

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's response to the UK Border
Authority's consultation on Reforming
Asylum Support**

February 2010

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

1. The right to seek protection from persecution is of fundamental importance, and the obligation on countries to offer protection is perhaps one of the most important international obligations on a State. Proper decision-making in this area can, quite literally, be a matter of life and death. The Refugee Convention, which imposes this obligation on states, was adopted after the horrors of World War II and the devastating effects of the displacement of millions of people. The UK was one of the main proponents of this Convention and an early signatory to it. Under the Convention, states have undertaken to offer refuge to any person in their territory who has a well-founded fear that they face persecution in their home country on certain specified grounds (such as race, religion, political opinion etc). The UK has willingly adopted this obligation and as such is bound under international law to consider all applications for refugee status. A person fleeing persecution has a right to seek asylum. The UK has a proud record of providing protection and has undoubtedly saved the lives of many thousands of people who would otherwise face persecution if removed to their country of origin. We are pleased therefore that the Government restates, in this consultation document, its commitment to fulfilling its obligations under the Refugee Convention.

2. This consultation has been published alongside the draft Immigration Bill which seeks to streamline immigration legislation to make it easier to understand and to operate. Given the piecemeal development of immigration legislation and its current complexities this seems a highly laudable aim – the present framework has become confused, bureaucratic and has left many people destitute. However, many of the proposals in this consultation will not lead to a simpler and more efficient system. Worse still, and as we explain below, proposals in this consultation will mean many more vulnerable people are left destitute.

Current system of support

3. Currently, a person who makes a claim for recognition as a refugee is given no right to work while awaiting a decision on their claim. Without a means of lawfully providing for their own subsistence, refugee claimants must necessarily rely on the support of the Government. Under the current rules the Government provides support for those awaiting a determination who would otherwise be destitute, in the form of accommodation and subsistence. It also provides assistance to those who

have not been recognised as refugees in certain limited circumstances. In general, refused adult asylum applicants without children are provided with assistance only where it is shown that they are taking reasonable steps to leave the UK or there is a specific reason why they cannot leave (i.e. because their country of origin will not allow re-entry etc). The assistance provided is currently in the form of accommodation and food vouchers or supermarket payment cards. Families with children who have been refused asylum will be provided with accommodation and monetary subsistence. This is subject to the application of section 9 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* which enables support to be withdrawn when a person fails, without reasonable excuse, to take reasonable steps to leave the UK.

4. In practice, this policy has resulted in the destitution of thousands of people who are left without any lawful means of supporting themselves. There are countless stories of failed refugee claimants becoming homeless and forced to resort to begging, irregular working and even prostitution, simply to survive. While we recognise the importance of enforcing final decisions on asylum applications, Liberty believes that the combination of preventing someone from working and leaving people without any means whatsoever to support themselves is inhuman and degrading treatment. Indeed, the House of Lords recognised just this in 2005 when considering the issue of the destitution of asylum seekers. It found that refusing support in circumstances where the Government itself has denied a person the ability to support themselves (by not allowing them to work) could breach Article 3 of the *Human Rights Act 1998* (right not to be subject to torture or to inhuman and degrading treatment or punishment). As Lord Bingham said:

A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant [for asylum] with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.¹

¹ See *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66 at para [7].

Key proposals for reform

5. The consultation proposes continuing the current practice of providing different levels of support to those who are in the process of awaiting a determination and those who have had their claims for asylum refused. It also proposes, as set out below, a number of other measures that would seriously restrict the levels of support given to applicants. We do not believe that refused asylum seekers should receive less support than those awaiting a refugee determination. Clearly the State has a duty to support those that are claiming asylum given its obligations under the Refugee Convention. But it also has an obligation, not least under human rights law, to ensure that those who are within its jurisdiction are not, through the actions of the State, left destitute, whether they be awaiting a determination or not.

6. Liberty believes that the refugee determination process needs to be vastly improved – from the quality of the decision-making, to access to legal advice from the outset, to a proper and effective appeals process. If these improvements were made everyone, particularly applicants, would have more confidence that each refugee claim had been given a full and fair hearing. Increased confidence in the system would also make return more likely for refused asylum seekers in a position to do so. Obviously it is preferable that such return be voluntary, but it may regrettably need to become forced removal if, after the process has fully ended, the applicant refuses to return home. We believe that once it has reached this point, the Government should either enforce removal or, if it decides not to, provide adequate living support. We do not believe that applicants should be ‘encouraged’ to return ‘voluntarily’ by effectively starving them out.

7. In addition to our principled objection to a ‘destitution policy’, we believe it also makes little practical sense to withdraw support or, as the consultation proposes to continue the different streams of support depending on the type of application involved. In practice this means that people will make multiple applications for support, placing a huge administrative burden on UK Border Agency staff. It also runs contrary to the observation in the consultation document that the system should be simple and cost-effective to deliver. We do not believe that the proposal constitutes a ‘simple and effective’ system, rather it continues the byzantine nature of the system that currently exists.

8. In addition to the concrete proposals in the consultation, we have further concerns about its tone. Despite the consultation relating solely to the provision of support for asylum claimants and failed applicants, it states that the Government must balance the needs of those seeking protection with the importance of a practical and robust system of immigration control, and that “*when people come to the UK they enter into a deal with the UK – to work hard, play by the rules and earn their right to stay*”.² To employ such a phrase in a consultation on asylum support is both confusing and concerning –the right to seek asylum is fundamental and does not need to be ‘earned’.

Repeal of provisions relating to families and Community Activities

9. There are two proposals in the consultation that Liberty welcomes - proposals which we believe will achieve the Government’s stated aim of simplicity and efficiency and, more importantly, will lead to less hardship for vulnerable families. The consultation proposes repealing section 9 and part of section 10 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*. Section 9 was designed to provide a mechanism for ceasing support for families determined to have no protection needs yet who were refusing to leave the UK. The consultation states that it has been concluded that there are more effective ways to encourage unsuccessful asylum-seeking families to voluntarily return, and will ensure that families with no protection needs continue to be supported. It also proposes to repeal provisions (in section 10) which make support for failed asylum seekers conditional on undertaking certain specified community activities.

10. We strongly welcome the repeal of these provisions. Support should not be removed from people who are prohibited from working in circumstances which will cause great hardship, particularly when there are children involved. It has also been shown not to be effective in encouraging voluntary returns. In addition, support, in circumstances where a person would otherwise be destitute, should not be conditioned on the performance of compulsory community activities. We are therefore pleased that the Government has recognised this and proposes to repeal the relevant provisions. However, the consultation document states, in making this proposal, that the Government wants to focus on “*increasing the speed of case*

² See page 7 of this consultation: *Reforming Asylum Support: Effective Support for those with Protection Needs*, UK Border Agency, November 2009.

conclusions” and to set itself “challenging targets for the conclusion of cases”. It concludes that:

Against that backdrop, we want to focus on making quick decisions and, therefore, reducing the amount of time asylum seekers are supported while their case is being considered rather than administering this sort of scheme.

While we applaud the aim of ensuring refugee claims are decided swiftly, speed must not be prioritised above quality and thoroughness of decision-making. In many cases it may take some time before all facts are known and before legal representatives can present the full case. It is essential that the right decision is reached, not just the quickest decision.

Re-enactment of section 55

11. Of particular concern is the proposal in the consultation to ‘re-enact’ section 55 of the *Nationality, Immigration and Asylum Act 2002*. This provision prevents access to support for those who have not claimed asylum as soon as reasonably practicable, unless it is necessary to provide access to support in order to prevent a breach of a person’s rights under the *Human Rights Act 1998* (HRA).. This provision is currently in force but we understand has not been used since the 2005 House of Lords ruling that denying support in this way could breach the prohibition on inhuman and degrading treatment in the HRA. In *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, which Liberty intervened in, three asylum seekers had been refused National Asylum Support Services (NASS) support by the Secretary of State on the basis that they had failed, as required by section 55, to make their claims for asylum as soon as reasonably practicable after arrival in the country (despite making them on the day of arrival, or one day after arriving, in the UK). The applicants were from Sudan, Angola and Ethiopia and as a result of section 55 were denied support, leading to them becoming homeless, forced to sleep in parks and beg for food which affected both their physical and mental health.

12. The Court considered whether the denial of support which led to the destitution of the applicants could constitute treatment that engaged obligations under the HRA.³ The Court held that while withholding support would not in and of itself amount to inhuman or degrading treatment, it would do so once a person

³ Under Article 3 of the European Convention on Human Rights as incorporated by the HRA.

became destitute in circumstances where the person was seriously suffering, or was likely to face severe suffering, because of the denial of shelter, food or basic necessities of life. This of course requires the Secretary of State to make an assessment in each individual case and monitor whether each individual is likely to, or has, fallen into destitution of the kind specified by the court. In 2004 the Greater London Authority did a report on s 55 related destitution in London one year after section 55 came into force and found that at that time “*around 10,000 asylum seekers a year, or 200 each week, are likely to be made destitute by Section 55 in London*”.⁴ The policy when it was first introduced was to generally deny support if a person had not claimed asylum within at least three days of arriving in the UK. It takes little imagination to see how a person fleeing persecution who arrives in the UK may not speak any English, may have no knowledge of UK law; may be traumatised, tired, hungry and quite possibly in fear of authority figures; and may therefore not be in a position to lodge their claim for refugee protection as soon as they arrive in the country. When section 55 was first introduced it was not consulted on and had a rocky passage through Parliament. Once it was enacted it led to numerous court challenges and administrative burdens on UK Border Agency staff (who must determine if a person has lodged their application within the appropriate time, and whether a person has reached the required level of destitution). Most importantly, and unsurprisingly, it led to thousands of vulnerable people being left destitute at the hands of the State, many of whom were later recognised to be refugees.

13. In light of this history Liberty is dismayed by the proposal to ‘re-enact’ section 55 (presumably this means to start to use it again). Article 3 of the *Human Rights Act 1998* prohibits, in absolute terms, the use of torture or inhuman or degrading treatment. The fact that the House of Lords found that the actions of the State in putting refugee applicants in such a position breached Article 3 demonstrates the very real inhumanity of the application of section 55. The proposals put far too high an obligation on the staff responsible for assessing whether the threshold has been satisfied in situations that raise some of the most grave human rights concerns. We strongly oppose the use of section 55 powers and instead call for its immediate repeal.

⁴ See Destitution by design: *Withdrawal of support from in-country asylum applicants: An impact assessment for London*, Greater London Authority, February 2004, at page 5, available at: http://www.london.gov.uk/mayor/refugees/docs/destitution_by_design.pdf

Fixed time limits for support

14. The Government further proposes that the planned Immigration Bill should grant the power to set a fixed time limit for how long it will provide support to people whose asylum claims have failed and who are taking steps to leave the UK. It is proposed that this period will be set at three months. The effect of this would be that if the supported individual had not left the UK at the end of the three months there would be no right of appeal once support stopped. Any applicant experiencing genuine difficulty in leaving the UK (for a list of specified reasons such as physical disability, ongoing judicial review, no viable route of return etc) might make a reapplication for support, on the basis of the evidence provided as to the barrier to leaving, before the end of this three month period.

15. Liberty believes that such a policy is wholly unworkable. There are many reasons why a person may be unable to return home within a three month period. Indeed, many of this will relate to circumstances beyond that person's control – for example, their country of origin has failed to prepare the necessary travel documents or the human rights situation in that country has deteriorated etc. In addition, barriers to return may only present itself towards the end of the three month period, at which point the person will have no right to apply for further support. Having a three month fixed period, but with the possibility for reapplication, also imposes administrative burdens on UK Border Agency staff, which runs contrary to the stated aim of simplicity and efficiency. It is Liberty's fear that the greater this burden, the more likely it will be that asylum seekers are denied much needed support.

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