

New Approaches to the Asylum Process

*Human Rights Watch Submission to the
House of Lords, Select Committee on the European Union,
Sub-Committee F (Social Affairs, Education and Home Affairs)*

September 2003

Introduction

1. Human Rights Watch welcomes the opportunity to give evidence on the United Kingdom's proposals for new approaches to the asylum process and the European Commission's communication: *Towards a More Accessible, Equitable and Managed Asylum System*. This submission first sets forth our understanding of the U.K. proposals. Thereafter, our comments are limited to queries (i) and (iii) through (vii) as detailed in the Committee's call for evidence. We indicate in parentheses the dates of our findings in support of the statements contained in this submission, and would be pleased to provide the Sub-Committee with the full text of the Human Rights Watch reports cited.

The U.K. Proposals

2. Human Rights Watch understands the U.K. proposals to comprise two components. The first is to create transit centers (either inside the European Union or at its borders) to process the claims of asylum seekers *en route* to the U.K. The second is to enhance protection in regions closer to refugees' home countries. This would include processing the applications of asylum seekers living in regional camps or centers and eventually resettling some successful asylum seekers in the U.K. In both cases, the U.K. would transfer many, if not all, arriving asylum seekers and undocumented migrants to such transit or regional centers (hereinafter both referred to as "centers"). The U.K. proposals also state that some asylum seekers and migrants could be transferred to centers located in countries in which the migrants have never lived or traveled previously.

Query (i): Validity of the premises for the U.K. proposals

3. The U.K. authorities have cited rising asylum-related costs as the primary reason for numerous reforms to the asylum system over the last decade. However, the government continues to ignore a range of measures—including permitting asylum seekers the right to work and reducing the use of detention—which would ensure significant cost-savings. In July 2002, the government withdrew the work concession, which permitted asylum seekers to apply for work permits after a six-month waiting period. As a result, any asylum seeker lodging a claim after July 2002 is entirely dependent upon government or private support. As well, the government's practice of routinely detaining a high percentage of asylum seekers also has significant costs. Official Home Office statistics indicate that detaining an asylum seeker can range from £362 to £1,620 per week (Hansard's, House of Commons Debates, 25 October 2001, C 333 W). According to the United Nations High Commissioner for Refugees (UNHCR), the U.K. detains more asylum seekers for longer periods than any other European country (UNHCR, 2000). The U.K. plans to expand the detention regime for asylum seekers by 40% by the end of 2003, increasing the number of beds to 4,000. This expansion and government policies geared toward detention contradict UNHCR guidelines that state that detention of asylum seekers should be "exceptional."

4. The U.K. government has also expressed alarm at the fact that some asylum seekers enter the country illegally. Many governments (including the U.K.) have long recognized that illegal entry to a potential asylum state is a likely consequence of a refugee's flight from persecution.¹ The authoritative UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states

¹ During the drafting of the Refugee Convention in July 1951, the representative of the United Kingdom showed keen awareness in his remarks on Article 31 that refugees would be forced to enter potential asylum countries illegally. In those remarks he stated that the fact that a refugee was fleeing from persecution was already a good cause for his illegal entry. (Weis, *Refugee Convention Travaux Préparatoires*, Cambridge University Press, p. 298).

that “in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.” Article 31 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) requires that refugees who have arrived or entered illegally with good cause must not be penalized. Moreover, such penalties and other restrictions on the right to seek asylum could force asylum seekers to go underground. A recent Home Office report argued that genuine asylum seekers may turn to clandestine methods when the authorities implement restrictive policies designed to deter people from coming to Britain (Home Office, 2003).

5. The government claims that the numbers of rejected asylum seekers indicate that a vast majority does not present credible claims. The fact that a significant proportion of asylum seekers’ applications is rejected is not an accurate indicator of the authenticity of the claims or the need for protection. The failure to qualify for protection is partly a function of the quality of asylum determination procedures and related practices. For example, in a recent examination of the accelerated procedures applied in 60 percent of the asylum cases in the Netherlands, Human Rights Watch found that asylum seekers were often deprived of their fundamental right to a full and fair consideration of their claims. (HRW: 4/2003) Nongovernmental organizations and U.K. courts have likewise criticized the U.K. government for asylum determination procedures and related practices that raise significant obstacles to the success of claimants in need of protection, including the ability to pursue an asylum application while destitute. In February 2003, the high court ruled that the U.K. practice of denying basic social support—that is, food and accommodation—to delayed asylum applicants breaches the European Convention of Human Rights. The court stated "Parliament can surely not have intended that genuine refugees should be faced with the bleak alternatives of returning to persecution—itsself a breach of the refugee convention—or of destitution." Moreover, approximately one-quarter of those asylum seekers who appeal their rejection in the U.K. are successfully granted asylum (Immigration and Nationality Directorate, 2002).

6. The U.K. government’s claim that external processing as described in the proposals would be more efficient privileges administrative efficiency over the fundamental human rights of migrants and asylum seekers. Increased efficiency in the procedures for processing asylum claims and returning failed asylum seekers cannot trump the U.K.’s regional and international obligations, including its *nonrefoulement* obligations under the Refugee Convention, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture).

Query (iii): Compatibility of the proposals with international obligations

7. The current proposals are not compatible with the U.K.’s international obligations. The Refugee Convention calls upon states parties to engage in international cooperation to ameliorate the plight of the world’s refugees. The U.K. proposals undermine international cooperation by attempting to shift the responsibility for refugees from the U. K. to other, often poorer, governments.

8. The proposals also threaten the right to seek asylum, enshrined in the Universal Declaration of Human Rights. They also risk undermining the fundamental right of refugees not to be returned to a country where their lives or freedom are threatened because of persecution (*nonrefoulement*), guaranteed in article 33 of the Refugee Convention, Article 3 of the ECHR, and Article 3 of the Convention against Torture. As outlined in paragraphs 13 and 22 - 28 below, Human Rights Watch believes that abuses encountered by refugees either inside or outside of the proposed centers may cause their transfer to the centers to result in *refoulement*.

9. The transfer of asylum seekers arriving illegally in the U.K. to centers abroad, where they will be detained pending the outcome of the asylum process, also constitutes a penalty in violation of article 31 of the Refugee Convention. Asylum seekers should be detained only in exceptional circumstances, not routinely, and on a case-by case basis in accordance with the UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. Moreover, the U.K. proposals make no mention of safeguards for undocumented migrants transferred to such centers for processing. Article 5 of the ECHR permits the detention of undocumented migrants pending an active process undertaken “with a view to deportation.” Our research in several West European countries has revealed the systematic abuse of migrants who are detained without any prospect of being returned to their home countries due to armed conflict, political obstacles, or administrative policies.

10. Targeting asylum applicants by nationality or geographic region of origin and transferring them to processing centers in regions where they will enjoy fewer Refugee Convention rights than refugees located on British soil could violate Article 3 of the Refugee Convention, which stipulates that the provisions of the Convention must be applied to refugees without discrimination as to race, religion, or country of origin. In August 2003, the U.N. Committee on the Elimination of Racial Discrimination expressed concern about discrimination in the U.K. against asylum seekers and recommended that the U.K. adopt “measures making the asylum procedures more equitable, efficient and unbiased.” The current proposals do not appear designed to make the asylum process either more equitable or more unbiased and may make it worse.

11. External processing and regional protection centers established and funded by the U.K. will be within the power and effective control of the U.K. government. Under Article 2 of the International Covenant on Civil and Political Rights (ICCPR) the U.K. will thus be responsible for violations of the ICCPR that occur in the centers. In addition, the U.K. will be responsible for violations of the ECHR that occur in the centers since the U.K. must guarantee rights under the ECHR to every person within its jurisdiction.

12. Human Rights Watch has documented egregious abuses against refugees in protection centers or guest houses run by UNHCR and the International Organization for Migration (IOM) in countries such as Cambodia, Indonesia, Kenya, and Uganda (HRW: 7/2002, 12/2002, 11/2002, 11/2002). The abuses suffered in these centers, which were often heavily guarded and are not comparable to refugee camps in remote rural settings, include violations of the right to life, the right to be free from cruel, inhuman or degrading treatment, and of *nonrefoulement*.

Query (iv): Acceptability of (forcible) transfer of asylum applicants

13. Human Rights Watch believes that it would not be acceptable to transfer (with or without force) an asylum applicant to a center in another country for processing because as noted above, such a transfer and resultant detention may amount to a penalty in contravention of Article 31 of the Refugee Convention and could result in the *refoulement* of a person in need of protection. Moreover, and as noted above, the United Kingdom may be complicit in abuses that occur as a result of the transfer of asylum applicants. Such transfers may also be contrary to UNHCR Executive Committee Conclusion No. 82 (1997), which reminds governments of “the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs.”

14. Finally, if asylum seekers are transferred to a country in which conditions do not guarantee them “effective protection,” international norms will be violated. Executive Committee Conclusion No. 58 recognizes that refugees who, for economic or other non-compelling reasons, leave a country where they have obtained “effective protection” may be returned to that country. The forced transfer of refugees to countries where effective protection cannot be guaranteed violates this standard. As described in paragraph 22 through 28 below, it is doubtful whether “effective protection” for the transferred applicants could be achieved. Human Rights Watch has documented how ineffective protection in countries such as Indonesia, Iran, Jordan, Malaysia, Pakistan, and Syria prompts refugees to move on to other countries, such as Australia, in the first place. (HRW: 12/2002) Returning them to such countries without substantially enhancing the countries’ protection capacity would be contrary to the Executive Committee Conclusion.

Query (v): Determining State responsibility for the processing of asylum claims

15. The U.K. is ultimately responsible for the processing of asylum claims under the proposals. The U.K. cannot delegate final responsibility for processing asylum claims to another government or to an international organization such as the IOM or UNHCR.

16. If errors are made in the processing of asylum claims in the centers and failed asylum seekers are sent to a country or left to live outside centers where they could face rape, torture, or other inhuman or degrading treatment, the U.K. would be liable in accordance with *Chahal v. United Kingdom* and *Soering v. United Kingdom*, in which the European Court of Human Rights recognized that states parties have an affirmative obligation under ECHR Article 3 to protect asylum seekers or other migrants from such abuses in a third state. In *Loizidou v. Turkey*, the court said that a country can violate the ECHR even when the act in question occurs outside of its territory: “[T]he responsibility of the Contracting State can be involved by acts and omissions of their authorities which produce effects outside their own territory.”

17. In the same vein, the U.K. cannot escape responsibility by delegating the task of processing asylum claims to UNHCR or IOM, who would be acting as its agents. In *X v. Federal Republic of Germany*, the European Court of Human Rights held that Sweden was responsible under the European Convention for its agent’s treatment of a Pole living in Germany. Human Rights Watch has documented violations of the human rights of asylum seekers and refugees held in housing blocks run by IOM, which was acting as the agent of the government of Australia in Indonesia. In the IOM-run centers, asylum seekers and refugees were attacked by mobs wielding swords and sticks, and setting fire to their housing. Refugee children were also denied the right to education (HRW: 12/2002).

18. Human Rights Watch is equally concerned that the high procedural standards required of the U.K. under regional and international law could not be attained under the current proposals. Human Rights Watch has documented egregious problems with asylum claim processing by governments throughout the world, including Macedonia, Uganda, South Africa, Spain, and the Netherlands (HRW: 7/2003, 11/2002, 3/1998, 7/2002, 4/2003). Moreover, Human Rights Watch has documented serious failings in UNHCR-run procedures in Egypt, Kenya, and Malaysia. (HRW: 11/2002, 2/2003, 8/2000) In some places, such as Pakistan and Nepal neither the government nor UNHCR assess the status of refugees, leaving them undocumented and vulnerable to abuse. (HRW: 2/2002, 5/2003)

19. During the time when asylum applicants are waiting to have their asylum claims heard, serious abuses can occur. The U.K. would be ultimately responsible for the failure to protect asylum

claimants being processed by the U.K. government or its agents. Human Rights Watch has documented numerous cases in which applicants waiting for their claims to be heard have been abducted and beaten, arbitrarily arrested and detained, raped, or otherwise tortured or mistreated, and *refouled* (HRW: Malaysia 8/2000, Kenya and Uganda 11/2002, Pakistan 2/2002).

Query (vi): Can effective protection be provided?

20. The European Commission has stated that effective protection encompasses physical security, a guarantee against *refoulement*, access to UNHCR asylum procedures or national procedures with sufficient safeguards, social-economic well being, including as a minimum, access to primary healthcare and primary education, and access to the labor market or a means of subsistence sufficient to maintain an adequate standard of living.² For international protection to be effective, refugees must enjoy the basic civil, political, economic, social, and cultural rights guaranteed to them under human rights treaties and the Refugee Convention. Finally, where a state permanently denies a refugee access to any form of legal status, effective protection is not guaranteed.

21. Police or other government agents in countries as diverse as Egypt, Kenya, Malaysia, and Uganda threaten refugees' physical security on a daily basis (HRW: 2/2003, 6/2002, 8/2000, 11/2002). Beatings, physical mistreatment, arbitrary detention, rape and other sexual violence are committed by governmental actors against refugees, even when such refugees have official permission to remain. Finally, UNHCR and the governments of Guinea, Kenya, Nepal, Uganda, and Tanzania (among many others) have been unable to protect refugees against rape and other forms of sexual and domestic abuse. (HRW: 7/2001, 10/1993 and 11/2002, 11/2002, 11/2002, 10/2000).

22. Human Rights Watch has documented numerous situations in countries including (but by no means limited to) Iran, Jordan, Kenya, Macedonia, Pakistan, and Thailand in which refugees do not enjoy free access to UNHCR, to national asylum procedures, or to a secure legal status. (HRW: 12/2002, 5/2003, 11/2002, 7/2003, 2/2002, 10/2002) Refugees outside of the proposed centers cannot enjoy effective protection if such policies are in effect.

23. The U.K. or its agents might be unable to provide effective protection to refugees even inside centers that they establish and maintain. For example, in Kenya UNHCR was unable to protect a nineteen-year-old girl from gang rape and assault with a knife outside their offices. UNHCR also failed to prevent the murders of two Rwandan children, aged nine and ten, and the brutal stabbing of their mother in a UNHCR "secure residence" (comparable to the proposed centers) in Nairobi (HRW: 4/2002). As noted in paragraph 13 above, other abuses suffered in centers include violations of the right to life, the right to be free from cruel, inhuman or degrading treatment, and of *nonrefoulement*.

24. Human Rights Watch has also documented the prolonged and arbitrary detention of asylum seekers as well as refugees in harsh and unacceptable conditions in Greece, Australia, and Spain's Canary Islands (HRW: 12/2000, 12/2002, 2/2001), as well as inadequate access to legal representation and information pertaining to the refugee determination processes run by UNHCR in Kenya, Malaysia, and Thailand (HRW: 11/2002, 8/2000, 10/1998).

² The evolving norm of "effective protection" has been identified by UNHCR's Executive Committee, and was recently elaborated in an expert roundtable held in Lisbon Portugal. See UNHCR, Migration Policy Institute, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers*, Lisbon, Portugal, December 9-10, 2002.

25. In some countries, refugee children are unable to access education because their freedom of movement is not respected (HRW: Kenya 11/2002). In other cases, such as Indonesia and Thailand, refugee children's right to education is overtly violated (HRW: 12/2002; 10/2002). Refugees hosted by governments such as Iran, Jordan, Indonesia, Syria, and Australia are unable to access employment as is their right under the Refugee Convention because of their inability to obtain documentation, or because of the temporary or restricted visas they are given by governments (HRW: 12/2002). Effective protection for refugees does not exist where there are no means by which to subsist; longstanding refugees denied the right to work or access to primary education are also without effective protection. The failure of the U.K. to ensure such rights to persons in the proposed centers will violate its obligation to provide effective protection.

Query (vii): Appropriate role for UNHCR and IOM

26. Primary responsibility for the protection of refugees resides with governments—in this case, the United Kingdom. Under the proposals, the U.K. would retain jurisdiction and effective control over refugees in the centers, and as such the U.K. would be required to assess the status of and protect refugees. When governments fail to protect refugees, the U.N. General Assembly has entrusted UNHCR with “providing international protection. . .to refugees,” and with “seek[ing] permanent solutions for the problem of refugees by assisting governments.”

27. UNHCR is the appropriate agency to enhance protection more generally in the regions from which refugees flee. However, enlisting UNHCR in a program of returns to regional processing centers would seriously compound the challenge it faces in fulfilling its protection mandate. As noted above, we already have concerns based on our research in numerous countries about the capacity of UNHCR to manage a status determination system that would conform to the U.K.'s obligations under various human rights treaties.

28. Delegating responsibility to the IOM for any aspect of implementation of the proposals also raises serious concerns. The IOM views itself as exempt from its member states' international legal obligations, including the prohibition against *refoulement* (IOM: 11/1997) Human Rights Watch has documented the agency's involvement in the violation of refugee rights in at least two settings. In Jordan, IOM returned (and potentially *refouled*) individuals coming from countries known to produce large numbers of refugees, such as Somalia and Sudan, within seventy-two hours of their arrival in Jordan from Iraq (HRW: 5/2003). In addition, the agency failed to impose controls on potentially dangerous contacts between Sudanese government officials and individuals reluctant to return home to Sudan from Jordan. (HRW: 5/2003)

29. In Australia, IOM was involved in the arbitrary and indefinite detention of refugees as a part of the so-called “Pacific Solution” (HRW: 12/2002). The agency also failed to provide education for child asylum seekers in Indonesia, in violation of these children's basic human rights. Living conditions in IOM-organized housing in Indonesia were sub-standard in some cases, and the agency put refugees under undue pressure to return home prematurely (HRW: 12/2002). Finally, we have serious concerns that returns via IOM are not always genuinely “voluntary” as required by IOM's mandate. For example, in Belgium Human Rights Watch found that IOM effected some returns from closed detention facilities in which staff at the centers presented asylum seekers with the harsh “choice” of “volunteering” to go home with IOM, remaining in a closed detention facility, or being forcibly deported by armed police escorts (HRW: 7/03).