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THE HUMAN RIGHTS OF MIGRANTS, PARTICULARLY REFUGEES

Note for presentation to Council of Europe Human Rights Commissioner, 22 January 2016

1. The organisation

THE Institute of Race Relations (IRR) was established as an independent educational charity in 1958 to carry out research, publish and collect resources on race relations throughout the world. In 1972, the IRR's membership backed the staff in a radical transformation of the organisation from a policy-oriented, establishment, academic institution into an anti-racist 'think-tank'. The IRR began to concentrate on responding to the needs of the most vulnerable members of BME communities and making direct analyses of institutionalised racism in Britain and the rest of Europe.

Today, the IRR is at the cutting edge of the research and analysis that inform the struggle for racial justice in Britain, Europe and internationally. It publishes the quarterly journal *Race & Class*; *IRR News*, an online alternative news service on race and refugee issues; and occasional briefing papers. One of the areas we have focussed on has been the growth of xeno-racism in response to immigration, which has informed policy in relation to migrants and refugees in Britain and Europe. This work has included analysing the effects of policies targeting migrants and asylum seekers on universal human rights, executive accountability and the rule of law.

Recent Briefing Papers include: *Europe's pariah state? The future of human rights in Britain* (February 2013); *Hidden despair: the deaths of foreign national prisoners* (February 2014) and *Unwanted, unnoticed: an audit of 160 asylum- and immigration-related deaths in Europe* (March 2015).

2. Our concerns

A. Loss of accountability/ threats to the rule of law

1. A number of recent developments cause concern that executive action in the field of migration and asylum is becoming less accountable, as avenues for challenging wrongful

decisions and actions are narrowed or blocked, while more powers are granted to immigration officers and private-sector surrogates.

Appeal rights

2. The 2014 Immigration Act abolished all appeals against immigration decisions except for those involving asylum and human rights claims. Wrongful visa refusals, or refusals of leave to remain for work or study, of settlement, of a certificate of entitlement, or decisions to remove or deport, no longer attract a right of appeal, only internal administrative review (in the context of an admission by the home secretary that the Home Office's performance was not good enough and would take years to fix). At the same time, deportation appeals on human rights grounds were made non-suspensive of removal on a Home Office certificate that pre-appeal removal would not entail a 'real risk of serious irreversible harm'. Non-suspensive, post-removal appeals are impossible for most, particularly when legal aid is unavailable. The Act also imposed on immigration judges statutory presumptions of what the 'public interest' means in human rights appeals, limiting judicial discretion.

3. The scope for challenge to Home Office decisions in immigration and asylum was further significantly reduced by legal aid cuts denying public legal funding to those not resident or without a year's lawful residence in the country (with few exceptions), and changes to judicial review, including hugely increased court fees and the denial of public funding for preparation and drafting of cases. This context added to the concern expressed by the Joint Parliamentary Committee on Human Rights, in its report on the Bill (para 39), that the provisions limiting appeals were incompatible with common-law rights of effective access to justice.

4. The 2015-16 Immigration Bill currently going through parliament continues the process of curtailment of migrants' access to justice, by making all appeals against removal non-suspensive on the same terms as deportation appeals. Making appeals non-suspensive affects equality of arms; with the appellant out of the country, the respondent has the advantage. In terms of both access to justice and equality of arms, we continue to see the baleful effect of *Maaouia v France*, decided in 2000, that matters relating to immigration, asylum and deportation do not attract the protection of Article 6 ECHR, which entrenches the second-class status of migrants vis-à-vis access to justice and fair trial guarantees and makes these developments impossible to challenge.

5. The Bill also proposes to withdraw of the right of appeal against refusal or withdrawal of support from refused asylum seekers. The Asylum Support Appeals Project calculates that 62 percent of appeals were successful (Home Office decisions were overturned, remitted or withdrawn). With the withdrawal of the right of appeal, the incidence of complete destitution on the basis of wrongful decisions, including for families with children, is bound to increase dramatically.

6. Withdrawal of appeal rights and restricting access to judicial review not only means hardship and injustice for those affected, and laxer standards of decision-making among officials; by making the executive less accountable it damages the rule of law.

Detention

7. The 2014 Act also gave the minister a complete veto on the release on bail of migrants scheduled for removal, instead of leaving the decision to immigration judges, and a ban on

judges hearing repeat bail applications, as well as an unprecedented veto on judges considering any new matter on appeal without Home Office permission, inverting the relationship between the executive and the judiciary. Immigration officers were given new powers to take steps to verify the identity of all arriving passengers, and vastly extended powers of search, seizure and retention of documents. And escorts' powers to use force were extended – despite the well-documented concerns about pervasive racism, dangerous restraint techniques and rewards for removal-at-any-cost voiced (most recently) by the coroner in the inquest of Jimmy Mubenga.

8. Since then, the All Party Parliamentary Group has recommended that detention should be used far less frequently, should genuinely be a last resort, and for a maximum period of 28 days for the purposes of removal. A subsequent Westminster Hall debate resulted in a vote by MPs to time-limit detention. These indications of widespread concern among MPs have been ignored by the Home Office, which has set its face against a statutory time limit.

9. There have now been several cases where the courts have ruled (on a case-by-case basis) that detention of particular vulnerable individuals was not just unlawful but breached Article 3 ECHR, constituting inhuman or degrading treatment. But no improvement is discernible in the Home Office attitude to detention, and the safeguards against detention of the vulnerable remain ineffective. Although former Prisons and Probation Ombudsman Stephen Shaw was commissioned to review the care of vulnerable detainees, the decision to detain was expressly excluded from his remit.

10. Shaw's report, submitted to the Home Office in September 2015 but not published until January 2016, interpreted the terms of reference generously. Acknowledging that detention impacted on mental health, he argued for a much more selective use of detention: fewer detainees, for a shorter period. His main conclusion was that the Home Office does not do enough to protect the vulnerable. He was critical of Home Office secrecy on detention conditions, and pointed out that 'it is simply inconceivable that these cases [where the courts found detention inhuman] would be so little known if they involved children in care, hospital patients, prisoners, or anyone else equally dependent upon the state'. He has recommended a ban on detaining pregnant women, a presumption against detaining other particularly vulnerable people and the immediate closure of the family detention centre Cedars.[1] The Home Office has indicated it will accept a presumption against detention of vulnerable people, but not a ban.

11. Meanwhile, the detained fast track system for speedy determination of asylum claims was suspended in July 2015 following a series of test cases which established that aspects of the system made the system so unfair as to be unlawful. These included the shortage of time between access to lawyers and making the asylum claim; detention of asylum seekers pending appeal; the extremely tight timetable for appeals; the inequality of arms caused by the fact that the Secretary of State, a party to the appeal, determined which track the appeal was in; and the lack of effective safeguards to prevent the detention of vulnerable claimants including survivors of torture and trafficking. Despite the suspension, the practice of detaining asylum seekers, including particularly vulnerable asylum seekers, has continued. Worse, their detention, now justified by 'fear of absconding' or 'lack of community ties', is generally lengthier, because the asylum claim and appeal are not expedited.

12. The 2015-16 Bill proposes new powers for the Home Office and a corresponding erosion of the role and independence of the judiciary, in the proposal that the Secretary of State can impose bail conditions overriding those set by the Tribunal. In its report on the Bill, the House of Lords Constitution Committee observed, 'This could be seen as undermining the rule of law. If the Government wants more immigration detainees to be subject to electronic tagging it should propose new criteria for the … Tribunal to take into account rather than seeking to override judicial decisions.'

Other powers
13. The Bill contains yet more powers of search (of premises and persons) and seizure for immigration officers, other officials and private sector surrogates, as well as new offences criminalising yet more civil society actors, such as landlords, for failing in their immigration control duties. There are many new regulation-making powers for the Secretary of State, which avoid parliamentary scrutiny for measures with the potential to adversely affect not only migrants but also many areas including local authority powers and duties, licensing of premises and taxis, the financial sector and employment regulation. The Bill extends the process whereby most public officials and much of the private sector are accountable to the Home Office for their policing of migrants (see below).

B. Instrumentalisation of welfare

14. It is alarming that, after the three-year freeze of asylum support for current claimants was successfully challenged in the High Court and the home secretary ordered to reconsider, the rate of support for current asylum seekers has remained at a level insufficient to live decently, and the amount provided for children has been drastically cut. Charities are seeing more and more asylum seekers, particularly those with children, regularly going without food, warm clothing and household and sanitary items, as well as having no money for transport. The painfully low level of support is clearly intended to deter refugees from seeking asylum in the UK.

15. As far as undocumented migrants and refused asylum seekers are concerned, the government has made no secret of its aim to create such a hostile environment that they are driven to leave. The fact that a migrant is in an irregular situation does not deprive him or her of protection under international human rights law. But deprivation of the means of life seems to have achieved respectability as a means of inducing undocumented migrants and refused asylum seekers to leave the UK.

16. Among the most worrying provisions are the withdrawal of all support from refused asylum seekers, including families with children, if they do not leave the UK after a final refusal and cannot demonstrate a 'genuine obstacle to removal'.[2] This re-enacts a measure which, when it was first introduced (as a pilot) over a decade ago, met with strong public criticism because of the threat that children would be taken into local authority care under child protection legislation. The Joint Parliamentary Human Rights Committee expressed its strong disapproval of the measure: '**using both the threats and the actuality of destitution and family separation is incompatible with the principles of common humanity and with international human rights law and … has no place in a humane society'.**[3] Because of these concerns, the provision was never fully implemented. But there has been no commensurate

public outcry on its reintroduction in the Bill. Although some eligibility for local authority support remains in certain narrowly defined situations, it is conditional on inability to leave.

17. The Bill also provides for the denial of support (again, with narrow exceptions) for undocumented migrants, regardless of their level of destitution or need, unless they are seeking protection (asylum or humanitarian leave) or can prove they are victims of trafficking.

18. It proposes the criminalisation of unauthorised working, with the express purpose of confiscating wages as 'proceeds of crime', although the wages, frequently minimum-wage or less, are the proceeds of real work. This measure sits uneasily with ministers' claims, during the passage of the Bill, to be tackling the exploitation of migrant labour with measures such as the creation of a director of labour market enforcement. Unauthorised workers are excluded from the Bill's protective measures, and thus at risk of the worst forms of exploitation and then, if caught, confiscation of their paltry earnings.[4]

19. Another aspect of the 'hostile environment' to be intensified by the 2015-16 Bill is the power of the Secretary of State to apply to the court to freeze bank accounts of undocumented migrants. Thus far, freezing orders have been seen only in the national security/serious crime context, where the effects on families, particularly children, have been devastating.

20. The housing provisions continue the thrust of the 2014 Immigration Act, which aimed to drive those without permission to be in the UK out of the private rented housing market. That Act also effectively closed off NHS hospital treatment from undocumented migrants. Other measures coming out of the hostile environment working group and contained in the 2014 Act or the 2015/16 Bill include the denial of driving licences and bank accounts and the criminalisation of driving while undocumented and the confiscation of vehicles – a measure which seems disproportionate and likely to offend against rights to peaceful enjoyment of property protected by Protocol I ECHR.

21. For some time, those not ordinarily resident in the UK have been required to pay for non-emergency medical treatment. Emergency treatment however was not chargeable. Now, charges for those not paying the 'health levy' (now payable by those with limited leave) are to be extended to urgent and emergency treatment, although payable after the event. This measure is bound to deter undocumented migrants from seeking even emergency life-saving treatment.

22. It is dangerous, as well as immoral and in violation of human rights law, to seek to instrumentalise access to welfare, housing and health care, and to make weapons out of destitution, homelessness and illness or accidents. In the migration context, there is no evidence that measures like withdrawal of support and employer sanctions have had their intended effect; the impression gained by those working on the ground with undocumented migrants is that they have simply increased destitution and desperation.

23. Such policies also have a tendency to spread across government departments. So measures designed to force migrants to leave the country are paralleled by those such as the 'bedroom tax', the caps on housing benefit and overall benefits, which are designed to force the British urban poor to move out of social housing in expensive inner-city areas, and benefit sanctions

designed to force the unemployed (including on occasion the terminally ill) off benefits and into work.[5]

D. Enabling and enforcing complicity in human rights violations

24. Not only are undocumented migrants and refused asylum seekers being denied rights to rented housing, to free NHS hospital treatment, to work and to social assistance: civil society actors have been conscripted to enforce these measures, which together violate fundamental human rights.

25.This is a cumulative process which has expanded to take in more and more aspects of life over two or more decades. Employer sanctions have existed in UK legislation since 1996, and have been vigorously pursued since 2006. Fines have recently been doubled to £20,000 for each unauthorised worker found in respect of whom the prescribed status checks have not been carried out, and the 2015 Bill proposes to extend the criminal offence of knowingly employing unauthorised workers to employers who have reason to believe workers are unauthorised and to increase the maximum sentence to five years. There are also powers to close down premises where unauthorised workers are employed, for up to two years in total.

26. The right to work, protected by Article 6 of the International Covenant on Economic, Social and Cultural Rights, should be enjoyed without discrimination as to (*inter alia*)race, nationality or other status. The whole structure of the UK's points-based system for admission for work favours nationals of high-income countries, and penalises asylum seekers (mainly from low-income countries),who may not work unless the determination of their claim takes over a year, and then only if they are qualified in a shortage occupation. In this context, arguably, employer sanctions are deployed to enforce race- or nationality-based discrimination in the denial of work rights.

27. There is no evidence that employer sanctions – which tend to be applied disproportionately to small, ethnic minority employers – have been effective in stopping unauthorised work; in fact the evidence clearly indicates that it has pushed undocumented workers further underground and deepened exploitation.[6] Ministers claim that provisions in the 2015 Bill will help end labour exploitation, but undocumented workers will not benefit, since they face criminalisation and confiscation of wages. The exclusion of undocumented workers from employment protections, and the denial to overseas domestic workers (among the most vulnerable of employees) of the right to switch employment, facilitate exploitation by employers and as such violate Article 7 ICESCR (which protects decent conditions of work).

28. One of the most worrying developments we have seen recently in the UK vis-à-vis the human rights of migrants and refugees has been the extension of the sanctions system from employers to private landlords. The provisions of the 2014 Immigration Act requiring private landlords to check the immigration status of prospective tenants and anyone in their households before renting, on pain of £3,000 fines, caused so much concern in parliament that the government agreed to pilot the scheme in a limited area before introducing it nationally. In 2015 the government decided to extend the 'right to rent' scheme nationally without waiting for an evaluation of the pilot. A review of the 2014-15 pilot by the Joint Council for the Welfare of Immigrants (JCWI) found evidence that landlords subject to the new duty

were less likely to rent to those who could not immediately provide documentary proof of their right to be in the UK, or whose status was complicated (eg, awaiting appeal).

29. In addition, the new Bill creates a criminal offence punishable by five years' imprisonment for landlords who allow their property to be occupied by someone they know or have reasonable grounds to believe has no 'right to rent'. Landlords will be required to evict occupiers who cannot prove a 'right to rent'. Eviction of undocumented migrants, and BME British citizens who cannot prove their rights, from private rented accommodation is bound to increase street homelessness, including among vulnerable migrants and even families with children. Forced eviction on grounds of nationality and immigration status is likely to be in breach of Articles 11 and 12 ICESCR (rights to adequate standard of living including housing, and to health). The criminalisation of non-compliant landlords makes more discrimination against anyone who looks or sounds foreign inevitable. It is also objectionable to force landlords to violate the housing rights of others.

30. Similarly, bank workers, who were required under the 2014 Act to check the immigration status of prospective account holders and to refuse banking facilities to those disqualified by their irregular immigration status, are now to be required to make periodic (as opposed to one-off) checks on their customers, and to close the bank accounts of those who cannot establish their right to be in the UK.

31. We are concerned that taken together, all the measures constituting the 'hostile environment' which is designed to force undocumented migrants and refused asylum seekers to leave the UK, coerce complicity by civil society actors in violations of fundamental human rights.

Frances Webber
19 January 2016

[1] '"UK must drastically reduce use of detention", says Shaw immigration report', *Guardian*, 14 January 2016.

[2] The House of Lords Constitution Committee has expressed concern that the phrase is not defined in the legislation, and calls for a statutory definition which can be debated: 7th report, 21 December 2015.

[3] Joint Parliamentary Human Rights Committee 10th report of 2006-7, para 97.

[4] For an analysis of the legality of confiscation of wages see 'Battening down the hatches', IRR News, 4 June 2015.

[5] See Jon Burnett, 'Where the war on welfare and the war on migrants and refugees lead', IRR News, 21 May 2015.

[6] The TUC Commission on Vulnerable Employment's *Hard Work, Hidden Lives* (2007) found shocking levels of exploitation, with employers and agencies taking advantage of workers' lack of status. Felicity Lawrence, 'The exploitation of migrants has become our way of life', *Guardian*, 17 August 2015, shows that nothing has changed since, and the UK's anti-slavery commissioner, Kevin Hyland, believes that exploitation has intensified.