



Response of the Joint Council for the Welfare of Immigrants to the call by the Joint Committee for Human Rights to submit evidence on the state of asylum seekers' human rights

The JCWI (Joint Council for the Welfare of Immigrants) is an independent national organisation which has been providing legal representation to individuals and families affected by immigration, nationality and refugee law and policy since 1967. Our mission is to combat discrimination and injustice wherever they arise in immigration and asylum law and policy.

We note that the JCHR has particularly called for evidence on the human rights of asylum applicants and specifically in relation to material assistance and support, health, detention and deportation, child asylum seekers and the media.

We would like to preface our comments on these specific areas with more general observations of factors which we believe materially affect asylum applicants access to human rights.

Refused asylum applicants potentially constitute one of the largest groups of people present in an unregulated capacity in the United Kingdom. At its official upper estimate the irregular migrant population, which also includes overstayers and trafficked and smuggled persons, numbers 570,000. At one of its upper estimates, quoted in the Public Accounts Committee report earlier this year the refused asylum applicant population alone may number over a quarter of a million. According to advice we have sought from Professor John Salt of University College London it is impossible to break down by immigration status or nationality the irregular population as a whole with any certainty and given the nature of irregularity definitive statistical coverage probably can never exist. However the factors uniting all irregular migrants including failed asylum applicants are as follows:

- The Government deems these groups, including the refused asylum applicant group, to be without rights, as is corroborated by its determination through *Baiai* to ensure these groups are not accorded the right to marry in a civil ceremony in the United Kingdom, its draft position statement on migrant rights at the UN High Level dialogue on migration which quite clearly sought to qualify the human rights of migrants; and its determination that workers here in an authorised capacity should be viewed primarily as illegal. For example Baroness Ashton of Upholland responding to Baroness Turner of Camden during the passage of the Immigration Asylum and Nationality Act 2006 on the subject of irregular migrants rights said: “I do not want to distort the fact that an illegal worker is an illegal worker or to take away from the critical need to support legal workers in this country appropriately.”
- In effect lawful presence dictates the UK Government’s readiness to accord individuals rights which via ratification of the ICESCR it has previously recognised as “equal and inalienable”
- Because all these groups live under threat of deportation they are effectively prevented from accessing a legal remedy against civil and criminal wrongs in the UK courts, including against the discrimination and exploitation to which they may be particularly prone in the workplace.
- The UK Government refuses to sign up to the 1990 UN Convention on the Rights of Migrant Workers and their Families; or to proactively engage in promoting any other alternative global standard for migrant rights; and is not engaging in dialogue on any broad programme of regularisation. Thus no increased human rights protection is imminent through either the global framework or a UK measure.

We would point out that the top ten refused asylum applicant nationalities and those in immigration detention would appear to be disproportionately drawn from countries in the global south – Africa, Asia and the Middle East - such that the failure to accord human rights to the refused asylum applicant group may be generally argued to have a racialised output and thus be discriminatory even if this is not an intended objective.

Health

The UK Government through its ratification of the ICESCR has recognized “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. In addition by ratifying the UNCRC the UK has recognised “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.” and undertaken “to strive to ensure that no child is deprived of his or her right of access to such health care services”.

However in 2004 the Government implemented mandatory rules effectively restricting overseas visitor access to non-urgent secondary health care including maternity services. Restriction on overseas visitors’ access to non-urgent primary health care is at the discretion of GPs. While overseas visitor would suggest a person who is not ordinarily resident in the UK, the rules changes do in fact apply to irregular migrants who may be living as members of UK society and making an economic and social contribution. A recent Refugee Council report *First do no harm: denying healthcare to people whose asylum claims have failed [June 2006]* draws attention to the fact that this not simply a *de jure* situation but has resulted in number of cases in which refused asylum applicants have effectively been denied access to health care including patients denied treatment for cancer and pregnant women forced to give birth alone at home

Opinion JCWI has obtained from the barrister Nadine Finch of 2 Garden Court suggests that the Government has not acted outside its powers under UK legislation in implementing the rule changes to date. “Section 1(2) of the National Health Service Act 1977, whilst stating that in general treatment will be free of charge, reserves the power to make and recover charges in certain circumstances¹. Section 121 of the Act goes on to make express provision for the Secretary of State to make regulations imposing charges on persons who were not ordinarily resident in Great Britain².” In addition because the ICESCR cannot be directly

¹ It states that “the services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed”.

² “Regulations may provide for the making and recovery, in such manner as may be prescribed, of such charges as the Secretary of State may determine –

- (a) in respect if such services provided under this Act as may be prescribed, being
- (b) services provided in respect of such persons not ordinarily resident in Great Britain as may be prescribed”

engaged in the UK courts it is difficult to establish in law that the UK has violated any international obligation by restricting access to health services by irregular migrant groups. However the ECHR can be engaged because it has been incorporated into UK law .

Ms Finch writes: “The ECHR is a convention, which primarily protects political and personal rights as opposed to social and economic rights. There is therefore no right to access free public health care as such but articles 2, 3 and 8 do provide rights which may be breached if free public health care is denied to an individual. Article 1 of the ECHR extends the protection of the Convention to anyone who is within the geographic jurisdiction of the country, which has ratified it. This article was not directly incorporated by the Human Rights Act 1998 but there is no limitation placed on the wide duty imposed by Section 6, so any illegal entrant, over stayer and/or failed asylum seeker who may be denied access to medical treatment could rely on rights derived from the ECHR.”

Once the ECHR is engaged the ICESR and UNCRC do become relevant considerations. Ms Finch’s opinion argues that particularly in the case of refused asylum applicants, who can be shown are not fit to travel ,children and those with a mental illness the restrictions may well be challengeable. “For example Article 3 would be breached if a woman were denied hospital treatment which was necessary to prevent intense suffering to her or to her baby. One possible scenario would be where an expectant mother was HIV Positive and where unless she was provided with anti retroviral treatment and an elective caesarean there would be a high likelihood that the baby would also contract the virus. There will also be other pregnancy related conditions, which would also require treatment to avoid intense physical and mental suffering.”

Obviously in the currently polarised climate of opinion on immigration any NGO or campaigning group will weigh up very carefully the gains to be obtained through a legal challenge denial of health care to overseas visitors. There is also the viability of persuading vulnerable and ill migrants who are denied care to participate in a legal challenge that would substantially realise Ms Finch’s arguments through a precedent in the case law. This means that we would prefer to persuade the Government and the

public that the rules should be changed but nevertheless as Ms Finch's opinion and the Refugee Council report suggest the Department of Health may in certain scenarios be acting unlawfully, and its actions suggest it is acting contrary to the spirit of human rights principles enshrined in international standards which it has previously recognised. In addition we note that no race equality impact assessment of the secondary health care rules changes was conducted by the DOH; and that to date they have conducted no such assessment of the primary health care rules, contrary to the guidance of the Commission for Racial Equality. This clearly has a racialised output when one considers the potential profile of refused asylum applicants we have detailed above

Media:

The terminology around persons in the UK in an unregulated capacity whether they are refused asylum applicants overstayers or trafficked people is an issue of contention in the academic literature on migration. Terms widely used include "illegal", "undocumented", "unauthorised" and "irregular". Within the day to day political debate however the government and politicians of all parties and the media frequently use the word "illegal" which risks influencing public discourse and attitudes toward migrants negatively given the usual association of the word illegal with "criminal". In addition, using the term "illegal" is contrary to the recommendations of the International Labour Organisation which has called upon all participating states to avoid this terminology.

We prefer the term "irregular" as most accurately describing the range of individuals who have entered and / or remained in the UK outside officially-regulated and sanctioned routes for entry and residence (as it is accepted that some refused asylum applicants cannot be removed). We also use it because it has a less "criminalising" effect on the migrant population as a whole. Migrants may have knowingly or not broken the immigration rules but not obeying instructions to return to a war-torn or poverty stricken country to risk death or penury cannot be put on a par with felonies such as theft, assault robbery or murder. Irregular immigration status is not a product of a person's moral intention but of the immigration regulations which actually are so complex and restrictive as to be easily broken.

In fairness to UK media when they use the term illegal immigrant they are frequently reproducing the word as used by UK and European politicians, and also by the new agencies and international press which supply them with foreign copy. JCWI monitors all Web available news reports on migration from around the world daily and it is clear that the word "illegal" is in frequent media usage not only in the UK media but by leading and otherwise reputable international news media such as Reuters and the International Herald Tribune. Their news coverage of African migrants who arrive on the shores of Malta and Spain via the Mediterranean and Atlantic frequently describe them as "illegal migrants" even though among them may be individuals with asylum claims.

The point is though that the general effect of "illegal immigrant" is to influence the public's perception of a group of people negatively so to excite a negative clamour against them which generally results in politicians seeking to restrict these persons' rights. In order to ensure that this vicious cycle is broken and that a culture of harmony for respect for human rights is fostered politicians as well as the media have a duty to inform the public of the exact nature of migration, and it is necessary to give leadership on the type of terminology used. It should be obvious that "illegal" is inflammatory and compounds the stigma that is already widely attached to migrant status. It should also be obvious that while certain acts may be referred to as illegal there can be no such thing as an "illegal" person. Politicians above all groups need to be clear about the groups of migrants they are referring to and to refer to them with respect for basic human dignity which is due to us all what ever our nationality or terms of our immigration status in the UK.