article 6, detention matters constitute one exception to the rule. Especially where claims under Article 3 of the ECHR (the right not to be subjected to torture or to inhuman or degrading treatment or punishment) are at the core

¹⁷ Hathaway, J and Dent, J Refugee Rights: Report on a Comparative Survey York Lanes Press, Toronto, 1995, p19

2. The Bill fails to provide legal aid for representation at asylum appeal hearings or bail hearings, thus falling short of the fair trial protection under Article 6 ECHR. This is compounded by the fact that, as has been illustrated above, access to courts in this regard often does not occur within a reasonable time.

C. SUPPORT OF ASYLUM SEEKERS

1. Support of Asylum Seekers: International and Domestic Human Rights Standards

The current proposal on support for asylum seekers in Part VI of the Immigration and Asylum Bill removes all residual support towards accommodation and living expenses provided for in other legislation. It confers the power to provide 'adequate accommodation' and means towards 'essential living needs' on the Secretary of State. There is no duty to support asylum seekers on either the Secretary of State or any other public body.

In spite of certain late concessions made by the Minister on support arrangements, the system is still largely based on a voucher system, and the level of support remains inadequate to ensure the well-being of asylum seekers.

There are potentially three types of human rights challenge to the support provisions in the Bill. Possible violations of the ECHR are of particular concern in light of the imminent entry into force of the Human Rights Act 1998. This means that challenges based on the violation of Convention rights could be made in domestic courts from October 2000.

1.1 International Instruments and Standards

The Commission believes that the provisions on support of asylum seekers contained in the Bill are in conflict with UN Convention on the Rights of the Child.

1. The support provisions, which do not currently make sufficient allowance for the especially vulnerable position of the children of asylum seekers, could be in breach of the UK's obligations under the UN Convention on the Rights of the Child, which confers duties on the state with regard to *all* children within its jurisdiction.¹⁸ This point should be given particular attention in

¹⁸ Article 3 of the Convention of 1989 requires that:

'[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

See also Article 22 which specifically requires that states must take:

light of the fact that consideration of the UK's Report on compliance with the Convention is now due. The European Social Charter of 1961, as revised in 1996¹⁹, also provides for a right of children to *special* protection against physical hazards,²⁰ as well as the right of children and young persons to appropriate social, legal and economic protection.²¹ The Charter specifically requires states to ensure the rights of persons and families who live or risk living in a situation of social exclusion or poverty. States are required in terms of this obligation to ensure effective access to employment, housing, training, education, culture and social and medical assistance.²²

The Commission believes that the provisions on support of asylum seekers contained in the Bill are in conflict with 1951 UN Convention relating to the Status of Refugees.

2. The limited support given to asylum seekers by the Bill could prevent asylum seekers from exercising the right to *non-refoulement* under the 1951 UN Convention relating to the Status of Refugees, which has been ratified by the UK and in effect made part of domestic law.²³ In cases where the Article 3 ECHR²⁴ rights of asylum seekers are threatened in their home countries, the UK is under the international obligation to provide assistance to them. Insufficient support to such applicants could render their chances of pursuing protection from persecution meaningless. As the 1951 Convention refers to the rights of

'appropriate measures to ensure that a child who is seeking refugee status...shall...receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights...instruments.'

The Convention also makes specific reference in Article 19 to the protection of children from abuse and neglect, as well as the right to the highest level of health care possible in Article 24. Article 26 protects the right of every child to benefit from social security, and requires that states:

'take the necessary measures to achieve the full realisation of this right in accordance with their national law.'

In determining the amount of social security benefit, consideration should be given to any relevant consideration, including the circumstances and resources of the child. Article 27 recognises the right of every child to a standard of living:

'adequate for the child's physical, mental, spiritual, moral and social development.'

In terms of this Article, the state shall, in case of need, provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

¹⁹ The UK has signed, but not ratified the 1996 Charter.

²⁰ Article 7 of the Charter.

²¹ Article 17 of the Charter provides *inter alia* that states should, with a view to '*ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities*', take all appropriate measures to ensure that children have the care, the assistance the education and the training they need. Article 16 of the Charter similarly provides that:

'[w]ith a view to ensuring the necessary conditions for the full development of the family, which is the fundamental unit of society, the Parties undertake...to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements [and] provision of family housing'.

²² Article 30 of the Charter.

²³ The 1951 Convention is effectively part of UK law, as both the Asylum and Immigration Act 1996 and the present Bill prohibit any breach of the UK's obligation under the Convention.

Article 33 of the Convention provides: '*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontier 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.*'

²⁴ Article 3 of the ECHR provides that '*[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.*'

'refugees', the Government might consider itself to be within the limits of these rights by providing, in Clause 114 of the Bill, for retroactive provision of support after an asylum seeker has successfully achieved refugee status. The granting of refugee status amounts to the recognition of a *pre-existing* legal status and the obligations that are owed to refugees therefore have to be honoured at all stages of the recognition process. It is also the more humane view that all applicants for refugee status should also benefit from support.

1.2 Regional Instruments and Domestic Standards

The Commission believes that the provisions on support of asylum seekers contained in the Bill are in conflict with the European Convention on Human Rights

The Commission would argue that the provisions are insufficient to protect the rights of asylum seekers under the European Convention on Human Rights – including the *right to human dignity* (interpreted by the European Court of Human Rights as being implicit in the Article 8 right to private and family life).

The Commission is concerned that the possible impact of the current Bill on **equality of opportunity** in Northern Ireland has not been considered fully. The Northern Ireland Act 1998,²⁵ as well as the Policy Appraisal and Fair Treatment Guidelines for Northern Ireland,²⁶ both require that all policies must be assessed, and the impact of such policies monitored for possible adverse impact on the promotion of equality of opportunity. In this regard, the Commission would advise the Government as a matter of urgency to assess the proposed support scheme for asylum seekers in terms of its impact on the equality of opportunity:

- between persons with dependants and persons without,
- between persons of different age, especially in light of a possible disparate impact on children or the aged;
- between persons with a disability and persons without;
- between men and women generally and
- between persons of different racial groups

Human rights and humanitarian considerations as well as the statutory equality duty specific to Northern Ireland demand a *more extensive* amendment to address the dire need of *all* asylum seekers.

2. THE EFFECT OF THE SUPPORT SCHEME ON ASYLUM SEEKERS

1. Who should qualify for support

²⁵Section 75 as well as Schedule 9 of the Act.

²⁶Paragraph 14 of the guidelines.

The Bill provides in Clause 85 that the Secretary of State 'may provide' support for asylum seekers or dependants of asylum seekers. Asylum seekers are classified as persons instituting a claim that it would be contrary to the UK's obligations under the Refugee Convention or Article 3 of the ECHR for them to be removed from the UK. It can be argued that persons whose rights under other Articles of the ECHR are threatened, should also be included in this definition.

Recommendation

- *That a wider definition of 'asylum seeker' be included in the Bill, in order to ensure the protection of persons who are persecuted for the exercise of their ECHR rights generally in their home country.*

2. Removal of mainstream benefits

2.1 One of the reasons why the proposed amendment has been considered necessary is the exclusion of asylum seekers (by Clause 106) from the benefits of current mainstream social security legislation, regardless of their needs. This has the implication that special needs, for example the needs of disabled asylum seekers or vulnerable children, could not be taken into account in determining the level of benefit that should be applicable. The duty of public authorities in Northern Ireland to promote the equality of opportunity between persons with a disability and those without, as well as between persons of different age, racial groups and between men and women generally deserves careful consideration.²⁷

Recommendation

- *That the Government urgently conducts an audit to determine the possible disparate effect of its current proposals on the disabled, the young, the aged, as well as between men and women and persons of different races.*
- *That Clause 101 be amended so as not to exclude all asylum seekers from mainstream benefits regardless of their needs, but to allow for the determination of benefits in terms of need or in terms of the best interests of a child, where applicable.*
- *That, as a bare minimum, all asylum seekers (and not just those with dependants) should be given access to Income Support – which is seen as the safety net of the social security system – as well as Housing Benefit under the Social Security Contributions and Benefits (Northern Ireland) Act 1992.*

2.2 The Health and Personal Social Services (Northern Ireland) Order 1972 aims to provide personal social services to the most

²⁷ See Section 75(1) of the Northern Ireland Act 1998, as well as paragraph 14 of PAFT

vulnerable of persons - the elderly, those suffering from illness or who are substantially handicapped by deformity or disability and the homeless.²⁸ Clause 112 of the Bill, however, proposes to prohibit local authorities from making any arrangements in terms of this Order with regard to 'the prevention of illness, the care of persons suffering from illness or the aftercare'²⁹ of such persons subject to immigration control. The duty of the Department of Health and Social Services to provide or secure personal social services in Northern Ireland and to promote the social welfare of the people of Northern Ireland will also not extend to those asylum seekers whose needs have arisen solely because s/he is destitute.³⁰ It is unclear how it will be decided whether a person's physical need for assistance arises out of destitution or some other cause. Either way, the withholding of services aimed at the prevention and treatment of illness can only lead to further hardship and isolation for asylum seekers.

The duty to appraise the disparate effect of the current proposals between persons of different ages, as well as the possible effect on the disabled in terms section 75 and Schedule 9 of the Northern Ireland Act and in terms of paragraph 14 of PAFT should be urgently considered in this regard.

Recommendation

- ❑ *That the Government conducts an audit to determine the possible disparate effect of its current proposals on the disabled as well as between persons of different ages.*
- ❑ *That Clause 112 be deleted.*

2.3. In terms of Clause 113 of the Bill, dependants of asylum seekers are also excluded from the ambit of the duty of authorities to safeguard and promote the welfare of children under the Children Act 1989.³¹ This is the first ever attempt to exclude a group of children from the protection of the Act, and could amount to discrimination against asylum-seeking children. Although the Government has stated its intention that children of asylum seekers should be excluded only from the benefits related to accommodation and living expenses provided for in the Act, and not from its minimum standards of treatment generally, it is essential to restore the totality of rights contained in the Children Act to children seeking asylum.

It is not clear whether Northern Ireland is excluded from the effect of Clause 113 of the Bill, as no mention is made of the analogous

²⁸ See the definition of 'person in need' in the Article 2 (b) of the Order.

²⁹ See Article 7(1) of the Health and Personal Social Services (Northern Ireland) Order and the proposed addition in clause 107(1) of the Bill.

³⁰ See Article 4(b) of the Order (*supra*) as well as the proposed amendment in Clause 112 of the Bill.

³¹ See Article 17 of the Children Act 1989, and Article 18 of the Children (Northern Ireland) Order 1995

law in Northern Ireland – the Children (Northern Ireland) Order 1995. The Commission would ask the Government to clarify their position on Northern Ireland in this regard.

In general, the Commission would urge the Government to consider this provision in terms of the equality duties on public authorities in Northern Ireland in terms of section 75 of the Northern Ireland Act 1998 as well as paragraph 14 of PAFT.

Recommendation

- *That the Government conducts an audit to determine the possible disparate effect of its current proposals on the disabled as well as between persons of different ages.*
- *That Clause 112 be deleted from the Bill so that all the regions of the UK can be saved from its effect.*

3. Insufficiency of the level of support

It has been calculated that an asylum-seeking family with two children will receive the equivalent of £90.80 per week under the current Government proposals. This is £45 below what is normally considered the poverty line for British families under income support levels. It can be argued that this is too low a level to safeguard the well being of asylum-seeking children.

The Government has argued that the 70% Income Support level proposed in the Bill is appropriate in light of the short-term nature of the scheme. Although the Government does not foresee that asylum-seeking families will find it necessary to purchase replacement items while waiting for claims to be processed, this is contested by those who argue that this does not take into account the fact that most asylum seekers arrive with very few or no possessions at all. Replacement purchases might therefore be necessary even for those who are on the support system for only six months.

Recommendation

- *That Income Support be paid at the urgent cases rate, namely at 90% for all adults and 100% for children*

4. The effect of the voucher system

In spite of recognition that the voucher system is more cumbersome to operate and more expensive per person than paying out cash benefits,³² the proposal of no-cash benefits is seen by the Government as a mechanism to provide disincentive to economic

³² *Fairer, faster and firmer – A Modern Approach to Immigration and Asylum*, July 1998, section 8, § 20.

migration. The effect of the voucher scheme on asylum seekers, and especially on families, could, however, be extremely detrimental, and may be in breach of their rights.

The provision of support in kind raises questions under Article 8 of the ECHR, which requires states not to interfere with and to respect everyone's private and family life. This Article has been interpreted as also placing a *positive* duty on states to ensure effective respect for these rights, including the right to '*establish and develop relationships with other human beings*'.³³

Justice has drawn up a comprehensive argument in this regard, and acquired a detailed Note provided by Matthew Craven of the School of Oriental and African Studies, in which it is argued that the voucher system would hinder the integration of asylum seekers into the societies that they live in, as it would make them permanently visible and stigmatised. They would not be able to enjoy the '*everyday prerogatives of community life*' and would be limited by the institutions that are able or willing to accept their vouchers for purchases.³⁴ The possible stigmatisation of specific groups within the community is of particular concern in Northern Ireland where there is a duty on public authority to assess policies for possible disparate impact on persons of different racial or ethnic groups.³⁵

Interference with Article 8 rights can be justified only if '*necessary in a democratic society*' for a number of reasons, including public safety, the economic well-being of the country, the prevention of disorder or crime and the protection of health and morals or the rights and freedoms of others. The test for necessity established by the ECtHR requires states to show a *pressing social need* which is *proportionate* to the means employed. Even if the Government can show that the proposed system is in some way aimed at securing the economic well-being of the country, it might be more difficult to successfully argue that the scheme meets the test of proportionality. The detrimental effect on asylum seekers is difficult to justify in the face of a scheme that is, in itself, difficult to administer and cost-inefficient, especially in light of the fact that there is much dispute about the causes of and possible solutions to the threat of economic migration.³⁶

As mentioned above, the proposed benefit scheme also constitutes *different* treatment from that afforded to nationals. In terms of ECHR protection, which can be claimed by all persons within the jurisdiction of the state, this could expose the Government to

³³ *Niemetz v Germany* A 251-B (1992) § 29, *Kroon v Netherlands* A 297-C (1994) § 31.

³⁴ See p26 of *Justice's* evidence to the House of Commons Special Standing Committee, March 1999 entitled '*Asylum and Immigration Bill – Human Rights Compliance*'

³⁵ [See paragraph 14 of PAFT, as well as section 75\(1\)a of the Northern Ireland Act.](#)

³⁶ See in this regard the submission by the Refugee Council to the Standing Committee, which proposes that the only way to ensure effective discouragement of economic migration would be the speeding up of the application process.

possible claims of discrimination on grounds of Article 14, read with either Article 8 or, more extremely, Article 3.

It has been pointed out by the Northern Ireland Immigration Practitioners' Group that the voucher scheme has particularly dire effects in Northern Ireland, as the relatively small numbers of ethnic minority communities within the region make asylum seekers even more visible. The insistence on a no-cash system would even further perpetuate difficulties with regard to the integration of migrants into communities. It can also be argued that the number of institutions that would be able to participate in such a scheme would be more limited in Northern Ireland than in other more densely populated regions of the UK, which would further limit the means that asylum seekers would have to meet their needs.

Recommendation

- *That the Government conducts an audit to determine the possible disparate effect of its current proposals on equality of opportunity.*
- *That the payment of benefits in kind be abandoned, and that far greater emphasis be placed on cash payments in order to ensure support for asylum-seeking families and individuals.*