UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/CN.4/1999/63/Add.3
18 December 1998

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Addendum

Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers

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Introduction

1. In its resolution 1997/50, the Commission on Human Rights requested the Working Group on Arbitrary Detention to devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative detention without the possibility of administrative or judicial remedy.

2. The Working Group was invited by the Government of the United Kingdom to visit the country. The Working Group, represented by Mr. Kapil Sibal (Chairman) and Mr. Petr Uhl (member), along with Mr. Markus Schmidt (Secretary), visited the United Kingdom from 21 to 25 September 1998.

3. In the United Kingdom, the Group visited both detention centres and prisons. Among the detention centres the Group visited were Campsfield House Detention Centre, Oxfordshire; Harmondsworth Detention Centre, Middlesex; Haslar Holding Centre (HOHC) in Hampshire and Tinsley House (near Gatwick airport). The prisons visited were the prison at Rochester, Kent, and Wormwood Scrubs in London. The Group visited Heathrow airport, met with the Assistant Director, Mr. Alan Craig, and familiarized itself with the primary and secondary control areas, the asylum casework section, the holding area and other operations at Heathrow.

4. In the course of its visit the Group met with Mr. Mike O'Brien (Parliamentary Under-Secretary of State with responsibility for immigration and asylum issues) and Home Office officials. The Group also met with Mr. Colin Harbing (Immigration Service Enforcement Directorate), Mr. Francis Masserick (head of the Detention Operations Management Unit), Ms. Kathy Casey (Asylum Directorate), Mr. Bob Daw (Directorate of Dispersal Prisons - Prison Service), governors and senior managers of prisons and those in charge of detention centres, officers of the Immigration Service, members of visiting committees, assistant directors and inspectors in the Immigration Service and several other officials. The Working Group also consulted with Immigration Appellate Authorities at Hatton Cross, who are vested with the jurisdiction to grant bail to asylum seekers and hear substantive appeals. The Working Group also met with representatives of the European Council for Refugees and Exiles (ECRE) and several non-governmental organizations involved in refugee work, such as the British Refugee Council, the Refugee Legal Centre and Amnesty International.

5. At the outset, the Working Group would like to express its appreciation for the complete cooperation extended to it and the openness with which the entire visit was handled by the United Kingdom authorities. The Working Group was allowed free access to all the facilities it visited. There was a free and frank exchange of views with the officials who assisted the Group during the visit. The Group was allowed free access to the detainees with whom it conducted private interviews, in order to understand better the functioning of the legal regime applicable to immigrants and asylum seekers. Whenever the Group requested statistical data and information which it considered relevant for better comprehension of the legal regime, government officials provided the delegation with the necessary data.

I. THE WHITE PAPER: THE GOVERNMENT'S STRATEGY

6. On 27 July 1998, the United Kingdom Government published a White Paper setting out a comprehensive long-term strategy to deal with the problem of asylum seekers. This involved additional resources being made available for the implementation of the strategy and the enacting of appropriate legislation to better manage the problems of asylum seekers through streamlined and flexible procedures. The Government plans to achieve the following objectives:

(a) Increased numbers of asylum decisions so that, based on current forecasts of asylum claims, the backlog will be cleared and a decision time of two months or less will be achieved by April 2001;

(b) Expansion of the immigration appeals system, with the aim of reducing the average waiting time for an appeal to an adjudicator to four months by April 2001;

(c) Increased removals of failed asylum seekers;

(d) Expansion of the network of airline liaison officers to reduce the numbers of inadequately documented passengers travelling to the United Kingdom; and

(e) Increasing detention capacities and to reduce backlogs and waiting times.

7. The objective is to efficiently run an asylum system which settles genuine refugees expeditiously while deterring abusive claims. The Government wishes to focus on creating an efficient system of protecting genuine refugees by scrupulous application of the 1951 Convention relating to the Status of Refugees, to resolve applications quickly and to ensure that no asylum seeker is left destitute while waiting for the application or appeal to be determined. The White Paper recognizes that it is essential that procedures for dealing with asylum applications be seen within the framework of an integrated immigration control. Potential abuse and exploitation of the institution of asylum harms the genuine refugee as much as it threatens to undermine proper controls on immigration. The White Paper suggests that it is in the best interest of genuine refugees that there should be firm action to improve current procedures, including measures to deter or prevent from travelling those who do not meet the criteria for entry into the United Kingdom. The Government inherited backlogs of over 50,000 cases awaiting decision and over 20,000 queuing for an appeal hearing. Some of the undecided cases dated back to 1990, and some of the appeals may take as many as 15 months to be listed for disposal. Such delays tend to be exploited by abusive applicants and harm the interests of those who genuinely need protection but await their fate with uncertainty for long stretches of time.

8. The Working Group notes with appreciation the intention of the Government to transform the asylum process. Some of the measures which the Government contemplates include the following:

(a) Faster tests. Delivering faster decisions is crucial to the success of the Government’s overall strategy. The objective is to ensure that by April 2001, most initial asylum decisions would be taken within two months

of receipt, and that most appeals to adjudicators would be heard within a further four months. Both these targets reflect average process times and the Government expects that many cases would be dealt with more quickly. To achieve such targets, the Government will need to successfully implement the Casework Programme. The Government considers that economic migrants abuse the refugee claims system because its inefficiency allows them to remain in the United Kingdom for years. A faster system with more certain removal at the end of the process would deter abuse significantly;

(b) Legal representation at asylum interviews. The Government considers that for swift and fair decision-making there is no need to make provision in all cases for legal representatives to be present at asylum interviews. The Government considers the asylum interviews to be essentially a fact-finding exercise, designed to enable the asylum claimants to state, in their own words, why they fear persecution in their own country;

(c) Post-interview representations. The Government indicates in the White Paper that it wishes to standardize the time period within which an asylum seeker would be required to make a post-interview representation. The period of five days has been proposed. In exceptional cases, however, this period may be extended;

(d) Support arrangements for asylum seekers. The support system, according to the Government, must serve the following objectives:

(i) To ensure that genuine asylum seekers are not left destitute, while containing costs through incentives for asylum seekers to rely first on their own means, or on those of their communities, for support;

(ii) To provide for asylum seekers separately from the main benefits system; and

(iii) To minimize the incentive to economic migration, particularly by minimizing cash payments to asylum seekers.

II. THE LEGAL REGIME: ESSENTIAL ELEMENTS

A. The Immigration Act

9. Paragraphs 16 to 18 of Schedule 2 of the Immigration Act, 1971 lay down the conditions and circumstances in which a person may be detained by an immigration officer and matters relating thereto. These paragraphs are set out hereunder:

"Detention of persons liable to examination or removal

"16.(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

"(2) A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given.

"(3) A person on board a ship or aircraft may, under the authority of an immigration officer, be removed from the ship or aircraft for detention under this paragraph; but if an immigration officer so requires the captain of a ship or aircraft shall prevent from disembarking in the United Kingdom any person who has arrived in the United Kingdom in the ship or aircraft and been refused leave to enter, and the captain may for that purpose detain him in custody on board the ship or aircraft.

"(4) The captain of a ship or aircraft, if so required by an immigration officer, shall prevent from disembarking in the United Kingdom or before the directions for his removal have been fulfilled any person placed on board the ship or aircraft under paragraph 11 or 15 above, and the captain may for that purpose detain him in custody on board the ship or aircraft.

["(4A) A person in a vehicle may, where he has arrived in the United Kingdom through the tunnel system in that vehicle, under the authority of an immigration officer, be removed from the vehicle for detention under this paragraph.]

"17.(1) A person liable to be detained under paragraph 16 above may be arrested without warrant by a constable or by an immigration officer.

"(2) If: (a) a justice of the peace is by written information on oath satisfied that there is reasonable ground for suspecting that a person liable to be arrested under this paragraph is to be found on any premises; or

(b) in Scotland, a sheriff, or a magistrate or justice of the peace, having jurisdiction in the place where the premises are situated is by evidence on oath so satisfied;

he may grant a warrant authorizing any constable ... to enter, if need be by force, the premises named in the warrant for the purpose of searching for and arresting that person.

"18.(1) Persons may be detained under paragraph 16 above in such places as the Secretary of State may direct (when not detained in accordance with paragraph 16 on board a ship or aircraft)."

B. Immigration Service Instructions (non-statutory)

10. In addition, Immigration Service Instructions are issued to staff in relation to such detentions. These instructions are dated 3 December 1991 and 20 December 1994. Though these instructions are non-statutory in nature, they provide guidelines to officers in the course of the discharge of their duties. The policy statement in the guidelines grants temporary admission/relief

whenever possible, and authorizes detention only when there is no alternative. Once detention is authorized, it is to be kept under close review to ensure that it continues to be justified. If the person concerned is not likely to comply voluntarily with any restrictions imposed upon him/her, then he/she is required to be detained. Such assessment is, however, made in the light of the person's immigration history and circumstances. An illegal entrant who lives at a settled address, has steady employment and a subsisting relationship is more likely to adhere to the restrictions imposed than a single unemployed person with no fixed abode. Factors relevant in making an assessment of the necessity to detain will include any compassionate circumstances, such as a medical condition of the subject or of a dependent relative, the likely length of detention and the expectation of removal within a reasonable period. Accordingly, detention is opted in respect of persons who show real disregard for immigration laws and who are able to be removed within a realistic time-frame.

11. The criteria for detention are also laid down in the guidelines; these are set out hereunder:

(a) Is there any evidence of previous absconding from detention?

(b) Is there any evidence of previous failure to comply with conditions of temporary admission/release or bail?

(c) Has the subject shown blatant disregard for the immigration law (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)?

(d) Has the subject attempted to gain entry by presenting falsified documentation?

(e) Is there a previous history of complying with the requirements of immigration control, e.g. by applying for a visa, etc.?

(f) What is the likelihood of the person being removed (especially in asylum cases) and, if so, after what period of time?

(g) What are the person's ties with the United Kingdom? Does he/she have a settled address/employment? Are there close relatives (including dependants) in the United Kingdom?

(h) What are the individual's expectations about the outcome of the case: are there factors, e.g. an outstanding application for judicial review, representations or an appeal, which afford an incentive for him/her to keep in touch with the Department?

12. The Instructions of 20 September 1994 stipulate that the Government's policy is to authorize detention only when there is no alternative. They state that the case for detention of an asylum seeker when he first makes his claim must be particularly strong. The policy does not encourage detention of individuals for lengthy periods, if it would be practical to effect detention at a later stage, when rights of appeal have been exhausted. The rationale is that a person who has an appeal pending or representation outstanding will

have more incentives to comply with restrictions imposed, if released, than one who faces early removal. Special consideration to release is given to such asylum applicants who have brought themselves to the attention of the authorities at the first reasonable opportunity. Port applicants who seek asylum at the outset of their examination and illegal entrants who bring themselves to notice when seeking asylum soon after arrival would perhaps have the benefit of consideration of release, as distinct from those who seek to enter clandestinely. But where the application is judged to be without foundation and in cases where the applicant has come from a safe third country, the presumption that the individual should be released unless there are strong countervailing factors may not apply. Yet, detention is to be authorized only when it is judged essential to do so.

13. Paragraphs 16 to 18 of Schedule 2 of the Immigration Act, 1971 cited above, do not indicate the criteria on the basis of which the immigration officer is entitled to refuse entry of persons who seek asylum in the United Kingdom. The guidelines are in the nature of instructions but have no statutory force. Nor is an asylum seeker informed at the outset of the reasons for the denial of entry in writing. The July 1998 White Paper envisages a legal regime and appropriate amendments pursuant to which an asylum seeker will be informed of reasons for denial of entry in writing at the first instance.

C. Procedural aspects and comments thereon

14. Once the immigration officer refuses entry to a person seeking asylum, the person is thereafter dealt with by officials of the Home Office who then decide, after recording the statement of the person concerned, whether or not to detain him. The functioning of the legal regime in the context of detention is at present guided by practical considerations relating to the availability of spaces for detention. Of the approximately 1,000 spaces where detainees may be placed at any given time, only 850 are available for use. Almost half of these spaces are either in the prisons at Rochester and Wormwood Scrubs, and at Haslar HOHC; the other half are in separate designated detention centres at Campsfield, Harmondsworth and Tinsley House.

15. At any given time the number of persons seeking entry to the United Kingdom is far larger than the number of persons who can be detained, given the limited space available (the number of persons who sought entry in 1997 exceeded 32,000). In a given year, about 20,000-25,000 persons seeking asylum are removed immediately. Accordingly, the Group was informed, about 1-1.5 per cent of the total number of persons seeking asylum are detained at any given time. The following table shows the number of detained persons as of 29 May 1998 and 1 June 1998.

Number of people recorded as being detained a/ on 29 May 1998 b/ and 1 June 1998 b/ who had sought asylum at some stage, by length of detention c/ and immigration status

Length of detention	Port applicants	Illegal entrants	Subject to deportation action	Total
Greater than 2 days but less than or equal to 1 week d/	15	23	0	38
Greater than 1 week but less than or equal to 1 month d/	54	116	5	175
Greater than 1 month but less than or equal to 2 months	44	87	3	134
Greater than 2 months but less than or equal to 3 months	39	68	4	111
Greater than 3 months but less than or equal to 4 months	24	43	5	72
Greater than 4 months but less than or equal to 5 months	19	29	0	48
Greater than 5 months but less than or equal to 6 months	25	17	2	44
Greater than 6 months but less than or equal 8 months	29	22	2	53
Greater than 8 months but less than or equal to 10 months	15	6	5	26
Greater than 10 months but less than or equal to 1 year	6	7	5	18
Greater than 1 year	6	10	7	23
TOTAL	276	428	38	742

a/ Persons detained solely under the powers contained in Schedule 2 or 3 of the Immigration Act 1971.

b/ After entry figures obtained on 29 May 1998. Port figures obtained on 1 June 1998.

c/ These figures cover people who have been in detention for less than a month. Because of the delay in recording receptions into, and releases from, detention and the large number of persons detained for a short period, the figures should be used with caution.

d/ In some cases the date a person enters detention may be understated due to the method of recording.

16. The lack of capacity on the one hand and the growing numbers seeking entry for asylum on the other produce inequitable results. For example, a person who is liable to be detained may well be released subject to conditions only because there is no available space for accommodation. On the other hand, a person whose case for release is stronger may well be detained because of availability of space. This anomalous situation in the functioning of the legal regime exposes the Government to the charge that the decision to detain is not determined by the quality of the applicant's case but by the physical consideration of availability of space. It may be mentioned at this stage that the White Paper seeks to address this problem by reducing dependency on prison services and by increasing the number of spaces in designated detention centres.

17. Once the decision to refuse entry and to detain has been made, the detainee is entitled, as of right, to appeal against the decision and to seek bail. For that purpose, the Immigration Appellate Authorities are required to adjudicate upon the claims of such detainees. All appeals of persons who claim refugee status, whether detained or not, that are received from the Home Office are scheduled for the first hearing within six weeks. Once asylum is refused and the person is either released on conditions or detained, he appears before an adjudicator who determines whether evidence is required. At the time of adjudication, the individual may be represented by counsel, as he is entitled to free legal representation. The adjudication proceedings are adversarial in nature and the decision by the adjudicator (judge) is in writing, giving full reasons for the decision. There is a further appeal from the decision of the adjudicator (judge) to the Immigration Appeals Tribunal, but before such an appeal can be filed the applicant has to seek leave to appeal and the Tribunal entertains the appeal only on a point of law. If the adjudicator (judge) refuses leave to appeal, the matter can be taken by the applicant in judicial review to the High Court where the applicant can plead that leave to appeal ought to have been granted. Normally, the decision by the adjudicator (judge) is taken within two weeks of the oral hearing. From the order of the Tribunal, the matter can also be brought before the Court of Appeal. The adjudicator (judge) is further entitled, at the time of the hearing, to grant bail. The right to bail is available to the applicant even before the final hearing of the appeal. In the event a person is detained, the adjudicator is entitled to grant bail and proceedings in the normal course will continue thereafter.

III. MATTERS OF CONCERN

18. The United Kingdom must observe the provisions of the 1951 Convention relating to the Status of Refugees and the other international instruments to which the United Kingdom is a party, i.e. the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms. The functioning of the legal regime in the United Kingdom, in the context of the above international instruments, gives rise to the following concerns:

(a) The functioning of the legal regime on occasion makes the restriction on liberty and free movement sufficiently prolonged that it might in specific instances result in arbitrary deprivation of liberty;

(b) The release of certain persons on account of non-availability of space and the detention of certain other persons whose cases for release are much stronger but who are detained because space is available makes detention dependent on the availability of space, rather than the quality of the applicant's case;

(c) Upon detention, there is no immediate access to court or to a quick judicial remedy;

(d) There is no judicial oversight of detention;

(e) At the outset, no written grounds for detention are communicated to the applicant;

(f) There are no written rules or statutory procedures delineating the obligations of the Government towards detainees and the rights of detainees while in custody;

(g) There is no specified time limit within which, pursuant to an order of detention, the applicant is required to be produced before an adjudicator. There is also no legal regime for time-bound appeal disposal and procedures in regard thereto;

(h) The decision to detain an asylum seeker is made by an immigration officer who may not have sufficient training in refugee law or the human rights situation in the refugee-producing countries. There is also no effective remedy to challenge a decision before a court or before an independent review body. Although the White Paper proposes that an asylum detainee will have an automatic right to a bail hearing after seven days of detention, in many instances legal aid may not be available for a bail hearing. Even though a bail hearing may be provided, as promised by the Government in the White Paper, this would not be an effective substitute for an independent review whereby the reasons for a decision to detain may be challenged. Consequently, asylum seekers may have no effective opportunity to challenge the reasons for detention, as a bail hearing would only examine reliability of surety and its relationship to the applicant.

IV. IMPRESSIONS OF THE WORKING GROUP DURING THE VISIT

19. The Working Group has the distinct impression that the present Government, on the one hand, wishes to help genuine asylum seekers by making it easier for them to seek entry into the United Kingdom, but, on the other hand, seeks to make the legal regime tighter for those who set out to seek asylum on unfounded grounds. The Government is seeking to make the law sufficiently accessible and precise in order to avoid all risk of arbitrary detention. In this context, the Government is committed to effecting the following changes, as reflected in the White Paper: to provide for written grounds for detention at the outset, judicial oversight of detention, an increased number of places in detention centres, written rules and sanctions for detainees, in particular concerning the obligations of the Government towards the detainees, and uniform legislation to regulate custody of detainees.

20. The Working Group conducted separate interviews of a large number of detainees. The impressions of the Group were as follows:

(a) A large majority of asylum seekers were economic migrants;

(b) A large number of economic migrants were aware of the fact that their travel documents were either forged or that they were not in possession of the correct identification documentation, and of the risks entailed in being apprehended and discovered at the time of entry;

(c) A small percentage were genuine asylum seekers.

21. The Government's position is that lack of availability of space for detention obliges it to release a large number of asylum seekers who otherwise may have been liable to be detained, though the Working Group does not accept the proposition put forth by the Government that it was the release of such persons which was arbitrary, rather than their detention.

22. The Working Group came across several instances where the authorities had detained persons who had been in the United Kingdom for long periods of time, in some instances, for over 10 and even 12 years. Throughout these years, the persons concerned complied with all the requirements and conditions of release imposed at the time of entry. The explanation given was that this situation was unavoidable since the appeal procedures and subsequent court proceedings had taken a long time; this does not, however, detract from the inherent injustice of the situation. The Group was informed that the person is allowed to remain in the United Kingdom only if the procedures are not completed within a period of 14 years. This period is far too long. To avoid such situations, the authorities must do everything possible to hasten the process of appeals and court proceedings. A rational rule based on proportionality may also be framed to obviate the necessity of detaining persons who have already been absorbed into society.

23. It must, however, be conceded that proceedings before appellate authorities and the courts are not entirely controlled by the Government. The issue requires a fresh look. Those who have overstayed in the United Kingdom or otherwise await completion of proceedings for long periods should not be subjected to detention. The Group was informed that the reason for detention was that pursuant to the conclusion of all legal remedies, it is likely that the persons concerned will abscond and will be therefore unavailable to the authorities for removal or deportation. Detention in these circumstances may be legally justified, but the fact remains that the removal in such circumstances of a person who has developed roots in the society from which his removal is sought is inherently unjust.

24. The Working Group came across instances where persons had been detained for long periods of time awaiting deportation. In many cases, countries of origin are reluctant or unwilling to accept their nationals, and the implementation of the deportation order takes a long time. Frequently, the person concerned does not have valid documentation for the issuance of a passport or entry permit. If the country of origin of the applicant does not respond favourably to the person awaiting deportation, the United Kingdom authorities have to find a third country to accept him. Locating such a

country and the subsequent processing of documentation take several months, during which the person continues to be detained. This is another area which requires looking into.

25. Though the mandate of the Working Group relates to the scrutiny of the applicable legal regime in the context of the detention of immigrants and asylum seekers, the Working Group wishes to note that the detainees it visited, both in prisons and in detention centres, were kept in conditions that were humane and consistent with international legal standards, and that the United Kingdom authorities made an effort to create an environment for the detainees that was consistent with basic human rights.

V. CONCLUSIONS AND RECOMMENDATIONS

26. The Government should ensure that detention of asylum seekers is resorted to only for reasons recognized as legitimate under international standards and only when other measures will not suffice; detention should be for the shortest possible period.

27. At the time of detention, detainees should be provided in writing, in a language they understand, with the reasons for detention.

28. At the time of detention, detainees should be provided with a written explanation of their rights and how to exercise them.

29. Each decision to detain should be reviewed as to its necessity and its compliance with international legal standards by means of a prompt, oral hearing by a court or similar competent independent and impartial review, accompanied by the appropriate provision of legal aid. In the event that continued detention is authorized, detainees should be able to initiate further challenges against the reasons for detention.

30. Detainees should be held in special immigration detention centres in conditions appropriate to their status and not with persons charged with or convicted of criminal offences (unless so charged or convicted themselves).

31. Detainees should be given adequate access to their legal representatives, relatives and officials of the Office of the United Nations High Commissioner for Refugees.

32. The Government should concentrate the use of detention on appropriate cases of rejected asylum seekers at the end of the asylum determination process (i.e. when the incentive to abscond is increased) or where removal is imminent and there are reasons to believe it cannot be effected unless the individual is detained. The power to detain should not be exercised if the person concerned is, on the basis of substantiated evidence, fully absorbed into the society from which his removal is sought. The relevant Schedules of the Immigration Act should spell out permissible criteria for detention.

33. Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.

34. The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker.

35. An absolute maximum duration for the detention of asylum seekers should be specified in national law.

36. Any review body should be independent from the detaining authorities.

37. Unaccompanied minors should never be detained.

38. Specialized non-governmental organizations, the Office of the United Nations High Commissioner for Refugees and legal representatives should have access to all places of detention, including transit zones at international ports and airports.

39. All staff should receive training related to the special situation and needs of asylum seekers in detention.

40. National authorities should provide detailed information on relevant policy, practice and statistics in order to ensure transparency.
