‘NEW PLAN FOR IMMIGRATION’
HOME OFFICE CONSULTATION

Doughty Street Chambers

Immigration Team Response

6 May 2021

Background

1. The Home Office launched a consultation on the 'New Plan for Immigration' policy paper on 24 March 2021. The consultation closed on 6 May 2021.

2. This response is prepared on behalf of the Immigration Team at Doughty Street Chambers. The Immigration Team provides advice, representation and advocacy on all aspects of personal immigration and nationality law, including refugee/asylum claims, human rights claims, EU free movement law and the EU Settlement Scheme, family reunion, investors, students and other aspects of the points based system, general refusal grounds and challenges to unlawful detention. The Team also advises on all aspects of business and commercial immigration, including sponsor compliance and challenges to the revocation of sponsor licences and challenges to civil penalties in relation to illegal working.

3. Doughty Street members appear regularly in the Immigration and Asylum Chamber of the First-Tier Tribunal and Upper Tribunal, as well as in the Special Immigration Appeals Commission, the Administrative Court, the Court of Appeal and the Supreme Court. We also work regularly in the European Court of Human Rights and the Court of Justice of the European Union. Team members have been involved in many of the leading European and domestic cases in immigration and asylum law.

4. Doughty Street Chambers is a set of internationally renowned barristers with a reputation for excellence. All members of Doughty Street Chambers have a commitment to human rights and civil liberties, and members are at the forefront of asylum, immigration and human rights law. Doughty Street has long been recognised as a leading set in immigration law by both Chambers & Partners and Legal 500.

Introduction

1. This year is the 70th anniversary of the 1951 UN Convention on Refugees, a milestone agreement which established the international legal framework for refugee protection. The UK was a founding signatory of the Convention, and the 'New Plan for Immigration' policy paper starts with a statement that Britain "takes pride in fulfilling our moral responsibility to support refugees fleeing peril around the world". What the New Plan actually proposes, however, is something very different.

2. The 'New Plan' policy document seeks to undermine the purpose of the Refugee Convention by distinguishing between refugees based on the way in which they have sought protection in the UK. The proposals seek to portray asylum claimants who reach the UK before recognition of their refugee status as illegal migrants and criminals, and to restrict access to safety, rights and benefits for all but a very limited number of refugees. We consider that these proposals are seriously misconceived and undermine the UK's ability to comply with domestic and international legal obligations.

3. The UK receives only a tiny fraction of the world's refugees each year. Of those who claim, the majority are recognised as refugees or people in need of international protection. There are almost no formal routes to enter the UK for the purpose of claiming asylum. There is no 'asylum visa' or application form by which a person can obtain permission to enter the UK to claim asylum. For the vast majority of refugees who do not fall within the very limited remit of family reunification or the Global Resettlement Scheme, there is no formal route to claim asylum in the UK. That does not however mean that other refugees seeking safety in the UK are 'illegal migrants'; it is not illegal to travel for the purposes of claiming asylum.

4. We consider that the 'New Plan' proposals are based on harmful and misconceived ideas about refugees and immigration. Far from reducing abuse and exploitation of people in need, and increasing integration in the UK, we consider that the proposals prevent those in need from being able to seek safety; the proposals are likely to increase division and xenophobia, and to undermine the UK's ability to comply with its international legal obligations.

5. The consultation itself is neither objective nor fair, and fails to meet the 'Sedley' requirements for a legally adequate consultation[1]. It frames both immigration and asylum

[1] *R (Moseley) v Haringey LBC* [2014] UKSC 56 at [25]

as problems, created by illegal activity and to be solved by punitive legislation limiting access to safety, family reunion and integration. It does not provide adequate information to allow an informed response, and it limits responses to an online survey allowing only limited answers to leading and partial questions.

6. Legislative proposals which have potentially grave consequences for those in need of international protection and their families require careful thought and a properly informed approach. The 'New Plan' consultation offers neither. The proposed legislative provisions have significant and wide-ranging implications, not only for those at risk of persecution or ill-harm, but for those seeking to be reunited with family members, for unaccompanied children seeking safety, and for British society as a whole.

Chapter 1: Overview

7. The 'overview' chapter reflects many of the serious flaws in this consultation. From the outset, it conflates asylum with illegal migration; it uses misleading statistics to overstate the extent of the UK's asylum provision relative to EU countries; and it ignores long-standing problems with delay and poor quality decision-making by the Home Office. The overview reflects a serious lack of understanding of both immigration law and practice, and of the very real problems that refugees face when fleeing persecution.

8. To put some of the highly selective figures used in the consultation paper in context:

   - In 2019, the number of people fleeing war and persecution worldwide was 79.5 million[2]. In 2019, the UK received 36,000 new asylum claims, a fraction of a percent of the global total and a fraction of a percent of the UK's population;

   - The number of refugees 'resettled' (through the Global Settlement Scheme and the predecessor schemes which it replaced) needs to be distinguished from the overall number of refugee claims determined by the UK. In 2019 the UK ranked 6th amongst EU countries in the number of people to whom it granted asylum[3], with 20,703 grants. By contrast, Germany granted asylum to 116,200 people and France to 42,100 people;

[2] UN High Commission for Refugees
[3] Migration Observatory briefing, 4 December 2020

- Asylum claims peaked in 2002 at 84,132. Although the number of claims rose in 2019, asylum claims fell by 41% by Q2 2020 as a result of the Covid-19 pandemic[4];

- Delays in the asylum system, and the poor quality of Home Office decisions, have been the subject of criticism from the Independent Chief Inspector of Borders and Immigration in a number of reports[5]. A recent report from the ICIBI criticised the Home Office for failing to take effective action against perpetrators of human trafficking and modern slavery[6];

- The standard of asylum support and accommodation has also been the subject of criticism by domestic and international organisations, including the Red Cross[7]

9. We do not consider that the 'Overview' represents a fair or objective assessment of the international migration context, nor of the part that the UK plays in protecting and supporting refugees.

Chapter 2 – Protecting those fleeing persecution

10. As the figures set out above demonstrate, Britain is very far from showing 'global leadership welcoming those most in need'. The Government's underlying premise – that refugees choose illegal migration in preference to safe routes in order to ensure that they can claim asylum in the UK, and should therefore be penalised – betrays a startling lack of understanding of the experience of refugees and is directly contradicted by a wealth of reports by organisations working in the field.

11. The policy proposals in Chapter 2 represent only limited aspects of providing protection for refugees, and focus exclusively on those who have been recognised as refugees before they reach the UK.

12. For example, resettlement schemes represent a tiny proportion of refugee reception globally: of over 75 million people displaced globally at the end of 2019, 22,800 were

[4] *ibid*
[5] Available at https://www.gov.uk/government/collections/inspection-reports-by-the-independent-chief-inspector-of-borders-and-immigration.
[6] 'An inspection of the work of Border Force, Immigration Enforcement and UK Visas and Immigration to identify, investigate, disrupt and prosecute perpetrators of modern slavery and human trafficking', published March 2021
[7] 'Far From Home', the British Red Cross, published April 2021

resettled via schemes and only 3,560 in the UK[8]. Over the last 5 years the number of people resettled via resettlement schemes in the UK has been around 22,000, a small proportion of asylum claimants in the UK and a tiny fraction of refugees worldwide.

13. Any steps to strengthen the existing resettlement schemes are welcome. But resettlement cannot and should not be viewed as a replacement for the UK's existing obligations under international law to accept and consider asylum claims made by refugees in the UK, whatever the route by which they arrive.

14. Likewise, the concept of enhanced financial and emotional support to refugees to enable them to access employment in the UK and integrate more quickly is welcome; however, this should not be limited only to those who have arrived via resettlement schemes, and should be extended to those who are awaiting recognition of their refugee status. However, any schemes need to recognise that a significant proportion of refugees are recovering from traumatic experiences and may not be able to access the labour market without support and time to recover. Limiting family reunion, support for integration, and access to employment only to those who arrive by 'safe and legal routes' is not supported by evidence and is likely to be unlawful.

15. The proposal for 'humanitarian routes' to resettlement, which would allow emergency assistance to refugees at very high risk, lacks detail, but would only be operated on 'exceptional' grounds. We consider that this proposal, in so far as it distinguishes between types of refugee on the basis of 'exceptionality', is likely to be both unlawful as contrary to the Convention and administratively unworkable.

Chapter 3 – Ending anomalies in British nationality law

16. The policy proposals in Chapter 3, which aim to correct historic anomalies in British nationality law, are broadly welcome.

17. In particular, the proposals to change the law to enable the children of British Overseas Territories Citizens (BOTCs) to acquire British citizenship more easily, and to enable registration of children entitled to citizenship through their biological father (married to

[8] Open letter to the Secretary of State on the 'New Plan for Immigration', signed by over 450 academics in immigration and asylum, available at https://docs.google.com/document/d/e/2PACX-1vQF_mpQDUxaFg5CUdc-cxTONLAJ5_811wkHjfPJWqASo3niClxmo8GHvCGfb_0uI4FV6LkbtggXAp7h/pub.

someone other than their mother at the time of the birth) are welcome. We also welcome the creation of a new discretionary adult registration route to enable the grant of citizenship, but note that the Secretary of State already has broad discretionary powers to grant citizenship, including where there has been historical unfairness. Similarly, the proposals to create flexibility on residence requirements are welcome, but should not be limited to "those impacted by Windrush". Again, the Secretary of State already has the power to waive residence requirements; the issue is that flexibility is often absent from Home Office decision-making.

18. The proposal to change the registration route for stateless children, so as to penalise children where their parents have deliberately not acquired another nationality for their child, lacks humanity and is likely to be unlawful as contrary to the duty in domestic legislation and international law to treat the best interests of the child as a primary factor in decision-making[9]. It is also likely to be administratively unworkable, as the burden is likely to be on the Home Office to prove deliberate intent on the part of the parent(s) in not making an application for another nationality. The suggestion in the consultation paper that the statelessness route is being abused is not supported by evidence of abuse.

Chapter 4: Disrupting criminal networks and reforming the asylum system

19. A refugee is someone with a genuine and well-founded fear of persecution. The 'grant' of asylum does not confer refugee status, but recognises it. It is not illegal to travel to another country for the purposes of claiming asylum. The Government's conflation of asylum seekers with 'illegal migrants' is contrary to international law and undermines the UK's status as a country which respects humanitarian norms.

20. The repeated conflation of 'asylum seeking' with 'illegal migration' in the consultation paper also needs to be seen in the context of UK arrangements. There are almost no formal routes to enter the UK for the purpose of claiming asylum. There is no 'asylum visa' or application form by which a person can obtain permission to enter the UK to claim asylum. The existing routes are very limited, and require recognition of refugee status prior to arrival in the UK. Existing routes are:

[9] s55 Borders, Citizenship and Immigration Act 2007, Article 3 of the UN Convention on Rights of the Child

- Family reunification, which is permitted for children under 18 and spouses, where their parent or spouse has already obtained refugee status in the UK

- The 'Global Resettlement Scheme' announced in 2019, which replaced previous schemes, was limited to 5,000 refugees in its first year and is currently suspended. Figures for the number of refugees who will be resettled through the scheme in future years have not been disclosed.

21. For the vast majority of refugees who do not fall within the very limited remit of family reunification or the Global Resettlement Scheme, there is no formal route to claim asylum in the UK. Individuals at risk of persecution or serious harm have therefore little choice. The few individuals who have time, money, a sponsor in the UK and who meet the requirements can make an application for leave under the Immigration Rules, wait weeks or months for a decision, and claim asylum on arrival in the UK (itself not what the Government would consider a 'legal route'). The majority of those at risk of persecution or serious harm, however, have no choice other than to flee their home country by whatever means is available; that can often entail paying an agent with no choice or control about the route, means or eventual destination country. It is in that context that refugees fall into the hands of people smugglers and become vulnerable to exploitation by criminal gangs.

22. The Government's claim that "our asylum system is too easily exploited by people smugglers and does little to disincentivise individuals from attempting to enter the UK illegally" ignores both international law and the reality for refugees seeking safety. There is no basis in law for distinguishing the position of a refugee who arrives in the UK via a resettlement scheme and one who arrives in the UK clandestinely in a lorry or via a small boat. We are concerned that the Government appears willing to breach international law on the basis of ill-founded misconceptions of how asylum works.

23. Any suggestion that the proposals are an attempt to 'disrupt criminal networks' also needs to be seen in the context of the consistent failure of the Home Office over a number of years to address, disrupt or prosecute criminal networks responsible for modern slavery and human trafficking[10].

24. The assertions in the consultation paper that asylum casework has grown to 'unsustainable levels' are similarly ill-judged. The number of cases currently in the system is the product of administrative failings and delay by the Home Office, which the Home

[10] ICIBI report April 2021 (*ibid*).

Office has failed to address over many years. The existing backlog cannot properly or legally be used to justify an attempt to restrict access to refugee protection.

25. The 'New Plan' proposes to change the basis for determining asylum claims by introducing a distinction between refugees who arrive by 'legal' routes and those who arrive 'illegally'. As set out above, we consider that there is no basis in law for drawing this distinction and that to limit refugee protection on the basis of the refugee's route to the UK is contrary to international law.

26. The proposals to enable removal of refugees before a decision has been made on their claim, or whilst an appeal against a decision is pending, are likely to be unlawful and to put a significant number of refugees at risk.

27. Practically speaking, the proposals are also likely to increase the administrative burden on the Home Office (since separate removal decisions will need to be taken and recorded) and on the court system (in applications to prevent removal where individuals are at risk).

28. The proposal to introduce 'new asylum reception centres', and to use detention whilst asylum claims are considered, gives rise to serious concern. The use of communal 'reception centres' has been criticised by NGOs, including the Red Cross, and use of communal reception accommodation at disused Ministry of Defence sites is the subject of ongoing litigation. We note that the current proposals for a 'fast track' process bear a strong resemblance to the 'Detained Fast Track' system, which was closed down in 2015 after the Government recognised that it was unfair and unlawful. We have real concerns any proposal to use reception centres and/or detention facilities to process asylum claims; such proposals need to have a strong evidential basis and to incorporate robust safeguards to ensure fair treatment, both of which are missing from the consultation paper.

29. The proposal for temporary protection status limits access to settlement, family reunion and benefits for individuals who cannot be removed from the UK. We consider that there is no basis in law for this proposal; nor does the consultation paper put forward any evidential basis for it.

30. The proposals to 'strengthen and clarify the framework for determining the age of people seeking asylum' are one-sided, and focus not on the situation of child claimants but on adults claiming to be children. Many vulnerable children arrive in the UK without any documents providing their age and, in some cases, without knowledge of their age. They are often highly traumatised and identified in statutory guidance as some of the most

vulnerable in the UK. Age determination is not an exact science and particular care is required to assess the age of child claimants; to start from the basis that claimants are lying about their age risks many children being wrongly assessed as adults, with grave consequences for their safety and development in the UK. The proposals do not set out what 'up to date scientific technology' is to be used, but the suggestion that front-line immigration officers and 'other staff' are equipped or properly trained to make reliable assessments of age is likely to significantly increase wrong decisions; age assessments by immigration officers made soon after a putative child has arrived in the UK, based primarily upon appearance and demeanour, are particularly unreliable[11]. It is unlikely to make the system more efficient or reliable. The proposal for a so-called 'fast track' age assessment appeal process is of concern and any proposals need to be properly informed by evidence, to comply with statutory 'best interests' obligations, and to include detailed and robust safeguards against unfairness.

31. Last but not least, the 'New Plan' policy paper proposes to 'strengthen' the fear of persecution test, by introducing a two-stage test which incorporates consideration of the route by which a person has travelled to the UK. The purpose behind this proposal is unclear; we consider that the proposal is wholly unnecessary, misconceived and highly likely to be unlawful.

32. The definition of a refugee is that in Article 1 of the Refugee Convention – a person with a genuine and well-founded fear of persecution for specific reasons, who cannot avail himself of the protection of his country of origin. It is well-established law that the standard of proof is that of a 'real and substantial risk' or a 'reasonable degree of likelihood'[12]; this is a low threshold, reflecting the seriousness of the issue at stake and the grave consequences of failing to recognise a refugee. The Convention has been incorporated into UK law and must be interpreted in good faith, to give effect to its humanitarian objects and purpose[13].

33. The policy statement does not explain why the Convention definition is not sufficient, nor how introducing a more restrictive threshold would be compliant with the UK's obligations under international law. We consider that the proposals are likely to be entirely unworkable and betray a serious lack of understanding of the relevant legal framework.

[11] *BF (Eritrea) v SSHD* [2019] EWCA Civ 872; ADCS Age Assessment Guidance, October 2015
[12] *R v SSHD ex p Sivakumaran* [1988] AC 958
[13] *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1

34. The proposal for a more restrictive threshold test also ignores the fact that there are already existing statutory provisions which require decision makers to consider whether an asylum claimant's credibility is affected by various factors, including whether they have delayed making a claim or failed to claim in a safe country[14]. The policy document does not make any reference to these provisions nor explain why they are not sufficient.

35. The proposals in the consultation paper appear designed to undermine the UK's performance of its moral and legal obligations to protect and support refugees fleeing persecution. We consider that they are misconceived, unsupported by evidence, and are unlawful.

Chapter 5 – Streamlining asylum claims and appeals

36. The introduction to Chapter 5, in common with other parts of the consultation paper, misrepresents the nature of asylum decision-making and the statutory appeal framework. The 'burden on resources' of 'repeated unmeritorious claims' is a common theme of Home Office policy, but the reality that most claimants and their representatives experience is very different.

37. The Immigration Law Practitioners Association (ILPA), in its response to the consultation[15], has made detailed submissions about the structure and practice of asylum decision-making and appeals. Those submissions accord with the experience of Doughty Street practitioners and we support them in their entirety.

38. Our experience as immigration lawyers is that Home Office decision making is often of poor quality; there are lengthy delays, failures to consider relevant evidence, and a repeated failure to consider an asylum claim 'in the round'. Added to this, there may be many reasons why an asylum claimant does not or is not able to disclose relevant details at an early stage, including the effects of trauma, mental illness, feelings of shame or stigma or fear of reprisals. Individuals may become refugees *sur place* whilst in the UK due to political or legislative changes in their country of origin. Some individuals will be refugees but may not be aware of their entitlement to refugee leave, or not have had access to legal advice on their status.

[14] s8 Asylum and Immigration (Treatment of Claimants etc) Act 2004
[15] https://ilpa.org.uk/wp-content/uploads/2021/05/New-Plan-for-Immigration-ILPA-response.pdf

39. This Government has already restricted statutory rights of appeal, which are currently limited to appeals against removal on asylum or human rights grounds. There is already a one-stop appeal which requires the appellant to raise all relevant matters in their appeal, and failure to do this can preclude a second statutory appeal right against a further decision.

40. Where the First Tier Tribunal dismisses an appeal, there is no appeal as of right to the Upper Tribunal (contrary to the suggestion in the consultation paper); the Upper Tribunal may only grant permission to appeal if there is a material error of law in the First Tier Tribunal's decision. Onward appeals to the Court of Appeal are also restricted, and leave to appeal will only be granted by the Supreme Court if the appeal raises a point of law of 'general public importance'; in practice most cases will not meet this test. Contrary to the suggestion in the consultation paper, judicial review will not be available where there is a statutory right of appeal.

41. The consultation paper's description of 'last minute' judicial challenges to removal does not accord with the experience of practitioners at Doughty Street, which is that judicial intervention is often necessary to prevent the removal of individuals who cannot lawfully be removed, including those with outstanding asylum or trafficking claims and/or individuals who are physically or mentally unfit to fly. The High Court does not make orders preventing removal where there are no grounds for doing so.

42. The consultation paper relies on internal Home Office statistics; although these are relied on to demonstrate alleged 'abuse' of the system, we consider that they in fact illustrate the serious flaws in Home Office decision making. The fact that 73% of individuals detained under immigration powers had to be released by the Home Office in 2019 because they had legal rights which had precluded their detention, for example, is a cause for concern about Home Office decision-making; it is not a basis for restricting rights of appeal.

43. We do not consider that the evidence supports the Government's assertion that repeated, unmeritorious or abusive claims are widespread, or that legal representatives fail to act in good faith in representing individuals in immigration proceedings. On the contrary, legal representatives are subject to rigorous codes of conduct and take their professional obligations extremely seriously; by contrast, the Presenting Officers representing the

Home Office in appeals are not subject to any form of professional standards or regulation, and have very limited training[16].

44. The proposals to 'streamline' asylum appeals are likely to result in unfairness to vulnerable appellants, many of whom have difficulty in accessing legal advice and representation, and are likely to result in serious injustice to many refugees, with potentially grave consequences. The proposal for 'expedited appeals from detention' has strong echoes of the former 'Detained Fast Track' appeal process which was found to be unlawful by the High Court and Court of Appeal in 2014 and 2015[17]. Litigation in respect of appeals decided under the unlawful fast track procedure is still continuing[18].

45. The proposal to encourage the use of costs orders to encourage compliance with court orders made by the First Tier and Upper Tribunal is largely welcome; not least because our experience is that it is usually the Secretary of State, as Respondent to an appeal, who fails to comply with directions.

46. Proposals to improve access to legal advice for migrants and refugees are again welcomed in principle; access to free, independent legal advice is essential for any fair and effective system. However, the consultation paper is short on detail: we note that the Government has to date implemented significant cuts to legal aid and are sceptical that the Government intends to make the changes necessary to enable effective access to high quality legal advice and representation.

47. The proposal to establish a panel of 'pre-approved experts' entitled to provide evidence to the court in immigration cases is bizarre. There is no evidence, and none is presented in the consultation paper, that existing expert witnesses who provide reports and/or oral evidence in immigration cases are not suitably positioned to do so. The suggestion that the Secretary of State (a party to all immigration appeals) can introduce controls over which witnesses may give evidence is inimical to a fair appeal process and indicates a woeful lack of understanding of court processes or the existing rules regarding experts.

Chapter 6 – Supporting victims of modern slavery

[16] ICIBI, 'An inspection of the Home Office Presenting Officer function', January 2021
[17] *R (on the application of Detention Action) v First Tier Tribunal* [2015] EWCA Civ 840
[18] *R (TN (Vietnam)) v SSHD* [2019] 3 All ER 433; cases stayed pending that judgment are now awaiting determination in the Administrative Court.

48. The proposals in Chapter 6 are of concern. The underlying premise is that a significant proportion of trafficking claims are not genuine but 'vexatious' and that there is an overlap between those who raise trafficking claims and 'serious criminals'. The consultation paper again relies on somewhat misleading statistics: of the 10,627 referrals to the NRM in 2019, 91% were investigated by police forces rather than the Home Office; the Home Office's own statistics state that the increase in referrals is due to increased awareness of modern slavery and the NRM[19]. 27% of all referrals (2,836 people) in 2019 were UK nationals. The Home Office does not publish statistics on the proportion of positive reasonable grounds or conclusive grounds decisions taken in the NRM, and the consultation paper does not contain any data, apart from the fact that 89% of trafficking claims made whilst in detention resulted in a positive reasonable grounds decision. This does not come anywhere near to demonstrating abuse or exploitation of the NRM.

49. The proposal for additional training for first responders is welcome, but needs to be implemented and resourced properly to ensure that first responders can act promptly and effectively to identify potential victims and take appropriate action. We note however that it is not the task of a first responder to assess whether an account is credible; training or encouraging first responders to assess credibility and/or raise concerns prior to referral to the NRM is likely to raise serious conflicts of interest and undermine the effectiveness of the NRM in identifying potential victims.

50. The suggestion in the consultation paper that the 'reasonable grounds' imposes a different threshold to 'I suspect but cannot prove' is wrong in law, and no evidential basis has been put forward for making the reasonable grounds threshold more restrictive. We are concerned that the proposals are likely to undermine the effectiveness of the NRM in identifying and protecting victims of trafficking.

51. In relation to the proposed 'public order exemption', the current statutory guidance on modern slavery already recognises that public order considerations may prevent the recovery and reflection period being implemented. It is unclear why the Home Office has not been able to set out a definition of the public order exemption in policy to date, or that a statutory definition is required. No evidence is provided in support of the suggestion that this is a serious or widespread problem, or one which requires a more restrictive approach than that available. We are concerned that the proposal may be used to justify extended

[19] Home Office: National Referral Mechanism Statistics, End of Year Summary, 2019

administrative detention on the basis of little more than an assertion by the Home Office that 'public order grounds' apply.

52. If the Government's intention is (as stated) to incorporate the Council of Europe Convention on Action Against Trafficking (ECAT) into domestic law, we would broadly welcome that suggestion. However, incorporation should not be selective or be used to limit the protection and support available to those recognised as victims of trafficking. We note that the consultation proposals are in some respects incompatible with the UK's international obligations under ECAT, particularly with regard to protection and residency status for child victims. Further, the conflation in the policy paper of victims of trafficking/modern slavery with foreign national offenders or criminals is entirely contrary to the purpose and approach of ECAT.

53. Proposals to strengthen the support given to victims of modern trafficking would be welcome, but the consultation paper is entirely devoid of detail.

Chapter 7 – Disrupting criminal networks

54. The proposals in Chapter 7 purport to combat people smuggling by measures which target and penalise the victims. The proposals are based on a misconception about the basis on which refugees travel to the UK, and the means by which they arrive. There is no evidence, and none is presented in the consultation paper, that increasing sentences for illegal entry offences has any effect on criminal networks who organise and facilitate people smuggling. As outlined above, most refugees have no choice over their route to safety or their destination; penalising illegal entrants therefore has no effect in deterring smugglers or disrupting their networks. The 'business model' of the smuggler (as it is referred to in the consultation paper) is entirely independent of the sanctions which may be applied to a claimant on arrival in the UK.

55. As outlined above, we have serious concerns that penalising refugees who arrive in the UK outside 'legal' routes is an approach which is entirely wrong in law and undermines the UK's international obligations to protect those fleeing persecution.

56. The proposals for civil penalties for illegal entry are unsupported by evidence and are based on unpublished Home Office internal management information.

57. Sensible proposals for improving the effectiveness of the Government's response to trafficking and modern slavery must, as a minimum, incorporate the recommendations

made by the ICIBI in its recent report, and should be underpinned not by hostility to victims of people smuggling or trafficking or a desire to penalise refugees, but by a commitment to the UK's international obligations to identify and protect those in need and to prosecute perpetrators.

Chapter 8 – Enforcing removals

58. The statistics presented in Chapter 8 are misleading and designed to create an impression of a system overburdened by criminal offenders who cannot be removed. For example: the figure of 42,000 failed asylum seekers in the UK as at the end of 2020 fails to reflect the fact that from March 2020, the Government paused removals due to the Covid-19 pandemic; it also fails to reflect that individuals 'subject to removal' include those where there are significant legal barriers to their removal, including lack of recognition by national governments or outstanding representations which have not yet been considered by the Government. Likewise, the number of foreign national offenders living in the community includes those whose statutory appeal against deportation has not yet been determined by the Tribunal, and those with outstanding claims or representations which have not yet been considered by the Home Office.

59. We are concerned that the consultation paper does not draw any distinction between 'failed asylum seekers' and 'foreign national offenders', and that the failure is indicative of the Government's generally hostile approach to migration and asylum.

60. The proposal to withdraw asylum support from individuals who 'fail to comply' with removal is unspecified. We note that where the withdrawal of support would leave an individual destitute and unable to meet basic living needs, it is likely to be unlawful[20]. We also note, and echo, the concerns raised by ILPA and the NRPF network that the proposal to remove asylum support from failed asylum seekers is likely simply to lead to an increased burden on local authorities; the policy paper does not identify how this burden will be met by local authorities or propose any increase in financial support to them.

61. The consultation paper does not identify how the Home Office proposes to comply with its statutory duty under s55 Borders, Citizenship and Immigration Act 2009 to safeguard and promote the wellbeing of children, which it must treat as a 'primary factor' in decision making. The High Court has recently found that the 'no recourse to public funds' scheme

[20] *R* (*Limbuela) v SSHD* [2005] UKHL 66, [2005] 3 WLR 1014

breaches the s55 duty[21] and we are concerned that the Government has failed to give any or adequate consideration to the impact on children of these proposals.

62. The proposal to extend the Early Removal Scheme window from 9 months to 12 months prior to the end of the custodial portion of a prison sentence is not detailed. Our experience is that foreign nationals detained in prison have significant difficulty in obtaining legal advice or representation, which can lead them to consent to waive their appeal rights without informed understanding of the consequences of removal[22]. We also have experience of individuals with cognitive impairments being pressured to agree to early removal, thereby waiving their right of appeal, without appropriate safeguards or proper advice.

63. The proposal to change Schedule 10 to the Immigration Act 2016 to enable consideration of non-compliance with immigration processes is odd, since immigration judges already can and do consider non-compliance when deciding bail applications. It is unclear what this proposal is intended to achieve. Our experience is that Home Office bail summaries often contain material inaccuracies of which the Presenting Officer may be unaware; we are concerned that this proposal may lead to unjustified refusals of bail and hence to longer periods of detention.

Public Sector Equality Duty

64. It is difficult to provide a detailed response to this issue within the constrained timetable of the consultation, not least because the Home Office does not itself monitor or publish data on protected characteristics of asylum seekers, victims of trafficking or those in detention.

65. We have serious concerns that the consultation proposals, by seeking to restrict refugee protection, by limiting access to work, public benefits and family reunion, and by removing safeguards within appeal processes, are likely to have a disproportionate impact on individuals who are already highly vulnerable by reason of past trauma, exploitation, and abuse. The disproportionate rates of serious mental illness amongst the asylum seeking population are well-documented; proposals which affect asylum seekers' ability to seek refuge or to have a fair and effective appeal are likely to have a disproportionate effect on those with disabilities.

[21] *ST (A Child) v SSHD* [2021] EWHC 1085 (Admin)
[22] These concerns are supported by the recent judgment in *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin).

66. Unless proper safeguards are implemented to ensure that those who lack mental capacity are able to assert their rights and challenge removal or detention, the proposals are also highly likely to be unlawful as contrary to ss20 and 29 Equality Act 2010 in line with established caselaw[23].

67. A recent Equality Impact Assessment carried out in respect of contingency asylum accommodation[24] incorporated the shocking assertion that asylum seekers with protected characteristics were "not analogous" to British citizens or other permanent residents with similar characteristics. If a similar attitude underlies the 'New Plan for Immigration' it is difficult to see how the proposals could comply with the Public Sector Equality Duty.

Conclusion

68. As outlined in our submissions above, we consider that the 'New Plan' policy document seeks to undermine the purpose of the Refugee Convention by distinguishing between refugees based on the way in which they have sought protection in the UK. The proposals seek to portray asylum claimants who reach the UK before recognition of their refugee status as illegal migrants and criminals, and to restrict access to safety, rights and benefits for all but a very limited number of refugees. We consider that these proposals are seriously misconceived and undermine the UK's ability to comply with domestic and international legal obligations.

69. We strongly urge the Government to reconsider its approach and to act in accordance with its stated commitment to "fulfilling our moral responsibility to support refugees fleeing peril around the world".

Doughty Street Chambers Immigration Team

6 May 2021

[23] See, for example, *R (VC) v SSHD* [2018] EWCA Civ 57, *R (ASK) v SSHD* [2019] EWCA Civ 1239, where the Court of Appeal found that the failure to protect individuals lacking mental capacity in immigration detention was unlawful. The Home Office has not to date taken action in response to these judgments.
[24] Available at https://committees.parliament.uk/publications/5348/documents/53233/default/.