

HOUSE OF LORDS

European Union Committee

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11th Report of Session 2003-04

# **Handling EU asylum claims: new approaches examined**

Report with Evidence

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- (Q) refers to a question in oral evidence
- (p) refers to a page of written evidence

## **ABSTRACT**

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Sending asylum seekers to another country for consideration of their asylum claims raises substantial difficulties regarding:

- the State responsible for the decision and accountable for it
- the legal procedures to be applied
- the cost and practical difficulties of removing people to a processing centre in another country and then having to move them again after the determination process.

The British Government's proposals for transit processing centres were misconceived and have now sensibly been dropped. Their proposals for regional protection areas are very unclear.

The United Nations High Commissioner's proposals for EU asylum processing centres are also open to objection on legal and practical grounds. There are no good reasons for replacing national determination procedures with a centralised EU system.

A better way of tackling high levels of asylum applications and deterring those with unfounded claims is by improving and accelerating initial determination procedures and ensuring that those without a claim to stay either leave or are removed promptly.

# Handling EU asylum claims: new approaches examined

## CHAPTER 1: INTRODUCTION

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### Background

1. Asylum has become one of the most sensitive political issues throughout the European Union (EU). The 1990s saw high and rapidly increasing levels of asylum applications in most of the Member States. This raised questions not only about the social implications but also about whether existing asylum systems could cope with the numbers involved.
2. In 2001 and 2002, the numbers declined across the EU as a whole, but increased dramatically in the United Kingdom to a peak of 103,100 in 2002 (including dependants), by far the highest number of applications in any of the Member States in absolute terms (although not the highest number proportionate to population).<sup>1</sup> Growing concern by governments has led to a succession of legislative and administrative measures designed to streamline processes and deter unmeritorious applications. The current Asylum and Immigration (Treatment of Claimants etc) Bill is the fifth major piece of British legislation on asylum in the past 12 years.
3. Concern about the situation has not been confined to the United Kingdom. In the last quarter of 2003 France received more asylum applications than any other EU country, and both the Netherlands and Denmark have recently introduced severe measures to deal with asylum seekers whose claims are judged to be unfounded.
4. In 2003 the pressures caused by high levels of asylum applications prompted a number of proposals of radical ways of handling at least some categories of asylum applications. The United Kingdom produced proposals for “transit processing centres” and “regional protection areas”, which prompted further work by the Commission.<sup>2</sup> In parallel the United Nations High Commissioner for Refugees (UNHCR) has been developing proposals, one element of which would involve joint EU consideration of some asylum claims. The common thread running through all these proposals is some form of “extra-territorial” processing—processing applications in a country other than the one in which protection is sought.

### The Committee’s approach

5. We have examined all these initiatives in order to form a view of the advantages and disadvantages of extra-territorial processing for certain categories of asylum applications. We describe these initiatives in detail in Chapter 3, but, in order to place them in context, first describe (in Chapter 2) the current asylum system. In Chapter 4 we examine the concept of

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<sup>1</sup> *Asylum Statistics: 4th Quarter 2003 United Kingdom*, Home Office. The numbers were much reduced in 2003, to 61,100 but in absolute terms were still higher than in any other Member State except France.

<sup>2</sup> *Towards more accessible, equitable and managed asylum systems*, document 102430/03, COM (2003) 152 final.

effective protection, before assessing in Chapter 5 the proposals for extra-territorial processing and regional protection areas. Finally in Chapter 6 we look at possible ways of improving the asylum process.

6. We invited evidence from a wide range of organisations and took oral evidence from several of them as well as from Caroline Flint, Parliamentary Under-Secretary of State at the Home Office, and representatives of UNHCR and the International Organization for Migration. A copy of the call for evidence is at Appendix 2 and a list of witnesses at Appendix 3. We are very grateful to all of those who assisted our inquiry by giving evidence to us. We were greatly assisted in our inquiry by our Specialist Adviser, Professor Guy Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford.
7. We also examined current procedures for determining asylum applications in order to compare them with alternative forms of processing being proposed. We saw at first hand both the standard procedure at Lunar House, the headquarters of the Immigration and Nationality Directorate, and the fast track procedure operated at Oakington Reception Centre near Cambridge. We are very grateful to all those who helped to organise these visits and make them such a valuable experience. In this context we also found very helpful the recent reports prepared by the House of Commons Home Affairs Committee on different aspects of the asylum process, in particular that on *Asylum Applications* published in January 2004.<sup>3</sup>

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<sup>3</sup> Second Report of Session 2003-04, HC 218-1, 26 January 2004.

## CHAPTER 2: THE CURRENT ASYLUM SYSTEM

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### The global context

#### *The origins of the current system*

8. The origins of the modern international refugee regime can be traced back to the League of Nations and the appointment of the first High Commissioner for Refugees in 1921. In its present form it is based on decisions taken by the United Nations General Assembly in 1949 and 1950: first, to create an Office of United Nations High Commissioner for Refugees (UNHCR); and, secondly, to promote the drafting of a new instrument on refugees. This became the 1951 Convention relating to the Status of Refugees. In 1967 the Convention was supplemented by a Protocol which removed the restrictions contained in it relating to time and geographical application.
9. Today some 145 States (out of a total UN membership of 191) have ratified the Convention (and most the Protocol as well). UNHCR is supported by an Executive Committee (with 64 members), whose function is to review and approve the organisation's programmes and budgets and to advise on protection matters. The worldwide protection regime also involves government departments; official institutions with varying degrees of autonomy responsible for determining who is a refugee; and a wide range of non-governmental organisations and community groups concerned with protection, the provision of assistance, and advocacy on behalf of refugees. In 2003 some 573 non-governmental organisations were working with UNHCR as "implementing partners" providing essential services other than protection, such as food and medical programmes. Its budget for 2003 was \$1.16 billion.

#### *The distribution of refugees and asylum seekers*

10. In 2003 UNHCR estimated that there were some 20.5 million persons "of concern" to the organisation, of whom just over half were considered to be refugees within the terms of the original mandate. Others of concern include asylum seekers, internally displaced persons, and returnees. Asia hosted nearly half of them, 9.4 million people (46 per cent), followed by Africa 4.6 million (22 per cent), Europe 4.4 million (21 per cent), North America and Latin America one million each (10 per cent), and Oceania 69,200 (0.3 per cent).
11. The number of asylum applications submitted worldwide during 2002 or still pending at the end of the year totalled one million compared with 940,000 in 2001. In 2003 the number of asylum seekers fell: by 20 per cent in 29 European and non-European industrialised countries; and by 22 per cent in the EU, where five countries (Austria, France, Germany, Sweden and the United Kingdom) received 79 per cent of all claims submitted.<sup>4</sup> In the United Kingdom the level of new claims fell by 41 per cent (from 103,100 in 2002 to 61,050 in 2003). France received more asylum seekers (51,400) than Germany for the first time since 1983, and, according to UNHCR

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<sup>4</sup> *Asylum Levels and Trends: Europe and non-European Industrialized Countries, 2003*, UNHCR, Geneva, 24 February 2004.

estimates, in the fourth quarter of 2003 became the largest asylum seeker-receiving country among the group of 29 industrialised countries.

12. Since 2000 the United Kingdom has received more asylum claims than any other EU country. Over a longer timescale Germany has been by far the largest recipient. Since 1990 of more than five million claims registered in the EU 41 per cent were made in Germany, followed by the United Kingdom (16 per cent) and France (nine per cent). On a per capita basis, the “league table” looks somewhat different. Between 1990 and 2003, the 15 EU countries received 14 asylum seekers per 1,000 inhabitants. Sweden (39.4) and Austria (30.4) received more than twice the EU average; Germany, Belgium and the Netherlands received almost twice as many; while Ireland and the United Kingdom received roughly the EU average. On this basis the United Kingdom ranked ninth among the 15 Member States.<sup>5</sup>
13. Apart from Palestinian refugees, 70 per cent of the world’s refugees are from just ten countries, but increasingly the overall spread is becoming wider. In recent years, the top seven source countries worldwide have been Afghanistan, Iraq, Somalia, Sudan, the former Federal Republic of Yugoslavia, Angola and Sierra Leone.
14. Across Europe as a whole the leading countries of origin for asylum seekers were Serbia and Montenegro in 2000; Afghanistan in 2001; Iraq in 2002; and Russia in 2003 (concentrated in Austria, Poland, the Czech Republic, Germany and Slovakia). Within the EU the main source countries in 2003 were:

Iraq (down 50 per cent over 2002)  
 Turkey (-21 per cent)  
 Serbia and Montenegro (-25 per cent)  
 Russia (+34 per cent)  
 Afghanistan (-50 per cent)  
 Nigeria (+4 per cent)  
 China (+23 per cent)  
 Democratic Republic of Congo (-22 per cent)  
 Somalia (+11 per cent)  
 Iran (+6 per cent).

Other source countries which had previously produced significant caseloads also showed major changes: Zimbabwe (-56 per cent); Angola (-48 per cent); Sri Lanka (-49 per cent); Romania (-50 per cent); and Sierra Leone (-58 per cent). Other countries in turmoil showed significant year on year increases, notably Cote d’Ivoire (+82 per cent) and Liberia (+100 per cent).

15. For the United Kingdom, the ten principal source countries in 2002 and 2003 were as follows (in order of the number of applications):

2002	2003
Iraq	Somalia
Zimbabwe	Iraq

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<sup>5</sup> *Ibid.*

2002	2003
Afghanistan	China
Somalia	Zimbabwe
China	Iran
Sri Lanka	Turkey
Turkey,	Afghanistan
Iran	India
Pakistan	Pakistan
Serbia and Montenegro	Democratic Republic of the Congo

16. What stands out from these lists of countries is that, with the single exception of China, all of them have been affected by war, or ethnic or political strife, often for many years; and that the numbers from the principal source countries fluctuate markedly from year to year reflecting changes in conditions there. The reasons why particular countries attract particular groups of asylum seekers have been much debated, but it is significant that each primary reception country enjoys a substantial international presence, has been a major immigration or labour-importing country over the years, and maintains family, cultural and trade links throughout the world.
17. Previous contacts also play a role in choice of destination, at least in certain periods and for certain groups. For example, given its geographical location, its earlier *Gastarbeiter* programmes, and its political interest in and connections with the Balkans, Germany, not surprisingly, has been a primary destination for Yugoslav and former Yugoslav nationals.
18. In our report on illegal immigration in 2002 we discussed the reasons for migrating.<sup>6</sup> Research carried out for the Home Office shows that asylum seekers may know little about the United Kingdom before they arrive here.<sup>7</sup> It also suggests that changes to benefit regulations in different European countries have had little effect on the numbers of asylum seekers coming to the United Kingdom, whose numbers continued to rise (up to 2003) despite a decade of increasing restrictions on the availability of welfare benefits for asylum seekers.<sup>8</sup>

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<sup>6</sup> *A Common Policy on Illegal Immigration*, 37th Report, 2001-02, HL Paper187, paragraphs 10-16.

<sup>7</sup> *Understanding the decision-making of asylum-seekers*, Vaughan Roberts and Jeremy Seagroatt, Home Office Research Study 243, July 2002.

<sup>8</sup> Under legislation passed in 1996 an asylum seeker's access to social security benefits and housing assistance ceased once a (negative) decision was made on their application. However, during an appeal local authority social services accommodation was available, and, for those with children, assistance under Part 3 of the Children Act 1989. The Immigration and Asylum Act 1999 replaced this system from 3 April 2000 with support from the National Asylum Support Service (NASS). Section 94(3) of that Act requires that, with the exception of families including children, support must be terminated to all asylum seekers who have received a final decision on their claim. Support for asylum seekers with minor dependants was originally continued until they were removed from the United Kingdom, but the Nationality, Immigration and Asylum Act 2002 introduced new restrictions, including the withdrawal of support from rejected asylum seekers who failed to comply with removal directions, whether or not they had minor dependants. The Asylum and Immigration (Treatment of Claimants etc) Bill would enable benefits to be withdrawn as soon as it was confirmed that the family was in a position to leave the United Kingdom, i.e. without the need for removal directions to be set. The concession whereby asylum seekers whose applications remained undecided after six months were allowed to work was withdrawn on 23 July 2002.

*The 1951 Convention relating to the Status of Refugees*

19. The 1951 Convention relating to the Status of Refugees, as extended by the 1967 Protocol, is the cornerstone of the international regime of refugee protection. Although there were earlier arrangements, both under the League of Nations and in the period immediately following the Second World War, no refugee treaty has attracted anything like the level of support given to the 1951 Convention.
20. The Convention first lays down (in Article 1) who is to be considered a refugee. In general terms a refugee is a person who is outside his or her country of nationality or former habitual residence, and who is unable or unwilling to return there or to invoke its protection by reason of a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion. Article 33 of the Convention sets out the fundamental basis of protection, in accordance with which each State party undertakes not to return a refugee “in any manner whatsoever” to a territory in which he or she may be at risk of persecution. (This is known as the principle of “*non-refoulement*”.)
21. Article 31 provides a limited immunity from penalties for illegal entry for refugees arriving directly from the country in which they fear persecution; Article 32 limits the expulsion of refugees to the most serious grounds. Other Articles specify in general terms the treatment to be accorded to refugees (in relation, for example, to access to the courts; to employment, education, and social security; and to identity and travel documentation); and generally promote their assimilation and the eventual possibility of naturalisation.
22. Under Article 35 of the Convention, States agree to cooperate with UNHCR in meeting its responsibility to provide international protection, supervise the application of the Convention and other treaties for the protection of refugees, and seek permanent solutions for refugees by way of voluntary repatriation or assimilation in new national communities.

*Who is a refugee under the 1951 Convention and how is the issue decided?*

23. As explained above, the 1951 Convention defines a refugee as someone who has a well-founded fear of persecution on one or more Convention grounds, and for that reason is unable and/or unwilling to return to his or her country of origin. The central issue for consideration is therefore very much the *future* risk of harm in the form of human rights violations.
24. The 1951 Convention says nothing about procedures for the determination of refugee status, however, and it is left to each ratifying State to find its own way to effective implementation, bearing in mind the fundamental obligation not to return a refugee to persecution.
25. The nature of the decision, which, if incorrect, may lead to the return of a person to persecution, underlines the importance of reaching good, defensible decisions. At the same time the fact that, if the application is not granted, the applicant is unlikely to have any other valid basis of stay underlines the importance of prompt decisions in the interests of effective immigration control as well as of the applicants themselves. We discuss the essential elements of good decision-making in Chapter 6.

## The European context

26. The Treaty of Amsterdam transferred immigration and asylum matters from the Third (intergovernmental) to the First (Community) Pillar. Provisions relating specifically to asylum are now contained in Title IV of the Treaty establishing the European Community (“Visas, asylum, immigration and other policies related to freedom of movement of persons”). Article 63 of the Treaty requires the Council, within five years of its entry into force, (i.e. by 1 May 2004) “to adopt measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties” in the following areas:
- (a) criteria and mechanisms for determining Member State responsibility for considering an asylum application,
  - (b) minimum standards on the reception of asylum seekers,
  - (c) minimum standards with respect to the refugee definition,
  - (d) minimum procedural standards for granting or withdrawing refugee status.
27. Article 63 also requires the Council to adopt measures relating to minimum standards for temporary protection for displaced persons “who cannot return to their country of origin and for persons who otherwise need international protection”; and “promoting a balance of effort” between Member States accepting refugees and displaced persons.
28. At its meeting in Tampere, Finland in October 1999, the European Council agreed “to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*.”
29. As at the date of preparation of this Report (completed shortly before the Amsterdam deadline of 1 May 2004) the Council had adopted a Regulation determining responsibility for considering an asylum application (“Dublin II”),<sup>9</sup> a Directive on reception conditions for asylum seekers<sup>10</sup> and a Directive on temporary protection in the event of a mass influx of displaced persons.<sup>11</sup> Directives on the definition of a refugee and on asylum procedures have still to be adopted, although negotiations are well-advanced.<sup>12</sup> All of these proposals have been examined in depth by the Committee.<sup>13</sup>

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<sup>9</sup> Council Regulation 343/2003/EC of 18.2.03 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25.2.03. It is known as “Dublin II”, because it revised and replaced the earlier Dublin Convention.

<sup>10</sup> Council Directive 2003/9/EC of 27.1.03 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003.

<sup>11</sup> Council Directive 2001/55/EC of 20.7.01 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7.8.2001.

<sup>12</sup> Political agreement on the former was reached in the Council on 30 March 2004. The Presidency was seeking political agreement on the Asylum Procedures Directive at the Justice and Home Affairs Council scheduled for 29/30 April 2004.

<sup>13</sup> See *inter alia*: *Asylum applications—who decides?*, 19th Report, 2001-02, HL Paper 100; *Minimum standards of reception conditions for asylum seekers*, 8th Report, 2001-02, HL Paper 49; *Defining refugee status and those in need of international protection*, 28th report, 2001-02, HL Paper 156; and *Minimum standards in asylum procedures*, 11th Report, 2000-01, HL Paper 59.

30. The mandate given by the Amsterdam Treaty did not call for a common EU asylum system requiring the harmonisation of national asylum systems, but for the adoption of minimum EU standards. In many cases this has led to the adoption of measures reflecting the lowest common denominator among Member States. The Committee has repeatedly commented on this phenomenon, and highlighted the danger of a lowering of national standards in countries which currently offer a high level of protection, since it would suffice for them to comply with the (potentially lower) EU minimum standard.<sup>14</sup>
31. Nevertheless, progress has been made on many aspects of the asylum systems of Member States. A notable example can be found in the draft Directive on the definition of a refugee, which explicitly includes persecution by non-State agents as a factor conferring entitlement to refugee status. Persecution by non-State agents has long been recognised in the United Kingdom as falling within the scope of the 1951 Convention, but in some countries, including France and Germany, an asylum seeker has been able to establish a valid claim for protection only if persecuted by a State.<sup>15</sup> The draft Directive addresses effectively the considerable discrepancies in Member States' approaches to this issue (which would otherwise undermine any attempt towards harmonisation) and ensures a high level of protection for refugees.<sup>16</sup>
32. The "minimum standards" measures are complemented by the Dublin II Regulation, which establishes a mechanism for attributing responsibility for examining asylum applications in the EU. The main principle of the Dublin II system is that responsibility for the examination of an asylum application lies with the Member State where a link with the asylum seeker was first established.<sup>17</sup> A Member State must thus assume responsibility for the examination of an asylum claim if:
- the applicant has entered its territory illegally (in the previous 12 months)
  - if it has tolerated the presence of the applicant in its territory (for at least five months)
  - if it has granted the applicant a visa or a residence permit, or
  - if it has already received an asylum application from the applicant.

Asylum seekers who claim asylum in another Member State will be returned to the country where a link exists, which is then responsible for examining the asylum application. The Regulation thus establishes a burden-sharing mechanism between Member States, but as with the Dublin Convention which it replaced its implementation is fraught with problems. We were told by Home Office officials (when we visited IND) that difficulties arise with some Member States which dispute their responsibility to take back individuals under the Dublin arrangements.

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<sup>14</sup> See reports cited in footnote 13.

<sup>15</sup> The Kirkhope Commission, on the other hand, recommended that only State persecution should carry entitlement to a recognition as a refugee.

<sup>16</sup> See also *Defining refugee status*, paragraph 71.

<sup>17</sup> See footnote 9.

### Asylum in the United Kingdom

33. In the period up to 2002 there was a substantial rise in the rate of asylum applications in the United Kingdom, as shown by the following table:

*Total asylum applications to the United Kingdom, 1985-2003  
(excluding dependants)<sup>18</sup>*

1985	4,389	1995	43,965
1986	4,266	1996	29,640
1987	4,256	1997	32,500
1988	3,998	1998	46,015
1989	11,640	1999	71,160
1990	26,205	2000	80,315
1991	44,840	2001	71,025
1992	24,605	2002	84,130
1993	22,370	2003	49,370
1994	32,830		

34. Successive Governments have responded with a series of legislative and administrative measures designed to speed up processing and reduce the level of applications. Examples of the former are the streaming of certain categories of cases into fast track procedures, requiring some appeals to be exercised from overseas (so-called non-suspensive appeals), and rationalising the appeals process. Measures to reduce the level of applications have included stricter control on visa issue and entry procedures and restricting benefits to asylum seekers. The latest piece of legislation in this series, the fifth in the last 12 years, is the Immigration and Asylum (Treatment of Claimants etc) Bill, which would, among other things, compress the current two levels of appeal into a single process, exclude the appeals system from the supervision of the higher courts through judicial review,<sup>19</sup> and further restrict eligibility for benefits.
35. Asylum seekers may make their application either at a port of entry to the United Kingdom or, after arrival, to the Immigration and Nationality Directorate (IND). After screening and fingerprinting, applicants are streamed into one of several different procedures according to the circumstances of their case:
- the standard procedure, with interviews conducted in Croydon or Liverpool
  - the fast track procedure at Oakington Reception Centre near Cambridge, where the intention is to complete the determination process in seven to ten days
  - the “super fast track” procedure at Harmondsworth Detention Centre, where the appeal stage is integrated into the process

<sup>18</sup> On average there is one dependant for every five principal applicants hence the figure for 2002 given in paragraph 2 of 103,100 applicants *including* dependants.

<sup>19</sup> At Second Reading of the Bill in the House of Lords on 15 March 2004 the Lord Chancellor indicated that the Government were prepared to look again at the provisions relating to judicial review.

- removal to another EU Member State without substantive consideration of the application, if the other State is responsible under the Dublin II Regulation for considering the application
- a special procedure for unaccompanied children seeking asylum.

A more detailed, but not exhaustive, account of these procedures is in Appendix 4. All unsuccessful applicants have a right of appeal to an independent asylum adjudicator, but some (“non-suspensive”) appeals can be heard only after removal from the United Kingdom. These cases are dealt with at Oakington.

36. In February 2003, in response to the unprecedentedly high level of applications in 2002, the Prime Minister undertook to halve the number of asylum applications by September that year.<sup>20</sup> On 27 November 2003 the Government announced that this target had been met.<sup>21</sup> It is difficult to identify the respective contribution of different measures to this reduction, although much of it was probably due to the effect of measures already taken, such as the tightening of visa regimes and the introduction of non-suspensive appeals, and of other recent events. The closure of the Red Cross Centre at Sangatte<sup>22</sup> near Calais in December 2002, for example, and substantial expenditure on increased security at Channel Tunnel sites and at the French Channel ports undoubtedly had a marked effect in cutting the flow of asylum seekers crossing the Channel. Political developments elsewhere in the world are also likely to have been a significant factor in the decline in numbers, just as cycles of violence in source countries are usually also the reason for increases. Of the three principal source countries of asylum seekers in the five years to 2003 Afghanistan and Iraq had been subject to military intervention and the overthrow of governments, while the situation in Sri Lanka had greatly improved as the result of a major peace initiative led by the Norwegian Government.<sup>23</sup>

### Is the global asylum system failing?

37. Notwithstanding the considerable international support for the 1951 Convention, as measured by the level of ratifications, participation in the Executive Committee, and contributions to UNHCR’s budget, it is much criticised today. Some refugee advocates claim that the Convention cannot cope with the “new” refugees from ethnic violence and gender-based persecution; others that it is inadequate in the face of national, regional and international security concerns. On the other hand, some see it is an inflexible tool in the greatly changed political and social environment of the 21<sup>st</sup> Century; or as, somehow, responsible for the clear disparity between what is spent on refugee determination nationally in the developed world,

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<sup>20</sup> *Official Report*, House of Commons, 12 February 2003, Col 861.

<sup>21</sup> Home Office press notice 325/2003.

<sup>22</sup> The Centre was set up by the French Red Cross in 1999 to accommodate the large numbers of asylum seekers on the streets of Calais who were trying to get to the United Kingdom. It subsequently became a magnet for asylum seekers—see our report *A Common Policy on Illegal Immigration*, 37th Report, 2001-02, HL Paper 187.

<sup>23</sup> The United Kingdom Government had also introduced a pilot scheme in Sri Lanka in the second half of 2003 involving fingerprinting applicants for visas.

and what is contributed, principally through the United Nations and UNHCR, to refugee protection and solutions in other parts of the world.<sup>24</sup>

38. Some of the criticism stems from the fact that the refugee regime is essentially reactive. It is concerned with the protection of refugees. It does not deal directly with the prevention of causes of flight, the plight of internally displaced persons, equity between refugee-receiving States, or the broader questions of international migration management.
39. The premise on which the proposals that we describe in the following chapter are based is that the global asylum system is failing and that in consequence radical new approaches are required. Although numbers cannot tell the whole story, the statistical picture in the United Kingdom and the rest of Europe suggests that unpredictability will continue to play a part in “choices” of destination by refugees and asylum seekers, while continuing violence and unrest will continue to fuel such movements. As many of our witnesses pointed out, the majority of asylum seekers in Europe come from countries facing violence and human rights violations: conflict is the main cause of asylum movements—poverty and underdevelopment are only indirect causes.<sup>25</sup>
40. It is also important to keep in mind that the current system, whatever its weaknesses, provides protection to some 20 million vulnerable people throughout the world.
41. At the same time, there is no doubt that the combination of increased ease of travel, mass movements of people and the activities of people smugglers has increased the pressure on the existing 1951 Convention system far beyond what its architects could have envisaged 50 years ago. The unpredictability of flows, coupled with an at times steep growth in the numbers of those applying for asylum, has placed heavy strains on procedures in the EU and in other Western countries. In the United Kingdom the assumption is often made that most applications are unfounded because initial decision-making tends to produce a refugee recognition rate of only some 10-12 per cent. This is a misconception because by the end of the process almost half of all applicants are acknowledged to have grounds to be allowed to stay. In many cases the initial decision is overturned on appeal or after judicial review, while other applicants are granted humanitarian protection (a variation on the former “exceptional leave to remain”) or allowed to stay on other grounds. These cases take the overall acceptance rate to around 42 per cent.<sup>26</sup>
42. The perception of abuse of the system is heightened by the fact that many “failed” asylum seekers are not removed to their country of origin. However, as we discuss further in Chapter 6, the reasons for non-removal of failed asylum seekers are complex, ranging from practical difficulties in obtaining

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<sup>24</sup> The Minister told us that “Western States spend annually around \$10 billion on less than half a million asylum seekers, most of whom are not in need of international protection. By contrast the UNHCR supports 12 million refugees and five million internally displaced persons in some of the poorest countries in the world on a budget of only \$900 million” (Q 60). The United Kingdom “concept paper” (Appendix 5) noted that support and legal costs for an asylum seeker in Europe could exceed \$10,000 compared with an average of \$50 a year spent by UNHCR on each refugee or other “persons of concern”.

<sup>25</sup> This was the conclusion of a study for the Institute of Public Policy cited by Dr Agnès Hurwitz (p 92): *States of Conflict: Causes and Patterns of Forced Migration to the EU and Policy Responses*, May 2003.

<sup>26</sup> *Asylum Statistics, United Kingdom 2002*.

travel documents or establishing nationality to the satisfaction of the authorities of the putative State of return to questions of fairness arising from time spent in the United Kingdom awaiting a final decision.

43. These perceptions of abuse are regularly reinforced, particularly by the British tabloid press, and rarely if ever challenged in official statements or other publicity. It is also frequently claimed that unsuccessful applicants regularly delay their removal by exploiting the system and lodging multiple appeals. So far as the asylum process provides a channel for “legal” migration into the United Kingdom, it is no doubt used by some whose reasons for seeking admission are primarily economic, or who are motivated by a desire for family reunion, or who hope to move on to a better life elsewhere. However, as pointed out above, the level of “abuse” is much lower than might be suggested by the rate of initial negative decisions by the Immigration and Nationality Directorate, of which 20-25 per cent, rising to 35-45 per cent in relation to some countries of origin, require correction on appeal or after judicial review.
44. The 1951 Convention has stood the test of time remarkably well. Even if there were any consensus on the need for changes to the international protection regime, the prospect of securing agreement from the States parties to it to a new convention is very remote.<sup>27</sup> If the Convention did not exist, civilised States would need to devise procedures to ensure that they did not send people to face persecution. Nor are the provisions of the Convention the only international obligations in this field. There are also broader human rights obligations which the United Kingdom has accepted under the European Convention on Human Rights, the 1984 Convention against Torture, the 1966 International Covenant on Civil and Political Rights, and the 1989 Convention on the Rights of the Child. These obligations have been reinforced by the Human Rights Act.
45. It is difficult to see how the alleged inability to deal effectively with asylum issues today can be traced to any basic defect in the 1951 Convention. The Convention imposes no obligation to grant asylum, nor does it restrict the freedom of States to consider asylum claims made abroad, or to accept refugees seeking resettlement from countries of first asylum. Likewise, the problem of irregular or secondary movements of refugees cannot be attributed to the 1951 Convention, since refugees have been crossing borders irregularly for years, either directly to escape persecution, or from first refuge countries in which they may still be personally at risk or where they are simply unable to access any reasonable or durable solution.
46. To identify the 1951 Convention as the reason for deficiencies in the asylum process or for the overload of national systems is misguided. So far as refugee movements are commonly the consequence of unpredictable human conflict, it will always be difficult to know with certainty how many refugees will flee or try to flee. But it does mean that the key to addressing the root causes of refugee movements is through conflict resolution.

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<sup>27</sup> In 1998 the Austrian Presidency presented a strategy paper on immigration and asylum policy, which included proposals for amending, supplementing or replacing the 1951 Convention, but they did not make progress.

## **Conclusions**

47. **The 1951 Convention regime has stood the test of time. There is no viable alternative to it as the principal international instrument of protection for those at risk of persecution.**
48. **The single most important factor generating asylum claims is conflict in source countries. The best way of reducing them would be through the United Nations and its Member States putting in place better mechanisms to prevent and stop conflicts.**
49. **There is no doubt that the asylum system is exploited by some people whose motivation is primarily economic, but it is important not to exaggerate the level of abuse. In particular, it needs to be borne in mind that most asylum seekers come from countries where there is serious conflict and that nearly half of those who apply for asylum in the United Kingdom are recognised as refugees or granted some other form of legal status. The Government should do more to correct misleading stories in the media.**

## CHAPTER 3: PROPOSED NEW APPROACHES

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### United Kingdom proposals

50. It was against the background of record levels of asylum applications in the United Kingdom that in March 2003 the Prime Minister circulated a “concept paper” to his European Council colleagues on new international approaches to asylum processing and protection.<sup>28</sup> The Prime Minister described the aim of the proposals as to “achieve better management of the asylum process globally through improved regional management and transit processing centres”. The premise underlying the proposals was that the current global asylum system was failing because:
- support for refugees was badly distributed between asylum seekers in Europe and the refugees and other “persons of concern” around the world supported by UNHCR
  - between half and three quarters of those claiming asylum in Europe did not meet the criteria of full refugees
  - individual countries experienced rapidly fluctuating and unmanaged intakes of asylum seekers and refugees, often resulting in poorly resourced responses
  - public support for asylum was falling across the developed world.
51. The paper proposed a strategy that would contribute to improving regional management of the asylum process which contained the following elements:
- working to prevent the conditions which cause population movement
  - working to ensure better protection and resources in regions
  - developing more managed resettlement arrangements from source regions to Europe on a quota basis
  - raising awareness and acceptance of State responsibility to accept returns.

The paper raised the question whether “protection in the regions should or could reach a level in which people could be moved from Europe to protected areas for processing”.

52. The second part of the proposal was for the establishment of transit processing centres designed to deter those who enter the EU illegally and make unfounded asylum applications. It envisaged establishing “protected zones” in transit countries, to which those who entered EU Member States illegally and claimed asylum could be transferred to have their claims processed. The centres, which would be located outside the EU, would be managed by the International Organization for Migration with a screening regime approved by UNHCR.

### Commission Communication

53. As a result of the United Kingdom’s initiative the European Council invited the Commission to explore the issues raised in the paper. The Commission

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<sup>28</sup> Reproduced as Appendix 5.

responded by presenting a Communication entitled *Towards more accessible, equitable and managed asylum systems*.<sup>29</sup>

54. The Communication accepted the United Kingdom's premise that there was a crisis in the asylum system, and "a growing malaise in public opinion". It saw the increasing abuse of asylum procedures and mixed migratory flows as "a real threat to the institution of asylum and more generally for Europe's humanitarian tradition".<sup>30</sup> It concluded that there was a "manifest need" to explore new avenues, which must however be underpinned by ten basic premises, which emphasised the need to:
- show full respect for international legal obligations
  - focus on the root causes of forced migration as the most effective way of addressing refugee issues
  - discourage illegal immigration by providing access to legal immigration channels
  - combat illegal immigration
  - establish full partnership with countries of origin, transit, first asylum and destination
  - build on the policy objectives identified in an earlier Communication published in March 2003:<sup>31</sup> improving the quality of decisions, consolidating protection capacities in the region of origin, and treating protection requests as close as possible to needs
  - ensure that any new approach was complementary to the Common European Asylum System
  - avoid delaying negotiations on existing Directives
  - align any new initiatives with UNHCR's Agenda for Protection and Convention Plus initiatives<sup>32</sup>
  - respect the current "financial perspective" (the EU's budget).
55. The Communication identified three complementary policy objectives on which a new approach, consistent with its ten basic premises, should be based: the orderly and managed arrival of persons in need of international protection in the EU from the region of origin; burden and responsibility-sharing within the EU as well as with regions of origin; and the development of an integrated approach to efficient and enforceable asylum decision making and return procedures. It identified as specific measures contributing to these objectives:
- a legislative instrument on an EU resettlement scheme, including on the financial underpinning of such a scheme
  - a legislative instrument on protected entry procedures
  - a legal basis which would support new approaches to asylum systems in third countries.

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<sup>29</sup> Document 102430/03, COM (2003) 315 final.

<sup>30</sup> *Op cit*, page 11.

<sup>31</sup> *The common asylum policy and the Agenda for protection*, COM (2003) 152 final, 26 March 2003.

<sup>32</sup> A brief description of these initiatives is in Appendix 6.

56. Overall, although it broadly endorsed the United Kingdom paper's analysis of the deficiencies of the current asylum system, the Communication was more circumspect about how best to achieve better management of it. It concluded cautiously that "the various legal, financial and practical questions surrounding the proposed reshaping of asylum procedures proposed by the UK, in particular in relation to the notion of transit processing centres, need to be researched and answered before taking any further position".<sup>33</sup>

### **The Thessaloniki European Council**

57. The Commission presented its Communication to the Thessaloniki European Council in June 2003, where there was, according to press reports, strong opposition from several Member States to the idea of transit processing centres. In her evidence to us the Minister confirmed that the Government were no longer pursuing this element of the United Kingdom proposal.<sup>34</sup> In the light of the Communication the European Council invited the Commission to "explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection, and to examine means and ways to enhance the protection capacity of regions of origin with a view to presenting to the Council before June 2004 a comprehensive report suggesting measures to be taken, including legal implications."<sup>35</sup> The European Council also invited the Council and the Commission to examine "the possibilities to further reinforce the asylum procedures in order to make them more efficient with a view to accelerating, as much as possible, the processing of non-international protection-related applications".<sup>36</sup>

### **UNHCR's "Three-Pronged" Proposal**

58. In parallel with these initiatives the UNHCR has been developing a "three-pronged" proposal based on multilateral cooperation and the equitable sharing of burdens and responsibilities. It produced its initial version of these proposals in June 2003 and a revised version in December 2003, which was the basis of a presentation by Mr Ruud Lubbers, the High Commissioner, to the Justice and Home Affairs Council in January 2004. The proposals consist of a "regional prong" designed to improve access to solutions in regions of origin; "a domestic prong" focusing on improving asylum determination procedures; and an "EU prong" designed "to encourage EU Member States to address the phenomenon of mixed movements of asylum-seekers and economic migrants by processing jointly presumed manifestly-unfounded asylum claims from selected non-refugee producing countries of origin". It is the EU prong that is most relevant to this inquiry. The revised version of UNHCR's EU prong proposal is reproduced as Appendix 7.
59. The original version of the UNHCR paper proposed the processing of certain categories of asylum claims in EU reception centres. It envisaged that "those recognised to be in need of international protection in this process would be settled in participating EU Member States in accordance with

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<sup>33</sup> *Op cit*, pages 6-7.

<sup>34</sup> Q 60. The Minister added, "we are now focusing more on the regional protection elements of our earlier ideas".

<sup>35</sup> European Council conclusions, paragraph 26.

<sup>36</sup> *Ibid*, paragraph 27.

agreed burden-sharing criteria, whilst those found not to be in need of international protection would be returned promptly to their respective countries of origin under joint EU operations...”. The revised proposal envisaged—more radically—that registration and pre-screening of applicants would progressively become an activity carried out at EU rather than at national level. One criterion for determining which cases should be assessed in EU reception centres would be the asylum seeker’s country of origin, the object being to identify at an early stage cases likely to prove unfounded. The claims would be decided initially on the basis of the national system in place in the Member State concerned, but UNHCR foresaw that in due course an independent asylum review board would be created for this purpose. UNHCR also envisages the establishment of an EU Asylum Agency whose role would eventually include carrying out the registration/pre-screening of asylum seekers, the provision of training and expert advice to Member States on information about countries of origin, and first instance decision making.

### Conclusion

60. In the following two chapters we assess the new approaches that have been made against the overriding need to ensure effective protection for refugees. In doing so we have found that the Commission’s analysis provides a useful framework within which to consider them. In particular, **we strongly endorse the Commission’s view that any new approaches should be consistent with the ten premises identified in its Communication**, many of which we have endorsed in previous reports.

## CHAPTER 4: EFFECTIVE PROTECTION

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61. The concept of “effective protection” is crucial in assessing proposals on the removal of asylum applicants to third countries, because it would be unsafe to send a person to a third country unless the sending State was satisfied that he or she would receive effective protection there. There is, however, no commonly accepted definition of effective protection. Various international bodies have put forward different views on the criteria that need to be fulfilled in order to be satisfied that protection is effective.
62. In its Communication the Commission argues that protection can be said to be effective when, as a minimum, the following conditions are met:
- physical security
  - a guarantee against *refoulement* (return to a country where there is a well-founded fear of persecution)
  - access to UNHCR asylum procedures or national procedures with sufficient safeguards, where this is required to access effective protection or durable solutions
  - social and economic well-being, including as a minimum access to primary healthcare and primary education, and access to the labour market or to means of subsistence sufficient to maintain an adequate standard of living.<sup>37</sup>
63. The concept of effective protection was examined by participants in the Lisbon Expert Roundtable organised by the UNHCR and the Migration Policy Institute in December 2002. The elements they identified as critical factors for effective protection included the following:
- the person has no well-founded fear of persecution in the third State on any of the 1951 Convention grounds
  - there will be respect for fundamental human rights in the third State in accordance with applicable international standards
  - there is no real risk that the person would be sent by the third State to another State in which he or she would not receive effective protection or would be at risk of being sent on from there to any other State where such protection would not be available
  - the third State has explicitly agreed to readmit the person as an asylum seeker, or as the case may be, a refugee
  - while accession to international refugee instruments and basic human rights instruments is a critical indicator, the actual practice of States and their compliance with these instruments is key to the assessment of the effectiveness of protection
  - the third State grants the person access to fair and efficient procedures for the determination of refugee status, which includes—as the basis of recognition of refugee status—grounds that would be recognised in the destination country

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<sup>37</sup> *Op cit*, page 6.

- the person has access to means of subsistence sufficient to maintain an adequate standard of living
  - the third State takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his or her family.
64. Matters of controversy regarding the definition of effective protection are whether the applicant must have a link with the country which will process his or her asylum claim and whether effective protection has actually been provided by that country. In her evidence to the Committee, Ms Erika Feller, UNHCR's Director of Protection, argued that "it is not appropriate to be returning asylum seekers to places where they cannot be positively demonstrated to have found protection ... We do not talk about a safe third country being a country where you could have found protection, we talk about it as a country where you have found protection when you were there; you were not just transiting through, where there were procedures in place that enabled you...to make yourself known".<sup>38</sup>
65. In its oral evidence, Amnesty International emphasised the importance of applicants having legal status in the country of effective protection and access to effective remedies. It argued further that effective protection should not be defined by the objective of return: it should not necessarily follow automatically from determining that a person has found effective protection in another country that they should be returned there. There are other considerations that in its view should come into play—for example, would return be consistent with principles of international responsibility and burden-sharing?<sup>39</sup>
66. Another question that has arisen is how situation-specific the concept of effective protection must be. General rules cannot cater for every situation. Even in relation to individual countries, a particular refugee-producing country may be safe for some groups, but not for others; or some parts of the country may be safe, but not others.<sup>40</sup> Both the Lisbon conclusions and UNHCR in its oral evidence recognised that there must be effective protection in practice. Ms Feller told us that UNHCR was "going into a process of gaps analysis in a situation-specific way, looking at where protection is and is not available on the ground".<sup>41</sup> However, Ms Feller stressed that while the notion of safety can be situation-specific, there have to be some general parameters attached to it—some "basic bottom lines".<sup>42</sup>
67. A related issue is whether the fulfilment by a country of all the criteria for effective protection would lead to an automatic presumption that it is safe for an asylum applicant to be sent there, without an examination of his or her claim on an individual basis. This appears to be the approach adopted in the

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<sup>38</sup> QQ 35, 36.

<sup>39</sup> Q 156.

<sup>40</sup> These issues are currently under discussion in the context of the draft Directive on minimum standards on asylum procedures. See *Evidence by Caroline Flint MP on asylum procedures*, 1st Report, 2003-04, HL Paper 8, Q 2.

<sup>41</sup> Q 36.

<sup>42</sup> Q 39.

Asylum Procedures Directive. Ms Feller said that UNHCR disagreed, arguing that safety must be able to be tested on an individual basis.<sup>43</sup>

68. **Internationally agreed guidelines on what constitutes “effective protection” would be useful in ensuring that the concept is interpreted in a consistent and meaningful way, even though they cannot cover every situation. Such guidelines should recognise the need for a link between the applicant and the third country where his or her application would be processed, although we believe that UNHCR’s view that removal to a third country should not take place unless the person concerned had already been offered effective protection there goes too far. However, as the Committee has noted in the context of scrutinising of the draft Asylum Procedures Directive, guidelines must not be applied automatically and in effect replace the individual consideration of cases.**<sup>44</sup>

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<sup>43</sup> Q 39.

<sup>44</sup> *Minimum standards in asylum procedures*, 11th Report, 2000-01, HL Paper 59, paragraphs 122-123.

## CHAPTER 5: EXTRA-TERRITORIAL PROCESSING AND REGIONAL PROTECTION

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### Extra-territorial processing

#### *Historical background*

69. Traditionally the processing of applicants outside the country in which they are seeking asylum has been undertaken in the context of refugee resettlement operations. For the UNHCR third country resettlement is one of the three “durable solutions” to be promoted for refugees (the other two being voluntary repatriation and local asylum). Major periods of resettlement activity have been those following the Second World War, the Hungarian uprising in 1956, the crisis in Latin America during the 1970s, and the South East Asian refugee movements after 1975.
70. Some countries, including Australia, Canada, New Zealand and the United States of America, have long had annual quotas for the resettlement of refugees from countries of first asylum, without reference to any particular crisis. Each country manages its resettlement programme according to national criteria, with many looking beyond the fact of status as a refugee to questions of education, language, previous links, and ability to settle successfully. Some countries limit their consideration of refugee applicants to those referred by the local UNHCR Branch Office: refugees in Egypt and Kenya, for example, who are identified for resettlement must first be screened by the UNHCR in Cairo and Nairobi respectively. In such cases the refugees are already present in a first country of asylum, to which the resettlement country then offers a limited number of places.
71. Although UNHCR continues to promote resettlement as a necessary solution for some refugees, its screening has attracted criticism on procedural and substantive grounds. For example, some have argued that UNHCR does not have the resources to offer a determination of refugee status procedure which complies with international standards of due process; and that where referral for resettlement is the issue, refugee status and protection needs may be lost in favour of an assessment of the individual’s ability to qualify under the “non-refugee” elements of a particular country’s programme.
72. Refugees who are refused the resettlement option will generally be able to remain in their country of first asylum, under the protection and with the assistance of UNHCR, or in a refugee camp or settlement.

#### *New forms of extra-territorial processing*

73. The forms of extra-territorial processing now being canvassed are quite different from that underlying traditional resettlement procedures. They are not concerned with the resettlement of those already recognised as refugees. They involve the use by one State of another’s territory, in order to determine claims to asylum which either have already been lodged on its own territory, or might have been lodged there if the claimant had not been intercepted en route.
74. The most controversial recent example of such a procedure is the Australian Government’s interception at sea of asylum seekers heading for Australia and their diversion for processing to Nauru, an independent republic in the

Pacific.<sup>45</sup> This was done in order to avoid the application of Australian immigration law and to prevent Australian courts from reviewing the exercise of executive powers. (Although such measures may enable a State to circumvent national obligations, the question of its liability for breach of international treaty and other obligations may still arise.)

### Asylum processing centres

75. As we have already explained, widespread debate of options for extra-territorial processing was prompted by the United Kingdom Government's proposals to process asylum applications "offshore", by removing asylum seekers to transit processing centres in third countries.<sup>46</sup> Although the Government have dropped the idea of transit processing centres, similar ideas have been put forward by UNHCR, endorsing a system of asylum processing centres within the EU. Although the Commission did not endorse the United Kingdom's proposal, it considered that the UNHCR proposal was worth further consideration. It said in its Communication, "such a model could usefully contribute to restoring the credibility and integrity of asylum systems, as it is expected to assist in discouraging economic migrants from using such systems to gain entry to the EU".<sup>47</sup>
76. As we explained in Chapter 3, UNHCR put forward a "three-pronged" proposal for the asylum process in June 2003. The original version of the EU prong would have involved the examination of "manifestly unfounded" cases in EU-based closed processing centres, to which applicants would be transferred. Processing would be speedy and include a simplified appeal process with UNHCR participation. Successful applicants would be distributed within the EU according to pre-agreed criteria, while rejected applicants would be returned under joint EU efforts.
77. This proposal was revised in December 2003. The revision (reproduced in Appendix 7) was prompted by the state of negotiations on the Asylum Procedures Directive, where the UNHCR had identified a trend towards downward harmonisation and a lowering of standards. UNHCR was also concerned about the position of the new Member States after May 2004:<sup>48</sup> with scant resources they could have to administer a huge caseload of asylum applications returned by current EU Member States as a result of the operation of the Dublin II and Eurodac Regulations.<sup>49</sup> In the light of these developments, the EU element of the proposals would now:
- progressively move registration and pre-screening of applicants from Member States to an EU level process at an EU Reception Centre

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<sup>45</sup> Nauru, which has a population of 12,500, is the smallest independent republic in the world.

<sup>46</sup> Proposals on "off-shore" processing were also put forward by the Kirkhope Commission on Asylum, set up at the request of the Conservative Party. As Mr Timothy Kirkhope MEP told the Committee, the Commission recommended that asylum applications should be made in offshore centres—but that could be a location "on the periphery of the UK, not outside the UK" (Q 11).

<sup>47</sup> *Op cit*, page 9.

<sup>48</sup> See speech of Mr Ruud Lubbers at the informal Justice and Home Affairs Council in Dublin, 22/23 January 2004.

<sup>49</sup> Eurodac is an EU database containing fingerprints of asylum applicants. It was set up by Regulation 2725/2000 for the establishment of Eurodac and for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L316/1, 15.12.00).

- increase the categories of cases to be examined in the EU prong. These would not be only manifestly unfounded cases, as in the June draft, but:
  - caseloads in Member States where the number of transfers under Dublin II and the effect of Eurodac threatened to jeopardise the effective implementation of these instruments
  - caseloads present in several EU Member States from countries of origin whose asylum seekers were regularly rejected in high numbers in destination States, and/or
  - caseloads present in several EU Member States from countries of origin, which warranted pooling of resources to determine status because of their complexity
- create a European Asylum Agency (which UNHCR sees as following the model of the European Border Agency). Its officers would take first instance decisions on asylum claims in EU Reception Centres (initially these decisions would be taken by national officers of the State concerned, supported by officials by the EU Agency)
- create an independent EU Asylum Review Board deciding on appeals
- create a consolidated EU asylum procedure

The paper contains no provisions on judicial control and scrutiny of the decisions of the European Asylum Agency and the Review Board.

78. In its evidence UNHCR justified the feasibility of the development of its EU prong by reference to the gradual establishment of a Common European Asylum System (CEAS). According to Ms Feller, “there is no legal impediment” to such a system, but it presupposes the adoption of the EU asylum directives on reception conditions, procedures and the definition of a refugee.<sup>50</sup> (Of these, only the reception conditions Directive has so far been adopted.) Ms Feller acknowledged, however, that the UNHCR system “would require an adaptation of the procedures Directive”.<sup>51</sup>
79. Reactions to the revised UNHCR proposal both in Brussels and in Member States have been lukewarm. It has been reported that Brussels sources believe the proposal is “too early” as it comes before Ministers have reached agreement on the procedures Directive, which will establish minimum EU standards for the processing of asylum applications;<sup>52</sup> and Mr Michael McDowell, the Justice Minister of Ireland (which currently holds the EU Presidency), has said that “there is a difference of emphasis” between the UNHCR and the EU Member States.<sup>53</sup>
80. Like all proposals for extra-territorial processing, the UNHCR’s EU prong raises formidable difficulties. We have examined these difficulties in the context of the UNHCR proposal, as it is the most developed of those on the table.

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<sup>50</sup> Q 40.

<sup>51</sup> Q 41.

<sup>52</sup> EUpolitix, 21 January 2004.

<sup>53</sup> euobserver, 23 January 2004.

*Legal safeguards*

81. The UNHCR proposal does not address the central question of what legal regime and which safeguards would apply in the processing of asylum applications in EU processing centres. It presupposes the existence of common rules across the EU. **But the fact that Member States have had great difficulty despite four years of negotiations in to agreeing even minimum standards on asylum procedures demonstrates that the establishment of common EU rules guaranteeing a high level of protection is unlikely to be achievable in the near future.**

*Legality of transfer*

82. Amnesty International questioned the legality under the 1951 Convention of the transfer of asylum seekers to third countries for their claims to be processed “extra-territorially”. According to Amnesty, State practice since 1951 “effectively creates a presumption against transfer being implicitly authorized by the Refugee Convention, instead imposing an obligation on the State in which an asylum seeker arrives to accord her [the asylum seeker] protection”.<sup>54</sup> This is not the view of UNHCR. As Ms Feller told us, the Geneva Convention is not specific about how it is to be implemented and it does not say which State has to accept responsibility for the individual. She said that the Convention “does, in a sense, remove a legal obstacle for States who want to argue that the Convention does not oblige them to process individual claims as such”;<sup>55</sup> and that UNHCR was “fully confident” that the transfer of responsibility was not contrary to international refugee law and that responsibility could be transferred under certain conditions, such as the existence of an effective link between the asylum seeker and the third State.<sup>56</sup> We agree. Such transfer is inherent in the Dublin II arrangements. **The 1951 Convention does not in principle prohibit the transfer of responsibility for the processing of asylum claims in third countries. However, such transfer must not take place unless the third country offers “effective protection”.**

*Transfer of State responsibility*

83. UNHCR’s proposal was criticised by the Immigration Law Practitioners’ Association (ILPA) on the ground that it would transfer responsibility from a State to the EU as an organisation, thus creating a sort of collective responsibility. In its evidence ILPA argued that “collective responsibility is something that is very difficult to make accountable in international law terms. If I were to take a case to the European Court of Human Rights because the system failed me, who am I going to bring as the State that is responsible in that kind of regime?”<sup>57</sup>
84. The issue of the allocation of responsibility for the processing of asylum claims remains unresolved. The UNHCR proposals would shift responsibility from Member States to the EU. This is a significant step, which would go far beyond the degree of collective EU responsibility inherent in the Common European Asylum Policy. The UNHCR draws an

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<sup>54</sup> UK/EU/UNHCR: *Unlawful and unworkable—extra-territorial processing of asylum claims*, June 2003.

<sup>55</sup> Q 40.

<sup>56</sup> QQ 40, 47.

<sup>57</sup> Q 190.

analogy between the proposed Agency and the new Border Management Agency,<sup>58</sup> but in our view that is not a valid analogy. The Border Management Agency will not have executive functions: Member States will remain responsible for operating controls at their own borders. **We have seen no adequate justification for a radical transfer of responsibility for processing asylum claims from Member States to the EU. The UNHCR has not fully thought through the question of which organisation or State would be held accountable under its proposal for the processing of asylum applications.**

#### *Detention*

85. The question arises in relation to any form of processing in reception centres whether it would involve the detention of applicants—and, in this case, whether this it would be consistent with international human rights standards. In its revised proposal, UNHCR states that reception centres are in principle open, with the exception of manifestly unfounded cases. This has been strongly criticised by Amnesty among others. Ms Eve Lester put it as follows: “It seems clear that, whatever extra-territorial processing mechanism is on the table, detention is a necessary corollary of that. There are very real concerns there about the fact that, if detention is mandatory, there would be a risk that it would be arbitrary and unlawful”.<sup>59</sup> **We agree that, if “fast track” reception centres were established, detention under specific safeguards would be unavoidable.**<sup>60</sup>

#### *Practical considerations*

86. Finally, there are the practical considerations involved in transferring unwilling applicants from one Member State to an EU Reception Centre in another country: the additional procedures, administrative arrangements and cost involved. Transfer to a Reception Centre would require a separate procedure to be established for deciding whether an applicant was suitable for transfer to a Centre, which would no doubt be open to challenge. If the application at the Centre was unsuccessful, the applicant would still have to be removed to the country of origin; and, if successful, (or if removal was impracticable) returned to the country where the application was originally made. In commenting on the removal of asylum seekers to third countries Amnesty International also identified massive costs related to “basic questions of access to an adequate standard of living in the course of transfer and access to legal counsel”.<sup>61</sup> A formula for allocating these costs would need to be devised. **The UNHCR proposals would require the establishment of new procedures and would incur significant additional costs for uncertain benefits, since at the end of the process the applicants, whether successful or unsuccessful, would have to be moved again. There is a danger that EU Reception Centres could**

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<sup>58</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, on which agreement was reached at the Justice and Home Affairs Council on 30 March 2004.

<sup>59</sup> Q 149.

<sup>60</sup> It should be noted that the Oakington arrangements were deemed to be compatible with the Human Rights Act by the House of Lords (*R v. Secretary of State for the Home Department ex parte Saadi and others* [2002] UKHL 41).

<sup>61</sup> Q 149.

**become new Sangattes, magnets for people smugglers and traffickers.**<sup>62</sup>

87. The concerns arising from the UNHCR proposals are relevant to the broader debate on extra-territorial asylum processing. Extra-territorial processing of applications addressed to EU Member States would fundamentally change current burden-sharing arrangements such as the Dublin II Regulation. As the Citizens' Freedoms and Rights Committee of the European Parliament has noted in connection with the proposals put forward by the United Kingdom, that Regulation "would become virtually pointless since co-operation between Member States would be replaced by a system of deportation to centres located in third countries".<sup>63</sup> Even with processing centres located within the EU, there would be no need to determine State responsibility in accordance with the Dublin procedure.
88. Both the UNHCR and the United Kingdom proposals signify a shift from the examination of applications arising from spontaneous arrivals to an attempt to manage the flows of asylum seekers globally.<sup>64</sup> They both leave major issues unresolved: the legal regime that would apply, the allocation of responsibility, and cost. **The Committee considers that rather than attempting to create EU processing centres, it would be preferable to devote resources to strengthening and accelerating the processing systems in Member States and to ensuring high minimum standards at EU level.**

### Protected entry and resettlement

89. A different way of dealing with asylum applications extra-territorially is the establishment of "protected entry" procedures, which would enable asylum seekers to apply for asylum to potential host EU Member States outside their territory—in embassies or other forms of diplomatic representation in the country of origin or other third countries. Amnesty argued that these arrangements "make a very significant difference for individuals, but systemically they are so far from addressing the global extent of the problem that they have a very long way to go if they are to be seen as mechanisms that may address migration management issues".<sup>65</sup> Justice argued that such measures may alleviate the impact of immigration control measures on refugees but must be complementary and without prejudice to the proper treatment of individual requests expressed by spontaneous arrivals.<sup>66</sup> According to the Government, "experience in a number of countries suggests that this is not a very productive way forward".<sup>67</sup> We share the witnesses' concerns. **Protected entry procedures might be of use in countries**

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<sup>62</sup> This point was made effectively by the Refugee Council in its response to the United Kingdom proposals on extra-territorial processing (the Council referred to "super-Sangattes")—see their paper *Unsafe Havens, Unworkable Solutions*, May 2003.

<sup>63</sup> Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, *Draft Report on the situation as regards fundamental rights in the European Union (2003)*, A5-0207/2004, 22.3.04 (rapporteur: Ms Boumediene-Thiery) p 45.

<sup>64</sup> See J. Crisp, "Refugees and the Global Politics of Asylum" in S. Spencer (ed.), *The Politics of Migration*, Blackwell 2003.

<sup>65</sup> Q 145.

<sup>66</sup> p 97.

<sup>67</sup> Q 70.

**other than the applicant's country of origin but they cannot address comprehensively the issue of asylum flows.**

90. As explained at the beginning of this Chapter, a complementary part of the international protection system is resettlement. It involves the selection and transfer of refugees (i.e. individuals whose asylum claims have already been successful) from one country to another. Although resettlement does not extend to asylum seekers, it involves, like protected entry procedures, an “extra-territorial” assessment of claims in the embassy of the State where resettlement is sought. The Government have recently established, in collaboration with UNHCR, a programme to resettle 500 mainly Liberian refugees to the United Kingdom.<sup>68</sup> Other EU countries, such as the Scandinavian countries and the Netherlands, have been traditional resettlement countries.<sup>69</sup> **Resettlement can contribute to the effective management of asylum flows. By accepting in their territory individuals granted refugee status, EU countries not only help refugees to resettle in a positive manner but also alleviate the burden of countries hosting large numbers of refugees. We recognise that resettlement is only one part of a comprehensive asylum policy, but welcome EU efforts to set up resettlement schemes.**

### Regional Protection Areas

91. UNHCR rejects the term “Regional Protection Areas” (RPAs) as used in the United Kingdom proposal, which it interprets as equivalent to “protection zones”, “because the notion of zones connotes closed camps, like a refugee camp, and we are not about creating refugee camps in countries who already have a large burden because of mass influxes and sending people back to these camps”. But it is in favour of assistance to regions of protection, “whole countries or several countries, where these caseloads arrive”.<sup>70</sup> Under its “regional prong” UNHCR proposes improved access to solutions in the region of origin. In advocating this aspect of its proposals, UNHCR notes that, in its experience, refugees often move on because they are not allowed, or not given, the means to become self-reliant pending a durable solution. UNHCR calls for the active promotion of voluntary repatriation and sustainable reintegration, targeted development assistance to achieve more equitable burden-sharing, and measures aiding the local integration of refugees and resettlement.
92. The Immigration Advisory Service argued that putting more money into regional protection schemes would not necessarily make the EU countries less attractive to asylum seekers and suggested that opening up more legal immigration channels would be a preferable way of addressing asylum flows.<sup>71</sup> In her evidence the Minister took a different view arguing that “if your application is not successful and you are in a country in the region where the opportunities are very different from what they are here, there would be less incentive to stay on”.<sup>72</sup> The Government believe that efforts

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<sup>68</sup> QQ 86-87.

<sup>69</sup> See the 2003 study carried on behalf of the Commission by the Migration Policy Institute on the feasibility of setting up resettlement schemes in EU Member States or at EU level, [http://europa.eu.int/comm/justice\\_home/doc\\_centre/asylum/studies](http://europa.eu.int/comm/justice_home/doc_centre/asylum/studies).

<sup>70</sup> Q 54.

<sup>71</sup> Q 197.

<sup>72</sup> Q 81.

should focus on improving protection for refugees closer to their homes,<sup>73</sup> but, as the Commons Home Affairs Committee has noted<sup>74</sup> and as was apparent from the Minister's evidence, their proposals are very unclear. In particular, it is not apparent whether it is intended that applicants would be sent to regional protection areas before their claims were considered, or only after they had been rejected, or if they are primarily intended to encourage asylum seekers not to move on to the United Kingdom in the first place by providing an alternative place of refuge. It is also not clear whether regional protection areas would accept failed asylum seekers. A similar lack of clarity characterised recent reports on Government negotiations with Tanzania on the handling of asylum seekers.<sup>75</sup>

93. **The concept of regional protection areas remains unclear. Sending asylum applicants to such areas for their claims to be processed would be equally, if not more, objectionable to the processing of asylum applications in centres within or in areas bordering the EU. It would shift the burden unduly to third (often poorer) countries without necessarily ensuring effective protection. Moreover, as the Commons Home Affairs Committee has noted, "it is essential that the existence of a protection zone does not become a reason for a refusal of an asylum application received in the UK".<sup>76</sup>**
94. However, this does not mean that countries of first asylum should not be provided with financial support towards improving their asylum systems and meeting their international obligations. Such investment would contribute decisively towards the stemming of secondary flows from these countries to the EU.
95. **More thought needs to be given by both the Government and the EU to how "protection in the region" can address the management of asylum flows to the EU. Any efforts in this area must be part of a general strategy of conflict prevention and resolution in refugee producing areas with the aim of achieving security and stability.**

### Conclusions

96. The proposals for the extra-territorial processing of asylum claims would represent a major shift in the way in which EU Member States deal with asylum applications. Rather than following the current model of examining applications arising from spontaneous arrivals, these proposals are an attempt to establish a system of managing asylum flows globally. Within the EU, this

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<sup>73</sup> Q 82.

<sup>74</sup> *Asylum Applications*, paragraph 285: "At present the Government's proposals lack clarity. The Home Office should issue a clear statement of what "regional protection" is intended to achieve, and set out a detailed strategy for achieving it".

<sup>75</sup> See *inter alia* "Tanzania camp plan for refugees refused UK home", *The Guardian*, 25 February 2004; and "Tanzania rejects Blair's refugee camp", *The Times*, 26 February 2004. According to the Downing Street press briefing, the United Kingdom established a pilot scheme aimed at helping Tanzania to process asylum applications which arose there—it was not about sending back people who had claimed asylum in the UK to have their claims processed in Tanzania: [www.number-10.gov.uk/output/Page5428.asp](http://www.number-10.gov.uk/output/Page5428.asp). In a written answer on 2 March 2004 Beverley Hughes said, "These partnerships are not about processing asylum claims nearer to the country of origin. Rather the Tanzanians are helping us to establish whether certain failed asylum seekers in the United Kingdom who claimed as Somali are in fact Tanzanian. We are also seeking to help them better manage their refugee caseload" (Written Answers, cols 892–893).

<sup>76</sup> *Id.*, paragraph 286.

has been partly attempted by the Dublin Convention and the Dublin II Regulation, but even under these procedures it is clear that applications will be examined by an EU Member State in its territory in accordance with its national law.

97. **The new proposals do not provide the safeguards contained in national law.** The United Kingdom proposals (now dropped) to process asylum applications in third countries would have shifted the burden to States outside the EU. It is not clear which legal regime would apply in these cases and whether claims would be examined under the laws and procedures of third States, which would not necessarily have adopted legal and human rights standards ensuring effective protection. **The UNHCR proposals, while envisaging the processing of applications within the EU, presuppose the existence of a common system of asylum rules across the Union. This is premature and, bearing in mind the difficulty Member States have found in agreeing even minimum standards, unrealistic.**
98. **A similar gap exists with regard to which country would assume responsibility for the asylum seekers. The United Kingdom proposals are silent in this respect, and the UNHCR's assume that it would be the EU rather than the Member States, but again this is premature. The lack of clarity on this issue risks leaving the asylum seekers in a legal vacuum.**
99. **The proposals have significant procedural and cost implications, as transfer of applicants from EU Member States to EU or third country reception centres would require another procedure to decide on such transfer as well as the transfer itself. To this would be added the cost of the running of the centres.**
100. **The Government's proposals for regional protection areas are vague: it seems unlikely that they would guarantee effective protection or provide durable solutions.**
101. **Rather than developing proposals for processing centres or regional protection areas, it would be preferable to devote resources to strengthening and accelerating asylum procedures in Member States and to ensuring high minimum standards at EU level. Furthermore, greater resources must be invested to strengthen the processing systems in countries of first asylum and to promote resettlement programmes. However, these efforts must not prejudice the capacity of EU Member States to consider fully asylum claims that are submitted in their territory.**

## CHAPTER 6: IMPROVING THE ASYLUM PROCESS

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### The “good decisions” goal

102. If, as we have suggested, it would be better to improve domestic determination systems rather than into develop new forms of extra-territorial processing, how can that be achieved?
103. Experience in Europe and North America suggests that for decisions to be “good” they should be based on the facts as they relate to the claimant and to his or her country of origin and social and political condition; that they should reflect an effective opportunity for the claimant to present his or her claim, with the benefit of advice and interpretation, in order to deal with actual or perceived doubts and inconsistencies and respond to the decision-maker’s needs for coherence and credibility; and that they should be reasoned and presented in writing.
104. Because so much asylum decision-making requires judgments to be made regarding the credibility of the applicant and of his or her account, the best approach is to:
- provide for the initial decision to be made by the person who interviews the applicant
  - ensure that authoritative and credible country of origin information is available
  - guarantee independent advice and representation, and competent interpretation
  - give prompt, reasoned decisions in writing
  - allow appeals on the facts
  - permit review of the law by the superior courts (in the United Kingdom through judicial review).

The last mentioned elements, in particular, will promote consistency in decision making and minimize the possibility of error leading to *refoulement*. Fair, expeditious and efficient determination procedures are also likely to help to deter abuse of them.

105. Decisions on applications for asylum should be taken individually, objectively and impartially. In this context, “individually” means on the basis of an individual assessment that precludes instructions to reject particular cases or groups of cases; “objectively” means on the basis of the facts of the case (which should be incorporated in the grounds for the decision); and “impartially” means without discriminating between similar cases because of, for example, political reasons.
106. “Good decisions” are defensible decisions. Decisions are defensible where they are:
- based on the impartial assessment of the merits of the individual claim
  - based on the evidence provided by the claimant or otherwise common between the parties

- reached after the claimant has had a fair opportunity, with the benefit of interpretation and legal advice and assistance, to present his or her claim to the decision-maker, to comment on the information, and to respond to any questions or queries regarding the application; and
- well-reasoned, timely and presented in writing.

### The quality of initial decision-making

107. Home Office statistics show that significant numbers of initial negative decisions by the Immigration and Nationality Directorate require correction on appeal or review (20-25 per cent, rising to 35 per cent in relation to certain countries of origin).<sup>77</sup> Many who gave evidence to us were of the view that the United Kingdom system as a whole was characterised by poor quality initial decision-making, and that this was a principal factor in the problems which the Government were seeking to fix.<sup>78</sup> They argued that it was essential to “front-load” the system (as recommended also by the European Commission), with a view to ensuring expeditious and efficient, high quality decision-making at first instance, based on accurate information, and with benefit of access to legal advice, support, and an effective appeal. Several witnesses suggested the creation of an independent or autonomous refugee agency, along the lines of the Canadian model for dealing with asylum claims and in particular the creation, support and use of an independent documentation centre, as a means of restoring credibility in the system.<sup>79</sup> A note on the Canadian system is at Appendix 8.
108. **We are in no doubt that the quality of initial decision-making is the single most important component of an effective asylum system.** When we visited the Immigration and Nationality Directorate (IND) at Lunar House, we were impressed by the efforts being made to improve the quality of initial decision-making, for example, through the use of quality audits, which showed that 80 per cent were assessed as fully effective or better, and of a “second pair of eyes” in non-suspensive appeals cases.<sup>80</sup> We were told that the rate of successful appeals was not an accurate guide to the quality of initial decisions, because there were many reasons why an appeal might be allowed, such as a change in the individual’s or the country circumstances or in representation, unrelated to the quality of the initial decision. We welcome the concern that the Department is showing about the quality of decisions and the introduction of quality audits, but they cannot disguise the fact that in the Committee’s view a figure of 20 per cent allowed appeals implies an unacceptable quality of initial decision-making. A high quality decision making will be essential if the proposals in the Immigration and Asylum (Treatment of Claimants etc) Bill are enacted given its severe restriction on rights of appeal.
109. We believe that the changes that have been made should be allowed to work through the system and dispel the “culture of refusal” that a number of our interlocutors identified as the root of the problem at the initial decision-

<sup>77</sup> *Asylum Statistics, United Kingdom 2002*. In the second quarter of 2003 35 per cent of Somali and 30 per cent of Zimbabwean refusals were overturned on appeal (p 46).

<sup>78</sup> ILPA described the standard of initial decision-making as “appalling” (Q 187).

<sup>79</sup> Including Mr Timothy Kirkhope MEP (Q6) and the Immigration Advisory Service (p 107).

<sup>80</sup> The Minister told us that the target for “fully effective” decision-making was set to rise to 85 per cent in 2005-06 (Q69).

making stage of the process. IND has had enough organisational changes in recent years and needs to be given a chance to get on top of its asylum caseload, which, partly as a result in the drop in the level of applications, it shows signs of being able to do for the first time for some years.

110. **However, if the high rate of decisions overturned on appeal continues, consideration should be given to establishing an independent body responsible for initial decisions. In her evidence to us the Minister resisted this suggestion on the ground that Ministers must retain ultimate responsibility for the decisions taken.<sup>81</sup> We do not agree with that. Ministers must retain overall responsibility for asylum policy, including the provision of an effective determination system, but we do not believe that it necessarily follows that they must be responsible for individual decisions.**

*Access to legal advice*

111. A vital component of good decision-making is access by asylum applicants to good legal advice. If this is not available, there is every danger that the decision will be made on incomplete information. The Refugee Legal Centre, among others, has expressed great concern at recent proposals to cut legal aid in asylum and immigration work. In 1999 the Legal Aid Board accepted that attendance at interviews was one of the “key tasks” in the proper legal representation of asylum seekers. However in June 2003, the Department for Constitutional Affairs’ consultation paper proposed to cap the amount of time that could be spent preparing a case at five hours and an appeal at four hours. The Government decided not to go ahead with these original proposals completely, but limitations are proposed, together with very narrow criteria for the grant of extensions to that limit by the Legal Services Commission. One consequence will be that legal advisers will not be able to represent many clients at their asylum interview; the resolution of disputes about what may or may not have been said at interview are frequently time consuming, detract from the goal of prompt, good decision-making, and are a constant drain on the resources of the appeals process. **The Committee shares the view that undue restrictions on legal aid and access to qualified legal representation are likely to lead to unfairness and more poor decisions.**

*Fast track procedures*

112. We referred in Chapter 2 to the fast track procedures that have been established at Oakington (which are described in more detail in Appendix 4) and more recently at Harmondsworth for dealing with particular categories of cases, particularly those that are likely to prove unfounded. We saw the Oakington procedure at first hand and in general were favourably impressed by the way the system operated. Ms Anne Dawson Shepherd, the London representative of UNHCR, told us that, while UNHCR had problems with some aspects of the process, it provided “a model of how an examination could take place properly”.<sup>82</sup> It is highly desirable to deal with cases speedily where this can be done without jeopardising fairness, but a fast track procedure puts extra pressure on all those concerned to ensure that good

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<sup>81</sup> Q 90.

<sup>82</sup> Q 57.

decision-making is not compromised. We received a number of criticisms from representatives of the Immigration Advisory Service, the Refugee Council and the Refugee Legal Centre at Oakington about aspects of the procedure and (also of the regime) there. It is very important that only cases suitable for fast track procedures are sent there, that any cases that prove unexpectedly complex are withdrawn from the procedure, and that legal representatives have full access to their clients.

113. There is a very high rate of refusal at Oakington: almost all applications are refused, but this is not surprising as the procedure is intended for what are likely to be the least meritorious cases. These are the sort of cases for which the extra-territorial procedures proposed by the Government and the UNHCR are intended. **In our view accelerated procedures in the country of application are preferable to extra-territorial solutions, as they avoid most of the difficulties associated with the latter. It is reasonable for the United Kingdom and other EU Member States to respond to large increases in applications by developing such procedures, particularly for applications likely to prove unfounded, provided cases are considered individually and the requirements of the 1951 Convention continue to be met.**

#### **Information and the asylum process**

114. Accurate and up to date country information is an essential element of good decision-making. Caseworkers in IND have ready access to country information compiled in-house, but Ministers have resisted calls for an independent documentation centre, which would ensure that the information was genuinely independent and seen to be so. Instead they have appointed an advisory committee to oversee the information provided to case workers. This committee can, however, only review the information after the event: it has no input into it before it is disseminated.
115. During the course of our inquiry, we were several times reminded of the importance of “credibility” in the asylum process, in relation both to the applicant and to the information on which decisions are based. Several witnesses, including Amnesty International, the Law Society and the Immigration Advisory Service supported the creation of an independent documentation centre, to be responsible for the timely collection and dissemination of information on conditions in countries of origin.<sup>83</sup> In view of the considerable number of first instance decisions which appear to call for correction on appeal or review, such a proposal would have the additional merit of contributing substantially to the credibility of the asylum process as a whole. A useful model can be found within the organisation of the Canadian Immigration and Refugee Board (IRB), where the importance of good information was recognised from the outset. The IRB’s “information products” are widely accepted by parties to the refugee determination process as authoritative, credible and free from political or policy bias; regrettably, this does not appear to be the case with the “country assessments” and “operational guidance notes” prepared by the Home Office.
116. **We recommend that the Government support the creation of an independent documentation centre, open to all parties to the asylum**

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<sup>83</sup> Q 168, pp 101, 107.

**process. The responsibilities of such a centre would include the collection, analysis and dissemination of credible and trustworthy country of origin information for use in the refugee determination process. In preparing its analyses and responding to questions, the centre should be required to draw exclusively on verifiable material in the public domain, to use a clear methodology, and to employ methods of citation and corroboration of sources consistent with the highest evidentiary standards.**

117. **It would be desirable if in time such an independent documentation centre could be managed on an EU, if not UNHCR, basis, which would ensure that decision taken throughout the EU were based on the same country information. Such an arrangement would also reduce duplication.**

### **Removal of failed asylum seekers**

118. We have argued above that a fair, well-informed and speedy initial decision-making process is an essential prerequisite of an effective asylum processing system. An authoritative and independent appeal system is also an important element. But it is equally important that at the end of the process those granted refugee status or humanitarian protection are given the necessary support straightaway and that, as far as possible, those whose applications have been judged unfounded are removed promptly. As we said in our report on illegal immigration, allowing people to stay who have no claim to do so undermines a country's legal immigration policy. **Prompt removal or voluntary departure of failed asylum seekers is likely to be the most effective deterrent to further unfounded applications. Failing to remove unsuccessful asylum seekers casts doubt on the efficacy of the whole system and weakens public confidence in it.**
119. The number of removals of failed asylum seekers has been steadily increasing in recent years (it rose from 13,910 in 2002 to 17,040 in 2003—a 23 per cent increase) but is still far short of the target of 30,000 a year that the Government initially set and subsequently abandoned. It also represents a minority of those whose applications are refused outright. It is clearly not possible for every failed asylum seeker to be returned to their country of origin immediately—there are some countries, like Somalia, to which returns are not currently possible for practical reasons and there are often problems with documentation which delay or prevent removal—but the Government must continue to give the highest priority to increasing the number of removals of failed asylum seekers.
120. On the other hand, the Government should either remove failed asylum seeker or give them at least a temporary legal status. It is unacceptable to leave people “in limbo” making no effort to remove them, but neither allowing them any means of supporting themselves.

### ***Voluntary returns***

121. As most failed asylum seekers are unwilling to return to their country of origin, it is unavoidable that most removals are compulsory. But it is important that every effort should be made to encourage voluntary departures where appropriate: this is much more desirable both for the dignity of the person concerned—and it is less of a barrier to their future return—and for the authorities. The Government are now using the services

of the International Organization for Migration (IOM) to assist in organising voluntary returns. Mr. Jan de Wilde, the IOM's London Head of Mission, told us that in October 2003 the organisation had returned voluntarily over 300 people from the United Kingdom, and that this figure was likely to grow. This is a much more attractive option than compulsory removal since, in addition to the considerations mentioned above, the IOM can provide modest short-term integration assistance through a vocational training programme.<sup>84</sup> **We urge the Government to develop its voluntary return programme energetically.**

122. The IOM's role in extra-territorial processing is more controversial. Its participation in the Australian operation of displacing asylum applicants to Nauru has been strongly criticised by human rights organisations, particularly Amnesty International.<sup>85</sup> There was also criticism that, despite being an international organisation with wide membership, the IOM does not consider itself bound by international human rights obligations.
123. In his evidence Mr de Wilde told us that the IOM was essentially an organisation which served its members. He said that "IOM is not an organisation that has a Convention ... so we're a much more pragmatic organisation in that sense".<sup>86</sup> As regards IOM's role in asylum processing centres, Mr. de Wilde explained that it played no part in the status determination process, nor in the running of such centres, which was the responsibility of Governments. Its main role would be to provide assistance to those who wished to return voluntarily to their country of origin or who were accepted for resettlement. It would also try to make sure that "these centres were as humane as they could be, which could involve medical care, psychological care, food, lodging, education".<sup>87</sup> Mr de Wilde acknowledged that, while IOM does not deal with compulsory movements, it was aware that in accepting voluntary return its clients would have taken into account that the alternative was a compulsory one.<sup>88</sup>
124. **IOM provides a useful function to Governments and we accept that its role in organising voluntary returns is an appropriate one. If extra-territorial asylum processing centres were set up (which we do not recommend) we would see no objection to IOM's role in organising voluntary returns from them also on behalf of Governments. It would, however, be desirable for IOM, in undertaking this work as an agent of Governments, to acknowledge formally that it is subject to international human rights obligations.**

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<sup>84</sup> Q 116.

<sup>85</sup> Q 159. See also *Unlawful and Unworkable—Amnesty International's views on proposals for extra-territorial processing of asylum claims* (AI Index IOR 61/004/2003).

<sup>86</sup> Q 104.

<sup>87</sup> Q 118.

<sup>88</sup> Q 113.

## CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

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125. The 1951 Convention regime has stood the test of time. There is no viable alternative to it as the principal international instrument of protection for those at risk of persecution (*paragraph 47*).
126. The single most important factor generating asylum claims is conflict in source countries. The best way of reducing them would be through the United Nations and its Member States putting in place better mechanisms to prevent and stop conflicts (*paragraph 48*).
127. There is no doubt that the asylum system is exploited by some people whose motivation is primarily economic, but it is important not to exaggerate the level of abuse. In particular, it needs to be borne in mind that most asylum seekers come from countries where there is serious conflict and that nearly half of those who apply for asylum in the United Kingdom are recognised as refugees or granted some other form of legal status. The Government should do more to correct misleading stories in the media (*paragraph 49*).
128. We strongly endorse the Commission's view that any new approaches should be consistent with the ten premises identified in its Communication (*paragraph 60*).
129. Internationally agreed guidelines on what constitutes "effective protection" would be useful in ensuring that the concept is interpreted in a consistent and meaningful way even though they cannot cover every situation. Such guidelines should recognise the need for a link between the applicant and the third country where his or her application would be processed, although we believe that UNHCR's view that removal to a third country should not take place unless the person concerned had already been offered effective protection there goes too far. However, as the Committee has noted in the context of its scrutiny of the draft Asylum Procedures Directive, guidelines must not be applied automatically and in effect replace the individual consideration of cases (*paragraph 68*).
130. The fact that Member States have had great difficulty despite four years of negotiations in agreeing even minimum standards on asylum procedures demonstrates that the establishment of common EU rules establishing a high level of protection is unlikely to be achievable in the near future (*paragraph 81*).
131. The 1951 Convention does not in principle prohibit the transfer of responsibility for the processing of asylum claims to third countries. However, such transfer must not take place unless the third country offers "effective protection" (*paragraph 82*).
132. We have seen no adequate justification for a radical transfer of responsibility for processing asylum claims from Member States to the EU. The UNHCR has not fully thought through the question of which organisation or State would be held accountable under its proposal for the processing of asylum applications (*paragraph 84*).
133. If "fast track" reception centres were established, detention under specific safeguards would be unavoidable (*paragraph 85*).
134. The UNHCR proposals would require the establishment of new procedures and would incur significant additional costs for uncertain benefits, since at the end of the process the applicants, whether successful or unsuccessful,

would have to be moved again. There is a danger that EU Reception Centres could become new Sangattes, magnets for people smugglers and traffickers. (*paragraph 86*).

135. Rather than attempting to create EU processing centres, it would be preferable to devote resources to strengthening the processing systems in Member States and striving to reach high minimum standards at EU level (*paragraph 88*).
136. Protected entry procedures might be of use in countries other than the applicant's country of origin but they cannot address comprehensively the issue of asylum flows (*paragraph 89*).
137. Resettlement can contribute to the effective management of asylum flows. By accepting in their territory individuals granted refugee status, EU countries not only help refugees settle in a positive manner but also alleviate the burden on countries hosting large numbers of refugees. We recognise that resettlement is only one part of a comprehensive asylum policy, but welcome EU efforts to set up resettlement schemes (*paragraph 90*).
138. The concept of regional protection areas remains unclear. Sending asylum applicants to such areas for their claims to be processed would be equally, if not more, objectionable to the processing of asylum applications in centres within or in areas bordering the EU. It would shift the burden unduly to third (often poorer) countries without necessarily ensuring effective protection. Moreover, as the Commons Home Affairs Committee has noted, "it is essential that the existence of a protection zone does not become a reason for a refusal of an asylum application received in the UK" (*paragraph 93*).
139. More thought needs to be given by both the Government and the EU to how "protection in the region" can address the management of asylum flows to the EU. Any efforts in this area must be part of a general strategy of conflict prevention and resolution in refugee producing areas with the aim of achieving security and stability (*paragraph 95*).
140. The new proposals do not provide the safeguards contained in national law. The UNHCR proposals, while envisaging the processing of applications within the EU, presuppose the existence of a common system of asylum rules across the Union. This is premature and, bearing in mind the difficulty Member States have found in agreeing even minimum standards, unrealistic (*paragraph 97*).
141. A similar gap exists with regard to which country would assume responsibility for the asylum seekers. The United Kingdom proposals are silent in this respect, and the UNHCR's assume that it would be the EU rather than the Member States, but such a transfer of responsibility would not be justified. The lack of clarity on this issue risks leaving the asylum seekers in a legal vacuum (*paragraph 98*).
142. The proposals have significant procedural and cost implications, as transfer of applicants from EU Member States to EU or third country reception centres would require another procedure to decide on such transfer as well as the transfer itself. To this would be added the cost of running the centres (*paragraph 99*).

143. The Government's proposals for regional protection areas are vague: it seems unlikely that they would guarantee effective protection or provide durable solutions (*paragraph 100*).
144. Rather than developing proposals for processing centres or regional protection areas, it would be preferable to devote resources to strengthening and accelerating asylum procedures in Member States and to securing high minimum standards at EU level. Greater resources must be invested to strengthen the processing systems in countries of first asylum and to promote resettlement programmes. However, these efforts must not prejudice the capacity of EU Member States to consider fully asylum claims that are submitted in their territory (*paragraph 101*).
145. We are in no doubt that the quality of initial decision-making is the single most important component of an effective asylum system (*paragraph 108*).
146. If the high rate of successful appeals continues, consideration should be given to establishing an independent body responsible for initial decisions. In her evidence to us the Minister resisted this suggestion on the ground that Ministers must retain ultimate responsibility for the decisions taken. We do not agree with that. Ministers must retain overall responsibility for asylum policy, including the provision of an effective determination system, but we do not believe that it necessarily follows that they must be responsible for individual decisions. (*paragraph 110*).
147. Undue restrictions on legal aid and access to qualified legal representation are likely to lead to unfairness and more poor decisions (*paragraph 111*).
148. Accelerated procedures in the country of application are preferable to extra-territorial solutions, as they avoid most of the difficulties associated with the latter. It is reasonable for the United Kingdom and other EU Member States to respond to large increases in applications by developing such procedures, particularly for applications likely to prove unfounded, provided cases are considered individually and the requirements of the 1951 Convention continue to be met (*paragraph 113*).
149. We recommend that the Government support the creation of an independent documentation centre, open to all parties to the asylum process. The responsibilities of such centre would include the collection, analysis and dissemination of credible and trustworthy country of origin information for use in the refugee determination process. In preparing its analyses and responding to questions, the centre should be required to draw exclusively on verifiable material in the public domain, to use a clear methodology, and to employ methods of citation and corroboration of sources consistent with the highest evidentiary standards (*paragraph 116*).
150. It would be desirable if in time an independent documentation centre could be managed on an EU, if not UNHCR, basis, which would ensure that decision taken throughout the EU were based on the same country information. Such an arrangement would also reduce duplication (*paragraph 117*).
151. Prompt removal or voluntary departure of failed asylum seekers is likely to be the most effective deterrent to further unfounded applications. Failing to remove unsuccessful asylum seekers casts doubt on the efficacy of the whole system and weakens public confidence in it (*paragraph 118*).

152. We urge the Government to develop its voluntary return programme energetically (*paragraph 121*).
153. The International Organization for Migration (IOM) provides a useful function to Governments and we accept that its role in organising voluntary returns is an appropriate one. If extra-territorial asylum processing centres were set up (which we do not recommend) we would see no objection to IOM's role in organising voluntary returns from them also on behalf of Governments. It would, however, be desirable for IOM, in undertaking this work as an agent of Governments, to acknowledge formally that it is subject to international human rights obligations (*paragraph 124*).

*Recommendation to the House*

154. The proposals discussed in this report would, if implemented, have major implications for asylum seekers, asylum procedures in the Member States and the development of a common European asylum policy, and we therefore recommend it to the House for debate.

## APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

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### Sub-Committee F

The members of the Sub-Committee which conducted this inquiry were:

- Lord Avebury
- † Earl of Caithness
- Lord Corbett of Castle Vale
- Lord Dubs
- Baroness Gibson of Market Rasen
- ‡ Baroness Greengross
- ‡ Lord Griffiths of Fforestfach
- Baroness Harris of Richmond (Chairman)
- ‡ Lord King of West Bromwich
- ‡ Baroness Knight of Collingtree
- § Earl of Listowel
- ‡ Baroness Stern
- § Viscount Ullswater
- Lord Wright of Richmond

\* Since 9 December 2003 (Formerly Sub-Committee F (Social Affairs, Education and Home Affairs)).

† Since 16 December 2003

‡ Until 9 December 2003

§ Since 9 December 2003

Professor Guy Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford, was appointed as Specialist adviser for the inquiry.

### Interests declared by Members in connection with the Inquiry:

#### *Lord Avebury*

- President, Peru Support Group
- Chairman, Cameroon Campaign Group,
- Chairman, Committee on Indonesian human rights,
- President, Kurdish Human Rights Project,
- Chairman, Friends of Kashmir
- Author of the foreword for an Immigration Law Practitioners' Association (ILPA) publication—Challenging Immigration Detention: a best practice guide
- Member, Amnesty International

#### *Lord Dubs*

- Former Director, Refugee Council, London
- Former Trustee, Immigration Advisory Service

#### *Baroness Harris of Richmond (Chairman)*

- Member, Amnesty International

#### *Lord King of West Bromwich*

- Member, Committee of the Regions and its external relations commission
- Member, Sandwell Metropolitan Borough Council, West Midlands

## APPENDIX 2: CALL FOR EVIDENCE

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Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords Select Committee on the European Union is conducting an inquiry into proposals for new approaches to the asylum process set out in a Communication of 3 June 2003 from the European Commission to the Council and the European Parliament *Towards more accessible, equitable and managed asylum systems*.<sup>89</sup>

The Communication responds to British proposals for a new approach to asylum, based on what are seen as four fundamental weaknesses of the current asylum system, which, it is said:

- provides unequal distribution of support for refugees
- requires those fleeing persecution to enter the EU illegally
- results in the majority of asylum-seekers not qualifying for protection
- does not succeed in returning failed asylum-seekers to their countries of origin.

The UK's two main proposals for remedying the situation involve setting up:

- regional protection areas in regions of origin with the object of providing protection "closer to home"
- transit processing centres, to which those arriving in EU Member States could be transferred to have their claims processed.

The Communication endorses the UK's analysis of the deficiencies in the present system, but urges caution in pursuing the proposed solutions. In the Commission's view they need to be compatible with other initiatives and set in the context of the proposed Common European Asylum System, which is an objective of the new draft Constitutional Treaty. The Communication identifies a number of basic premises that need to guide work in this area, including respect for international obligations, the need to address root causes of refugee movements, the provision of access to legal immigration, and measures to combat illegal immigration. In proposing that Protected Entry Procedures and Resettlement Schemes should be examined as part of the asylum agenda, the Communication emphasizes that any new approach should share rather than shift the burden and that substantial assistance needs to be given to regions of origin.

The Committee will also be taking account of proposals made by the Commission in a parallel Communication, *A common asylum policy and the Agenda for protection*.<sup>90</sup>

Evidence is invited on all aspects of the subject. Questions on which the Sub-Committee would particularly welcome comments centre on the idea of determining asylum applications in a country other than that where they were made and include the following:

- (i) Are the premises on which these proposals have been made valid?
- (ii) Why do people apparently not in need of protection have recourse to the asylum system?

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<sup>89</sup> Document COM (2003) 315 final, available on the Commission's web-site: [www.europa.eu.int](http://www.europa.eu.int).

<sup>90</sup> Council document no. 7964/03, March 2003.

- (iii) Are the proposals compatible with international obligations, in particular the 1951 Refugee Convention and the European Convention on Human Rights?
- (iv) Would it be acceptable to (forcibly) transfer an asylum applicant to a centre in another country for processing?
- (v) How would State responsibility for the processing of asylum claims in these circumstances be determined?
- (vi) Can solutions of this kind provide effective protection; how would that be judged and monitored?
- (vii) What should be the role of the UNHCR—and of other international bodies (such as the International Organization for Migration (IOM))?
- (viii) In the absence of durable solutions to refugee problems, would there be a danger of such centres becoming refugee camps?
- (ix) Is there a risk that the proposals would shift rather than share the burden?
- (x) Are there alternative solutions to the problems presented by the current asylum system?

18 July 2003

### APPENDIX 3: LIST OF WITNESSES

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The following witnesses gave evidence. Those marked \* gave oral evidence.

- Advice on Individual Rights in Europe (AIRE)
- \* Amnesty International and Amnesty UK
- \* Home Office, Caroline Flint, MP, Parliamentary Under-Secretary of State
- Human Rights Watch (USA)
- Dr Agnès Hurwitz, Ford Foundation Research Fellow in International Human Rights and Refugee Law, Refugee Studies Centre, University of Oxford
- \* Immigration Advisory Service (IAS)
- \* Immigration Law Practitioners' Association (ILPA)
- \* Institute for the study of Civil Society (CIVITAS)
- \* International Organization for Migration (IOM)
- Joint Council for the Welfare of Immigrants (JCWI)
- JUSTICE
- Kent County Council
- \* Timothy Kirkhope, MEP
- Law Society
- Oxfam GB
- \* Refugee Council
- \* United National High Commissioner for Refugees (UNHCR)

#### **APPENDIX 4: UNITED KINGDOM ASYLUM PROCEDURES**

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Asylum seekers can make their application at a port of entry to the United Kingdom or, usually after arrival, to the Immigration and Nationality Directorate (IND).

Applicants are first screened by the Asylum Screening Unit (ASU) and fingerprinted by the Immigration Fingerprint Bureau (IFB). The ASU conducts basic (Level 1) interviewing, with the help of interpreters if necessary, with a view to establishing identity and nationality. A “Statement of Evidence Form” (SEF) is also issued, to be completed in English.

After the screening interview all applicants over the age of five years are fingerprinted and issued with an Applicant Registration Card (ARC). The card contains a photograph and fingerprint identification, and is proof of entitlement to benefits in qualifying cases.

Every applicant’s fingerprints are recorded on the Automated Fingerprint Identification System (AFIS), which is used to identify anyone making multiple asylum applications in the United Kingdom, or who has made an earlier application in another EU Member State. The fingerprints are also transmitted to Eurodac, an IT system containing the fingerprints of all those who apply for asylum in the EU, which entered operation on 15 January 2003. In the first twelve months or so, some 2,229 fingerprint matches were identified, thereby assisting in the Dublin process, which permits the return of an asylum seeker to the State considered responsible for determining the claim. In addition, the IFB processes fingerprints taken from visa applicants (initially limited to applicants in Sri Lanka).

The ASU next conducts a Level 2 interview, using “assertive interviewing” techniques to establish how the applicant travelled to and entered the United Kingdom (identifying the point of departure and countries of transit), and whether they have support or any links in the United Kingdom; and to assess the credibility of the applicant’s story, although without asking for a detailed account of the basis of the claim.

The Committee was informed that applicants are usually required to return for the Level 2 interview, although efforts are being made to hold it on the same day. Decisions on entitlement to support (in accordance with the criteria laid down in section 55 of the Immigration, Asylum and Nationality Act 2002) are taken on the basis of the Level 2 interview, although standards and procedures have been adjusted following criticism by the Court of Appeal in several cases.

The screening process also generally determines the “stream” into which the application will be directed. Leaving aside withdrawn applications and those scheduled for “Pending Escorted Removal”, those subject to “Self Check-In Removal Directions”, and “Voluntary Departure”, the basic streaming distinctions are between:

- (1) Standard and Super Fast Track Cases;
- (2) Non-Suspensive Appeal (NSA) Cases;
- (3) Secure Transfer Cases;
- (4) Open Transfer Cases; and
- (5) Unaccompanied Asylum Seeker Children Cases.

In very broad terms asylum applicants in Category (1) are directed to a “Removal Centre” for determination of their claim; those in Categories (2) and (3) go to Oakington Reception Centre (from which, in the case of a negative decision, they may be sent to a Removal Centre, any right of appeal in NSA cases having to be exercised from abroad); those in Category (4), in due course, will pass through an “Induction Centre” pending allocation to an Accommodation Centre, NASS Dispersed Accommodation, or to “unsupported accommodation”, for the duration of their claim; and those in Category (5) are referred to the relevant local authority for care and accommodation pending determination of their claim, and may be returned to the adult stream as and when they reach the age of 18.

### **The fast track process**

The Committee was able to examine aspects of the fast-track process during its visit to the Oakington Reception Centre on 7 January 2004. Oakington was originally established (on a former airbase) to deal with asylum seekers from listed countries, whose applications were considered likely to be refused. It has since become a “place of detention” and a place of referral for asylum seekers from ports of entry, the Asylum Screening Unit in Croydon, and from police stations. It has a capacity of 600 places and, at the time of the visit, about 60 per cent of detainees were non-suspensive appeal (NSA) cases.

Initially, it had been intended to complete the determination process within seven to ten days. This had not been achieved: the current average is in the region of 12 to 13 days. About five per cent of those refused asylum are detained at the end of the process. The Committee was informed that the longest period of stay had, very exceptionally, been five months, apparently because of delay in obtaining the necessary travel document.

The planned timetable for the Oakington process is as follows:

*Day 1:* Medical assessment and offer of legal representation by one of the Immigration Advisory Service (IAS) or Refugee Legal Centre (RLC) representatives on site. Asylum seekers are not offered a choice between the two organisations; some detainees prefer to have representation from outside the Centre.

*Day 2:* Interview by the Refugee Council on behalf of the National Asylum Support Service (NASS) and completion of the NASS application form if a non-NSA case is involved.

*Day 3:* Interview with legal representative.

*Day 4:* Asylum interview (with interpreter if required; the legal representative may be present and may bring their own interpreter as well). The legal representative has 48 hours within which to submit any comments on the application.

*Day 6:* Target for decisions in suspensive appeal cases.

*Day 10:* Target for decisions in non-suspensive appeal cases.

Representatives from the IAS, the RLC and the Refugee Council expressed considerable concern regarding restrictions on the availability of legal advice in asylum cases, including at interviews, and on the fact that they are not allowed to be present at NSA decisions.

At the same time, the Committee heard that there were positive aspects of the Oakington process, including access to early legal advice, if not to the extent of

legal representation considered appropriate. On the other hand, legal and other representatives were critical of a number of other aspects, including the “culture of refusal” perceived to exist among IND decision-makers, the rigid timetable, a disinclination on the part of the Home Office to recognise that some cases were not suitable for fast track treatment, a disinclination to accept even expert paediatric evidence in disputed age cases, erratic provision of copies of screening interview records, disagreements in regard to the signing of interview records, and insufficient attention to the need to ensure that the IAS and RLC are seen as independent..

Following completion of the initial screening, the application is forwarded to the Asylum Casework Directorate. Here, in Croydon and Liverpool, the file papers and the SEF are combined, and a “substantive” asylum interview is arranged. The Asylum Coordination Unit aims to manage the workflow, both in Croydon and Liverpool. This involves receiving and linking files and all post relating to it; liaising with ports, local enforcement offices, Oakington, and NASS to ensure that the correct paperwork is received; booking interviews for caseworkers; dealing with cases requiring reconsideration, for example, after appeal to an adjudicator; dealing with non-compliance with procedural requirements (e.g. return of forms); and withdrawing and reconsidering erroneous decisions. In addition, the Multiple Applications Unit, as the name implies, considers instances of multiple asylum applications and provides guidance on the appropriateness of prosecution.

Substantive asylum interviews take place daily. At the IND in Croydon, there are 51 interview rooms. At present, some 400-600 substantive interviews are booked each week, together with a further 100 interviews for asylum assistance. The Committee was informed that with the reduction in asylum numbers, approximately 50 per cent of interviews booked are new cases.

A legal representative may attend the interview if the applicant wishes. An interpreter will be provided by IND, whether or not the applicant or their representative also provides an interpreter. IND interpreters must have been assessed as competent by Language Services Ltd. and are expected to abide by the published Code of Conduct.

The asylum decision is made by a caseworker, usually in the Asylum Casework Directorate, or an immigration officer. The decision is based on the details given at interview, and, if available, the Statement of Evidence Form (SEF). In general, the decision is made by the person who conducted the interview. However, this is not always done, and decisions on Oakington cases may be taken in Croydon, the papers having been faxed through.

Caseworkers are divided into teams, all of which have the capacity to handle the full range of cases, although some have expertise in a particular area or countries. Their targets are to deliver six interviews and six decisions per week, and to achieve a six-week period between application and decision. The caseworker’s principal aim is to assess the credibility of the claimant’s story and whether what is said matches the application. The Committee was informed that there is some evidence of “schooling” by legal representatives, even in the case of applicants having a good claim.

According to information supplied by IND, decision-makers are trained to decide each case on its merits, and on the basis of the 1951 Convention/1967 Protocol. Decision-makers have access to online country of origin information, both material prepared in-house and that derived from external sources, such as the US Department of State.

If the application is refused, a “Reason for Refusal Letter” is served, together with right of appeal papers. If an appeal is lodged, which is usual, the papers are passed to the Immigration Appellate Authority. If asylum is refused, the applicant’s entitlement to appeal depends on a number of factors, including whether or not the appeal is suspensive.

An asylum seeker who is recognised as a refugee is granted indefinite leave to enter or remain in the United Kingdom. The recognised refugee is also entitled to apply for a Convention travel document and for family reunion, and has the same access to social and economic rights (medical treatment, housing, education, and employment) as a British citizen.

Since 1 April 2003, “exceptional leave to remain” is no longer being granted, having been replaced by two new categories of leave, namely, “Humanitarian Protection” and “Discretionary Leave”, which according to IND “will be used more sparingly than exceptional leave”.

“Humanitarian Protection” may be granted to certain applicants who have been refused asylum as Convention refugees but who have been able to establish a need for protection in the United Kingdom. However, there is as yet no procedure comparable to the refugee process, by which such claims can be objectively and impartially determined.

“Discretionary Leave” may be available to a person who does not qualify for either refuge protection or humanitarian protection, but only for one of a defined and limited number of reasons.

## APPENDIX 5: UNITED KINGDOM CONCEPT PAPER ON ZONES OF PROTECTION

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### New International Approaches to Asylum Processing and Protection

#### *Background and Aim*

We start from the premise that the current global system is failing because:

- support for refugees is badly distributed, with asylum seekers who make it to Europe frequently receiving support and legal costs exceeding \$10,000 a year, whereas the UNHCR spends an average of only \$50 a year on each refugee or other ‘person of concern’ around the world;
- the current asylum seeking system usually requires those fleeing persecution to enter the West illegally, often paying criminal organisations many thousands of dollars;
- between half and three quarters of those claiming asylum in Europe do not meet the criteria of full refugees, whereas according to the UNHCR there are 12 million genuine refugees in the world, most of whom stay in their own regions;
- individual countries experience rapidly fluctuating and unmanaged intakes of asylum seekers and refugees, often resulting in poorly resourced responses which cause problems for genuine refugees, and public concern about the numbers of unfounded claims.
- And because of these failures, public support for asylum is falling across the developed world.

The aim of the proposals in this paper is better management of the asylum process globally, reducing unfounded applications and providing more equitable protection for genuine refugees.

This new approach would complement the EU-wide approach to asylum called for at Tampere, and the work set in train at Seville to tackle illegal immigration by strengthening the EU’s external frontiers, and tackling the causes of migration in source countries. We want to develop a system in which the vast majority of migrants who come to Europe do so through legal channels, including refugee resettlement routes, rather than arriving illegally, frequently with the involvement of criminal gangs, and then claiming asylum, irrelevant of whether they are genuinely in need of protection.

#### *Concepts*

We are developing proposals for better international management of refugees and asylum seekers through two complementary elements:

- 1) Measures to improve regional management of migration flows; and
- 2) Processing centres, on transit routes to Europe.

This new approach draws on the UNHCR’s plans for modernisation of the international protection system (“Convention Plus”), through new partnerships between destination, transit and origin countries.

### 1) Improving regional management

In the long-term, our aim should be to deal more successfully with irregular migrants within their regions of origin, through: approaches to address the causes of mass population flows; greater protection to displaced people close to their home countries, and; development of legal routes by which genuine refugees can, if the situation requires, come to Europe. Such improvements would help those in genuine need of protection and enable European countries to manage flows of refugees more successfully. It would build on work already underway in the UNHCR (Convention Plus) and by the EU to pursue action in source regions, following the Seville European Council.

Regional intervention could have four elements:

- (i) Working to prevent the conditions which cause population movements. This includes: an increased focus on poverty reduction through effective use of development assistance targeted on the poorest countries; better conflict prevention in areas of instability; and enhancing the ability of the UNHCR and others to respond rapidly to emerging crises. The UK strongly advocates a smarter allocation of global development assistance towards the poorest countries, and the international community most recently made a Commitment to this at the Monterrey 'Financing for Development' Summit.
- (ii) Working to ensure better protection in source regions: we should not be content for traffickers and facilitators to dictate who reaches our shores, and who benefits from our protection. The vast majority of displaced people (including refugees) remain in the regions close to their country of origin, often supported by the UNHCR. Yet the level of protection in some areas is relatively poor. Improving such protection would not simply benefit those who currently remain in the region: it should also reduce the incentive for the minority who do move on to Europe to do so (although it should be remembered that even higher levels of general protection will not adequately protect some individuals; those who consider themselves to be still in danger may flee protected areas). In particular, we consider that it would be important to work with the UNHCR to improve their capacity to respond rapidly to increased and sudden population flows.
- (iii) Developing more managed resettlement routes from source regions to Europe, on a quota basis, as some European countries already have in place. Protection in the region will not be appropriate for all, particularly in the long term. It is important that at least an appropriate proportion of genuine refugees can reach Europe without the need to use criminal facilitators to arrive illegally. Significantly greater processing of asylum applications in regions, attached to resettlement programmes, would need to be developed in a way which avoided creating a 'pull factor' or attracting people to camps as an easy way to get to Europe, and which avoided agencies being inundated with applications.
- (iv) Raising awareness and acceptance of state responsibility to accept returns, perhaps through new readmission agreements, or a new international instrument. This would require further work with the

Commission, the UNHCR, the IOM and the Office of the Secretary General.

This is a long-term agenda. One of the key uncertainties is whether protection in the regions should and could reach a level in which people could be moved from Europe to protected areas for processing (in the same way as transit centres), for temporary protection or on a return route.

Such a level of protection would need to satisfy Member States' domestic courts that the rights of persons moved from Europe were being met in their region of origin. Generally, the further from Europe, the greater the challenge of providing such protection and moving people back to regions of origin. Moreover, if conditions in regional protection areas reached a very high standard they could act as a pull-factor for local people. The appropriateness of this solution will clearly vary from region to region.

In principle, however, better regional protection should allow more equitable management of flows of irregular migrants who want to come to Europe. It might also be possible to return to regional protection areas failed asylum seekers who have reached Europe but have been found not to have a well-founded claim to refugee status, but who can not be immediately returned to their country of origin. The aim would be to provide temporary support until conditions allowed for voluntary returns.

We are currently exploring these options further with the Commission and UNHCR.

## 2) **Transit Processing Centres**

In addition to better protection in regions of origin, it is worth considering medium term action to deter those who enter the EU illegally and make unfounded asylum applications. One possibility might be to establish protected zones in third countries, to which those arriving in EU Member States, and claiming asylum could be transferred to have their claims processed. These 'transit processing centres' might be on transit routes into the EU. Those given refugee status could then be resettled in participating Member States. Others would be returned to their country of origin. This approach could act as a deterrent to abuse of the asylum system, whilst preserving the right to protection for those who are genuinely entitled to it.

Such a system might operate as follows:

- Asylum seekers arriving in the UK (and other EU member states), could be transferred to a transit processing centre (TPC), where their claims would be assessed. This process would allow participating countries to uphold their obligations under the 1951 Convention and ECHR;
- The centre would be located outside the EU. It could be managed by the IOM, with a screening system approved by the UNHCR. It could be financed by participating member states – but we would also wish to closely involve the European Commission;
- Those granted refugee status would be resettled within the EU, on a burden-sharing basis. Failed claimants could not remain in the TPC. The majority of those not granted refugee status would be returned to their countries of origin. If necessary, new or strengthened re-admission agreements could be developed to facilitate this;

- Those who could not be returned to their country of origin – because that country was not safe – might be given temporary status in the EU, until the situation improved in their country of origin. We could also draw on IOM’s considerable experience with voluntary repatriation schemes.
- It is for consideration whether the centre would also receive illegal migrants intercepted en route to the EU before they had lodged an asylum claim but where they had a clear intention of doing so.

The IOM and UNHCR have expressed an interest in working up these ideas with Member States and the Commission. A key question will be to consider whether such a process should apply to all, or only certain categories of unfounded asylum applicants. But we envisage that there will always be certain categories of people, such as disabled persons or minors, who would never be sent to a transit centre.

### *Legal Framework*

The 1951 Refugee Convention obliges states to provide protection, and not to return those with a well-founded fear of persecution. There is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application.

There is an additional obligation on 1951 Convention signatory countries, derived from the ECHR, to ensure that decisions under the asylum process do not expose applicants to inhuman or degrading treatment. Both the processing centres and the decisions taken in them would clearly have to conform to this requirement as a matter of policy and to avoid a successful challenge in the courts.

### *Next steps*

The UK is committed to taking forward new approaches to asylum and immigration with EU partners, the UNHCR, and the IOM.

## APPENDIX 6: UNHCR'S AGENDA FOR PROTECTION

In December 2001 following 18 months of discussions with governments, intergovernmental and non-governmental organisations (NGOs) and refugee experts—known as the Global Consultations on International Protection—UNHCR and States adopted a joint Agenda for Protection, a programme of action to improve the protection of refugees and asylum seekers around the world. It is intended to serve as a guide for concrete action, not only by UNHCR, but also by governments, NGOs and other partners.

The High Commissioner has termed the Agenda for Protection and certain related efforts “Convention Plus”, since the intention is to build on the 1951 Convention by developing special agreements and multilateral arrangements to improve refugee protection worldwide and encourage responsibility-sharing. UNHCR will pursue generic multilateral agreements to tackle three priority challenges:

- the strategic use of resettlement as a tool of protection, a durable solution and a tangible form of burden sharing;
- more effective targeting of development assistance to support durable solutions for refugees, whether in countries of asylum or upon return home; and
- clarification of the responsibilities of States in the event of secondary movements (i.e. when refugees and asylum seekers move, in an irregular manner, from an initial country of refuge to another country).

The Agenda for Protection consists of two sections: the Declaration of States Parties and a Programme of Action. The *Declaration* was adopted at the conclusion of the December 2001 Ministerial Meeting of States Parties to the 1951 Convention. In adopting the Declaration, States Parties reaffirmed the validity of the 1951 Convention and pledged to meet their obligations under the treaty and to uphold the values and principles embodied in the Convention and its 1967 Protocol.

The *Programme of Action* identifies specific objectives and activities grouped according to six inter-related goals:

- strengthening implementation of the 1951 Convention and its 1967 Protocol;
- protecting refugees within broader migration movements;
- sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees;
- addressing security-related concerns more effectively;
- redoubling the search for durable solutions for refugees; and
- meeting the protection needs of refugee women and children.

The Programme of Action suggests that strengthening implementation of the 1951 Convention and its 1967 Protocol can be done in a number of ways, including by working towards universal accession to the 1951 Convention and 1967 Protocol; by improving individual States' asylum procedures and trying to harmonise those procedures among States; by offering other forms of protection to those who need it but may not qualify under the 1951 Convention's

definition; and, conversely, by taking immediate action to exclude those who do not deserve international protection.

The Programme of Action also calls on States, intergovernmental organisations and UNHCR to examine the root causes of refugee movements, particularly armed conflict, and to devote greater resources, both human and financial, to developing respect for human rights, democratic values and good governance in refugee-producing countries and to supporting the work of the United Nations in conflict-prevention, conflict-resolution and peacekeeping.

The Programme recognises that refugees move within broader population flows that are also composed of economic and other categories of migrants. With only limited migration options available, many people who are not refugees try to enter countries as asylum-seekers. UNHCR, the International Organization for Migration, other intergovernmental agencies and States are to collect more data on the nexus between asylum and migration. The aim is to better understand “push” and “pull” migration factors, or those factors that drive people out of their home countries and lure them to other countries, human smuggling, travel routes and other aspects of complex mixed movements that include refugees.

States are encouraged to ensure that any immigration control measures they adopt will contain safeguards allowing access to international protection for those who need it. These kinds of safeguards should also be applied during rescue-at-sea operations and during any attempts to intercept migrants before they reach their intended destinations. In addition, strategies will be developed to ensure that those asylum seekers found not to be in need of international protection will be returned to their home countries quickly, but humanely and with respect for their human rights and dignity.

The Programme of Action also calls for combating human trafficking and smuggling. It encourages States to accede to the 2000 United Nations Convention against Transnational Organized Crime and its Protocols, to launch information campaigns aimed at potential migrants that will warn about the dangers of human smuggling and trafficking and will inform about legal immigration opportunities, and to publicize the penalties they will impose for trafficking in people.

States are also encouraged to make greater use of resettlement, both as a protection and burden-sharing tool, particularly in mass-influx situations. Since responsibility sharing involves participation among a broad array of partners in protection, the Programme of Action aims to strengthen relationships with civil society, including NGOs, and to nurture community-based systems of protection within refugee populations.

Resettlement opportunities will be expanded for use as both a protection tool and a durable solution. UNHCR will encourage States that do not yet have resettlement programmes to make resettlement places available. Those States that do offer resettlement opportunities will be encouraged to increase their quotas, diversify the kinds of refugee groups they welcome, and introduce more flexible resettlement criteria.

## APPENDIX 7: UNHCR WORKING PAPER: A REVISED “EU PRONG” PROPOSAL

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### A. Genesis and rationale of revised “EU prong” proposal

In June 2003, UNHCR presented a three-pronged proposal in the context of a dialogue with European Union Member States. This focussed on multilateral cooperation and the equitable sharing of burdens and responsibilities, goals identified both by the European Commission<sup>91</sup> and in the Agenda for Protection.<sup>92</sup> The proposal contained elements on improving access to solutions in regions of origin and on improving domestic asylum systems, as well as a so-called “EU-prong”. The latter aimed to encourage EU Member States to address the phenomenon of mixed movements of asylum-seekers and economic migrants by processing jointly presumed manifestly-unfounded asylum claims from selected non-refugee producing countries of origin. The proposal in its entirety and the EU prong in particular provoked an intense dialogue.

Even though overall numbers of asylum applications have declined in Europe, there continue to be serious concerns about the misuse of asylum procedures and the smuggling and trafficking which often accompany it. At the same time, the fast approaching deadline for agreement by May 2004 on the building blocks of the common European asylum system set at Tampere has accentuated the trend towards downward harmonisation, more exceptions and even derogations to established standards, as evidenced in particular by discussions surrounding the Draft Asylum Procedures Directive.

In the intervening months, there has also been an increasing awareness of the likely challenges to Member States’ asylum systems resulting from the imminent accession of 10 new EU Member States in May 2004 combined with the operation of the new “Dublin II” and Eurodac Regulations.<sup>93</sup> This combination of factors may well change the pattern of asylum applications within the enlarged EU. Fingerprinting and registration under Eurodac are likely to mean asylum-seekers can more easily be identified if they seek to move from one EU country to another. Much larger numbers of asylum-seekers may be referred back to and present claims in Member States at the EU’s new external borders as the point of entry into the EU responsible under Dublin II for examining their claims. Returns under Dublin II could therefore overwhelm less well-equipped asylum systems and contribute to pressure for irregular onward movement within the EU. Ultimately, the overloading of some national asylum systems could jeopardise the harmonisation process itself as well as respect for basic protection standards.

In light both of considerations relating to the earlier proposals and new thinking about asylum developments in Europe, UNHCR has revised its “EU prong” proposal. The proposed revision endeavours to take into account:

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<sup>91</sup> See Communication from the Commission to the Council and the European Parliament, Towards a more accessible, equitable and managed asylum system, 3 June 2003, COM(2003) 315 final; Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for Protection, 26 March 2003, COM(2003)152 final.

<sup>92</sup> A/AC.96/965/Add.I, 26 June 2002.

<sup>93</sup> Council Regulation (EC) No. 343/2003 of 18 Feb. 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25 Feb. 2003 (Dublin II); Council Regulation (EC) No. 2725/2000 of 11 Dec. 2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15 Dec. 2000, p. 1.

- the concerns of future EU States on the external borders of the enlarged EU likely to be most affected by the implementation of Dublin II and Eurodac;
- the concerns of EU Member States, particularly those relating to mixed migratory flows and the return of those not in need of international protection; and
- the longer term objective of the EU harmonisation process to establish a common European asylum system.

UNHCR's revised EU prong is presented here as a further move towards responsibility sharing within the EU in the provision of reception, decision-making and durable solutions for asylum-seekers and refugees. In short, it proposes the processing of certain categories of asylum claims in EU Reception Centres. Those recognised to be in need of international protection in this process would be settled in participating EU Member States in accordance with agreed burden-sharing criteria, whilst those found not to be in need of international protection would be returned promptly to their respective countries of origin under joint EU operations supported by an international organisation such as the International Organisation for Migration (IOM). Other categories of asylum-seekers would continue to be assessed under the national system applicable in the Member State responsible for assessing the claim. These arrangements would be established in an incremental manner and are outlined in the paragraphs below. Structural elements include the creation of EU Reception Centres and an EU Asylum Agency, their legal basis being determined by one or more Council Regulations or Decisions.

## **B. Proposed procedural elements**

### *Registration and pre-screening*

UNHCR's revised EU-prong proposal recommends that registration and prescreening be moved progressively from a matter implemented at national level to one that is carried out at EU level. Initially, therefore these processes would continue to be carried out by national officers, assisted if necessary by staff made available through the EU Asylum Agency, there where capacity is lacking or systems become overwhelmed by an influx. Registration and pre-screening would, however, progressively become an EU undertaking which

- (a) registers the personal details of asylum applicants;
- (b) channels asylum applicants into the national asylum procedure or the EU Reception Centre, depending on the categories set out in paragraph 7 below;
- (c) identifies family members who can be reunited;<sup>94</sup>
- (d) refers victims of trafficking without protection concerns wishing to return to their country of origin to an organisation such as IOM for assistance; and

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<sup>94</sup> Article 8 of the "Dublin II" Regulation determines that where "an asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire". On a similar basis, if assessment of the claim of one family member was already under way at one EU Reception Centre, other family members could be reunited there.

- (e) refers arrivals not claiming asylum for return to their country of origin under relevant readmission agreements, with IOM assistance as appropriate.

### **Categories of asylum claim to be assessed in EU Reception Centres**

In order to determine which asylum applications should be assessed at EU Reception Centres, UNHCR suggests that caseloads be identified either in relation to measures needed to ensure the effective implementation of Dublin II and Eurodac and/or on the basis of the asylum-seeker's country of origin. Categories of asylum claims which EU Member States could consider processing in EU Reception Centres would include:

- (i) caseloads in EU Member States where the number of transfers under Dublin II and the effect of Eurodac threaten to jeopardise the effective implementation of these instruments;
- (ii) caseloads present in several EU Member States from countries of origin whose asylum-seekers are regularly rejected in high numbers in destination States; and/or
- (iii) caseloads present in several EU Member States from countries of origin, which warrant pooling of resources to determine status because of their complexity.

In this way, States could pool and share their expertise and experience. If all asylum claims in the particular category concerned were determined at the same Centre (or group of Centres if the numbers of applications warrant it), this should reduce pressure for irregular secondary movement and the likelihood of multiple asylum applications. Flexibility to adjust the caseloads selected would be needed, so as to adapt to changes in the numbers or nature of arrivals.

### **Process to determine claims of selected caseloads in EU Reception Centres**

It is envisaged that decision-making in the EU Reception Centres would lead to a uniform status for those in need of international protection valid throughout the Union. Procedures and decision-making would

- involve first instance decisions being made in an interim phase by national officers of the State concerned, supported by officials, interpreters, etc. seconded by the EU Asylum Agency and, at a later stage, directly by EU officers of the EU Asylum Agency; and
- appeals decided, in an interim phase, on the basis of the national system in place in the Member State concerned (if necessary, supported by the EU Asylum Agency) and, at a later stage, by an independent EU Asylum Review Board created under an appropriate instrument determining its composition and mandate; as well as
- follow a consolidated asylum procedure regulated by a new Council Regulation or Decision for the purpose of determining refugee status and subsidiary protection substantively on the basis of the Qualification Directive.

### **Settlement through burden-sharing arrangements of those found to be in need of international protection**

Settlement of those found to be in need of international protection in EU Member States on the basis of agreed criteria represents a key element of UNHCR's proposal. Otherwise the potentially overwhelming burden of hosting and integrating persons in need of international protection is likely to fall largely on EU Member States at the external borders of the Union. Asylum-seekers' awareness that cases recognised in EU Reception Centres would end up being settled among all Member States, rather than just in the Member State hosting the EU Reception Centre would represent an incentive for applicants to remain in the Reception Centre to which they have been assigned until a decision is made, thus reducing pressure for onward irregular movement among Member States. The criteria for an equitable distribution would take into account:

- effective links, including family, educational, or cultural ties;
- the absorption capacity of Member States; and
- the contribution to burden sharing made, for instance, by Member States with EU Reception Centres on their territory.

Assistance with integration would be provided through a (relaunched) European Refugee Fund, thus also assisting burden sharing.

### **Return of those not in need of international protection to countries of origin**

Collective action by EU Member States to ensure the prompt return of those found not to be in need of international protection to their countries of origin<sup>95</sup> would allow the burden of returning rejected cases to be addressed jointly. Readmission agreements, complemented, for instance, by the forthcoming draft Directive on the mutual recognition of return decisions to be presented in early 2004, and other supportive incentives represent important components. Collective action by EU Member States is advantageous for the following reasons:

- prior negotiation of readmission agreements helps ensure rejected cases can be transferred promptly and under acceptable conditions;
- such negotiations are facilitated by the joint political weight of the EU and Member States;
- rejected asylum-seekers from the same country of origin can be held together (and if likely to abscond, detained) before deportation and returned more easily as a group; and
- the burden of returning rejected asylum-seekers is carried jointly by the EU and Member States, rather than falling solely on the State hosting the EU Reception Centre.

### **Role of international organisations and other actors**

Collective EU action along the lines outlined above would enable the EU to take advantage of support and assistance from international organisations and non-governmental organisations (NGOs), including local civil society groups. UNHCR's supervisory and monitoring role under its Statute in conjunction with

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<sup>95</sup> See UNHCR Executive Committee, Conclusion No. 96 (LIV) on the return of persons found not to be in need of international protection.

Article 35 of the 1951 Convention relating to the Status of Refugees, could be realised, for instance, through

- overall monitoring to ensure integrity and transparency of the process, including through the appropriate sharing of data;
- the provision of UNHCR expert advice, training and other capacity building support, especially in acceding Member States; and
- at a later stage, the provision of an advisory and support function to the EU Asylum Agency and the EU Asylum Review Board once these are established.

NGO assistance in EU Reception Centres, including through the provision of advice and counselling, would be especially valuable in Member States with more limited capacities. As for IOM, functions could involve the provision of assistance

- to victims of trafficking without international protection needs, wishing to return to their country of origin and referred to it by Member States after pre-screening;
- to arrivals not claiming asylum and returning to their country of origin; or
- assistance with the return of asylum-seekers found after pre-screening not to be in need of international protection.

### C. Proposed structural elements

#### *EU Asylum Agency*

The creation of an EU Asylum Agency represents an integral element of the UNHCR revised proposal. Like the recently agreed EU Agency for the Management of Operational Cooperation at External Borders, endorsed in November 2003 by the Council of Ministers, the EU Asylum Agency could set up offices in the different Member States as well as a headquarters in one Member State. Staff would initially be seconded from national immigration or asylum agencies and, as the Agency expands, then be independently recruited. The initial functions of the Agency would essentially be related to capacity building and provision of support, with these functions expanding as it became established. Functions could thus progressively include:

- support for and later carrying out of registration/pre-screening of asylum-seekers at points of entry or in EU Reception Centres;
- rapid deployment of decision-makers, interpreters, etc. to deal with particular influxes or capacity problems;
- provision of training, expert advice, country of origin information, etc. to Member States to strengthen capacities and assist harmonisation of decision-making;
- at a later stage, first instance decision-making in a collectively implemented EU asylum procedure;
- establishment and management of an independent EU Asylum Review Board;

- coordination and administration of settlement solutions within the EU; and
- coordination of return of those found not to be in need of international protection.

### *EU Reception Centres within the EU*

The proposal also envisages the establishment of Reception Centres for asylum seekers within the EU. A number of such centres could, for instance, be located close to the land and sea borders of the EU to facilitate reception and return. Asylum-seekers would be hosted in such centres for determination of their claims both from within the EU Member State where the Centre was situated and from other EU Member States on the basis of an appropriate arrangement. Features of these EU Reception Centres would include:

- all asylum-seekers from selected caseloads are in principle hosted in such centres while their claims are determined;
- decent accommodation and reception facilities are provided, taking account of the special needs of vulnerable persons, including children;<sup>96</sup>
- funding is with the support of a (relaunched) European Refugee Fund;
- EU Reception Centres are in principle open; an exception could be made where a particular Centre is dedicated to determining categories of presumed manifestly unfounded cases from designated countries of origin where most applicants are likely to face rejection and return and where simplified procedures would ensure fair but swift processing of claims.<sup>97</sup>

### *Legal basis: EC Regulation(s) or Decision(s)*

The legal basis for the proposals outlined above would need to be set out in one or more Council Regulations or Decisions. These would represent “measures on refugees and displaced persons”, which “promot[e] a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons”, as envisaged in Article 63(2b) of the Consolidated Treaty. Two phases of implementation are envisaged, initially involving joint (inter-State) processing under the national law of the State where the EU Reception Centre is located and in conformity with EC Regulations and international standards. This pooling of decision-making and resources could later pave the way for collective EU processing by the EU Asylum Agency. As these mechanisms are gradually instituted, instrument(s) will be needed to regulate matters including:

- the creation of EU Reception Centres, including appropriate reception arrangements and basis for processing cases there;
- the creation of an EU Asylum Agency, including an EU Asylum Review Board, and the composition and mandate of these bodies;

<sup>96</sup> Standards in EU Reception Centres would be based on those set out in Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Additionally, in some situations, host family or other types of reception arrangements could be envisaged.

<sup>97</sup> For applicable standards, see Executive Committee Conclusion No. 30 (XXXIV). In such cases detention would be subject to human rights guarantees, including the right to regular judicial review.

- the EU-wide recognition of asylum decisions taken collectively;
- the distribution criteria for EU settlement of those recognised to be in need of international protection;
- the joint return endeavours for rejected cases; and
- the inter-relationship between the EU arrangements and applicable national law.

#### **D. Similarities and differences with original UNHCR EU-prong proposal**

The revised EU-prong is similar to UNHCR's original proposal in the following key respects:

- reception and processing remains within EU borders;
- settlement through burden-sharing arrangements of those recognised;
- burden-sharing in return operations;
- monitoring role for UNHCR.

Bearing in mind subsequent developments, the revised proposal is, however, more comprehensive in that

- a clearer administrative structure is established (EU Reception Centres; EU Asylum Agency; EU Asylum Review Board);
- EU-level processing is no longer for “asylum applicants originating from designated countries of origin who are primarily economic migrants resorting the asylum channel” but for the categories outlined in paragraph 7 above;
- it takes account of problems likely to be faced by EU Member States, including in particular those situated at external borders as a result of the implementation of Dublin II and Eurodac;
- EU Reception Centres are in principle open, unless there are exceptional circumstances as outlined in paragraph 16 above;
- decision-making is in principle under a regular rather than an accelerated procedure;
- the proposal provides a mechanism for progressive shift from national to EU reception, processing and settlement/return arrangements.

#### **E. The need for urgent action**

Common European approaches are urgently needed to address the asylum/migration nexus, to preserve the integrity of the Council Directives and other arrangements put in place as part of the harmonisation process, including under Dublin II and Eurodac, and to avoid the overburdening of inadequately resourced asylum environments.

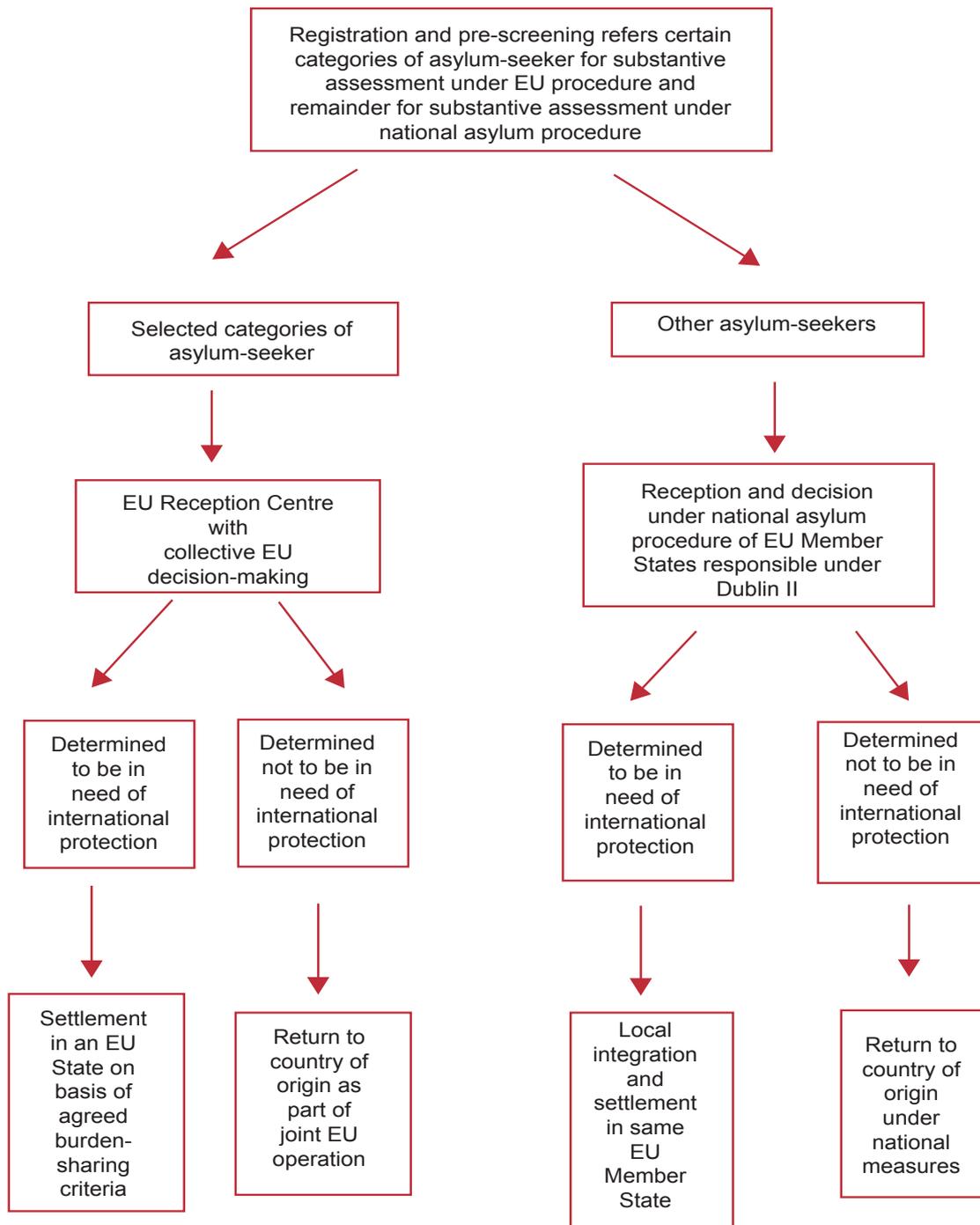
By reducing pressure on national asylum debates, it may also provide space to take a fresh look at the draft Council Directive on asylum procedures. This Directive has been the subject of concerns including those brought to the attention of the Italian Presidency by the High Commissioner for Refugees in his letter and *Aide Mémoire* of 20 November 2003.

The proposal outlined here is more ambitious than its predecessor, but the need for collective action and a clearer sense of direction as to how the common European asylum system can be realised is more evident, particularly in view of the EU's impending enlargement in 2004.

*UNHCR Geneva*

22 December 2003

**CHART OF REVISED UNHCR PROPOSAL ON "EU PRONG"**



## APPENDIX 8: REFUGEE DETERMINATION: THE CANADIAN MODEL

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### Structure and process

1. The Canadian Immigration and Refugee Board (IRB), established in 1989, is a model of a statute-based decision-making authority. As an independent administrative tribunal, the IRB is responsible for making decisions on immigration and refugee matters efficiently, fairly and in accordance with the law. These responsibilities include deciding who needs refugee protection from among the thousands of claimants who come to Canada each year.
2. The Immigration and Refugee Board has its Headquarters in Ottawa; the Refugee Protection Division is present in the IRB offices in Montréal, Toronto, Calgary, Vancouver and Winnipeg, which also have Regional Documentation Centres. The IRB Chairperson and Deputies, and the Members of the IRB are appointed to the Board by the Governor in Council, “to hold office during good behaviour for a term not exceeding seven years, subject to removal by the Governor in Council at any time for cause, to serve in a regional or district office of the Board” (Immigration and Refugee Protection Act 2001, Sections 151-153); there are currently 194 “Members” (i.e. decision-makers) in the Refugee Protection Division. The Chairperson is accountable to Parliament through the Minister of Citizenship and Immigration.
3. The IRB exercises an authority complementary to that of the department, Citizenship and Immigration Canada (CIC), which has overall responsibility for immigration and refugee matters. CIC decides claims for refugee protection made abroad at Canadian embassies and consulates, and is responsible for selecting immigrants, issuing visitors’ visas, granting citizenship and removing people from Canada.
4. Refugee claims cannot be lodged directly with the IRB, but may be made by notifying an officer of (CIC) at any port of entry or at a Canada Immigration Centre. A CIC officer decides whether the claim is eligible to be heard and refers eligible claims to the IRB’s Refugee Protection Division. “Ineligible claims” are those in which refugee protection has already been granted in another country or refused in Canada; where the claimant came to Canada from or through a designated “safe third country” where refugee protection could have been claimed; or in which the claimant has been determined to be a security risk, a violator of human rights, a serious criminal or a person involved in organized crime. If an eligibility decision has not been made within three days, the claim is deemed to be referred to the IRB.
5. Claimants who are referred to the Refugee Protection Division are provided with information about the hearing process. They complete a Personal Information Form detailing the nature and facts of their claim, which is then reviewed to determine whether it will go through an expedited process or a full hearing process. The expedited process is used when a claim appears to be manifestly well-founded. In this process, a claimant is interviewed by an IRB “refugee protection officer”; if that officer makes a favourable recommendation, the claim is forwarded to a Member of the IRB, who decides if it should be accepted without a hearing. If the claimant

is not granted refugee protection at the expedited interview, a full hearing is held.

6. Full hearings are usually non-adversarial, but become adversarial if a CIC representative participates to argue against the claim. A refugee protection officer assists the IRB Member to ensure that credible and relevant evidence is presented. The claimant has the right to be represented by counsel (who need not be a lawyer), and to be heard and to present their case fully, usually by way of an oral hearing. All testimony is given under oath or by affirmation.
7. Most cases are now heard by a single member panel, although three-member panels are occasionally used. Refugee hearings are usually held in private and in person, and are relatively informal: the evidence presented and accepted is not restricted by technical or legal rules of evidence. An interpreter is provided if required. All IRB decisions are based on the evidence provided during the proceedings, and members must provide written reasons. There is statutory provision for an internal appeals procedure to be introduced, but this has not yet been implemented. Both CIC and individuals appearing before the IRB have the right to apply to the Federal Court of Canada for leave to seek judicial review of a decision. If permission is granted and the judicial review is allowed, the claim is returned to the Refugee Protection Division for a re-hearing.
8. Those whose claims for refugee protection are accepted by the IRB may apply to become permanent residents of Canada.

### Costs and performance

9. In the financial year 2002-2003, planned spending on the Immigration and Refugee Board (IRB) (which comprises three tribunals dealing with refugee determinations, immigration appeals, and admissibility hearings and detention reviews) was Canadian \$123.7 million, and actual spending was Canadian \$116.8 million (with some Canadian \$63.4 million being spent on refugee determination).
10. The IRB received almost 39,000 new refugee claims in 2002-03. It finalised 35,400 claims, the highest number in its history, 29 per cent more than in the previous year. Of these claims 46 per cent resulted in claimants being determined a Convention refugee or a person in need of protection, 36 per cent were rejected; and the remaining 18 per cent were either withdrawn by the claimant or declared abandoned by the IRB.
11. Average processing time is the average length of time claims are with the IRB, starting with referral of the claim by CIC and ending when a decision is given to the claimant. It includes the time a claimant waits before a hearing is scheduled. The average wait, which was under 10 months in 2000-01, rose to 12.5 months in 2002-03 and was expected to continue to grow in 2003-04 as the older cases were finalised. The increase was reported as due to shortage of capacity. Following the introduction of new processes, the IRB rendered a greater number of decisions in 2002-03 than in 2001-02, and at a lower cost per claim, \$2,700 in 2002-03 compared with \$3,050 in 2001-02.

**Reporting**

12. The IRB reports to Parliament through the Minister of CIC, but it remains independent from CIC and the Minister.

## **APPENDIX 9: OTHER RECENT REPORTS FROM THE SELECT COMMITTEE**

### **Recent Reports from the Select Committee**

*Review of Scrutiny of European Legislation* (1st Report session 2002–03, HL Paper 15)

*Annual Report 2003* (44th Report session 2002–03, HL Paper 19)

*The Draft Constitutional Treaty* (41st Report session 2002–2003, HL Paper 169)

### **Relevant Reports prepared by Sub-Committee E**

#### *Session 2001–2002*

*Asylum applications—who decides?* (19th Report, HL Paper 100)

*Minimum standards of reception conditions for asylum seekers* (8th Report, HL Paper 49)

*Defining refugee status and those in need of international protection* (28th report, HL Paper 156)

*Minimum standards in asylum procedures* (11th Report, HL Paper 59)

#### *Session 2002–2003*

*Evidence by Lord Filkin CBE on the Proposed Council Directive Defining Refugee Status and Those In Need of International Protection* (43rd Report, HL Paper 173)

#### *Session 2003—2004*

*Evidence by Caroline Flint MP on Asylum Procedures* (1st Report, HL Paper 8)

### **Reports prepared by Sub-Committee F**

#### *Session 2002–03*

*Europol's Role in Fighting Crime* (5th Report, HL Paper 43)

*The Future of Europe: "Social Europe"* (14th Report, HL Paper 79)

*Proposals for a European Border Guard* (29th Report, HL Paper 133)

#### *Session 2003–04*

*Fighting illegal immigration: should carriers carry the burden?* (5th Report, HL Paper 29)

The Sub-Committee is currently conducting an inquiry into Eurojust. A report will be published in due course.