

## **Establishing a Legal Basis for Article 26- Abridged version**

The Refugee Support Network (RSN) and the Brent Law Centre were commissioned by Article 26 to write a report for the project, establishing its legal basis. The key facts and issues have been summarized below:

### **What legal framework supports the right to higher education for asylum seekers?**

There are various provisions in international treaties and declarations containing a universal “right to education”. These are often an aspiration rather than a concrete right which an individual can enforce. A detailed analysis of these numerous treaties would require more time but the strongest basis for claiming human rights in the UK is the Human Rights Act 1998.

The Human Rights Act 1998 incorporates the European Convention on Human Rights (“ECHR”) into UK law. Protocol II, Article 2 of the ECHR contains a generic provision that “no person shall be denied the right to education (...)”. Despite being phrased negatively, this provides a right of access to educational institutions existing at a given time<sup>1</sup>. It does not prevent a State from regulating it, however, as long as the restriction does not “injure the substance of the right to education nor conflict with other rights enshrined in the Convention”<sup>2</sup>.

The right to education does not as a general rule affect the system of immigration control at national level. For example, Section 50 of the Border, Citizenship and Immigration Act 2009 states that a condition restricting studies is one of the conditions that may be imposed on limited leave to enter or remain in the UK. In the case of *15 foreign students v UK*<sup>3</sup>, it was held that the “refusal of permission to remain in the country cannot [ ] be regarded as an interference with the right to education, but only as a control of immigration which falls outside the scope of Article 2.” In another case, the removal of a failed asylum seeking Polish family to Poland under immigration law was not affected by the argument that their daughter would face educational difficulties if returned to Poland<sup>4</sup>.

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<sup>1</sup> *Belgian Linguistics case (No 2)* (1979-80) 1 E.H.R.R. 252

<sup>2</sup> *Ibid*, p. 282

<sup>3</sup> 19 May 1977, 9 D.R. 185

<sup>4</sup> *R. (Holub) v Secretary of State for the Home Department* [2001] 1 W.L.R. 1359

There is, however, some support to say that a state would be in breach of the Convention if it were to bar access to education for asylum seekers who are within the jurisdiction. In a Russian case<sup>5</sup>, *Timishev v Russia*, where children had been excluded from school because their parent was forced to surrender his migrant card validating his residence, the European Court of Human Rights held that Article 2 had been infringed. Although this case was in the context of primary education and the court pointed out that Russian law did not allow the exercise of the educational right by children to be made conditional on the registration of their parents' residence, it does support the view that an asylum seeker has a right to education. For our purposes, it is important to note that Article 2 has been held to apply to higher education institutions<sup>6</sup>.

### **Are there any restrictions in the UK on asylum seekers accessing higher education?**

There appears to be no particular restriction on asylum seekers accessing university education. Against the background of *Timishev v Russia* and the Convention right itself, it is highly questionable whether a law passed by the UK preventing asylum seekers from accessing education could be justified in any case.

In the absence of any provisions to the contrary, in the same way that a UK student can apply to go to university, there should be no reason why an asylum seeker who is lawfully in the UK should not be able to go to university provided he or she meets the admissions criteria. Some helpful information to support this generic assumption can be gleaned from the laws and guidance relating to university fees.

### **Support for asylum seekers attending university**

Even though there is no clear legal provision affirming an asylum seeker's right to study, the practical application of the law relating to the classification of university students for fee purposes by the UK Council for International Student Affairs ("UKCISA") shows that there has at least been the practice of allowing asylum seekers to study. There is legislation<sup>7</sup> permitting a university to charge higher fees for students, who do not qualify as "home students". Among those falling within the definition of "home students" are refugees who are ordinarily

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<sup>5</sup> *Timishev v Russia* 2005-XII, 44 EHRR 776

<sup>6</sup> *Leyla Sahin v Turkey* 2005-XI, 41 EHRR 109 GC

<sup>7</sup> Education (Fees and Awards) Act 1983; Education (Fees and Awards) (England) Regulations 2007

resident in the UK on the first day of the first academic year of the course and have not ceased to be ordinarily resident since being given leave to remain in the UK. Whoever was their spouse and child (under 18) at the time of the refugee's asylum application is also included. Similar provisions exist for those granted humanitarian protection.

UKCISA on its website for "Fees, funding and Student Support"<sup>8</sup> explains that you can become a "home student" after starting your course as an "overseas" fee payer, if you become a refugee, or your asylum application is refused but you are granted another specified form of leave, or this happens to a relevant member of your family and you meet the relevant "family condition" on the date of their asylum application. This clearly pre-supposes that the asylum seeker was already engaged in studying before gaining status as a refugee. While this has no legal effect, this goes some way to showing that the practice has been to allow asylum seekers to study.

The same UKCISA website addresses what happens in terms of your funding if you applied for asylum and were granted Discretionary Leave. The answer states that you will no longer be eligible for "home" fees for a higher education course in England due to a change introduced by government. The fact that no suggestion is made that these students can now no longer study, coupled with the fact that the "home" category used to be extended to those with discretionary leave to remain and still is in Wales, Scotland and Northern Ireland, suggests that these students have in practice been allowed to study.

### **Is there an impact from the Tier 4 student category?**

There is no clear legal provision which would suggest that the university's duties and responsibilities under Tier (4) extend to asylum seekers or failed asylum seekers or that their dealings with asylum seekers would jeopardize their Tier (4) license. Paragraph 521 of the Tier 4 Sponsor Policy Guidance makes it clear that "(s)ome duties apply to all sponsors under the points-based system, others are specific to sponsors who are licensed under certain tiers or categories." Given that the asylum system is separate to the points-based system, it is difficult to see how the Tier (4) sponsorship duties and responsibilities are relevant to asylum seekers.

However, there is some concern that a failed asylum seeker could be equated to a student under Tier 4 who has overstayed their visa – both essentially having no right to be in the UK. The extent of the duties under Tier (4) is such that a university would be expected to report a

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<sup>8</sup> [http://www.ukcisa.org.uk/student/fees\\_student\\_support.php](http://www.ukcisa.org.uk/student/fees_student_support.php)

student who has overstayed their student visa (for example, duty to report significant changes in a sponsored student's circumstances<sup>9</sup>). Paragraphs 456 to 459 of the Sponsor Policy Guidance specifically deal with overstaying and state that the university should be aware that a student who has overstayed by more than 28 days would be refused further leave. In the spirit of the Policy, it can be expected that the university would have to not only report a student who overstayed their visa but also refuse further study if the student attempted to continue studying.

A cautious approach would be to apply this reasoning to failed asylum seekers who continued to study. However, as stated above, the Tier system is a separate system to that of claiming asylum and no explicit reference is made to asylum seekers. A definite answer about the risks to a university that permits failed asylum seekers to continue studying cannot be provided.

### **When does an asylum seeker cease to be “lawfully” in the UK?**

Given the general positive assumption that asylum seekers have a right to study, it is important to examine a) whether there is a point at which an asylum seeker ceases to be an asylum seeker, i.e. is in the UK unlawfully, and b) even if the asylum seeker ceases technically to have a right to be in the UK, whether this means they can no longer study.

The UKBA's "Full guide for employers on preventing illegal working in the UK" and "Guidance for employers on preventing illegal working in the UK: asylum seekers and refugees"<sup>10</sup> provide a useful comparison in this context. They both make an interesting reference to failed asylum seekers in the context of volunteering. The relevant sentence<sup>11</sup> reads "*On the grounds that a failed asylum seeker should not be in the UK at all they should not be volunteering following a final decision on their claim or if they have exhausted all their appeal rights.*" (Emphasis added)

Refugee Action, supported by a number of large charities, wrote a letter<sup>12</sup> to the UKBA pointing out that the previous guidance had

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<sup>9</sup> Paragraph 554 of the Tier 4 Sponsor Policy Guidance, see footnote 13 above

<sup>10</sup> Both available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/>

<sup>11</sup> p. 44 and p. 12 respectively

<sup>12</sup> Available at <http://www.volunteering.org.uk/policy-and-campaigns/what-we-are-saying/2357-latter-to-the-home-office-regarding-asylum-seekers-and-volunteering>

clarified this sentence by saying that “Although there is no specific legal power to prevent a failed asylum seeker from volunteering, the normal course of action should be for the Border and Immigration Agency to issue removal directions and to discourage further voluntary activity.” The letter goes on to say that as far as they understand the legal situation has not changed and therefore the UKBA still does not have legal authority to prohibit volunteering by refused asylum seekers.

The UKBA guidance quoted above suggests that an asylum seeker who currently does not have an active claim/ appeal/ fresh claim has no right to be in the UK. The problem with this broad statement is that this may be only temporarily true until an asylum seeker submits a fresh claim for example.

The second problem with the UKBA guidance, as picked up by the charities, is that the UKBA itself previously acknowledged a lack of specific legal power to prevent a failed asylum seeker from volunteering despite the fact that the failed asylum seeker technically no longer had a right to be in the UK. The UKBA clearly wishes to discourage failed asylum seekers from volunteering but appears to lack the legal backing.

Applying this to the educational context, there again appears to be a lack of specific legal power by the UKBA to prevent a failed asylum seeker from studying even if technically he/ she may no longer have a right to be in the UK. In addition, the right to education is a specific human right under the ECHR whereas there is no equivalent for volunteering.

### **General recommendations from the report:**

- a. Article 26 and its partner universities can be confident that people with DLR or any other form of temporary status awarded as a result of a claim for asylum, and asylum seekers (including those who are Appeal Rights Exhausted- ARE) who have an ongoing claim, are lawfully present in the UK. There are no legal grounds for them to be denied access to higher education, even though they are not entitled to “home” fees or student finance.
- b. Article 26 and its partner universities have grounds to argue that ARE asylum seekers who have not submitted a fresh claim should not automatically be barred from higher education, in spite of the UKBA’s assertion that they no longer have the right to be in the UK. There appears to be a lack of specific legal power by the UKBA to prevent a failed asylum seeker from studying even if

technically he/ she may no longer have a right to be in the UK.

- c. Article 26 should bear in mind that while the UKBA lacks specific legal power to prevent asylum seekers with Appeal Rights Exhausted- ARE (no fresh claim submitted) from accessing or continuing in higher education, the support of such students could possibly lead to suspensions or revocations of universities' Tier (4) licenses due to ambiguities in the policy guidelines about universities' general obligations to the UKBA regarding issues of immigration control.
- d. Article 26 and universities could choose to seek clarification from the UKBA about some of the ambiguity in its Tier (4) policy guidelines insofar as this ambiguity could have potentially negative impacts on all students who are subject to immigration control. However, it must be acknowledged that uncertainty in this area may be better than seeking clarification from UKBA which may a) be negative and b) not necessarily legally justified.
- e. Article 26 should, in response to HTS status universities' fears about entering into contractual relationships with asylum-seeking students and those with DLR or other forms of temporary status resulting from a claim for asylum, continue to highlight the difference between asylum-seeking students and international students who have come to the UK for the express purpose of studying.