



ASYLUM LAWS: A WAY FORWARD

Summary

1. False asylum claimants are clogging up the system to the detriment of genuine refugees. The present legal framework is unable to deliver the only humane solution - the swift grant of asylum to those who deserve it and the rapid removal of those who do not. The 1951 Refugee Convention and the Human Rights Act interlock to prevent rapid decisions. They should be replaced by national legislation tailored to British circumstances.

Introduction

2. Asylum is now one of the top three concerns of the British public. In 2002 110,700 claimants arrived but only 13,300 left. The total number of claimants arriving in Europe has not greatly changed in the past 10 years but the proportion coming to Britain has risen from 5% to 27%. Clearly, we are regarded as a "soft touch".

3. The government are currently discussing with the EU and the United Nations High Commissioner for Refugees (UNHCR) the possibility of moving the processing of claimants to Transit Processing Centres outside EU territory while preserving the present international and national legal framework. We do not believe that this will prove negotiable, at least not in any useful time frame. Accordingly, we suggest instead a radical re-appraisal of the legal framework.

1951 Refugee Convention

4. Part of the problem lies in the 1951 Geneva Convention on the status of Refugees. This, of course, applies to all European countries but its application has been widened by the decisions of British judges. They have, for example, recognised persecution by non state agents - unlike their colleagues in France and Germany. Accordingly, they have granted asylum to homosexuals from Jamaica on the grounds that they would face persecution from their fellow citizens. And, in the Shah case (1999) the Law Lords ruled that women in Pakistan could constitute a persecuted "particular social group" who were entitled to asylum because they were subject to discrimination and inferior status in Pakistan. (There are approximately 65 million women in Pakistan). Furthermore, the Convention itself forbids imposing any penalty on "genuine refugees" who have no documents. This is being exploited by asylum seekers who are instructed by people traffickers to destroy their documents so as to make

their removal more difficult. The Home Office have stated that 80-90% of asylum seekers are found to be without documents. Other difficulties flow from the fact that the document is an International Convention rather than a national law and, is therefore, much vaguer in its drafting.

5. The Geneva Convention was designed for quite different circumstances - namely to deal with a tiny flow of refugees from behind the Iron Curtain. In the 1990's it has provided a channel for mass migration into Europe. We should therefore withdraw from it. Article 44 of the Convention provides that a Contracting State may denounce it at any time by notification to the UN Secretary General. Denunciation takes effect after one year. Any such action should be accompanied by the establishment of national laws and procedures (see below).

European Convention on Human Rights (ECHR)

6. Four Asylum and Immigration Acts in 12 years have failed to bring the numbers under control. The 2002 Act seeks to speed up the process but will have no practical effect if those who fail are not removed. One of the major obstacles to removal is the European Convention on Human Rights, now incorporated in British law as the Human Rights Act 1998. Article 5 (f) permits the detention of a person against whom action is being taken with a view to deportation or extradition. However, British judges have ruled that detention is illegal unless the deportation is imminent. Meanwhile, Article 6 provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". This, in practice, means lengthy judicial review and appeals processes. So, once a judicial review or appeal is lodged, deportation ceases to be "imminent" and the applicant must normally be released from detention even if his legal challenge is later shown to be meritless. It is noteworthy that Mr Justice Munby recently criticised delays to a deportation case caused by a string of meritless appeals (The Times 10/4/03). In other case Article 8, which provides that "everyone has the right to respect for his private and family life.", can also be brought into play. If an asylum claim has already taken a considerable period the applicant can contest his deportation under this Article on the grounds that he has established a family life in Britain.

7. The result is a vicious circle whereby various provisions of the two Conventions interlock so as to prevent detention which is the only means of ensuring both a rapid turn round of cases and effective removal.

A way forward

8. The number of asylum seekers (including dependants) is now running at about 300 a day. This is unmanageable unless the cases are processed within a month or so. Such a flow can only be achieved under a new legal framework. Three stages are required:

- a) Denunciation of the 1951 Geneva Convention of Refugees

There is a technical difficulty as the Dublin Convention re-affirms the 1951 Convention but does not, itself, have a denunciation clause. However, in such cases it would be usual to look at the original intention of the parties.
- b) Re-negotiation of the European Convention of Human Rights

It would be possible to withdraw from the ECHR by giving 6 months notice. A better course might be to withdraw and then re-adhere having made a reservation under Article 57 in respect of revised national legislation.
- c) Construct a new national framework
 - i. If the legislation were to be "repatriated" it should be possible to introduce powers to disqualify certain categories from asylum. For example those who:
 - are suspected of terrorism (already covered by part 4 of the Anti-Terrorism Act 2001)
 - interfere with the Channel Tunnel
 - hi-jack an aircraft
 - are involved in drugs or prostitution
 - have committed a serious criminal offence abroad [1]
 - have deliberately destroyed their documents
 - make an asylum application only when detected
 - have taken up arms against British forces or their allies.
 - ii. Abolish the Immigration Appeal Tribunal. Appeals, with leave, would go straight to the Court of Appeal, just as appeals from County Courts have always done. There would thus remain three levels of appeal but the right to apply for judicial review would need to be restricted.
 - iii. In future, asylum should normally be a temporary concession where there is clear and specific evidence that applicants would be in fear for their lives or of serious physical harm if they were returned. To reduce the incentive to make this claim, applicants would not be granted settlement (and eventual citizenship) for at least five years. Asylum would be made subject to periodic reviews of conditions in the countries of origin.
 - iv. Oblige dependants to show that they were also at risk. Otherwise family re-Unification would be postponed until permanent settlement was granted.

9. A change of this kind in the legal framework should permit most cases to be decided within a month and thus make it feasible for applicants to be detained while their cases were heard.

10. Detention centres should provide legal advice, interpreters and courts in situ. Applicants from particular nationalities could be sent to particular detention centres where relevant expertise was available. The UNHCR could be invited to monitor standards in the camps. Detention and rapid decision making would facilitate a major effort on removal which would be an essential concomitant.

11. There are two anticipated developments in the European Union which would threaten the ability of Britain to deal with the asylum problem by national means. A proposed directive and regulation on asylum claims would assert community law in this field. This directive, which is under negotiation,

would be put forward under the Amsterdam protocol from which United Kingdom has an opt-out. However, if the directive were to be accepted by HMG, we would have entirely lost national control over asylum policy.

12. A second development is the drafting of a European Union Charter of fundamental rights and freedoms. At present, this has no legal force but the new European Treaty might give it such force with the same result as far as British policy on asylum was concerned.

Conclusion

13. It is clear that there are major difficulties involved in bringing unfounded asylum cases under control. But the difficulties are certainly not insuperable and they must be set against the prospect of continued large scale immigration in the guise of asylum seeking. This is arousing intense resentment among the indigenous population and is very damaging to community relations. Allowing this to continue without effective action is not a prudent option.

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NOTES

- 1 At present, the Geneva Convention permits refusal where it is a serious non-political offence or a crime against humanity (Art 1 F). This proposal would widen the grounds of refusal to political offences, e.g. terrorist activities