

MEMORANDUM OF EVIDENCE TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON PART 11 OF THE DRAFT IMMIGRATION BILL BY THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

Joint Council for the Welfare of Immigrants (“JCWI”) is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to promote the welfare of migrants within a human rights framework.

Introduction

This submission is JCWI’s response to the Committee’s call for evidence on part 11 of the Draft Immigration Bill (“DIB”). It is drafted with *Reforming Asylum Support: Effective Support for those with Protection Needs* in mind (“RAS”).¹

Whilst we welcome some aspects of part 11 of DIB including for example the repeal of s. 9 and s. 10 of the 2004 Act², in this submission we focus on areas of concern by reference to the ECHR, the EU Reception Directive (“RD”)³, and the findings of the JCHR in its 2007 report.⁴ Given that the JCHR’s 2007 report was followed by the implementation of two further policies which are significant for support purposes (fresh claims and limits on the duration of s. 4 support), and given that these arrangements will presumably be replicated in DIB, we also use this as an opportunity to draw these current practices to the attention of the Committee.

¹ *Reforming Asylum Support: Effective Support for those with Protection Needs*, UKBA, November 2009

² Asylum and Immigration (Treatment of Claimants, etc) Act 2004

³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

⁴ Joint Committee on Human Rights (2007) *The Treatment of Asylum Seekers*, tenth report of Session 2006-2007, House of lords, House of Commons, HC 60-I HL Paper 81-I

Key concerns

Our key concerns which are dealt with in this paper in the following order are: (a) overreliance on secondary legislation, (b) inconsistency of the structure of the scheme with the JCHR's previous recommendations in its 2007 report⁵, (c) lack of judicial oversight of executive decision making in relation to asylum support matters, (d) treatment of specific categories of migrant: (i) children, (ii) those with 'restricted immigration status', (iii) dependants of protection applicants abroad, (e) rates of payment, (f) the right to work for former asylum seekers.

a. Overreliance on secondary legislation

Part 11 as a whole is drafted as vague enabling legislation which provides for subsequent more precise provisions to be set out at some point in the future in secondary legislation. A number of important issues are to be left to secondary legislation. By way of example these include substantive criteria for entitlement to support under c 210, powers to limit c 210 support for prescribed period,⁶ the circumstances in which support may be withdrawn or discontinued⁷, and factors relevant to the assessment of 'destitution' for part 11 support.⁸

It must be recalled that asylum support decisions engage core human rights, and obligations under EU and international law. Given that this secondary legislation will by its nature receive inadequate parliamentary scrutiny, this seems to us to ultimately represent one of the chief threats to securing compliance with human rights/EU obligations and norms.

⁵ See footnote 4

⁶ See c 210(8)

⁷ See c 214(6)

⁸ See c 208 for example

b. Inconsistency of the support scheme with the JCHR's previous recommendations

The JCHR findings on the structure of the asylum support scheme

In its report, the JCHR concluded that the overall structure of the scheme for asylum support with its parallel systems was inhumane and inefficient. It further went on to note that s.4 voucher based support scheme was itself to contrary to Articles 3 and 8 in conjunction with 14 ECHR, and that the use of s.55 (late claims) gave rise to risk of treatment contrary to Articles 3 ECHR. The Committee recommended that these were repealed and replaced by a 'coherent unified, simplified and accessible system of support for asylum seekers, from arrival until voluntary departure or compulsory removal...'⁹. The JCHR indicated that this could be achieved through extending s. 95 support to applicants until voluntary departure or removal.¹⁰

The proposed asylum support scheme

Whilst c 212 establishes a general toolbox and therefore the possibility of uniform support under part 11 of "DIB", its structure is such that it envisages three levels of support; temporary support (209), support (206), and support for destitute failed asylum seekers and others which broadly reflect the position now (210).

In the case of 210 support there is a power to require *all* applicants to apply for it (which will now extend to families though there is also a power to disapply this C201(2)).¹¹ RAS suggests that 210 support will to a large extent be implemented in a way that would replicate the current s.4 scheme. Those who currently receive s.4 support would continue to receive accommodation and the equivalent of vouchers in the form of payment cards. Additionally this form of unsuitable support would apply to families whose claims are refused and who are not taking steps to leave the UK. These cards are currently generating considerable hardship. There are limitations as to where they are accepted and the scope for carrying over unspent

⁹ Joint Committee on Human Rights (2007) *The Treatment of Asylum Seekers*, tenth report of Session 2006-2007, House of lords, House of Commons, HC 60-I HL Paper 81-I, para 121

¹⁰ Joint Committee on Human Rights (2007) *The Treatment of Asylum Seekers*, tenth report of Session 2006-2007, House of lords, House of Commons, HC 60-I HL Paper 81-I, para 110

¹¹ For intentions on families and applications see ¹¹ *Reforming Asylum Support: Effective Support for those with Protection Needs*, UKBA, November 2009

amounts. Additionally there are concerns about the extent to which they actually work, and the problems they present from the point of view of being able to maximise their limited value given the obvious restrictions that apply.¹²

Importantly under 210 support there is a power to limit that support for a prescribed period which would apply to individuals and families.¹³ The explanatory notes¹⁴ and RAS¹⁵ note that these provisions will reflect UKBA's June 2009 policy of discontinuing s. 4 support after three months for those who receive it on the basis that they are taking all steps to leave the UK. Whilst of course there remains the ability to reapply (though no right of appeal for which see below) given that: (a) there are certain groups that simply cannot return home (b) a barrier to return may occur at the last minute, (c) barriers to return are frequently beyond the control of those taking steps to leave through delays in issuing documentation etc, (d) it is not inconceivable that there will be delay and even errors in processing these subsequent applications and (e) there are further limitations proposed in relation to Children Act 1989 support these provisions are likely to present considerable difficulty for applicants. Additionally each of these levels of support (206, 209, 210) is to be subject to the existing s. 55 (late claims) test.

An additional and existing problem arising from policy introduced in 2009 which will presumably be replicated in DIB under c 210(4) relates to fresh submissions from failed asylum seekers. In these cases it is UKBA's recently adopted policy not to make a decision on a s.4 application for support from destitute applicants based on a need for accommodation to avoid breaches of ECHR rights¹⁶ unless the submissions remain outstanding for more than 20 working days after having being *lodged in person, and in accordance with the October 2009 arrangements.*¹⁷

¹² These were reported at a meeting held by the Refugee Council in November 2009

¹³ See c210(8)

¹⁴ Para 384

¹⁵ *Reforming Asylum Support: Effective Support for those with Protection Needs*, UKBA, November 2009, p.13

¹⁶ Under Regulation 3(e) Immigration Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005

¹⁷ Those arrangements require, subject to limited exceptions, applicants to comply with a specified procedure which is subject to oversubscription and significant delay i.e. they must claim in person in Liverpool if their case is dealt with by CRD/at a regional centre if it is dealt with by NAM. There are very significant delays in getting through on the specified number to make an appointment, delays once this is done in securing an appointment, problems with applicants complying with this due to absence of funds. For the new arrangements for claiming asylum see <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/postdecisionrepresentations/guidance/further submissions.pdf?view=Binary>

Legal issues arising from the proposed scheme

In the light of the use of prescribed periods for support purposes under c210, the intended mode of implementation and the requirement for reapplication together with the continuing use of the late claims s.55 provision, the scheme overall risks generating gaps in support and reproducing identical problems to those referred to by the JCHR in its report. In so doing this raises concerns both from the perspective of Articles 3 and 8 ECHR alone, and in conjunction with Article 14 (for c 210 support) and under Article 3 CRC 1989 (best interests of the child obligation).

In relation to the discrete issue relating to delay in dealing with section 4 applications, aside from giving rise to a risk of Article 3 and 8 ECHR breaches in individual cases, the failure to operate a sifting mechanism by reference to need in relation to these support applications may itself be incompatible with Article 3/8/6 ECHR. Further, in the case of fresh claims that relate to the Refugee Convention, the policy may well breach Article 13.2 RD.¹⁸ As the former advisor to the House of Lords EU Committee has pointed out obligations under RD run from the point at which an application is ‘made’.¹⁹ There is no requirement for this to be made at a designated place in person and correspondence in person and RD would arguably now apply to fresh asylum cases.²⁰

c. Lack of oversight of executive decision making in relation to support decisions

The net effect of c 222 is to exacerbate an already inadequate position with regards to the limited merits based rights of appeal in relation to support decisions with the effect that applicants are left only with judicial review by way of remedy. Judicial review is not an adequate substitute for a full merits based appeal before a First Tier Tribunal. Furthermore, from the perspective of an applicant judicial review is impractical and inaccessible.

¹⁸ Article 13.2 reads ‘Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence’

¹⁹ See Baldaccini, A, (2005) *Asylum Support, A Practitioners’ guide to the EU Reception Directive*, Justice p.33

²⁰ See *R on the applications of ZO Somalia and MM (Burma) v SSHD and R (on the application of) DT Eritrea and SSHD* [2009] EWCA Civ 442 .

Under c 222, decisions in the following circumstances will not attract a right of appeal in relation to the provision of c 206/210 support. We have italicised new exclusions: (a) applications that do not meet prescribed requirements, (b) s.55 situations on account of classification as a late claim, (c) *cases in which applicants fail to move into accommodation*,²¹ (d) *cases in which c 206 support is replaced with c 210 support and vice versa*, (e) ***provision of support under c 210 ceases as a result of expiry of a prescribed period*****, (f) cases where a previous application has been made and there is no material change of circumstances, (g) cases in which the applicant is no longer an eligible protection applicant or the dependant of one, (h) ***cases where applicants cease to meet c 210 criteria.***** Dependents in the above situations will also no longer possess a right of appeal.

Further it will continue to be the case that decisions concerning: (a) 209 support,²² (b) how support is to be provided under c 212, (c) adequacy of accommodation or its location, (c) duties by local authorities in relation to the *new arrangements* for access to support for children under c 221 and (d) initial temporary support under c 209 will all be without a merits based right of appeal.

It will also continue to be the case that in those matters in which a right of appeal exists, appeals will not have suspensory effect pending determination of such matters. Whilst interim relief may theoretically be available from the courts, this remedy is not practical and will not therefore in most cases be a viable option.

The former advisor to the House of Lords EU Committee took the view that the existing exclusions from merits based appeals were not consistent with Article 21(1) of RD which requires provision of a *right of appeal* in relation to benefits under RD.²³ The same logic would apply to the appeals provisions above (with the exceptions of those relating to

²¹ C222(3)(c)

²² C211

²³ See Baldaccini, A, (2005) Asylum Support, A Practitioners' guide to the EU Reception Directive, Justice p.68

²³ By A3 RD applies to 3rd country nationals with pending asylum applications/appeals under the Refugee Convention (RC). This would now arguably extend to fresh asylum claims under see *R on the applications of ZO Somalia and MM (Burma) v SSHD and R (on the application of) DT Eritrea and SSHD* [2009] EWCA Civ 442 . Article 13.2 RD requires member states to make provision to ensure an 'adequate standard of living for the health of applicants capable of ensuring their subsistence.' Article 21 (1) of the RD imposes what is arguably in EC law a requirement for the provision of a *right of appeal* (not merely a review) in relation to negative decisions 'relating' to the granting of benefits under it. It is an implicit requirement that the duty continues pending determination of any support appeal.

individuals who were taking steps to leave the UK including in cases where the prescribed period expires).²⁴

Quite apart from the above however, it is clear that the exclusions from a merits based appeal increase the likelihood of applicants being subjected to treatment that is inconsistent with Articles 3 and 8 ECHR. Given also the extensive use of requirements set out in secondary legislation, the provision of a merits based appeal takes on critical importance.

d. Specific groups

(i) Children

C 221 creates the possibility of gaps in the provision of support for children through limiting support by local authorities under s17 of Children Act 1989. This is achieved by extending the grounds upon which support (proposed s.47 of the Nationality, Immigration and Asylum Act 2002²⁵) may be refused. As such, clause 221(3) and (5) are to permit local authorities to refuse to support individuals not simply in situations where they are receiving support under part 11 of DIB, or it has been agreed by SSHD that they will receive support, but where the *local authority* has ‘reasonable *suspicions*’ that they will be accommodated under Part 11 of DIB. This is likely to lead to situations where children and their families are left without accommodation and assistance in situations where this is withdrawn by the UKBA, on account of erroneous supposition by hard pressed local authorities with limited budgets.

It is also worth noting that S.17 Children Act 1989 is widely drawn to reflect the varying needs that a ‘child in need’ may have. It could potentially cover a range of assistance from housing to facilitating day care for pre-school children or providing additional assistance e.g. for those with learning difficulties. Given the proposals to bring families into full board accommodation and for the use of fixed periods for support and given the requirements imposed by Article 3 of the CRC²⁶ 1989 (best interests obligation) and Article 17 of RD (member states are required to take into account the specific situation of children in implementing material reception conditions and health care) the possibility of such support in

²⁵ Section 47, Nationality Immigration and Asylum Act 2002 is not yet in force, the current provision is s.122(5) of IAA 1999

²⁶ Convention on the Rights of the Child 1989

its entirety should remain open regardless of whether support is provided under Part 11 or not.

(ii) Those with restricted immigration status

By c. 134 of part 10 of the CJIA 08 it was originally intended that those with the indefinite restricted immigration status would have access both to a modified form s.95 support, whilst also being treated as ‘dependants’ of eligible applicants for the purpose of homelessness applicants made under the Housing Act 1996.²⁷ Given however that it seems that this group will in future instead receive ‘immigration bail’ under c.98 of DIB, the effect may be to lead to a reduction in their entitlements. Firstly it would seem that they are to be catered for by c 210, the mode of intended implementation would make this an unsuitable form of support for a class of applicant that may enjoy this status indefinitely and in any event for many years. Further, there is a relegation of their unrestricted entitlement to be treated as dependants in the case of homelessness applications. This will in future presumably be provided on the terms set out in the Housing and Regeneration Act 2008²⁸ which are in themselves arguably inconsistent Article 8 and 14 ECHR²⁹ (see the declaration of incompatibility in *Morris*³⁰

(iii) UK Dependants of those making protection applications abroad

C 207 maintains an existing lacuna for asylum support purposes for destitute dependants in the UK, in cases where the principal applicant is making a protection based application from outside of the UK. This would cover: (a) those applying under the quota refugee resettlement programme; (b) mandate refugees (those in a third country or their own country who have been recognized by UNHCR as refugees, (c) those applying under ‘ten or more plan’ (admission of disabled persons and their families who have been accepted overseas by UNHCR as refugees); and (d) group refugees (e.g. Vietnamese in the 1980s). Whilst this does

²⁷ The latter is to be repealed under the Housing and Regeneration Act 2008, schedule 15

²⁸ See Schedule 15

²⁹ Willman S, and Knafler S, *Support for Asylum-seekers and other Migrants* (2009), Legal Action Group, p. 382

³⁰ [Morris, R \(on the application of\) v Westminster City Council & Anor \[2004\] EWHC 2191 \(Admin\) \(07 October 2004\)](#)

not currently affect large numbers of dependants, it could in times of mass upheaval given that this could disrupt funds for those migrants in the UK (in some other capacity). Its effect would be to create a situation where such dependants are in the UK without access to any form of support, and in so doing generate treatment that is contrary to Articles 3 and 8 and ECHR.

e. Rates of payment

By c 214(2)(b) there is, as is presently the case a power to make regulations determining support levels .

We understand these rates are to be reviewed shortly. Currently the rate of support for a single person aged 18 or over is £35.13 both in the case of s.95 and in the case of the value of vouchers for those on s.4 support. This is below what the Government feel is necessary to live (i.e, the rate of Income Support for those aged 25 or over), and is below the 70% benchmark that the Government has historically used for support purposes.³¹

Article 31 of RD obliges the UK to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Article 31 is to be read in conjunction with Article 13(4) of the European Social Charter (right to resources and social assistance on equal footing with nationals). In the above, these rates are arguably inconsistent with A 31.

f. The right to work for former asylum seekers

We agree with ILPA that the provisions should implement the JCHR's recommendation that former asylum seekers should be given the right to work given that it has been held that the entitlement to work in the RD should extend to refused asylum seekers.³²

³¹ Willman S, and Knafler S, *Support for Asylum-seekers and other Migrants* (2009), Legal Action Group, p. 252

³² See above case at footnote 20.