Response to the Home Office consultation "Reforming support for failed asylum seekers and other illegal migrants"

The Migrants' Law Project is a legal and public legal education project, hosted by Islington Law Centre. The MLP promotes fair treatment and access to justice for migrants, refugees and asylum seekers in the UK through the use of public law.

We use a dual approach incorporating strategic legal work and legal education. Our strategic legal work – advice, representation, pre-litigation research, negotiation and litigation – means that we seek to tackle systemic problems around issues including, among others, detention, destitution, and the protection of fundamental human rights.

Our notable recent strategic work includes representation of the NGO Claimant in the *Detention Action* series of litigation, which recently resulted in the suspension of the fast-track appeals process for asylum claims before the First-tier Tribunal.

Our legal education work involves building legal capacity within organisations assisting asylum seekers, refugees, and migrants, as well as disseminating learning on key developments.

Response to Specific Consultation Questions:

1. *The proposed repeal of section 4(1) of the 1999 Act (paragraph 16).*

We do not support this proposal, which is likely to result in unlawful detention.

Repeal of s.4(1)(a) and (b) will affect some individuals who are on temporary admission or have been released from immigration detention. While it is accepted that people are less frequently supported under these provisions, they include people who are attempting to return home, but encountering difficulties and people seeking to regularize their status (such as people brought to the UK as children).

We are particularly concerned that it is likely to result in unlawful detention in cases where individuals would have previously been released on immigration bail to a s.4 address. This form of support can be granted on an urgent basis, in order to secure the release of an individual who might otherwise be unlawfully detained. The Home Office expressly acknowledges at para 15 of the consultation that s.4(1)(c) is presently used 'frequently' for these purposes.

In fact, figures obtained by Bail for Immigration Detainees ('BID') show that there were 2, 860 grants of s.4(1)(c) accommodation in 2014, with 53% of BID's client base applying for a s.4 address. BID's view is that without such an address the majority of these individuals will be unable to make an application for bail at all[1]. They will therefore be put at risk of unlawful detention.

There are significant cost implications to the public purse

In addition to being an egregious breach of individual liberty, unlawful detention carries significant cost implications for the public purse, which far outweigh any savings to the asylum support budget, including the cost of detention, legal aid, court time and resources, damages and treatment for mental health conditions exacerbated by unlawful detention. Further cost implications arise from the fact that people denied support will undoubtedly approach their local authority for support instead, which will have an impact on local authority time and resources even if no support is eventually offered.

2. *The proposal to close off support for failed asylum seekers who make no effort to leave the UK at the point that their asylum claim is finally rejected, subject to continued support in cases with a genuine obstacle to departure at that point or in which further submissions are lodged with the Home Office and are outstanding (paragraphs 20-21).*

We do not support these proposals and strongly object to the use of the term 'failed asylum seeker'.

In our submission, the use of the expression 'failed asylum seeker' throughout the consultation is inaccurate, disingenuous and unnecessarily pejorative. We would refer to such people as 'refused asylum seekers' and note that at any one time, the cohort of people dependent upon s.4 support includes a significant number of people who will eventually go on to establish that they are refugees and be granted protection. The reasons why a person fleeing persecution might be wrongly refused are diverse but include poor legal representation and systemic unfairness.

We note in particular that at present, there will be a number of people dependent upon s.4 support whose asylum applications have been considered under the Home Office's 'Detained Fast-Track' ('DFT') procedures and their appeals heard under the Fast Track Procedure Rules 2014 ('FTR'), both of which have been found by the High Court and Court of Appeal to be so systemically unfair as to be unlawful. [2][3]

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[1] BID Parliamentary briefing for House of Commons debate, Report of the Inquiry into the Use of Immigration Detention in the UK, on10 September 2015.

[2] The DFT process was found to be unlawful by the High Court in *R (oao Detention Action) v SSHD [2014] EWHC 2245 (Admin)*, and the Court of Appeal in *R (oao Detention Action) v SSHD [2014] EWCA Civ 1634.*

[3] The FTR were found to be unlawful by the High Court in *R (oao Detention Action) v FTT (IAC) & Others [2015] EWHC 1689 (Admin).* The decision was upheld by the Court of Appeal in The Lord Chancellor v Detention Action [2015] EWCA Civ 840.

The full DFT process from initial decision through to fast-track appeal is currently suspended, following a ministerial statement which admitted, "an unacceptable risk of unfairness to vulnerable or potentially vulnerable individuals". Individuals who have been subjected to this systemically unfair regime have been failed by the UK asylum system and do not deserve to be stigmatized or demonized.

Destitution is not an effective tool to enforce return to the country of origin

It is our submission that withdrawing support from asylum seekers is not effective at coercing them to leave the UK and is in fact more likely to undermine immigration control. Asylum seekers who have lost their support have little incentive to remain in contact with the Home Office. Where they are nonetheless inclined to do so, their efforts are thwarted by destitution, as they have no money for travel or communication.

'Genuine obstacles to departure' have historically been interpreted in too restrictive a way

Whilst the consultation paper contains the assurance that it will continue to provide support where there is a genuine obstacle to departure or further submissions outstanding, we are concerned that these assurances will not be borne out in practice. These concerns arise from the historic actions of the Home Office, which are likely to be repeated where similar political circumstances and incentives arise in future.

We note in particular the attempt in August 2005 to force Iraqi Kurds to return to Iraq, despite the absence of a safe route and the inability of the Iraqi government to provide any level of protection. In that instance, the threat of removal of s.4 support was made in written letters to Iraqi Kurds in an attempt to coerce them into returning to their country of origin using travel routes that were plainly unsafe.[4]

Appeal rights remain essential

The Iraqi Kurds example, while a stark one, does not represent a historic anomaly. Poor quality Home Office decision making in relation to Home office support decisions continues and is reflected in the Asylum Support Tribunal statistics for 1 September 2014 to 28 February 2015. During that period, 44% of appeal cases were allowed and 12% were remitted back to the Home Office. These figures do not take account of cases that the Home Office conceded prior to the hearing.

In our submission, in response to para 34 of the consultation, it clearly remains essential that asylum seekers retain a right of appeal against any refusal to provide support in light of these figures.

3. *The proposed changes for failed asylum seekers with children (paragraphs 29-33).*

[4] Refugee Council Briefing:
http://www.refugeecouncil.org.uk/assets/0001/5818/Briefing_Iraq_returnAndS4.pdf

We strongly oppose these measures which are inconsistent with the statutory duty to 'safeguard and promote' the welfare of children.

In our submission there has been insufficient consideration to the interests, needs and rights of children. These proposals fly in the face of judgments of the higher courts that asylum-seeking children should not be punished for the decisions of their parents[5]. Forcing children and their families into destitution and homelessness as a means of enforcing immigration control places them at an unacceptable risk of harm and is ineffective in achieving the intended aim of forcing them to leave the United Kingdom.

We repeat our submission concerning the use of the term 'failed asylum seeker' and note that of the 1,193 families expected to return through the Family Returns Process between 2012 and 2014, 242 families (20%) could not in fact be returned and were granted leave[6]. These vulnerable families with valid concerns about the possibility of safely returning to their country of origin would all have been at risk of destitution under the current proposal.

This proposal will cause real harm to children

It follows that if parents opt to stay in the United Kingdom and face destitution rather than return to their country of origin, their children will be at risk of significant harm as a result of this policy. A number of serious case reviews have recorded the potentially fatal consequences if a family is cut off from all forms of statutory support[7].

Enforced destitution is not an effective mechanism for removing families from the United Kingdom

When forced by circumstances to choose, refused asylum seeking families will often remain in the United Kingdom and face destitution, than return to face their real or perceived fears in the country of origin. The Home Office has previously attempted to use destitution as a tool to enforce return in a pilot of a similar policy under Section 9 of the Asylum and Immigration Act 2004.

The Home Office's own evaluation of this pilot showed that the policy was a failure. Only one family was successfully removed during the time period, compared to 9 families in the control group. The report concluded "There was no significant increase in the number of voluntary returns or removals of unsuccessful asylum seeking families". On the contrary, there was an increase in the number of families

[5] ZH (Tanzania) v SSHD [2011] UKSC 4
[6] Independent Family Returns Panel: 2012-14
[7] Child Z (2011): the circumstances of the refused asylum seeking mother, suffering from a life threatening illness and caring for a young child with little support 'would challenge any individual's coping strategies'. Child EG (2012): Involving a family who became destitute following the grant of refugee status and before any other forms of support were in place, leaving the family dependent upon hand outs.

who absconded, to almost double that of the control group who remained supported (39% in the pilot compared to 21% in the control).

Given the resounding failure of this policy, the Home Office evaluation recommended that this approach 'was not used on a blanket basis' in future, yet this is now precisely what the government proposes with no more evidence of its efficacy. It is in any event our contention that the welfare of asylum seeking children should not be sacrificed in pursuit of a policy objective.

4. *The length of the proposed grace period in family cases (paragraph 31).*

We consider that the proposed grace period is too short in duration

The consultation document proposes just 28 days before support is removed. In our view this is clearly insufficient. The individual circumstances of such families will be diverse. All will need to review their situation, seek advice and consider their options. We consider that the grace period should be comparable to that provided to asylum seekers who are engaged in the voluntary returns programme (three months). This would recognize the complex and difficult decisions that refused asylum seekers are forced to make.

In the event that there are no protection issues preventing a family returning to their country of origin, there may still be a genuinely held perceived fear of return that will need to be overcome. Families with such fears should be supported whilst they seek advice about their situation and consider their return.

In addition, families will need to explore whether there are any barriers to their return and seek appropriate advice. During the Section 9 pilot, the NGOs providing outreach services found that on average the 35 families that they supported needed a minimum of three advice sessions after receiving Home Office letters notifying them of the withdrawal of their support.

For other families, there will remain valid protection issues that need to be explored and properly made out in further representations to the Home Office. For example, children may have protection claims of their own which were not properly explored in the initial process when they were under their parent's claim. Effective legal advice and representation will be required in such circumstances.

It is plainly wrong to decline to create any kind of appeal mechanism against a refusal to extend support when an asylum seeker is taking all reasonable steps to leave the UK. We repeat our submissions above. The inevitable consequence of removing this effective safeguard would be that families would be left destitute due to poor quality decision-making by the Home Office.

5. *The proposed transitional arrangements (paragraphs 36 - 37).*

We propose that if these proposals are implemented despite the concerns raised elsewhere in this response, they should only be applied to those individuals who receive refusals after the new legislation comes into force. To do otherwise would be impractical and would result in local authorities being overwhelmed by applications for support from this group.

6. The assessment of the impact of the proposals on local authorities (paragraphs 38 - 45).

These proposals would significantly increase pressure on the budgets of local authorities

The stated view that the proposal has been framed in order to 'avoid new burdens on local authorities' is incredible. It is clear that the proposals would considerably increase the pressure on local authority resources. Whether this is a 'new burden' or the increase of an existing 'burden' is entirely semantic. In real, practical terms, this proposal represents a significant 'cost-shift' onto the budgets of local authorities who have legal obligations under s.17 of the Children Act 1989 to children who are found to be 'in need' in their area.

Any estimate of the cost to local authorities should also take into account the increased drain on resources of dealing with additional requests from destitute asylum seeking families for support and in undertaking assessments of whether a failure to support might lead to a breach of fundamental rights under the Human Rights Act or the Children Act 1989.

We note that during the Section 9 pilot, Barnardos carried out research focusing on the impact of that section upon local authorities[8]. All of the local authorities interviewed were clear that Section 9 was in conflict with their established duties and practices under the Children Act. These concerns continue to be relevant to the Government's new proposal to withdraw support.

A further, longer-term risk is that children from otherwise healthy families may subsequently be taken into care by the local authority following an extended period on s.17 support. This would have devastating consequences for the families concerned and significant cost implications for the local authority.

7. *Whether and, if so, how we might make it clearer for local authorities that they do not need to support migrants, including families, who can and should return to their own country (paragraph 42).*

If the government proceeds with these proposals, it will have transferred its moral and legal obligation to provide support to destitute asylum seeking families onto Local Authorities. It would be entirely inappropriate to dissuade them from acting in order to carry out their responsibilities.

[8] The End of the Road, 2005

8. *Any suggestions on how the Home Office, local authorities and other partners can work together to ensure the departure from the UK of those migrants with no lawful basis to remain here and minimise burdens on the public purse (paragraph 47).*

The Home Office can minimise cost to the tax payer by properly investing in all stages of the asylum process to ensure that decisions are taken fairly and promptly, thereby reducing the length of time spent on asylum support and ensuring that refugees are able to properly integrate into society sooner.

A further means by which to minimise burdens on the public purse would be to permit asylum seekers to work whilst they await the determination of their claim for asylum. This would result in decreased spending on asylum support and enable asylum seekers to contribute to the economy through taxation on their earnings. It would be consistent with the wishes of the many asylum seekers want to work and support their families without reliance on state support or handouts.

9. *Any information or evidence that will help us to assess the potential impacts of the changes proposed in this consultation document and to revise the consultation stage Impact Assessment (paragraph 48).*

See the responses provided above concerning the impact on local authorities and the Section 9 pilot.

10. *Any information or evidence that will help us to assess the potential impacts of the changes proposed in this consultation document on persons who have any of the protected characteristics as defined in the Equality Act 2010 (paragraph 49).*

The consultation document provides no evidence of the consideration of the interests, needs and rights of children in their own right.