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# The Well Guarded Turnstile:

## A Comparative Examination and Appraisal of Asylum Status Determination Systems in Four Industrialised States.

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# ABSTRACT

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## THE WELL GUARDED TURNSTILE - A COMPARATIVE EXAMINATION AND APPRAISAL OF ASYLUM STATUS DETERMINATION SYSTEMS IN FOUR INDUSTRIALISED STATES.

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Part I encompassing chapters one to three examines what legal rights may be relied on by asylum seekers and that extent to which they may offer procedural protection during the determination process. Chapter one examines the relevance and effectiveness of international law and theory on asylum procedures. Chapter two evaluates the relevance and significance of constitutional norms for asylum seekers in respect of procedural guarantees that those norms may give rise to, and chapter three considers the impact and influence of human rights treaties.

The aim of Part II of the thesis, that comprises of chapter four is twofold: (1) to explore the possibilities and advantages that moral and political philosophical approaches may offer for establishing standards of procedural fairness; and (2) to derive specific dignitary principles from the theoretical approaches that may be utilised as values of assessing comparative asylum determination systems.

In Part III chapter five examines in detail the respective laws and procedures governing asylum systems, whether procedures are unjust by reference to dignitary principles - theories that are linked by the common understanding that thet effects of process on individuals must be considered when evaluating and designing asylum determination systems. Chapters six and seven consider in detail two factors critical to the system design of asylum status determination that is intent on being considered procedurally just: (1) education and training and (2) information technology, with emphasis on information resource centres.

The original contribution that this thesis makes is founded on the critical examination of four contemporary refugee-receiving states, and in its attempt to avoid the consequentialist conjecture that, perhaps inevitably, has characterised this area of law and policy reform to date. It does not predicate arguments for legal reform on the mere *possbility* that exisiting procedures might lead to future persecution and torture for refused claimants. Rather, process values are utilised as the basis for evaluation, and for the formulation of reform proposals.

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# PREFACE

The completion of this research coincided with the passage of the Immigration and Asylum Act 1999 - the third major piece of legislation in the United Kingdom in six years that addresses the regulation of asylum seekers. That immigration law in general, and the legal treatment of asylum seekers in particular, has become the subject of such unprecedented attention by the policy-makers, media and public is symptomatic of a general phenomena occurring in industrialised refugee-receiving States across Europe, North America and Oceania. This thesis has attempted to examine one of the means utilised by the international community to address the issue of forced migration - namely in-country asylum status determination systems. It is important to clarify at this stage what the issue is. In this study the issue is primarily one of procedural justice, however it may also be characterised as geopolitical or one of global economic inequality.

Starting with an examination of the strategies employed by industrialised States over the past ten to fifteen years, and a critique of the purported reasoning underpinning those strategies, the thesis highlights the necessity of maintaining a commitment to asylum as part of a holistic approach to the forced migration phenomenon. Leaving discussion of important matters such as addressing root causes to others, the thesis focuses on the pressing need to maintain fair and effective asylum determination systems. Challenging the statistical basis upon which past reforms have been premised, or by making references to the perceived racist nature of legal controls, is unlikely to convince governments and policy-makers of the need to reappraise their approach. Moreover, there is a growing acceptance among refugee advocates of the reality that certain aspects of asylum policy, such as carrier sanctions, are entrenched owing to broad agreement between political parties. Therefore, reluctantly, they have had to confine their observations to mitigating the worst effects of such policies.[1] Constructive criticism founded upon objective criteria, in tandem with viable proposals for reform, is an approach which may proffer principled guidance for the future. It is with this end firmly in mind that the thesis attempts to demonstrate the difficulties associated with: (1) the assortment of

[1] For example see the representations made by Amnesty International and Justice representatives to the Special Standing Committee on the Immigration and Asylum Bill 1999 (March 16, 1999).

legal (procedural) rights; and (2) those rights from which procedural safeguards may be derived, available to asylum seekers. In short the legal implications of constitutive and common law traditions of fairness, and human rights principles, whilst enshrining a conception of fundamental values are often indeterminate.

Finding an alternative basis for grounding reform resulted in the adoption of a new perspective from which a critical appraisal of comparative systems was made. It should be stressed that the use of the dignitary principles are not advanced as absolute standards, but have afforded the author the opportunity to be rigorous in the examination of the prevailing law and practice. The principles themselves are ultimately founded on moral principle, otherwise the approach to law reform may be rooted in conjecture and therefore flounder. This is because the furthest one can go in respect of procedural rights *in the asylum context* is to state that they are rights against risks: the initial risk being the imposition of an erroneous official determination. Now since an erroneous determination by asylum officials may only give rise to a further unquantifiable risk - of possible future persecution or torture, the procedural rights required must necessarily be rooted in principle.

This thesis does not provide concrete solutions to the problems facing those States seeking to observe their commitments to the 1951 Convention- and 1967 Protocol relating to the Status of Refugees, and regional human rights instruments. Rather, the conclusions drawn and recommendations made aim to highlight some considerations that are imperative if administrative and adjudicative determination systems are to be regarded as just.

The law presented is as of January 31, 2000.

# ACKNOWLEDGMENTS

This thesis would not have been undertaken, nor completed, without the financial support of the Faculty of Law, University of Southampton. Numerous individuals have contributed their time, expertise and energy to this study. A complete list of those who have assisted me during the course of the past four and a half years is listed in the appendix. However, special mention must go to the following people: First and foremost Dr Rachel Trost whose wisdom, encouragement, patience and warmth was much appreciated - no doctoral student could have wished for more support from a supervisor; Dr Ralph Beddard for his advice in respect of chapter three; Professor Laurence Lustgarten, whose passing reference to Bayles' monograph on procedural justice, and its relevance to my research, subsequently formed the basis for the second part of chapter four; Dr Andrew Halpin who graciously acted as a quasi-supervisor in respect of the rights-based analysis at the beginning of the chapter three, and whose assistance proved invaluable; Professor Nick Wikeley for his comments on chapter three, and for his continuing interest in, and support of, my research throughout the process; and to Professor Gabriele Ganz for ensuring that I was always prepared to rigorously justify my methodology and the relevance of my research.

Thanks, and sympathy, to Dave Carter who had to endure four years sharing several different offices with me , and also to Kate Paradine. Both helped with my research and contributed to making the process both enjoyable, intellectually rewarding and, at times, highly entertaining. Moral support and good humour were always in plentiful supply from Kit Barker and Tim Jewell.

Finally, much love and thanks go to my parents, Lesley and Dennis, and grandparents, Ruby, Bill and Bette, for their unwavering support and financial assistance.

# Introduction

> Who benefits from protection is less related to a comparative index of risk of persecution than to the ability of the claimant to enter and to negotiate complex asylum adjudication systems.[1]

## (I) Asylum Seekers: Haunting Spectre or Phantom Menace?

Asylum has become one of the primary political imperatives for industrialised states in the 1990s. Developments in the legal regulation of asylum applicants by those states in the late twentieth century were induced by the increase in numbers of those seeking refugee status. The increase in numbers resulted in the traditional individual determination procedures buckling under the strain. New migration movements presented challenges which the domestic legal systems designed for the protection of refugees were ill-prepared and ill-equipped to deal with.[2]

Governments explained this rise in claimants in the late 1980s and 1990s by reference to abuse of the process by people whose motivations for migration were economic. It was their contention that because most other forms of legal immigration had been stopped or significantly reduced, asylum procedures came to be regarded as a *de facto* immigration mechanism.[3] Indicators in the early to mid 1990s pointed to a reduction in the number of claims globally.[4] These figures were cited by governments as

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[1] Frelick, B., 'Afterword: Assessing the Prospects for Reform of International Refugee Law' in Hathaway, J., (ed.) *Reconceiving International Refugee Law* (Kluwer 1997) at 148.

[2] No continent in the world is free of economic and political upheaval: the post Cold-War world order is more unstable than ever before. Recent figures suggest that there are 15 million people in the world today considered refugees and a further 20-25 million who are called 'internally displaced' Winfield, N., 'UN May Redefine The Term "Refugee"' (January 14, 2000) cited by Center for Immigration Studies <center@cis.org>. Hard copy of email on file with author.

[3] Secretariat of the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), *Report on Asylum Procedures* (September 1997) at 21.

[4] *ibid* at 22.

confirmation that asylum procedures had been abused and that their responses were vindicated. It is an undeniable social fact that for a period in the early 1990s the regulatory responses of those states had worked *in terms of* reducing the numbers of claims. However, this did not validate the initial premise, that rising numbers were a product of claimants who sought employment and welfare benefit. It did reveal that states had failed to appreciate, or successfully identify the complexities of the global conditions in the late twentieth century, and the problems that troubled (and continue to trouble) their administrative and adjudicative systems.

The strategies employed for managing the increasing volume of claimants were clumsy attempts to deflect and deter people away from lodging claims. They were not discerning in respect of whom they affected. The primary function of interdiction, visa requirements and carrier sanctions was to reduce the numbers of asylum seekers. All asylum seekers regardless of the merits of their claims were susceptible to the restrictive regulations. Nonetheless, when asylum claims began to increase again in the mid 1990s the restrictive regulatory strategies already in place were buttressed and extended. At present, in respect of those four states which comprise the subject matter of this thesis: the United Kingdom has just legislated for the third time on asylum and immigration in six years; Canada has, following an extensive review of procedures in 1998, published a White Paper; and an inquiry into refugee determination procedures, initiated by the Australian Senate, is well underway. The United States legislated in 1996, following several comparatively small administrative reforms in the early part of the decade.

Consideration of the assumptions that have underpinned the asylum debate in media and political circles, to determine if they are either gounded in reality, mythology or beneficial to the discourse, is merited at this juncture. If they prove not to be then such a finding may serve to open the door to, and help justify, the approach taken in the thesis.

First, the polity in the United States, Canada and the United Kingdom have, throughout the 1990s, been given the impression that the state is fighting off floods of

illegal immigrants who would swamp them if it were not for tough controls. It is only in the later part of the decade that such an impression has been conveyed to the public in Australia. The majority of refugees are not in Europe, North America or Oceania, they are in the third world, adjacent to the countries from which they have fled.

Secondly, those with a bias to the political right, have insisted that the small percentage of asylum applicants ever granted refugee status, was evidence of whole-scale abuse of the system.[5] This is misleading. Some people do set out to avoid immigration controls, but that characterisation does not apply to all those who did not secure refugee status: some will have been ill advised in making their claims;[6] some may have had strong, arguable, claims yet failed to satisfy the narrow 1951 Geneva Convention grounds for refugee status.[7] This in no way justifies the characterisation of their claims as abusive. Otherwise, every unsuccessful litigant, recipient of a negative administrative decision, or losing party in arbitration, could be so described; and some will have failed because of the fallibility of the administrative procedures. The last point is developed in chapters four and five.

Thirdly, unsuccessful claimants were labeled 'bogus' or 'economic migrants', seeking to milk the welfare state or secure employment opportunity. Such a stereotype creates a negative impression that is hard to dislodge from the public's psyche. Is it tenable to suggest that cash payments or work opportunities were and remain the prime incentive for migration[8] from Kosovo, Somalia, Sri Lanka, China, El Salvador or

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[5] In the context of the political debates in the United Kingdom, see O'Brien, M., HC Debs vol 326, col 122, February 22, 1999.

[6] In the United States regulations in force since 1992 authorise disciplinary sanctions against attorneys or representatives who engage in 'frivolous behaviour' (see 8 CFR § 292.3(a)(15) (1995)). The regulation of legal advisers, to prevent 'cowboy practitioners', is currently being addressed in the United Kingdom (see the 1999 Immigration and Asylum Act, Part V, §§ 82-92 and sch 5-7).

[7] Although some may be given leave to remain on humanitarian grounds, the statistics relating to the numbers of individuals afforded *de facto* refugee status are seldom referred to by politicians from the centre/right.

[8] Furthermore, to vilify and demonise economic migrants, as subhuman, as a disease infecting industrialised states, is to forget that Europeans have been economic migrants for centuries, and that they have migrated to Australia, Canada and the United States among others.

Guatemala? There is no incontrovertible evidence available to substantiate such an assertion.[9] Yet the assumption that applicants are drawn to states because of generous welfare provisions, is the premise relied on by the Government in the United Kingdom, as the basis of the shift to an alternative, cashless, welfare support system.[10]

Those individuals and organisations whose political inclinations lean to the left, are also partly responsible for the polarisation of the asylum debate, and it is the purpose of this thesis to transcend what has, at times, been a stagnant discourse in asylum law and policy-making.[11]

## (II) Literature Review

A review of the literature reveals that there is a paucity of international comparative studies in this area. For example, one study (now dated) offers a comprehensive 'overview' of the rudimentaries of administrative procedures in five industrialised states.[12] Another, more recent publication, examines immigration *policy* in nine industrialised democracies.[13] Few studies attempt to critically analyse procedures. Those that

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[9] There has been no change in the balance between numbers of port applicants (who still receive cash benefits) and those who apply 'in-country', since the replacement of welfare benefits with support in kind for 'in-country' applicants in the United Kingdom in 1996 (Nick Hardwick (Chief Executive of the Refuge Council) giving oral evidence before the Special Standing Committee, Immigration and Asylum Bill 1999, Second Sitting, Tuesday March 16, 1999 at 98).

[10] 1999 Immigration and Asylum Act, Part VI, §§ 94-127.

[11] [w]e have to break out of a tedious debate where the non governmental side attributes the failures of the current policies to the unpleasantness of governments towards protecting refugees, and the other, ie governmental, side talks all the time about the abuse of the right of asylum and the costs of it all.

Rudge, P., 'Reconciling State Interest with International Responsibilities: Asylum in North America and Western Europe' (1998) 10(1/2) *International Journal of Refugee Law* 7, 9.

[12] Sexton, R., 'Political Refugees, *Non-Refoulement* and State Practice: A Comparative Study' (1985) 18 *Vanderbilt Journal of Transnational Law* 731.

[13] Cornelius, W., Martin, P. and Hollifield, J., *Controlling Immigration: The Ambivalent Quest for Immigration Control* (Stanford University Press 1994).

endeavour to have either: (1) adopted a methodological approach which appears limited,[14] or (2) having used comparative materials critically, reach conclusions about the proper goals that their own national laws alone should pursue.[15] Moreover, the purpose of Lambert's comprehensive comparative law study of refugee rights in six European states, is explicitly "not to discuss solutions at a regional or international level."[16]

**(III) Aims**

Part I of the thesis examines an assortment of legal rights from a variety of legal sources that may offer procedural protection for asylum seekers: (1) the relevance and effectiveness of international law and theory on asylum procedures; (2) the significance of constitutional norms in the United States and the United Kingdom for asylum seekers; and (3) the impact and influence of human-rights treaties. Without going into too much detail at this stage, the purpose of that inquiry and the conclusions drawn from it, inform Parts II and III. It is difficulties associated with using norms derived from the three sources outlined as a foundation for circumscribing specific procedural rights that provides the justification for Part II and the analytical approach adopted in Part III.

The aim of Part II is to address the legal dilemmas raised in Part I and to attempt to explore the possibilities and the unique advantages of moral and political philosophy as the basis for standards of procedural fairness in asylum determination. A catalogue of

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[14] Such as utilising the 'good faith' doctrine in international law as the foundation for the review of ten states (see Avery, C., 'Refugee Status Decision-Making: The Systems of Ten Counties' (1983) 19 *Stanford Law Journal* 235). Good faith as a normative requirement suffers from indeterminacy, and is arguably of limited utility as an evaluative tool.

[15] See Glenn, P., *Strangers at the Gate: Refugees, Illegal Entrants and Procedural Justice* (Les Editions Yvon Inc, Montreal 1992) which examines comparative state practice in order to inform the development of the Canadian system; and Justice, *Providing Protection: Towards Fair and Effective Asylum Procedures* (August 1997) which reflects on the UK system following a comparative study. Such an approach is in no way deficient, it is simply that this thesis aims to apply to a wider readership.

[16] Lambert, H., *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff 1995) at 7. The possibilities for a harmonized approach at the European level are briefly touched on in the conclusion (*ibid* at 202-204).

specific procedural values, called 'dignitary' principles are derived from the moral grounding and are adopted as legitimating values that are used to assess whether the procedures are unjust.

The aims of Part III of the thesis are twofold: (1) to provide a detailed guide to the respective laws relating to asylum administration and adjudication; and (2) to go beyond the description of the technicalities of each state's approach to asylum regulation and reveal the broad principles and policy imperatives that emerge. The conclusions drawn and recommendations made are not tailored to inform the policy choices for the law to adopt in one particular state. Although the four states scrutinised in the thesis have a common legal heritage, the aim is to highlight factors and considerations that are crucial to the design of any system of asylum administration and adjudication, whether within a common- or civil-law system.

It is submitted that the original contribution which this thesis makes, is founded on the following: It goes beyond the mere juxtaposition of law, and beyond simply listing the similarities and differences found. It offers a critical commentary on comparative systems from three different continents, in contrast to studies which have focused on national or regional practices and developments.[17] The critique avoids the consequentialist conjecture which has characterised earlier research. It does not seek to base legal reform on the ground that some asylum seekers might be erroneously refused asylum as a result of inadequate procedures. Rather than evaluating procedures to determine whether the potential consequences for individuals is forcible return to countries where they may be persecuted or worse, it addresses the question of whether asylum systems are unjust. The tools of evaluation are a unique application of ideas and theories which are connected by the common understanding that the effects of process on individuals must be considered when evaluating and formulating asylum systems. It is submitted that utilising process values as the fundamental premise from which to examine administrative and adjudicative

[17] Amnesty International, *Europe: The Need for Minimum Standards in Asylum Procedures* (Amnesty International EU Association June 1994).

procedures, provides a more neutral basis for analysis. This approach may be contrasted with the politicisation of international and regional human rights principles or due process tenets, and the fact that human rights and constitutional norms may not have the effect of entitling asylum seekers to specific procedural rights.[18] In times of perceived crisis international norms can prove too abstract in their formulation to truly 'bite', constitutional and human rights norms may be either deemed inapplicable to non-citizens or legislated around, and the rule of law is liable to be sacrificed. In short, the aim of this comparative thesis is to critique prevailing law and practice, and to formulate norms which could be invoked when states consider reforming their administrative law and practice.

## (IV) Research Methodology

The process of researching for this thesis has led to the conclusion that there appears to be no definitive approach to methodology in comparative studies. At the outset the methodology was based on a detailed examination and analysis of the four states legal systems and institutions, municipal primary and secondary legislation, selected case law, selected parliamentary papers and reports, official statistics and extensive secondary legal literature[19] in each country produced by academic scholars, practitioners, NGOs and public officials. Subsequently, it transpired that other comparacists had adopted similar techniques.[20]

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[18] I do not wish to de-emphasise the important role which international law has made in terms of regulating state action vis-à-vis asylum seekers. The rights-based liberalism of the postwar order has constrained the sovereignty and autonomy of states. Indeed the strategies employed by states to avoid obligations under the 1951 Geneva Convention and human rights instruments 'testify to the continuing centrality of the duty [of *non-refoulement*]' (Fitzpatrick, J., 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal* 229, 237). However, international law has barely impacted on procedural rights, where constitutional/administrative law predominates.

[19] Including traditional, and world wide web sources.

[20] See Glenn, P. and also Lambert, H., *supra*.

Secondly, the empirical research was based on qualitiative interviews which were conducted with carefully selected individuals. Data was acquired from individuals who were in the best position to provide both original information - thereby developing the author's understanding of the law in practice, and who were able to offer authoritative consideration in respect of the some of the ideas advanced in this thesis.[21] Discussions with numerous academic scholars, practitioners and NGO representatives have contributed to, and informed the development of, ideas in this thesis, but these interactions could not be presented as formal qualitative interviews.[22]

During the course of researching the respective procedures two issues arose which significantly shaped the direction and methodology of the thesis in Part II.

First, it appeared that arguments urging reform of asylum procedures were predicated on the *belief* that procedural unfairness would result in claimants being erroneously refused asylum. Such arguments were understandable given the difficulties associated with obtaining objective empirical evidence concerning the conditions to which refused asylum claimants are returned. Basing a case for procedural reform on circumstances which could only be speculative appeared suspect and prompted the search for other grounds from which to base a coherent case for reform. The methodology in Part II of the thesis evolved into examining arguments rooted in liberalism, natural law and the realist tradition, in order to provide a more persuasive form of ultimate grounding for legal reform.

The second issue emerging during the first part of the thesis, was that the abstract formulation of the international and human rights norms, and the constitutional canons of due process, made it difficult to derive and provide for, a series of rights which might

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[21] Particularly in respect of chapters six and seven in part III of the thesis, which assess: (1) the pivotal role training can play for those who examine and adjudicate asylum claims; and (2) the advantages of information technology (IT), specifically information resource centres.

[22] See part B in the appendix.

safeguard procedural fairness. The philosophical approaches, although addressing the problems identified in respect of grounding a case for reform, were similarly indeterminate. Therefore the second development of the methodology, and the second contribution this thesis offers, is in its attempt to address the problem that when analysing asylum laws and procedures, international and human rights instruments offer limited determinate guidance vis-à-vis procedural standards. The study builds on the arguments based on morality and presents an analysis of the four states using ideas which may be expressed as 'dignitary theories'. Such a methodological approach to asylum procedures is unique, and arguably such theories have a particular pertinence when applied to asylum determination systems.

The states selected for the thesis share the characteristic of being industrialised refugee-receiving states, and were selected primarily for their shared legal heritage, geographical diversity and that they were English-speaking. They were also similar in terms of democratic forms of government, political stability and their avowed commitment to human rights protection.[23] This commitment was important because it was indicative of certain shared moral aspirations, which provided the theoretical foundation for the 'dignitary' theories which were used to appraise the four systems. In addition to the cultural and historical differences between the states which have, and continue to contribute to their different approaches to asylum and immigration regulation, the legal culture, traditions and institutions underpinning the respective laws and practices, have important implications for asylum seekers and, therefore, this study. The presence of written statements of constitutional rights in the United States and Canada, as opposed to the common law guarantees provided in the United Kingdom and Australia is perhaps the most obvious point of departure. Civil law traditions pervade Canadian procedures, characterised by, *inter alia*, investigative judicial proceedings, in contrast to the adversarial driven forms of legal procedure which are embraced in the other three states. That said, developments in the United States and Australia in the 1990s have shown that

[23] By signing and ratifying international human rights instruments, states make a commitment to a realm wherein moral considerations are paramount.

they are not impervious to the potential benefits which investigative or inquisitorial approaches to legal dispute resolution can bring. In the United Kingdom there is the backdrop and pervasive influence of the European Union, as Members States coordinate and harmonise asylum policies.[24]

The overall orientation of the thesis is from a UK law and practice perspective. The research draws on the other three states selectively in chapters one, two, three, six and seven - where those asylum systems, institutions, or historical developments are germane in the context of the particular investigation and appraisal. The synthesis of chapters five and eight, by contrast, has developed to a level of detail and analysis vis-à-vis each state, that it is possible to present as a truly comparative examination.

There remains scope for the further development of ideas in this thesis particularly with regard to those who participate in the administrative and adjudicative procedures: the asylum seekers. Such an undertaking was beyond the scope of this thesis but could be pursued in the future given that no comprehensive study of this nature has been undertaken.[25]

## (V) Individualised Determination Procedures and a Comprehensive Strategy for Dealing with Forced Migration

[24] The effect of the Amsterdam Treaty of October 2, 1997 is that '[C]ooperation of Member States within a basically intergovernmental framework will be replaced by Community action by means of supranational legislation.' Hailbronner, K., 'European Immigration and Asylum Law Under the Amsterdam Treaty' (1998) 35 *Common Market Law Review* 1047.

[25] Such research would be a methodological minefield. For example, it would have to be borne in mind that the value of such interviews may be limited given that an asylum seeker's acquaintance with the procedures will be relatively brief and at a traumatic time when much is at stake, which may inhibit their ability to form an objective view. Additionally there are practical problems relating to; locating a sufficient number of them so that the study can draw some statistically significant conclusions from the data, and once found overcoming problems pertaining to trust and translation.

The 1990s has witnessed a change of focus in academic discourse in the discipline. There has been a shift away from traditional concerns with the substance of the 1951 Geneva Convention - the adequacy of the persecution standard. Prompted by a realisation that states are increasingly concerned about rising numbers, delays operating as a magnet for unmeritorious claims and costs associated with refugee determination procedures, alternatives to the 'exilic' nature of the refugee protection regime have been sought. Some advocates have called for the 'creation of a central refugee determination agency in which the UNHCR would play a prominent role'[26] or a UN judiciary to protect the rights of those with valid asylum claims and to determine the validity of asylum procedures of all Member States of the United Nations.[27] The UNHCR has championed the 'right to remain', a cause celebrè which depends upon a commitment to address and prevent the root causes of forced migration.[28] That commitment is lacking in the international community at present. Although the use of safe havens does extend protection to those traditionally beyond the reach of international protection, there is the suspicion that their use, for example in Iraqi Kurdistan and Bosnia in the early 1990s, is designed to prevent the risk of refugee flows toward the developed world.[29] Moreover, such interventions

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[26] Fitzpatrick, J., *op cit* 243. See also Kelley, J., 'Refugee Protection: Whose Responsibility is it Anyway?' (1990) Special Issue *International Journal of Refugee Law* 277.

[27] McCarron, K., 'The Schengen Convention as a Violation of International Law and the Need for Centralized Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations' (1995) 18(2) *Boston College International and Comparative Law Review* 401, 426-427.

[28] UNHCR, The State of the World's Refugees: *In Search of Solutions* (Oxford University Press 1995). A comprehensive approach to tackling forced migration must address human rights and economic conditions in counties of origin, and conflict resolution. It will require a concerted effort by the United Nations regional organizations and governments. (See Loescher, G., 'Resolving Refugee Problems: Addressing Political Causes' in Loescher, G., *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press 1993) 180; and Wee, L., *Causing Forced Migration and International Responsibility: A Functional Perspective on the Subject and the Identification of Wrongfulness* (Unpublished PhD thesis, University of Southampton 1996).

[29] Hathaway, J., 'Preface: Can International Refugee Law be Made Relevant Again' in Hathaway, J., (ed.) *Reconceiving International Refugee Law op cit* xxi: see also Adelman, H., 'Humantarian Intervention: The Case of the Kurds' (1992) 4(1) *International Journal of Refugee Law* 4; Fitzpatrick, J., 'Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations' (1994) 35 *Virginia Journal of International Law* 13, and the response of Hailbronner, K., 'Temporary and Local Responses to Forced Migrations: A Comment' (1994) 35 *Virginia Journal of International Law* 81; and in the context of the use of Guantanamo Naval base for Cuban and Haitian migrants, see Aleinikoff, T. A., 'Safe Haven: Pragmatics and Prospects' (1994) 35 *Virginia Journal of International Law* 71.

will never amount to more than a discretionary response in a minority of refugee-producing situations.[30]

Other academics have considered how states could share the burdens and responsibilities of refugee protection more equitably between them. 'Burden-sharing' has traditionally meant the provision of financial aid to regions and states coping with large influxes of refugees. It has also come to mean a system for human redistribution. Such a system for sharing responsibility for the processing of asylum claimants has been adopted by Member States of the European Union (EU). In the European context burden-sharing is to be found in the guise of the Dublin Convention.[31] This instrument establishes criteria for determining which EU Member State is responsible for examining an asylum application. It does not relate to the absorptive capacity of an EU state, but establishes that an asylum seeker is to be dealt with by the first safe country they arrived in, or that via which they transited.

Finally, it has been suggested that refugee protection should be (re)formulated as temporary protection - as it was initially conceived.[32] In effect this approach enlivens the norm in international law that freedom from *refoulement*[33] is a negative obligation on states, but is not tantamount to a positive obligation to grant refugee status and affiliated residency rights. It has become the normal practice to offer permanent protection to those who fall within the ambit of Article 33 of the 1951 Geneva Convention. Stressing the temporary nature of asylum pending a resolution to the cause of the forced migration, was

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[30] Hathaway, J., *ibid.*

[31] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, Dublin, June 15, 1990, 30 ILM 425. It was designed to prevent multiple or successive asylum claims in different EU states.

[32] See Hathaway, J., *op cit* xxvi.

[33] No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 33, 1951 Geneva Convention.

the sort of approach adopted by some of states (for example the UK and Australia) who accepted Kosovar refugees in 1999.

The theme of temporary protection has also been taken up in a somewhat different form in two articles by three prominent scholars in refugee law. The articles by Hathaway and Neve,[34] and Schuck[35] advocate the replacement of the individualised systems of asylum determination with approaches which focus on collective action by states, based on a convergence of interests, and which emphasise protection in the region of origin. Though vital to the ongoing process of addressing how the protection needs of refugees may be met in the future, these contributions appear flawed. In particular these articles 'tend to capitulate to the underlying loss of the North's political will to comply with refugee law', and will continue the process of 'de-emphasising existing protection responsibilities of states'.[36] Moreover, although they envisage the dismantling of the costly individuated systems, because neither proposal advocates the abolition of the international legal standards governing refugee status, there is implicit recognition that some form of system will still be required for considering claims.

## (VI) Why Focus on Individualised Asylum Status Determination Systems?

It is a truism that national, individualised, systems for asylum administration and adjudication are struggling to cope with the pressures that are being exerted upon them. Two observations are merited in this respect: First, the drafters of the 1951 Geneva Convention could not have foreseen how the world has shrunk as a result of the evolution of international travel. Thus, South to North and East to West (within Europe) migration

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[34] Hathaway, J. And Neve, R. A., 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115.

[35] Schuck, P., 'Refugee Burden Sharing: A Modest Proposal' (1997) 22 *Yale Journal of International Law* 243 at 244-245.

[36] Anker, D., Fitzpatrick, J. and Shacknove, A., 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' (1998) 11 *Harvard Human Rights Journal* 295.

has been greatly facilitated, resulting in increasing numbers of putative refugees arriving at the borders and ports of industrialised states. Secondly, the Convention was never constructed to deal with those displaced by civil war, ecological disaster and economic deprivation. Yet such individuals find their way into determination procedures alongside those for whom the international legal regime was established.

It seems almost trite to state that a comprehensive approach to forced migration must encompass all or most of the strategies described above, and that individualised determination systems, coupled with the effective enforcement of negative decisions, are an integral element of such an approach. However, the value of such systems does appear to have been lost in the search to find alternative methods to address forced migration. The view of Hathaway is that the traditional international legal regime for the protection of refugees has been 'decimated' by policies of *non-entrée* and policies of containment.[37] Certainly such developments have undermined the traditional approach, but should we discard or marginalise it? It is doubtful whether any refugee advocates would subscribe to the view that it should be completely discarded. Individualised procedures may only meet the protection needs of a minority of the world's displaced but it is a vital contribution. States will never be able to completely divorce themselves from the victims of persecution, and sadly, it seems unlikely that they will ever entirely eradicate the causes of forced migration: people will always come in search of asylum.[38]

Nonetheless, it is reasonable to question the approach taken in this thesis, with its focus on formulating progressive, procedural standards, applicable to all industrialised refugee-receiving states, when those states appear to favour regional approaches to regulation at present.[39] Would it not be more desirable to work towards ensuring dignitary principles are adhered to in determination procedures from within that paradigm? I suggest not. It is not that I find regional attempts to address asylum policy disagreeable.

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[37] Hathaway, J., *op cit* xxiv.

[38] See conclusions of Anker et al, *op cit* 309.

[39] Be that in Europe or (in a less developed fashion) North America and Oceanic states.

I share the view that although the substance of policy in Europe is questionable, this does not preclude the possibility of future progressive reform within a regional framework.[40] Whilst endorsing the underlying sentiment of his view that 'the desirable approach is to create a strong procedural model, which places emphasis on standards of due process',[41] I would seek to extend that proposition to all industrialised refugee-receiving states. I would put the question to those in favour of regional responses in the following terms: "Why stop at regional regulation?" There do not appear to be any logical reasons for precluding states that share common characteristics in terms of wealth, stable democratic government and a commitment to human rights, from adhering to a 'dignitary' approach vis-à-vis asylum status determination. While there are geographic, cultural and historical differences between states in Europe, North America and Oceania,[42] they all share the same moral aspirations - it is what marks them out as liberal democracies. Intellectually, the process of comparing such asylum systems, the extra dimension that may be provided, may enrich the process of law and policy formulation.

Like Harvey, I have one eye to the future possibilities for asylum regulation - that is the very purpose of this thesis, and also share his view that asylum law needs to be more closely linked to debates in public law and socio-legal theory.[43] It is to be hoped that this thesis also 'challenge[s] some of the partial perspectives on law and policy, and in the process [...] encourage[s] others to embark on similar ventures'.[44]

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[40] It is the unilateral nature (in the sense that regulation is ultimately delegated to individual states) of refugee protection which has contributed most to the development of 'lowest common denominator' strategies of regulation in Europe.

Harvey, C., 'The European Regulation of Asylum: Constructing a Model of Regional Solidarity?' (1998) 4(4) *European Public Law* 561, 565.

[41] *ibid* 568.

[42] Arguably the differences between individual EU Member States in historical and cultural terms are as least as marked as those between the EU and the North American and Oceanic states. It appears to me that there are no greater bars to achieving a consensus among all industrialised states than there were to adopting common asylum policies in the EU.

[43] Harvey, C., *op cit* 563.

[44] *ibid.*

# PART ONE

## Introduction

The legal and administrative procedural arrangements which govern the determination of asylum applications in the four States examined and appraised in this thesis, are, *prima facie*, responses to a perception among states that the asylum system is unable to cope with, and control, the general escalation in numbers of applicants witnessed since the mid 1980s, and to the related concern about abuse of the asylum process by individuals characterised as 'economic migrants'. Although some kind of innovative approach was necessary to respond to these legitimate anxieties, the governments of refugee-receiving states focused solely on legal arrangements as the panacea for alleviating the burden on the asylum regime[1] - arrangements which are 'hostile' to refugee protection.[2] These 'hostile', 'ideologically unsound'[3] governmental measures which have been designed to limit access to mechanisms designed to determine entitlement to refugee status, are commonly understood to be the imposition of carrier's liability for transporting undocumented aliens, visa restrictions, 'safe' third country policies, and extraterritorial strategies such as the Haitian interdiction programme. The deleterious nature of such tactics, (and I use the word 'tactics' advisedly, because it is the common consensus among scholars and practitioners that they are strategies devised to deter asylum seekers and ensure that the 'problem' is contained and dealt with elsewhere) has, quite appropriately, received considerable academic attention.[4] The aim of part one of this study is to inquire into the influence and

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[1] Refugee-receiving states have failed to adopt a comprehensive, coherent strategy to the problem facing both refugees and the governments of the Western world, utilising economic, political, diplomatic and development responses. See generally, European Consultation on Refugees and Exiles (ECRE) 'Fair and Efficient Procedures for Determining Refugee Status: A Proposal' (1991) 3(1) *International Journal of Refugee Law* 113.

[2] Helton, A., 'What is Refugee Protection' (1990) SPEISS *International Journal of Refugee Law* 123.

[3] Tuitt, P., 'Refugees and Human Rights' (1997) 1(2) *The International Journal of Human Rights* 66.

[4] See generally: Nicholson, F. and Twomey, P., (eds) *Current Issues of UK Asylum Law and Policy* (Ashgate Publishing 1998); Feller, E., 'Carrier Sanctions and International Law' *International Journal of Refugee Law* 1(1) 1988 48; Hailbronner, K., 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective' (1994) 5(1) *International Journal of Refugee Law* 31; Marx, R., '*Non-refoulement*, Access to Procedures and Responsibility to Determine Claims' (1995) 7(3)

impact that: international law and theory (chapter one); constitutional or common law traditions of due process (chapter two); and international human rights norms of procedural fairness (chapter three), have on the procedural standards of treatment for asylum seekers provided by refugee-receiving states. States who have increasingly threatened the institution of asylum through the lowering, or removal of, legal procedural standards and safeguards by subtle and often insidious means.

# Chapter One

# The Significance and Influence of International Law and Theory for the Asylum Determination and Adjudication Process

## 1. Introduction

The law relating to the protection of refugees is primarily contained in the 1951 Geneva Convention Relating to the Status of Refugees,[5] (hereinafter referred to as the 1951 Convention) and the 1967 New York Protocol[6] (hereinafter referred to as the 1967 Protocol).[7] The 1951 Convention created an authoritative standard for determining entitlement to refugee status. Article 1A(2) of the Convention carefully delineated the legal characteristics of refugeehood, and Article 33 established the principle of *non-refoulement*,

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*International Journal of Refugee Law* 383; and Nicholson, F., 'Implementation of the Immigration (Carriers' Liability) Act: Privatising Immigration Functions at the Expense of International Obligations' (1997) 43(3) *International and Comparative Law Quarterly* 586.

[5] July 28, 1951, 189 U.N.T.S. 267.

[6] January 31, 1967, 606 U.N.T.S. 267.

[7] The law and theory relating to refugees is also comprised of: (1) International and regional conventions, such as the 1948 Universal Declaration of Human Rights (UDHR) - Art. 13 and 14, the 1966 International Covenant on Civil and Political Rights (ICCPR) - Art.13, the 1969 Organization of African Unity (OAU) Convention relating to the Specific Aspects of Refugee Problems and the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum; (2) General Assembly Resolutions, such as the 1967 General Assembly Declaration on Territorial Asylum; (3) resolutions of regional groups, such as the Council of European Union Justice and Home Affairs Ministers, post 1997 (Amsterdam Treaty) this intergovernmental framwork is to be replaced by Community action by means of supranational legislation; (4) the states' respective administrative laws ; and (5) the 'soft' law contained in such documents as the UNHCR Executive Committee (ExComm) Conclusions.

which has been described as the cornerstone of refugee protection.[8] This principle prohibits the removal of an asylum seeker to a country where he or she is likely to face persecution (or torture). However regulation of the determination process, the aggregate of procedures used in reaching a decision on the merits of an application for asylum, did not merit any detailed attention or recommendations. 'It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.'[9] When considering that the 1951 Convention and 1967 Protocol are among the most significant international documents pertaining to refugee protection,[10] it begs the question, why was the administration of the process left almost entirely in the domain of municipal law? In the absence of any guidelines concerning the process of asylum determination, it seems reasonable to suggest that one notable commentator was overstating the case when writing that 'the 1951 Convention Relating to the Status of Refugees marked the genesis of a comprehensive legal framework designed to deal with refugee issues.'[11]

### 1.2 State Sovereignty and Self Interest

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[8] Marx, R., '*Non-refoulement*, Access to Procedures and Responsibility for Determining Asylum Claims' (1995) 7(3) *International Journal of Refugee Law* 383. The principle has also been characterised as 'perhaps the single most important protection offered refugees' (Carens, J., 'Refugees and the Limits of Obligation' (1992) 6(1) *Public Affairs Quarterly* 31, 41).

[9] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979) 45.

[10] The significance of other legal instruments must be appreciated. For example, the importance of the European Convention on Human Rights (ECHR), particularly in the light of judgments such as that delivered by the European Court of Human Rights (ECtHRs) in *Chahal v United Kingdom* [1997] 23 EHRR 413. The applicant successfully challenged a deportation order on the ground that inter alia, it would expose him to a real risk of torture or inhuman or degrading treatment in violation of ECHR Art 3. The court stated that:

> Although] the right to political asylum is not contained in either the Convention or its protocols it is well established in the case law of the court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled would face a real risk of being subjected to treatment contrary to Article 3. In these circumstances Article 3 implies the obligation not to expel the person in question to that country. [...] The protection afforded by Article 3 is thus wider than that by Articles 32 and 33 of the UN Convention on the Status of Refugees.

[11] Henkin, L., 'An Agenda for the Next Century: The Myth and Mantra of State Sovereignty' (1994) 35 *Virginia Journal of International Law* 115, 116.

Characteristic of any consideration of domestic asylum law, indeed immigration law as a whole, is the observation that, in the post second world war era, while other areas of law, notably international human rights law,[12] have eroded previously staunchly held notions that how a state conducts its internal affairs is its own concern, in the immigration and asylum domain such an approach continues to prevail. That 'control over the entry of non-citizens is one of the few universal characteristics of national sovereignty',[13] may conceivably account for the lack of procedural specification in the 1951 Convention or 1967 Protocol.[14] International refugee law contained in the 1951 Convention can be seen to represent 'a compromise between the exclusive power of the state over entry into and presence in its territory, the very essence of sovereignty, and the competing humanitarian impulse to aid strangers in necessitous circumstances.'[15]

The legal regime governing the determination and allocation of refugee status may be understood as a kind of trade-off. On the one hand, states yielded their absolute control over immigration by agreeing upon formal legal criteria for defining a refugee. On the

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[12] The unrestricted freedom of states has been encountering increasing qualification since the First World War.[...] So many states are now a party to so large a number of treaties impinging upon their domestic legal systems that, at present, most of the world community are bound to obey a number of duties which greatly restrict their latitude, both as regards their own internal systems and concerning their freedom in the international sphere. Many of them have assumed obligations in the field of commercial, political and judicial cooperation, in the realm of human rights etc.

Cassese, A., *International Law in a Divided World* (Clarendon Press Oxford 1994) 25.

[13] Kelley, J., 'Refugee Protection: Whose Responsibility is it Anyway?' (1990) SPEISS *International Journal of Refugee Law* 277.

[14] Another reason being that international law generally leaves states free to determine the manner in which they meet their international obligations. However if a state fails to fulfil its international obligations, adequately then that state's position in international law becomes affected and may lead to the charge that it is in breach of international law. See generally, Jennings, L.F.L. and Watts, A., *Oppenheim's International Law* (Longman 1997) at 82-86.

[15] Fitzpatrick, J., 'Flight From Asylum: Trends Toward Temporary Refuge and Local Responses to Forced Migrations' (1994) 35 *Vanderbilt Journal of InternationalLaw* 13 at 13-14. Hathaway has expressed similar sentiments: 'Current refugee law can be thought of as a compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk' (Hathaway, J., 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 133).

The language adopted in order to incorporate the United States international obligations into municipal law (1980 Refugee Act) is testimony the reluctance of governments to relinquish their sovereignty, their discretionary powers over immigration. Section 208(a) of the Immigration and Nationality Act provides: ' the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

other, relinquishing total control over the admittance of aliens, by permitting international law to encroach into, arguably, the most jealously guarded area of state sovereignty, came at a price. Firstly, the formulation of the refugee standard was limited to incidence of civil and political persecution and excluded persecution based on a denial of socio-economic rights. Hathaway has characterised this as: '[t]he conviction of most Western states that their limited resettlement capacity should be reserved for those whose flight was motivated by pro-Western political values.'[16] Second, the malleable nature of the refugee definition has enabled states to interpret their obligations narrowly in order to limit the numbers of those admitted, and has arguably resulted in protection being afforded to those who will serve the national self-interest, or at least not damage the political priorities of, the receiving host country.[17] Third, the ability of states to screen persons seeking asylum, and exclude them, based on the cessation and exclusion clauses in the Convention,[18] was considered by some states as a necessary corollary of 'generous policies on protection'.[19] Fourth, 'the absence of any explicit correlation between refugee status and a right to asylum was the price demanded by some states in return for their participation in the Convention-based system.'[20] Finally, and significantly for our present purposes, administrative responsibility for controlling the process of refugee determination, which had previously been in the hands of a number of international agencies,[21] was not to be the concern of the, new international authority, the United Nations High Commission for Refugees (UNHCR).[22] Nor was any formal role created for UNHCR in regard of either the design or administration of the determination process. States were left complete autonomy in respect of the procedures to be adopted in fulfilment of the obligations to which they did accede.

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[16] Hathaway, J., *op cit* at 148.

[17] *ibid* at 168-171.

[18] Art. 1C and Art. 1F.

[19] Hathaway, J., *op cit* at 172.

[20] *ibid* at 175.

[21] The League of Nations High Commissioner for Refugees (1921-1930), the Nansen International Office (1930-38), the High Commissioner's Office for Refugees from Germany (1933-38), and the High Commissioner's Office for all Refugees (1938-46).

[22] General Assembly Resolution 428(V) (December 14, 1950) founded the organization. Since January 1, 1951 UNHCR has been responsible for protecting refugees and promoting lasting solutions to the problems facing them. (See generally, UNHCR, *The State of the World's Refugees: The Challenge of Protection* (Penguin 1993) at 169-178.

The foregoing account has only partially addressed the question posed earlier: Why was the administration of the refugee determination process left almost entirely in the domain of private municipal law? In short, at the time the 1951 Convention was drafted, states considered controlling the process of determination as 'an enhanced opportunity [...] to shape their compliance with refugee law to coincide with their perceived self interest',[23] and to counterbalance the erosion of state sovereignty which they perceived the Convention to constitute. A common trait in scholarly literature investigating aspects of immigration and asylum law and procedure, is that the primacy of state sovereignty over matters of immigration control and asylum is taken as read, the point of departure for the academic endeavour.[24] However, the question of *why* states have, and continue to consider absolute control over immigration as inextricably linked to sovereignty, 'as an essential precondition of its independence and sovereignty',[25] merits some consideration.

Hathaway has pointed to the turn of the twentieth century, as the period when the 'universalist political philosophy' which began in the medieval period and continued during the era of liberalism, was jettisoned 'in favour of a conceptualisation of the state as an independent political apparatus dedicated to advancing the general good of its own population.'[26] Perceived self-interest manifested itself in a belief that national sovereignty was safeguarded by a link between cultural similarities and political organisation.[27] The ideology of the period, has been labelled 'restrictive nationalism', and 'classical immigration

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[23] Hathaway, J., *op cit* at 165.

[24] Warner makes this very point in his discussion of Hathaway's work. See Warner, D., and Hathaway, J., 'Refugee Law and Human Rights: Warner and Hathaway in Debate' (1992) 5(2) *Journal of Refugee Studies* 162, 163.

[25] Schuck, P., 'The Transformation of Immigration Law' (1984) 84(1) *Columbia Law Review* 1.

[26] Hathaway, J., *op cit* at 135. Although others have argued that the evolution of the state system occurred earlier than this. For example, see Linklater, A., *The Transformation of Political Community* (Macmillan 1998). The author wishes to acknowledge David Owen (Department of Politics, University of Southampton) for providing this reference.

[27] The spirit of the American and French revolutions had imbued states with the conviction that a 'people' should be entitled to political self-determination within a defined territory and that the legitimacy of the state was in some sense contingent on the extent to which its actions promoted a common cultural consciousness. States thus came to use control over immigration as a means of excluding those persons whose backgrounds differentiated them from the national norm and who might as a result constitute a threat to the unity of the nation-state.

Hathaway, J., *loc cit*. The communitarian rationale for restrictive immigration control based on, *inter alia*, the need to preserve national identity and the liberal polity, is discussed at page 30 *et seq.*.

law' was the legal epiphenomenon of this age.[28] It was 'new' immigrants who were the target, and became the subjects of the emerging legal approach to immigration. Unlike the 'old' immigrants who had come to the United States from Northern and Western Europe and who had ethnic and cultural similarities with the 'natives', the 'new' immigrants, from Southern and Eastern Europe, and the Orient lacked such similarities. The era witnessed racist and class-based opposition to Chinese labourers, and hostility to strangers in general.[29] Similarly, in the United Kingdom, there was the Aliens Act of 1905,[30] which has been described as a response to Jewish immigration from Eastern Europe between 1880 and 1905, and to the anti-Jewish campaign which accompanied it.[31] Such impulses, antipathy toward immigrants, toward strangers, lay behind the geographical limitation contained in the 1951 Convention, which restricted the extent of requisite international protection to those refugees whose exodus was caused by a pre-1951 event within Europe. The Eurocentric focus of refugee law arose largely because of 'concern about negative public reaction to a [universal] definition that would accord rights to refugees of unknown origin.'[32]

Judicial pronouncements mirrored the prevailing ideology of the times on both sides of the Atlantic. In 1892 the United States Supreme Court stated:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[33]

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[28] Schuck, P., *op cit* at 3.

[29] See Schuck, P., *op cit* at 3-7. The Chinese Exclusion Act 1882, ch. 126, 22 Stat. 58 (repealed in 1945).

[30] Although not aimed at asylum seekers, indeed they were exempt from its provisions. The opinion of Sir Charles Dilke, is representative of the consensus throughout the passage of the Aliens Bill: '[T]his House... desires to assure itself before assenting to the Aliens Bill that sufficient regard is had in the proposed measure to the retention of the principle of asylum for victims of persecution.' (HC Debs, vol 133, cols 1062-1063, April 25, 1904).

[31] MacDonald, I. and Blake, N., *MacDonald's Immigration Law and Practice* (Butterworths 1995) at 2.

[32] Hathaway, J., *op cit* at 154.

[33] *Nishimura Ekiu v United States*, 142 U.S. 651 (1892) at 659.

Judicial abstinence in the sphere of immigration law and policy for the last century is striking, illustrated by the earliest proposition on the subject by Justice Field in *The Chinese Exclusion Case*:[34]

> [If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, ...its determination is conclusive upon the judiciary.

This line of reasoning continues to be relied upon nearly a century later, and was cited with approval in *Kleindienst v Mandel*.[35] The Supreme Court noted that the power to exclude aliens is: '[i]nherent in sovereignty [and] necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers.'[36] In the United Kingdom the position is reflected in the comments of Lord Denning M.R. in *Schmidt v Secretary of State for Home Affairs*.[37] '[A]t common law no alien has any right to enter this country except by leave of the Crown'.[38] The current position was stated recently by Lord Mustill in *T v Secretary of State for the Home Department*[39] where he asserted that it was of cardinal importance to recognise that

> although it is easy to assume that the appellant invokes a 'right of asylum' no such right exists. [...] Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries.

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[34] *Chae Chan Ping v United States*, 130 U.S. 581 (1889). For a critique of the Supreme Court's deference to Congress over immigration control, and an analysis of the underlying rationale behind it, see Moyce, D., 'Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws' (1986) 74 *California LawReview* 1747 at 1762-65. One may decipher the references made by Justice Field, to the dangers posed to peace and security by foreigners, and the ability of foreigners to assimilate, as tacit qualms about the threat they pose to the liberal polity and national identity. For further discussion on these and related questions see section 1.3 text, *infra*.

[35] 408 U.S. 753, 765-67 (1972).

[36] *ibid*. See also *Landon v Plascenia*, 459 U.S. 21, 26 (1982), referring to the tradition of regarding immigration as a matter of sovereign prerogative.

[37] [1969] 2 Ch 149. See also *Musgrove v Chun Teeong Toy* [1891] AC 272.

[38] *ibid* at 168. Widgery L.J. expresses a similar view at 155.

[39] [1996] 2 ALL ER 865 at 868.

## 1.3 Justifications Advanced for State Sovereign Control Over Immigration and Asylum Controls

An inquiry into the liberal, moral and philosophical justifications for state sovereign control of immigration, over borders, reveals a general degree of consensus that such controls are necessary to preserve social goods. In particular, three social goods have been identified as representing the current orthodoxy: national identity; welfare provision; and the liberal polity.[40] Illustrative of the first of these arguments advanced in favour of border control is the communitarian case made by Walzer.

> The right to choose an admissions policy... is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interest. At stake here is the shape of the community that acts in the world, exercises sovereignty and so on. Admission and expulsion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.[41]

In his specific discussion of refugees, Walzer concludes

> [T]he call "Give me... your huddled masses yearning to breathe free" is generous and noble; actually to take in large numbers of refugees is often morally necessary; but the right to restrain the flow remains a feature of communal self-determination.[42]

Jackson has suggested that the underlying need for immigration control

> is founded on the perceived need to protect the interests of those within the State exercising control. These needs are seen by some as a general protection of culture and other more particular matters such as employment and the control of state benefits like housing and social services.[43]

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[40] Schuster, L., 'Real Asylum Seekers in a Virtual World' at 7, unpublished manuscript. (Presented to the Frankfurt-Southampton Link Seminar 'Globalization and Identity' (September 9, 1997) University of Southampton).

[41] Walzer, M., Spheres of Justice (New York Basic Books 1983) at 61.

[42] *ibid* at 51. For a critique of Walzer's philosophical treatment of refugees, see Carens, J., 'Refugees and the Limits of Obligation' *op cit* 31.

[43] Jackson, D., *Immigration Law and Practice* (Sweet and Maxwell 1997) 3.

The necessity of protecting forms of social welfare, to which Jackson refers, is another rationale advanced by communitarian scholars,[44] as well as cosmopolitan scholars, for controlling borders. The third justification for immigration controls may be represented by Whelan's consideration of an open admissions policy. In addressing the justifications for the power claimed by states to exclude foreigners from their territory, Whelan submits that whilst liberalism in its fully realized form would require the reduction, if not abolition, of the sovereign powers of states, especially those concerned with borders and the citizen-alien distinction, on occasion liberal principles may have to be compromised in the non-ideal world, in order to preserve or strengthen them were they have a foothold. Liberals may thus support sovereign powers over borders, and restrictive policies on admission

> insofar as there were good reasons to believe that uncontrolled cross-border movement of people-in particular the influx of nonliberal people into liberal states-would pose a threat to the survival or perhaps simply to the flourishing and strengthening of liberal commitments and institutions where they exist.[45]

Such arguments have usually been presented by scholars in the context of immigration control as a whole, rather than to asylum. Where these theories have been applied to asylum, as Walzer has attempted to do, the authors have wrestled with the moral implications of restricting admission. On the one hand it is accepted that 'the victims of political or religious persecution [...] make the most forceful claim for admission',[46] on the other hand however, this tenet may be qualified by the principle of mutual aid, according to Walzer. The obligation whereby everyone has to help others in need when the cost to oneself is low. Walzer claims that communal self-determination is a morally legitimate concern that may justify the exclusion of refugees.

> We seem bound to grant asylum for two reasons: because its denial would require us to use force against helpless and desperate people and because the numbers

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[44] '[N]o effective welfare state could exist which did not restrict its benefits to members/citizens.' (Brown, C., 'Borders and Frontiers in International Political Theory' at 7 unpublished manuscript (Presented to the Frankfurt-Southampton Link Seminar 'Globalization and Identity' (September 9, 1997) University of Southampton).

[45] Whelan, F., 'Citizenship and Freedom of Movement:An Open Admission Policy' in Gibney, M., (ed.) *Open Borders? Closed Societies? The Ethical and Political Dilemas* (Greenwood Press 1988) 17.

[46] Walzer, M., *op cit* at 49.

> involved, except in unusual cases, are small and the people easily absorbed. [...] But if we offered refuge to everyone in the world who could plausibly say that he needed it, we might be overwhelmed. [...] The principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's understanding of itself.[47]

Some of the justifications for controlling immigration, outlined above, have found expression in the various Parliamentary debates in the United Kingdom during the passage of immigration, and more recently asylum legislation, this century. In over ninety years of immigration and asylum law it is discernible how little the language and arguments utilised, have changed. Without the accompanying notes to reveal the historical details behind the following extracts from those debates, the reader would find it difficult to ascertain which statement accompanied which legislation - from the Aliens Act 1905, through to the Immigration and Asylum Act 1999.

> [I] have no desire to see our doors closed to the genuine victims of persecution... provided the movement is carried on under proper and reasonable regulations without inflicting detriment and hardship on our own people. I desire an amelioration in the condition of Jews in Eastern Europe but I cannot countenance the transfer of their burdens to the shoulders of the poorest and most helpless of our own population.[48]

The communitarian rationale for immigration control as essential in order to protect the national identity, is an explanation which features in the debates during the passage of the Immigration Act 1971,[49] and reliance on the communitarian and cosmopolitan call for

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[47] Walzer, M., *op cit* at 51.

> We are clearly not obliged to admit an overwhelming number, assuming that 'overwhelming' means something substantive like destroying the capacity of the society to provide basic services to its members. But it doesn't follow that we are morally free to admit as many or as few as we like. ...[W]e need some argument as to why a concern for communal self-determination (and not just a fear of being `overwhelmed') should trump any claims that refugees might put forward [...].

Carens, J., *op cit* at 33.

[48] Gordon, E., HC Debs, vol 133, col 1083, April 25, 1904. Gordon, in expressing a form of the communitarian argument, also charged opponents of the Aliens Bill with thinking 'that the comfort, and the moral and economic welfare of our own people are quite subordinate matters' and challenged opponents of the Bill to deny 'the well-known principle of international law that a nation has the right to exclude foreigners.' (HC Debs, vol 133, col 1088, April 25, 1904).

[49] [C]ontrol became quite necessary, because of the scale of immigration which took place, because of the speed at which it took place, and because of the way in which it was concentrated in certain areas where whole districts changed their character very rapidly. [...] [S]ome control had become necessary in the interests of society in this country.

controls to preserve the liberal polity, is evident from the debate on the Immigration Act 1988.[50] The approach adopted by the respective Secretaries of State for the Home Department responsible for the 1993 Asylum and Immigration Appeals Act (AIAA), and the 1996 AIA, is an approach which is not only similar in terms of the language employed in previous debates, but it bears a certain resemblance to the approaches of Walzer and Whelan. Just as Walzer recognised that '[a]t the extreme the claim of asylum is virtually undeniable',[51] so too have the respective Home Secretaries affirmed both their personal, and their party's liberal[52] belief in 'maintaining a tolerant society in which the diverse cultures and backgrounds of those who are lawfully present in this country are fully respected',[53] and accept and welcome the 'multiracial and multicultural society' in which we live.[54] Then, just as Walzer modified his position, so the Home Secretaries qualified theirs, resorting to reasoning rooted in the preservation of social goods. Clarke's assertion that 'there is a strict limit on the number of people who can be allowed to migrate for settlement in this country'[55] is uncannily similar to Walzer's reference that 'there are in fact limits on our collective liability [...]',[56] and his allusion to the possibility of being 'overwhelmed'.[57] Restricting numbers as a means of protecting the liberal polity, represented in the guise of race relations, is explicitly stated.

> Race relations in Britain are not perfect - they could be better - but they are better that almost anywhere else in Western Europe or North America. One reason for

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Maudling, R., HC Debs, vol 813, col 43, March 8, 1971.

50 The Bill amends the Immigration Act 1971 [which]... was introduced in the belief that there is a limit to the extent to which a society can accept large numbers of people from different cultures without unacceptable social tensions.

Hurd, D., HC Debs, vol 122, col 779, November 16, 1987.

51 Walzer, M., *op cit* at 51.

52 Liberalism in its *fully realised form* (emphasis added) would require the reduction if not the abolition of the sovereign powers of states, at least the sovereign powers, and especially those connected with borders and the citizen-alien distinction, that lend themselves to maintaining advantages and inequalities among different populations.

Whelan, F., *op cit* at 17).

53 Howard, M., HC Debs, vol. 268, col 699, December 11, 1995.

54 Clarke, K., HC Debs, vol. 213, col 21, November 2, 1992.

55 *ibid.*

56 He continued with candour, '[b]ut I don't know how to specify them. ' (Walzer, M., *op cit* at 35).

57 *ibid* at 51.

> that is that our host population feels comfortable with a system that restricts to manageable numbers the influx of people from overseas.[58]

Clarke also unreservedly adheres to the justification for limiting entry which is linked to welfare provision, founded on duties owed to: '[o]ur citizens [which] include the duty to protect our welfare and benefits budgets and our housing at a time of economic stringency.'[59] Truly, it would be 'misguided liberalism' to promote an open entry policy, because it: '[w]ould lead to terrible pressures on our employment, on our housing, on our social services, on our health service and on our education service.'[60]

The fact that the type of rhetoric used in relation to immigrants, during the passage of all immigration legislation enacted prior to 1993, has been, and continues to be applied in relation to asylum seekers is disturbing. Its significance rests on the fact that it betrays the important distinction between asylum seekers and other immigrant categories. A distinction recognised when the 1905 Aliens Act was passed, and which was still asserted in 1993.[61] Proponents of the contemporary legislation would doubtless argue that the vast majority of claimants are not genuine refugees in any case, and fall precisely in the category of other immigrants, and are merely trying to circumvent our immigration controls. However one consequence of this approach has been to attenuate the distinctive quality of the asylum institution. This has resulted in asylum seekers becoming bound up with immigrants in general, who most scholars would argue from a variety of perspectives, are quite properly subject to regulation. I am not suggesting that asylum seekers should be free of any regulation, but by being associated with general categories of immigrants,[62] it proves

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[58] Clarke, K., HC Debs, vol. 213, cols. 21-22, November 2, 1992. Virtually identical opinions are expressed in the debate on the 1996 Asylum and Immigration Act (HC Debs, vol 268, col 699, December 11, 1995 (Howard, M.). What Walzer and Whelan share with Clarke and Howard when faced with assessing the conflicting duties and aspirations of the country's citizens, and those wishing to migrate here for refuge, is a recognition, be it on moral, philosophical or legal grounds, of the legitimacy of the claim made by asylum seekers.

[59] Clarke, K., HC Debs, vol 213, col 61. Accordingly it would seem reasonable to imply from this statement that such a duty is not owed when there is a period of economic prosperity.

[60] *ibid* at col. 22.

[61] Asylum is not just another immigration category. We all know from what we see and hear daily throughout the world what the scale of human misery is at the moment and therefore we know that asylum is not just an ordinary immigration category.
*ibid* at col 26.

[62] Or even illegal immigrants, drug taffickers and terrorists. (See Loescher,G. and Monahan, L., (eds) *Refugees and International Relations* (Oxford University Press 1989) 624).

less problematic for states to justify subjecting them to the same restrictions as other immigrants,[63] and crucially diminishes the strength of their moral claim to refuge in the minds of the citizens of the host state.

## 1.4 Conclusion

The points raised in the foregoing chapter lead to the conclusion that at present, perhaps more than ever, states care to regard the right to grant asylum, like their right to refuse to admit immigrants, as an integral aspect of territorial sovereignty, where 'government authority is at its zenith and individual entitlement is at the nadir'.[64] The inescapable reality is, that it remains a right more jealously guarded than ever.[65]

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[63] Although I understand why we have an Asylum and Immigration Appeals Bill... I am sorry that we have confused the two issues of asylum and immigration... Immigration is a separate issue and should be handled differently from asylum. I hope that all hon. Members will try as far as they can to ensure that the two are not related in the public mind.

Lester, J., HC Debs, vol 213, col 80, November 2, 1992.

The position is the same in the United States:

> [W]hile the United States has created a unique status for asylees, the ability of the refugee to obtain that status has been frustrated as a result of asylum being grouped together procedurally with other immigration statuses with which it has little in common.

Cannon, R., 'A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches' Settlement' (1991) 5 *The Administrative Law Journal* 713, 718.

[64] Schuck, P., *op cit* at 1.

[65] This might be considered hardly surprising since the foundation of the international legal system, '[t]he concept and value that first lent the system coherence, was sovereignty, the sovereignty of princes initially, later the sovereignty of nation-states.' (Farer, T., 'How the International System Copes with Involuntary Migration: Norms, Institutions and State Practice' in Teitlebaum, M. and Weiner, M., (eds) *Threatened Peoples, Threatened Borders: World Migration and US Policy* (W. Norton New York 1995) 258).

# Chapter Two

# The Significance and Influence of Due Process and Natural Justice Norms on the Procedural Formalities of the Asylum Determination Process

## 2.1 The Significance and Influence of Constitutional Canons of Due Process for Asylum Claimants in the United States

### 2.1.1 *The Application of Due Process Norms to Asylum Seekers*

Due process[1] arose under the auspices of the American constitution. It is similar to the concept of procedural fairness, alternatively known as natural justice, so familiar to lawyers in the United Kingdom. The latter notion is more limited in scope than procedural fairness, applying only to the rule against bias and the right to a fair hearing. Procedural fairness is a more general concept and refers to a principle upon which various procedural doctrines are founded.[2] Consideration of the protective provisions of the United States Constitution and the Bill of Rights, reveal terminology which applies to 'persons' and not merely citizens. *Prima facie*, the due process protection contained within the fifth amendment[3] and fourteenth amendment[4] extends to asylum seekers. Indeed the tradition that the Constitution protects aliens and citizens alike, characterised as 'one of the proudest

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[1] See generally, Morrison, A., *Fundamentals of American Law* (Oxford University Press 1996) at 115-127: 'The precise attributes vary but include 'fair notice, an opportunity to be heard, a right to retained counsel, and access to a neutral arbiter. (*ibid* at 116).

[2] Galligan, D., *Due Process and Fair Procedures* (Oxford University Process 1996) 73.

[3] '[N]or shall any person... be deprived of life, liberty or property, without due process of law.' (United States Constitution Amendment V).

[4] No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

United States Constitution Amendment XIV, § 1.

It has been suggested that the contrasting use of 'citizens' in the first clause of the amendment, and the reference to 'any person' in the due process clause means that the protections of the latter apply to any person over whom a state exercises power, notwithstanding an absence of citizenship (see Moyce, D., *op cit* at 1747). The inauspicious reference to only citizens in the first clause is a source of embarrassment to some authors (see Martin, D., 'Due Process and Membership in the National Community: Political Asylum and Beyond' (1983) 44 *University of Pittsburgh Law Review* 165 at 177-178).

elements of our [U.S.] constitutional heritage',[5] is epitomised by the decision handed down in *Yick Wo v Hopkins*.[6] This case concerned the applicability of the due process and equal protection provisions of the fourteenth amendment in respect of Chinese aliens. The Court explained that: '[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of colour, or of nationality [...]'.

However, before we laud the liberalism of the American due process tradition as the guarantor of the procedural protection lacking in the 1951 Refugee Convention or 1967 Protocol, a cautionary note. Under immigration law and administrative processes extant prior to the enactment of the 1996 Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) there were two categories of immigration status to which an asylum seeker could be subject - 'excludable' and 'deportable'. This divergence related to the status of the person at the time of the application, and the distinction carried with it significant implications for what process was 'due'. The courts calibrated the level of process due according to an aliens physical location inside or outside the borders of the United States. The Supreme Court has been guided by the principle that the nation has no legal obligations to those who are outside its borders, deemed 'excludable' aliens. The court recognized in *Shaughnessy v US ex rel. Mezei*, that:

> [A]liens who have once passed through our gates, even illegally, may be expelled (deported) only after proceedings conforming to fundamental standards of fairness encompassed in due process of law.[7]

In *Mezei* the court affirmed the denial of re-entry of a man to his wife, four children and home in Buffalo of twenty-five years, without a hearing on the grounds that he was a risk to national security. For an alien seeking entry the court determined that: '[W]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'[8] More recently the court stated that: 'an alien seeking initial admissions to the

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[5] Martin, D., *op cit* 176.

[6] 118 U.S. 356, 369 (1886).

[7] 345 U.S. 206 (1953) at 212.

[8] *ibid* at 212, quoting the Supreme Court in an earlier case in which it denied entry to the German wife of an American soldier (see *United States ex rel. Knauff v Shaugnessy* 338 U.S. 537 (1950) at 544.

U.S. requests a privilege and has no constitutional rights regarding his application [...]'.[9] This statement of equities was entirely inappropriate in the case of asylum seekers, where the consequences of exclusion, or potential consequences, arguably outweigh other considerations. As the judiciary and academics alike have explained, it is chance and not equities which accounts for the virtual absence of rights and safeguards in the expulsion process.[10] This was the paradox. The problems posed by the lack of due process rights for excludable aliens developed a certain poignancy throughout the 1980s, in respect of the Mariel Cubans initially, and then Haitians in particular, but applicants from South America too.[11] One may usefully extend Scanlon's use of the voluntary organisation to the concept of asylum. In the case of the former, and Scanlon employs universities as the example, he states that:

> [b]ecause they are a means of access to benefits desired by most in that society, are so important to life in the society that their power cannot plausibly be justified merely by saying that anyone who does not wish to deal with them on their own terms may simply refrain from dealing with them.[12]

Asylum is an institution which for some is 'so important to life', indeed may be important *for* life, and even though it is reasonable to suggest that most asylum seekers do not really *choose* to flee, and voluntarily *choose* to deal with Western receiving countries, the rhetoric of most Western governments and the pronouncements of the judiciary is couched in the sort of terms which imply 'you chose to come here you can have no cause for complaint if the determination procedures are not to your liking'.

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[9] *Landon v Plascenia*, 459 U.S. 21 (1982) at 32.

[10] Aleinikoff has also pointed to the:

> [a]bsurdity of the line drawn... when one considers that an alien who has entered this country surreptiously and has stayed in San Diego for a week is afforded, as a matter of constitutional right, a hearing, an opportunity to present evidence and cross-examine witnesses, an unbiased decision-maker, a translator and sometimes counsel.

Aleinikoff, A., 'Aliens, Due Process and "Community Ties": A Response to Martin' (1983) 44 *University of Pittsburgh LawReview* 237, 238.

[11] See generally Loescher, G., *Beyond Charity* (Oxford University Press 1993) at 101-105.

[12] Scanlon, T., 'Due Process' in Pennock, R. and Chapman, J., *Due Process:Nomos XVIII* (New York University Press 1977) 112.

The 1996 IIRIRA[13] remedied the anomalous situation described above, by creating a new process by placing not only those previously deemed 'excludable' in an expedited procedure, but in addition, 'any or all' aliens already in the United States who have not been paroled or admitted, and who cannot affirmatively show to an immigration officer that they have been continuously present in the United States for a period of two years immediately prior to the officer's determination. In short, many of those who were previously deemed 'deportable' are now as disadvantged as those previously deemed 'excludable'. To compound matters, the process due, is qualitatively inferior to that which 'excludable' claimants used to endure.[14]

### 2.1.2 *Immigration and Asylum - The Blot on the Constitutional Law Landscape*

Although the distinction between the two statutes of 'excludable' and 'deportable' has now been eroded, because some individuals previously categorised as 'deportable', are now deemed 'exludable', and therefore recipients of the same process, it may prove interesting to explore how the courts have dealt with 'excludable' individuals in the past. Despite the fact that the 1980 Act established a statutory right for all aliens to apply for asylum, some courts maintained that excludable aliens lacked constitutional rights. In *Jean v Nelson*[15] the Eleventh court considered and rejected a claim by Haitians that conditions of detention violated their fifth amendment rights by making difficult the submission of meaningful asylum claims.

> Aliens seeking admission to the U.S. have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges are granted by Congress.[16]

Under the court's analysis the plaintiff's status of asylum seeker had no bearing on the determination of constitutional rights. However the Second Circuit in *Yiu Sing Chun v*

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[13] § 302, revising Immigration and Nationality Act 1952 (INA) § 235.

[14] For a detailed discussion of the reforms introduced by the 1996 IIRIRA, see chapter five.

[15] 727 F.2d 957 (11th Cir. 1984).

[16] *ibid* at 968.

*Sava*,[17] when considering whether a hearing before an Immigration Judge was required for asylum seekers who were also stowaways, concluded that because of the high stakes involved in an asylum hearing, due process might require a hearing for those aliens even in the absence of the statutory provision.[18] The focus on 'privileges' in *Jean v Nelson* is revealing because it rendered immigration law (including asylum) as an island in the mainstream of public law[19]. While the Supreme Court's approach to due process may have 'undergone a virtual revolution',[20] burying the right-privilege distinction evident in the Court's reasoning in *United States ex rel. Knauff v Shaugnessy*,[21] 'immigration procedures have never come in for [the same] thorough reconsideration.'[22] Immigration continued in isolation and in respect to the doctrines relating to exclusion, the right-privilege distinction 'remained a seductive principle through which the dominant ideas of consent, sovereignty and national community could be vindicated.' Elsewhere, the right-privilege distinction was abandoned in favour of an entitlement test.[23]

The work of Schuck provides some background to the formulation and development of the right-privilege idea, which underpinned restrictive nationalism - the ideology of classical immigration law.[24] Schuck points to the formulation of the doctrine in *McAuliffe v New Bedford*[25]. A case in which the court rejected a policeman's first amendment challenge to his discharge by stating that

> [t]he petitioner may have a constitutional right to talk politics, but has no constitutional right to be a policeman... The servant cannot complain, as he takes the employment on the terms which are offered him.[26]

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[17] 708 F.2d 869 (2d Cir. 1983).

[18] *ibid* at 877. See generally Martin, D., *op cit* at 168-171, for further examples of successful due process challenges in lower federal courts.

[19] See generally, Schuck, P., 'The Transformation of Immigration Law' (1984) 84(1) *Columbia Law Review* 1.

[20] Martin, D., *op cit* 167.

[21] 338 U.S. 537 (1950) at 542.

[22] Martin, D., *loc cit*.

[23] *Board of Regents v Roth* 408 U.S. 564 (1972).

[24] Schuck, P., *op cit* at 47-49.

[25] 155 Mass. 216, 220, 29 N.E. 517 (1892).

[26] *ibid* at 517-518.

Classical immigration law embraced this principle, if government employment was deemed a privilege and not a right, how much more conditional was the alien's ability to enter the United States and receive equal treatment.[27] The notion that 'outsiders', those who are excludable, receive less protection than those with established ties to the community was affirmed in *Landon v Plascenia*[28] where the court held that a resident alien returning to the United States was entitled to due process in exclusion proceedings because: '[o]nce the alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.'[29] For Martin such a distinction is intuitive, quite independent of any considerations of administrative overload that might occur as a result of affording greater procedural protection to excludable aliens. He asserts that while we do owe such aliens some form of protection, 'by virtue of their common humanity and physical presence in our territorial jurisdiction',[30] 'the established community ties, which exist to varying degrees with respect to different categories of aliens, ought to count in deciding what process is due.'[31] Following the 1996 IIRIRIA, it is apparent that mere physical presence inside the United States is insufficient. The requirement of two years continuous presence is evidence of the need to demonstrate the establishment of community ties, in order to benefit from standard asylum determination procedures, as opposed to the expedited procedures.

An administrative system whose subjects are treated equally is preferable, indeed more rational than one were it is a positive advantage to evade the system in place. It is not surprising that the policy makers in the United States should wish to equalise the

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[27] Schuck, P., *op cit* 48. The right-privilege distinction has reared its head in deportation cases in the UK. In *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904, Lord Denning reasoned that an alien had no 'right' to be in the UK except by licence of the Crown, and therefore no right to be protected and no legitimate expectation in respect of permission to remain after leave to stay expires. In *R v Board of Visitors of Hull Prison ex parte Germain* [1979] 1 All ER 701, at 712 and 723, the right-privilege distinction was repudiated. The case established the norm that natural justice principles were applicable to prison disciplinary systems.

[28] 459 U.S. 21 (1982).

[29] *ibid* at 34. The decision in *Plyler v Doe*, 457 U.S. 202 (1982) supported the proposition that alien's rights increase with the ties established with the community. Here the court required a state to provide free education to the children of illegal immigrants.

[30] Martin, D., *op cit* 216.

[31] *ibid* at 190.

constitutional entitlements to procedural protection afforded to the majority of asylum seekers, and that the preferred method was to harmonise at a lower common denominator.[32]

## 2.2 The Significance and Influence of Common Law Traditions of Natural Justice for Asylum Claimants in the United Kingdom

Historically, natural justice has been the label attached to the means by which the courts have exerted a measure of control over the procedures used by public authorities. The term currently in common usage, is procedural fairness, which encompasses the principles associated with natural justice, and is considered the counterpart of the American due process legacy.[33] The web of natural justice covers a wide range of judicial and administrative decisions, the 'basic' content of the rules of natural justice require that the authority must act without bias (*nemo judex in causa*) and allow those who are affected by the decision to be heard (*audi alteram partem*).[34] However:

> [t]he concept can be extended to other issues, such as the giving of reasons, the setting of standards, and the issue of fettering. In other words once the issue of procedural fairness is seen to be a general, dynamic principle wider issues arise about the standards of fair treatment and the procedures needed for them.[35]

It is now settled law that the rules are applicable, and must be observed, when the act is an administrative or executive act and not just judicial in character.[36] The rules themselves necessitate 'that the administrative body should act fairly towards those persons who will be affected by their decisions.'[37] This opinion epitomises what has become known as the

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[32] *ibid* at 231. For a critique of Martin's position see Aleinikoff, A., *loc cit.*

[33] See Wade, H.W.R. and Forsyth C.F., *Administrative Law* (Clarendon Press 1994) at 463. By contrast Marshall has advocated that due process is more akin to the rule of law, than natural justice. He advances the proposition that the following are constituent of such principles; fairness, impartiality, independence, equality, openness, rationality, certainty and universality. See Marshall, G., 'Due Process in England' in Pennock , R.and Chapman, J., (eds) *op cit* at 70.

[34] Wade, H.W.R. and Forsyth, C.F., *op cit* at 471-500.

[35] Galligan, D., *op cit* at 186.

[36] *Ridge v Baldwin* [1964] AC 40.

[37] *R v Commission for Racial Equality ex parte Hillingdon LBC* [1982] AC 779.

'duty to act fairly' or the 'acting fairly' doctrine.[38] What significance do these principles of procedural fairness have for protecting asylum seekers from unfair treatment in the determination process?

Before the 1969 Immigration Appeal Act[39] (consolidated in the 1971 Immigration Act) established a right to an appeal prior to any decision to deport an alien, or refuse entry to the United Kingdom,[40] the position was that the Home Secretary was not required to give an alien any such hearing before deportation, and that this state of affairs was not deemed contrary to principles of natural justice.[41] The 1993 AIA Act, and accompanying rules,[42] conferred, for the first time, a *prima facie* entitlement to an in-country right of appeal for all asylum seekers whose claims were refused. It was a central plank of the legislation,[43] and represented 'a considerable strengthening of the rights of asylum seekers in the UK.'[44]

It is not only the primary legislative instruments that contain administrative measures which carry profound implications for the asylum applicant, but the

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[38] See generally Foulkes, D., *Administrative Law* (Butterworths 1995) at 286-87.

[39] The Act implemented the recommendations contained in the *Report of the Committee on Immigration Appeals* (Cmnd 3387 para 84) which concluded that it was:

> wrong and inconsistent with the rule of law that power to take decisions affecting a whole man's future should be vested in officers of the executive, from whose finding there is no appeal.

[40] §§ 15 and 13.

[41] See *R v Inspector of Lemon St. Police Station, ex parte Venicoff* (1920) 3 KB 72, the Home Secretary, acting on an Order in Council, deported an alien without holding a hearing, because it was deemed 'conducive to the public good'. Venicoff argued that this violated principles of natural justice, however despite the magnitudes of the interest at stake, the court disagreed, noting the broad discretion conferred on the Home Secretary in reaching what the court described as an executive decision. In *R v Governor of Brixton Prison, ex parte Soblem* (1963) 2 QB 243, Lord Denning M.R. acknowledged the general rule that a public officer depriving a person of liberty or property must give the person an opportunity to be heard. Expressly refusing to disapprove Venicoff however, he then held that the deportation of aliens was an exception to this rule. In *Schmidt v SoS for Home Affairs* [1969] 2 Ch.149, it was stated that: '[t]he Crown can refuse leave [to enter] without giving any reason' (*ibid* at 168).

[42] Asylum Appeals (Procedure) Rules 1993 (S.I. 1993 No.1661). As amended by the 1996 Asylum and Immigration Act, and accompanying Asylum Appeals (Procedure) Rules 1996 (S.I. 1996 No.2070 (L.5)).

[43] § 8 and sch 2. A development which received cross party support in Parliament during the debates on the Bill (see generally, HC Debs vol 213, cols 21-113, November 2, 1992).

[44] ICCPR, HRC, *Fourth periodic report submitted by the government of the UK of Great Britain and NI*, CCPR/C/95/Add.3, December 19, 1994, at 65, para 300.

accompanying procedural rules too.[45] Indeed it is in the form of such delegated legislation that a number of the most insidious aspects of the recent asylum and immigration reforms reside. During the passage of the 1993 Act, Edward Garnier MP correctly asserted that: '[the] procedures must be clearly subject to the rules of natural justice [...]', however his conclusion that the existing immigration appeal system, and the proposed system 'were well within the rules of natural justice', did not at that time, and still does not accurately reflect 'the situation on the ground'. Although an inspection of the primary legislation reveals that the minimum requirements of natural justice, a hearing and the absence of bias, appear to be satisfied, this fulfilment of natural justice is more apparent than real, due to the 'small print'. The intricacies included in the schedules to the legislation, and the application of the procedural rules, arguably, empties the right to a fair hearing of any content rendering it nugatory. In short, the duty to act fairly is circumvented by procedural requirements that are not in accordance with the 'spirit' of natural justice. Ironically, prior to the enactment of the 1993 AIAA, the Standing Committee considered a number of extra provisions which would have ensured that when the procedural rules were made they would have taken into account 'matters [...] vital to the conduct and determination of an appeal'.[46] The suggestions were dismissed on the grounds that it was 'not appropriate to include the items in the procedure rules'.[47] It begs the question what are appropriate procedural rules, only those which undermine fairness?

A thorough examination of the impact of the truncated procedures for the determination of asylum applications and appeals contained in the 1993 AIAA will be

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[45] Procedural rules are made pursuant to powers conferred on the Lord Chancellor (as a consequence of the Transfer of Functions (Immigration Appeals) Order 1987 S.I. 1987/465) under § 22 and para 25 of sch 2 of the 1971 Immigration Act.

[46] Standing Committee A, December 15, 1992, col 560. The procedural amendments suggested included, *inter alia*:

> [T]he setting of time limits giving appellants adequate time in which to bring an effective appeal; issuing of summonses compelling the maker of the decision appealed against or his representative to appear and give evidence before the appellate authorities; appellants obtaining effective legal advice and representation free of charge; detained appellants being brought before the appellate authority to give evidence; granting of a hearing on any question of extending the time limit in the bringing of an appeal; and providing of translators in a language accessible to the appellant of the documents relied on in the appeal.

*ibid* at cols 559-560.

[47] *ibid* col 561 (Charles Wardle Under Secretary of State for the Home Department).

conducted in chapter five. Suffice to say that two appeals procedures were established. It established a separate fast-track procedure for unfounded claims, those certified by the Secretary of State as without foundation. For certified claims the obvious effect of this special appeals procedure was the removal of the right to appeal to the Immigration Appeals Tribunal (IAT) on a point of law.[48] However, the pernicious aspect of the procedural changes was contained in the immigration appeals rules. For claims deemed manifestly unfounded and processed in the fast-track appeals procedure, following notification of refusal there is just two days to lodge the appeal in relation to port refusals, deportation and illegal entry cases, where refusal is served personally on the applicant.[49] This may be contrasted with the ten day period for non-certified cases following notification of refusal of the asylum application.[50] Special adjudicators, having received the requisite papers are then required to determine the appeal within seven days,[51] as opposed to forty-two days for appeals that are not within the truncated procedure.[52] These measures were subjected to strident criticism during the parliamentary debates on the Bill:

> Someone who enters at a port has two days within which to apply and five days within which to gather and present the necessary evidence for the application to succeed, including medical evidence making a total of seven days. That cannot be said to be a reasonable application of the rules of natural justice [...] I challenge any reasonably minded person to say that, when an applicant may have arrived in a state of desperation, shock or extreme distress seven days is a fair time limit [...].[53]

The 1996 AIA curtailed appeal rights further for some categories of claimant. In particular in respect of applicants emanating from 'safe third countries', the appeal right under section

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[48] Sch. 2(5) sub-para 5.

[49] Rule 5(2). The time limit remains unaltered by the 1996 Rules r. 5(2)

[50] As amended by the Asylum Appeals (Procedure) Rules (S.I.1996 No.2070 (L.5) r. 5(1). The period is now seven days after receiving notice of the decision. The Lord Chancellor's Department is engaged in a process of consultation at present prior to publication of draft procedural rules which will accompany the Immigration and Asylum Act 1999 (Lord Chancellor's Department, *Immigration and Asylum Bill - Immigration Appellate Authorities: Appeal Procedure Rules*, October 1999).

[51] Rule 9(2). Under the 1996 Rules the period is amended to ten days.

[52] The time-frame remains constant under the 1996 Rules.

[53] HC Debs, vol 213, col 42, November 2, 1992 (Blair, T.). The 1993 Act was also labeled 'a travesty of natural justice' (Khabra, P., HC Debs, vol 213, col 78, November 2, 1992). Given statements of this nature by Opposition MPs at the time, it is disturbing, to note that such procedural requirements are unlikely to be substantially changed under the terms of the 1999 Act and accompanying Procedural Rules. (See Lord Chancellor's Department report, *supra*).

8(1) of the 1993 Act on the ground that removal would be contrary to the UK's obligations under the Convention, was substantially altered. The applicant may only appeal on the strictly limited basis that the grounds mentioned in section 2(2) of the Act[54] are not fulfilled at the time the Secretary of State has certified the applicant as arriving from a 'safe third country'. Only then, if the certificate is set aside, may the applicant submit an appeal on Convention grounds. The restrictions on appeal are compounded by the condition in section 3(2) that prohibits an applicant who is to be sent to a Member State of the European Union, or to a country designated by the Home Secretary, from pursuing an appeal under section 2 whilst remaining in the United Kingdom. The appeal has no suspensive effect on deportation.[55] 'The effect of these measures is to 'effectively insulate the government from inquiry into the rightness of its decisions.'[56]

The appeal rules for 'safe third country' claims were chastised as 'Kafkaesque', and the then shadow Secretary of State for the Home Department, referred to the: '[m]ockery of justice... created by the new regime for so-called safe third country appeals.' He declared that: '[t]he final injustice is that the application can be made only from outside the UK'.[57] He eloquently characterised the situation when he described: '[t]he rights of appeal for safe third country cases [as] so *elusive* that they will almost certainly put Britain in

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[54] The conditions are:

> (a) that the person is not a national or citizen of the country or territory to which he is being sent;
>
> (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group or political opinion; and
>
> (c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.

[55] The applicant does 'enjoy' a longer period to submit an appeal from abroad - 28 days as opposed to the general time limit of seven days under the 1996 Asylum Appeals (Procedure) Rules, or two days for claims certified as without foundation.

[56] Leigh L. and Beyani C., *Asylum and Immigration Act 1996* (Blackstones 1996) at 13.

[57] HC Debs, vol 268, col 719, December 11, 1995. The IAA 1999 § 72, preserves the bar on in-country appeals for applicants deemed to have arrived form safe countries.

> The hallmark of a decision that can be described as 'Kafkaesque' is the participants befuddlement. They only know that they seem to be involved in an important decision concerning their lives. But they have no idea what is relevant to the decision, who will make it, and, in the extreme case, what precisely the decision is about. Perhaps the only thing that becomes clear in such a process is that if and when a decision is made, the participants will not be given any understandable reasons for it'

Mashaw, J., 'Administrative Due Process; The Quest For A Dignitary Theory' (1981) 61 *Boston University Law Review* 885, .901.

breach of its international obligations.'[58] This description of appeal rights as 'elusive' is apposite, although the right exists, the accompanying legal rules qualify it rendering it too slippery to grasp, and to utilise effectively. One of the stated objectives for the 1996 Act was to strengthen the asylum procedures so that bogus claims and appeals can be dealt with more quickly.[59] It appears nonsensical to assert that the intention is to strengthen procedures, if the means employed to achieve this goal is to weaken the very procedures that are intended to serve asylum claimants. 'It is a misguided principle of the legal system that if the exercise of legal rights is causing administrative inconvenience the solution is to remove the right.'[60]

In the wake of the procedural hurdles outlined above, it is therefore disappointing to discover that the immigration appellate bodies have, generally been either unwilling, or unable, to be assertive in their role as the arbiters of what fairness requires. In *R v An Adjudicator, Mr R.G.Care ex parte Secretary of State for the Home Department*,[61] it was determined that

> [t]he appellate authority's powers to control the procedure relating to appeals before them were limited to those powers vested in them by statute or subordinate legislation. They had no powers analogous to the inherent powers of the High Court to control its procedure *nor could they exercise their powers in the interest of fairness*.

The adjudicator was deemed to have acted outside of the powers granted to him, and whilst the procedural rules enabled a witness to be summoned, there was no corresponding rule in relation to the discovery of documents. Similarly in the case of *Secretary of State for the Home Department v Oladehinde*,[62] the IAT allowed an appeal against the decision of an adjudicator who determined that the Secretary of State had acted unfairly and not in accordance with law, when serving an intention to deport notice on the respondent. The

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[58] HC Debs, vol 268, col 720, December 11, 1995.

[59] See Howard, M., HC Debs, vol 268, col 699, December 11, 1995.

[60] Blair, T., HC Debs, vol 213, col 43, November 2, 1995. The force of this statement is not lessened by reason of the fact that it was made in relation to the removal of appeal rights for visitors and students under the 1993 Act.

[61] [1989] Imm AR 423.

[62] [1989] Imm AR 461.

IAT held that: 'The 1988 Act... does not empower an adjudicator to allow an appeal on the grounds of "unfairness" or "unreasonableness" [since these] are not "grounds of appeal" applicable to the case.' The Court of Appeal in *IAT v Hussain*[63] considered the question whether the IAT was entitled to reverse an adjudicator's decision without hearing witnesses. At first instance the court concluded that the Tribunal had not been wrong on *Wednesbury* principles of unreasonableness, or wrong at all, but considered that the decision of the Tribunal should be quashed and a re-hearing of the case, *in order to serve the interests of justice*. The Court of Appeal, in setting aside, that decision held that there was no procedural unfairness, and that a decision of the Tribunal could only be quashed where there had been an error of law. It has also been decided that there is no duty as a matter of natural justice, on the part of the Adjudicator to point out discrepancies between the accounts given at interview and that given before the adjudicator by the applicant.[64]

It would be misleading however, to convey the impression that the appellate bodies are entirely ineffective as guardians of procedural fairness. For example, it has been established that the IAT acts unfairly if, having been notified in an appeal application that additional grounds would follow, it then proceeds and determines the appeal without waiting for additional grounds of appeal, or alternatively calling for a specified period within which additional grounds must be submitted and postponing any decision until such time lapsed.[65] Moreover, in *ECO, Islamabad v Ishfaq*[66] the IAT determined that it was improper for an Adjudicator to allow an appeal without either party being given the opportunity to put a case to him (the Adjudicator).

It is appropriate to consider why the discussion of natural justice has centred around the exercise of appeal rights in the asylum process. Since '[n]atural justice does not require the provision of a right to appeal',[67] why are the requirements of the duty to act fairly not fully satisified through the initial presentation and examination by immigration

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[63] [1990] Imm AR 51.

[64] *R v IAT ex parte Williams* [1995] Imm AR 518.

[65] *R v IAT ex parte Pollicino* [1989] Imm AR 531.

[66] [1992] Imm AR 289.

[67] Foulkes, D., *op cit* at 320 citing Lord Denning in *Ward v Bradford Corporation* [1972] 70 LGR 27 at 37.

officers, and caseworkers in the Integrated Casework Directorate (ICD).[68] Immigration officers are bound by the principles of procedural fairness: In *Re K(H)*[69] the court recognised that an immigration officer was under the duty to act fairly in respect of decisions taken on whether to admit the child of a Commonwealth citizen.[70] The Court of Appeal has stated that the Secretary of State has a duty to act fairly and promptly upon the case put to him.[71] However as a result of the decision in *R v Secretary of State for the Home Department ex parte Abdi and Gawe*,[72] the equilibrium appears to have been distorted, and inequality legitimised. In this case the need to balance the demands of fairness, with the competing requirement to reduce the perceived pressure on the asylum determination process, arose in the context of whether there was a general duty on the Secretary of State to disclose all the material on which he had relied in certifying a country, as a 'safe third country'. The House of Lords (Lord Slynn dissenting)[73] decided there was no such an obligation on the Secretary of State. Per Lord Mustill: '[i]n the very special context of this abbreviated procedure no such duty [to disclose all material information] can be implied.'[74] In *R v Secretary of State for the Home Department ex parte Butt*,[75] the court was asked to consider whether the applicant's case had been dealt with fairly, where there had been a considerable delay between asylum interviews, and the applicant had not been reminded of replies given at the first interview at the subsequent interview. The court held

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[68] Formerly the Asylum Directorate. The ICD was created in December 1998.

[69] [1967] 2 QB 617.

[70] Where immigration officers were satisfied with the asylum applicant's knowledge of English there was no procedural impropriety or unfairness due to the absence of an interpreter at the interviewer. (*R v SoS for the Home Department ex parte Labiche* [1990] Imm AR 157); However, it is clear that as part of the interviewing process, the interviewer has to be satisfied that the interpreter was saying what the interviewee wanted to say. The court deemed the correct test to be applied in such cases to be: has it been shown that the interpreter is not competent to conduct the interview to the knowledge of the respondents. (*R v Mayor and Burgesses of the London Borough of Tower Hamlets ex parte Begum* [1991] Imm AR 86, If it were self-evident that an interpreter had not been capable of communicating in English the court would overturn any decision based on such interview); In *Mutengu v SoS for the Home Department* [1992] Imm AR 419, the court was faced with determining whether there had been unfairness as a result of the immigration officer failing to offer the applicant an opportunity to seek legal advice before or at the asylum interview. It was held that the immigration officer had no obligation to offer the applicant such an opportunity.

[71] *Ahmed v Secretary of State for the Home Department* [1992] Imm AR 449.

[72] [1996] 1 WLR 298.

[73] 'The current procedure is not such as to enable the special adjudicators fully to perform their task and is calculated to produce unfairness' per Lord Slynn (dissenting), agreeing with Steyn L.J. in the Court of Appeal, [1994] Imm AR 402.

[74] 4 ALL ER 385, at 387.

[75] [1992] Imm AR 534.

that '[i]n any case, and in particular an asylum case, it is required that matters should be dealt with fairly',[76] however there had been no procedural impropriety as a result of the delay between interviews and the failure to remind the applicant of replies given in the previous interview. In *R v Secretary of State for the Home Department ex parte Singh*[77] the court was faced, *inter alia*, with the assertion that the Political Asylum Questionnaire (PAQ) was defective, and this vitiated decisions taken on the basis of replies recorded within.[78] Furthermore, that the Secretary of State had acted contrary to natural justice in not revealing to the applicant all those sources of information on which he relied. It was held that the form of the PAQ could not be criticised. It offered an applicant the opportunity to state whatever he wishes to state. Furthermore, the Secretary of State had no obligation to reveal all the sources of information on which he relied to assess the background, against which he evaluated a claim for asylum. In *R v Secretary of State for the Home Department ex parte Thirukumar and others*[79] it was submitted that the procedures adopted by the Home Office were unfair, the applicants had not had a proper opportunity to put their cases or to correct any possibly material errors of fact on which the Home Secretary had relied. It was decided that the procedures were unfair and applicant's should have been provided with copies of the completed questionnaires so they might, with advisers if necessary consider whether to add or alter anything:

> [It] appears to me that fairness demands that he [the asylum applicant] should be supplied with the completed questionnaire or a copy of it, including the immigration officer's comments or recommendations. His life may well depend upon the outcome of his application. He will in many cases have given his answers after a long flight or when he has not fully recovered, and he should have the opportunity to consider calmly whether there is anything which he should add or alter.[80]

It appears settled that: '[t]here must be fairness in the way that [...] applicants for entry are treated and the circumstances in which their interviews are conducted',[81] so why the

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[76] *ibid* at 536.

[77] [1992] Imm AR 607.

[78] Specifically counsel for the applicant submitted that the expression 'other organisations' in section C of the form limited the scope of representations to be made on behalf of the applicant.

[79] [1989] Imm AR 270.

[80] *ibid* at 282-283.

[81] *R v Secretary of State ex parte Mohan* [1989] Imm AR 436 at 449. However, in *R v Secretary of State for the Home Department ex parte Agbonmenio* [1996] Imm AR 69, the adjudicator was allowed to take

preoccupation with the appeals procedures as integral to the fulfilment of the fairness doctrine? One possible reason which may account for this state of affairs can be located in the parliamentary debates:

> I am worried about fairness. That cannot be achieved by removing rights of appeal or by creating special procedures that will apply solely to asylum matters. There is little confidence in the way in which IO's operate, so the right of appeal is important. [...] A right of appeal is a check on the actions of officials. It is not sufficient to rely on the belief that officials will always be right, they are not.[82]

The ratio in *R v Secretary of State for the Home Department ex parte Sesay*,[83] is also revealing in considering the question of the importance attached to appeals. A case in which it was held that any procedural unfairness arising at the initial interview, arising in this case due to illness on the part of the applicant, did not vitiate subsequent proceedings. Moreover, that the *de novo* hearing before the adjudicator would cure any defect and meet the demands of fairness:

> If there was a want of fairness in the original interview process, the purpose and effect of the hearing offered before the Special Adjudicator was precisely to put at large again all the factual issues to which the applicant might not have done himself justice at interview.[84]

The reach of the fairness tradition in the United Kingdom does not extend to correct procedural inequities in the asylum procedures beyond remedying the most flagrant violations of the duty to act fairly incumbent on the administrative decision makers and judicial bodies.

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into account the record of the interview even when that record was not read over to the applicant and was not signed by the applicant.

[82] HC Debs, vol 268, col 69, December 11, 1995.

[83] [1995] Imm AR 521.

[84] *ibid* at 522.

# Chapter Three

# The Influence of International and Regional Human Rights Law on the Procedural Formalities of the Asylum Determination and Adjudication Process

## 3.1 Introduction

Goodwin-Gill has referred to the 'moral and religious underpinnings'[1] of the customary international law principle of *non-refoulement,* and that from such basic principles we may

> readily infer the necessity for procedures to determine claims, and for remedies for violations, drawing at the same time upon our constitutions, bills of rights, traditions and conceptions of justice.[2]

However, although we should look towards bills of rights and traditions of natural justice, the application of these precepts to asylum seekers, generally, have not been vigorously asserted by the judiciary in the context of immigration and asylum. This judicial deference to the executive has resulted in the susceptibility of domestic asylum administration to counterveiling influences such as political expedience and foreign policy imperatives. Such

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† A version of this chapter appears in (1998) 2(1) *International Journal of Human Rights* 32.

†† All four states studied in the thesis have ratified the ICCPR and recognise the competence of the Human Rights Committee under Article 41, but the UK has not ratified the first Optional Protocol, therefore individual petitions are not possible. The UK does not recognise the competence of the Torture Committee (set up under the auspices of the Convention against Torture, Article 22) to hear individual complaints. However, the UK has ratified the ECHR and recognises the competence of the ECtHR (Article 34). The United States signed the ACHR on June 1, 1997, but has not ratified it as yet. (See UN, Human Rights: International Instruments - *Chart of Ratifications as at 31 December 1997*; OAS, *Basic Documents Pertaining to Human Rights in the Inter-American System* (OAS 1996); and *Council of Europe: Signatories and Ratifications ETS No. 5* <www.coe.fr/tablconv/5t.htm>.

[1] Goodwin-Gill, G., 'Refugees and Human Rights: Challenges for the 1990s' (1990) SPEISS *International Journal of Refugee Law* 29, 33. It is not uncommon for scholars to refer to origins of human rights which are not rooted in positive law. See for example ECRE, 'Fair and Efficient Procedures for Determining Refugee Status: A Proposal' (1991) 3(1) *International Journal of Refugee Law* 112, which draws on both natural law and positive law origins of refugee law:

> procedural standards derive from fundamental respect for the dignity of the individual and from humanitarian obligations undertaken by governments by virtue of their accession to the 1951 Convention and the 1967 Protocol and other relevant international instruments.

[2] Goodwin-Gill, G., *loc cit.*

factors detract from a non-discriminatory, objective adherence to constitutional canons of due process or common law rules of procedural fairness in respect of securing and enforcing minimum standards for dealing with claims for refugee status. International human rights law may be viewed as less obviously anchored in the mire of domestic political preoccupations, and as such embrace standards to which asylum seekers may appeal when the states own legal traditions, conceptions of justice and bills of rights, fail to afford adequate procedural protection to them.

In the absence of a procedural framework for determining asylum applications within the normative structures of refugee law, the discourse of refugee rights must, almost by default, shift to human rights law, a paradigmatic change that Tuitt has recently identified.[3] But are human rights really 'the foundation of freedom, justice, and peace',[4] 'the principal legal and moral indices of how to govern?'[5] To what degree does reality reflect the legal theory? The question to be addressed is to what extent the procedural fairness norms are applied to, inform and influence, in a concretised manner, state practice?

As a consequence of the growth of the legal regime of human rights over the last fifty years, the idea that how a state treats its inhabitants is within its own domestic competence, representing the 'essence of sovereignty', has been washed away according to Henkin.[6] Whilst this characterisation may well be true of general human rights protection, in the asylum and immigration domain, as I have sought to demonstrate in the previous chapter, states still largely assume that such matters are within their exclusive power. Indeed, the fact that states are exercising their sovereignty by granting asylum was given explicit recognition in the form of Article 1(1) of the 1967 United Nations Declaration on Territorial Asylum.[7] Gowland-Debbas has pointed out that

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[3] Tuitt, P., 'Human Rights and Refugees' (1997) 1(2) *The International Journal of Human Rights* 66.

[4] Coles, G., 'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Inquiry' in *Human Rights and the Protection of Refugees Under International Law*, Nash (ed) (Institute for Research on Public Policy 1988) at 217.

[5] Goodwin-Gill, G., *loc cit.*

[6] Henkin, L., 'An Agenda for the Next Century: The Myth and mantra of State Sovereignty' (1994) 35 *Virginia Journal of International Law* 115, 118.

[7] UN GA Resolution 2312 (XXII).

> [i]t is indeed ironical at a time when it has become fashionable to speak of the withering away or erosion of state sovereignty, that we are witnessing a reinforcement of that last bastion of state sovereignty which is the right to decide who to admit and who to expel.[8]

Whilst the 1951 Convention and the 1967 Protocol, have been labeled as the first post-war universal human rights instruments

> refugee law was (and still is) hooked on to traditional concepts of state territorial jurisdiction, ie the sovereign right of states to decide on admission and expulsion of all those not linked by the bonds of nationality.[9]

Perhaps if refugee law was integrated into human rights law, as Henkin has advocated,[10] then the axiomatic principle linking state sovereignty with control over entry, would, be rejected,[11] thus advancing the possibility of removing procedural formalities in asylum matters from the sole jurisdiction of municipal law.[12] Associating refugee law with human rights law is not without its problems.[13] It is beyond the scope of this thesis to address such questions, thus, assuming that those difficulties may be reconciled, what practical effect

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[8] Gowland-Debbas, V., *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1995) x. The author is referring to the panoply of legal, administrative and physical barriers facing refugees seeking asylum. Examples of what Gowland-Debbas has eloquently characterised as '[states] asserting jurisdiction in order to deny jurisdiction and the obligations which flow from it' (*ibid*) are; interdiction at sea, carrier sanctions and the imposition of visa requirements on nationals of designated countries.

[9] *ibid*

[10] Henkin, L., *op. cit* 116. Human rights law and refugee law though both products of the post war era, and notwithstanding the fact the Article 14 of the UDHR declares the right to seek and enjoy asylum, developed separately.

[11] The international community should reject by its refugee law, as it has by its human rights law generally, the notion that states maintain exclusive power over entry and presence in their territory as the very essence of their national sovereignty.

*ibid* at 118.

[12] Indeed Tuitt has characterised 'international human rights norms as being the mechanism wherein the refugees rights can be best protected' and international refugee law as being 'relegated to the sidelines.' (Tuitt, P., *op cit* 66).

[13] The following conflicts have been identified:

> domestic versus international jurisdiction debate; traditional concepts of state sovereignty against humanitarian intervention; tensions between political security and humanitarian concerns; issues of state responsibility where reciprocity does not play its traditional role and the problem of institutional coordination and overlapping mandates.

Gowland-Debbas, V., *op cit* xii.

could international human rights law have upon ensuring fairness throughout the asylum determination process?

### 3.2 The Universal Declaration of Human Rights and International Covenant on Civil and Political Rights

The 1948 UDHR includes the right to emigrate but not the corresponding right to immigrate. Article 13 provides: 'Everyone has the right to leave any country including his own', however Article 14 falls short of establishing a reciprocal right, stating that: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' The difference between Article 14 of the UDHR and the other human rights principles contained in the Declaration, is that the other provisions generally deal with the relation between a state and its nationals, and not those non-nationals who enter within its territory and legal jurisdiction. This fact was addressed by the UN Human Rights Committee (HRC, hereafter)[14] in its considerations of the position of aliens under the 1966 ICCPR.[15] The HRC commented on reports that the universal applicability of the Covenant[16] was being undermined by a failure on the part of state signatories to ensure the rights in the Covenant were respected: '[t]o all individuals within its territory and subject to its jurisdiction'.[17] '[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens',[18] and the assertion that:

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[14] Article 28 of the Covenant provided for the establishment of the Human Rights Committee, and Articles 29-45 delineate the organization and functions of the Committee. It is recognised as: '[t]he principal organ of implementation of the Covenant'. (Robertson, A. and Merrills, J., *Human Rights in the World* (Manchester University Press 1994) 37). There is no mechanism of redress for individual asylum seekers under the 1951 Convention, therefore it is vital that the HRC examines questions relating to asylum seekers in the context of Articles 13 and 14 when considering country reports, submitted by states in fulfillment of their obligations under Article 40.

[15] International Covenant on Civil and Political Rights, Official Records of the Human Rights Committee (ORHRC) (1988/89(II)), thirty-sixth session; General Comment 15(27) *The position of aliens under the covenant,* CCPR/C/21/Rev.1., May 19, 1989 at 300.

[16] ICCPR preamble recognises the: '[i]nherent dignity and [...] the equal and inalienable rights of all members of the human family'.

[17] ICCPR, Article 2(1).

[18] ICCPR, ORHRC, *The position of aliens under the covenant*, at 300 para 2.

> Aliens shall be equal before the courts and tribunals and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of [...] rights and obligations in a suit at law,[19]

ostensibly holds crucial implications for asylum procedures. The rights contained in the Covenant do indeed extend to the asylum determination process itself. The HRC in its reflections on the Canadian procedures for asylum, noted that the 1951 Convention '[s]hould be interpreted in a manner consonant with the obligations under the Covenant and that asylum seekers should enjoy the rights recognised in the Covenant'[20] It was unequivocal in its determination that administrative bodies, such as the various judicatures which deal with immigration or refugee issues, '[w]ere actually judicial bodies to which some, if not all, of the principles set out in Article 14 of the ICCPR, such as the principles of independence and impartiality should apply'.[21] However, the HRC can reflect, comment, and voice its concerns forever and a day, but such endeavours are reduced to mere academic abstraction if the ratification of the ICCPR is flawed.[22] This is the position in respect of the United States. The ICCPR was ratified in 1992 by the United State's Senate and thus, *prima facie*, became the supreme law of the land via the Senate's treaty power. However, because it was ratified as non-self-executing by the Senate,[23] the United State's government may argue that the courts are not bound to apply the Covenant's guarantees on due process, or prohibitions against indefinite detention and should defer to the executive and legislative branches. This situation arose because during the negotiation of the Covenant with the international community and the ratification proceedings in the Senate, State Department officials stated that the domestic law was in complete compliance with the Covenant's prohibitions. The Senate based its ratification of the Covenant upon this assertion, and the international community accepted the non-self-execution of the

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[19] *ibid*, para 7.

[20] ICCPR, ORHRC, (1990/91(I)), Summary record of the fortieth to forty-second session, 1013th meeting; *Periodic report of Canada considered*, October 24, 1990, at 34 para. 19 (Higgins, R.).

[21] ibid. at 35 para 27 (Wako).

[22] United States Constitution, Art VI, § 2.

[23] ICCPR, HRC, *Initial Report of the United States of America*, CCPR/C/81/Add.4, August 24, 1994, at 4 para. 8.

Covenant based on this promise.[24] Schulze has commented that the Senate's declaration of non-self-execution strips the refugees of any international protections, and that the non-self-execution distinction: '[h]as become the favourite tool of a nation wanting to keep up with international mores, but highly reluctant to sacrifice increasingly dwindling sovereignty.'[25] In March 1995 the HRC tackled the failure of the United State's government to ratify the Covenant properly, concerns which met with the response from the government that its laws were already consistent with the basic provisions of the Covenant. In the absence of regulatory or punitive powers residing in the United Nations, or a consensus among the international community that the United States should change its practices to reflect its international legal commitments, asylum seekers remain without a private cause of action to enforce rights under the Covenant.

Moreover, the fourth periodic report of the United Kingdom submitted to the HRC, is arguably indicative of the conviction of states that asylum determination is, irrespective of the conclusions of the HRC, untouched by the requirements of Article 14. The submissions concerning the administrative authority for determining asylum claims were contained in the section concerned with Article 13, which deals with the expulsion of aliens.[26] If human rights law is to have a practical effect on the asylum determination and adjudication process, then it is to provisions like Article 14 relating to an individuals entitlement to a fair and public hearing, and competent independent tribunal, to which attention must necessarily focus. This is because with exception of the American Convention on Human Rights (ACHR),[27] the international human rights instruments do not dilate upon the basic right to seek and enjoy asylum. Indeed even that basic premise is lacking from the European Convention on Human Rights (ECHR).

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[24] See Schulze Jr, L., 'The United State's Detention of Refugees: Evidence of the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights' (1997) 23(2) *New England Journal on Criminal and Civil Confinement* 641 *et seq.*

[25] *ibid* at 655.

[26] ICCPR, HRC, *Fourth Periodic Report of the UK of Great Britain and Northern Ireland*, CCPR/C/95/Add.3, December 19, 1994, at 65 para 300. Although it is perhaps understandable why the system of asylum appeal rights (in this case those established under the 1993 AIAA) was contained in the section referring to expulsion of aliens governed by Article 13, there is an arguable case for including these too in the section of submissions pertaining to Article 14.

[27] Article 22(7) provides that: 'Every person has the right to seek and be granted asylum in a foreign territory'.

### 3.3 The European Convention on Human Rights

Article 6 of the ECHR is the equivalent of Article 14 in the ICCPR, and the extent to which it applies to administrative processes has also been the subject of academic and judicial scrutiny. Article 6(1) provides:

> In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

The procedural standards of the European Convention apply to administrative processes only if civil rights are in issue. It has been suggested that the use of the term 'civil' is simply employed to distinguish civil rights from criminal charges,[28] but: '[t]he difficulty is that the meaning of civil rights has no clear meaning either at international law or in the legal systems of the member states.'[29] Tomuschat has concluded that refugee determination does not concern a 'civil right', and draws support for this conclusion from Article 1 of the Seventh Protocol to the European Convention which deals with legal remedies against expulsion of an alien.[30] With the greatest respect to that author, I find myself unable to agree with that line of reasoning. When an asylum applicant has submitted an affirmative asylum claim for initial consideration, (as opposed to a defensive claim initiated in an effort to stay removal proceedings) their legal status is undetermined, they are neither legal or illegal, but are not in any form of expulsion proceedings.

The potential of Article 6(1) to act as a check on the activities of public bodies, on the determinations of administrative authorities which impact in an ever increasing number

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[28] Farran, S., *The UK Before the European Court of Human Rights* (Blackstone Press 1996) 143.

[29] Galligan, D., *Due Peocess and Fair Procedures* (Oxford University Press 1996) 215. For consideration of the difficulties in defining the phrase 'determination of civil rights and obligations', and its scope in the light of the European jurisprudence, see Jacobs, F. and White, R., *The European Convention on Human Rights* (Clarendon Press 1996) at 128-133.

[30] Tomuschat, C., 'A Right to Asylum in Europe' *Human Rights Law Journal* (1992) 13 (7-8) 257, 263.

of ways on the freedoms of the individual, has been appreciated for some time.[31] However, the desired wish to see Article 6(1) encompass almost endless areas of public administration has not fully transpired.[32] In *Lukka v UK*[33] the applicant contended that he had been denied a fair hearing before a competent jurisdiction in respect of his request for asylum. The European Commission determined, by analogy to an earlier case involving the proceedings by which decisions are reached in deportation cases, that no question of a determination of civil rights or obligations arose. In the earlier deportation case, *Uppal and other v UK*[34] the Commission decided that

> [A] decision as to whether an alien should be allowed to stay in a country is a discretionary act by a public authority. Consequently the decision to expel [...] [was] made in the exercise of the discretionary powers of the immigration authorities.[35]

In *Lukka v UK* the Commission decided

> that similarly, the proceedings by which the UK authorities refused the applicant political asylum were of an administrative, discretionary nature and did not involve the determination of the applicants civil rights and obligations.[36]

I suggest that it is possible to put two different constructions on this decision, and in addition propose several reasons which, arguably, underlie the Commission's decision, all of which merit analysis in order to determine their relative validity.

The Commission referred in its decision to the 'administrative' nature of asylum decision-making. Is it simply the case that Article 6(1) does not encompass instances

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[31] Newton, P., 'A Fair Hearing for "Civil Rights" in the European Convention', (1985) 1(2) *Interights Bulletin* 4.

[32] A list of all those areas to which Article 6(1) is potentially applicable would be almost endless, for example to [...] social security, licenses and professional competence [...] taxation, expropriation, patents, criminal injuries compensation, legal aid, disciplinary matters, land planning, and even such matters as military service and *immigration*.

*ibid* at 5.

[33] 9 EHRR 552.

[34] (No.2) 3 EHRR 391.

[35] *ibid* 398.

[36] 9 EHRR 552, 554.

where a matter is determined by public law through acts of public administration. If this view is correct, then the Commission appears to have overlooked its decision in *Kaplan v UK*,[37] in which it held that Article 6(1) may be applicable in cases where public authorities are legally empowered to take decisions impinging on the rights of private individuals.[38] Moreover, it would be out of step with the general thrust of the jurisprudence of the European Court of Human Rights (ECtHR hereafter) which has adopted an evolutive interpretation to the circumstances in which Article 6(1) applies. This is in order to reflect modern day conditions, embracing, *inter alia*, social security, the grant of expropriation permits, objection to amendments to the building plan for an area, and disciplinary proceedings resulting in suspension from medical practice.[39] This failure to include asylum decision making within the auspices of Article 6(1) is a little curious when one considers that Article 6(1) is commensurate with common law conditions of procedural fairness and the American due process traditions, and both these doctrines embrace standards that are certainly applicable to administrative decisions generally,[40] and to certain aspects of asylum and immigration decision making too.[41] Therefore, why should 'European due process' fail to have any bearing on such decisions? In the social security cases that have come before it,[42] the ECtHR has conducted a balancing exercise, balancing the private interest at stake and the public law features of the decision. The features of public law were *inter alia*, the character of the legislation, and the assumption by the state of responsibility for social protection. Although asylum decision making is like social security adjudication in that it is, *par excellence*, a matter governed by public law, one important difference exists between them. The social security cases concerned domestic, civil rights to benefits, which derived from the fulfilment of entitlement criteria prescribed in legislation. Whereas in cases of asylum there is of course no such civil right legislated for. However, having made that distinction plain, were the ECtHR ever to adopt a similar approach in relation to asylum

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[37] 4 EHRR 64.

[38] *ibid* at 88 para 150.

[39] Jacobs, F. and White, R., *op cit* 131. See also Wadham, J., and Mountfield, H., *Human Rights Act 1998* (Blackstone Press 1999) 78: '[I]n recent years, [...] the Strasbourg institutions [have been] increasingly willing to find a 'civil right' within, or alongside a public law right.'

[40] Within the legal traditions of the United Kingdom see for example *Ridge v Baldwin* [1964] AC 40, and in respect of the United States, see *Mathews v Eldridge* 424 U.S. 319 [1976].

[41] See generally, Chapter 2.

[42] *Feldbrugge v Netherlands* [1986] 8 EHRR 425; and *Deumeland v Germany* [1986] 8 EHRR 448.

cases (the *Lukka* and *Uppal* cases pre-date the Court's balancing test) it would be fascinating to observe whether an individual's private 'interest' in their civil and political right to life, (Article 2 ECHR) or to liberty, (Article 5 ECHR) which might be threatened by deportation to their country of origin, or the individual's right not to be subject to torture, inhuman or degrading treatment or punishment, (Article 3 ECHR), or other forms of persecution, would be outweighed by features of a public law character.[43] In *Chahal v United Kingdom*,[44] the ECtHR conducted a balancing exercise and determined that the fact that Article 3 'enshrines one of the most fundamental values of democratic society',[45] overrode the government's legitimate national interest in protecting their society from terrorist violence.[46] Such a balancing exercise assumes even greater interest when considering that the rights enumerated above have become a direct element of the domestic law of the United Kingdom through the Human Rights Act 1998.[47]

Perhaps it is the absence of a 'civil right' to asylum which is the determinative factor, and which was the principal consideration in the Commission's judgment when deciding that decisions on political asylum do not involve the determination of a civil right. This question is one which I intend to return to shortly, having first explored the possibility of an alternative, but unstated, reason for the Commission's conclusions on the administrative nature of the asylum determination process. This possibility turns on the understanding of the term 'determination'. Although not concerned with asylum and immigration procedures, the approach of the Commission in *Kaplan v UK*,[48] is, in my

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[43] The importance of effective domestic review procedures because of the high stakes involved in asylum decision making, was recognised by the ECtHR in *Vilvarajah et al v United Kingdom* [1991] 14 EHRR 248. In a case concerning the adequacy of judicial review as a remedy for the purposes of Article 13, it said that '[t]he [domestic] courts reviewed asylum decisions with the most anxious scrutiny since an applicants life or liberty might be at stake'. Similarly in *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] 1 ALL ER 940, 956, Lord Templeman stated that 'where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.'

[44] [1997] 23 EHRR 413.

[45] Quoting *Soering v UK* [1989] 11 EHRR 439, at 467 para 88.

[46] [1997] 23 EHRR 413 at 456 para 79.

[47] For a summary of the effects of the Act see, Wadham, J. and Mountfield, H., *op cit* at 3. Particularly the duty placed on public authorities (including immigration officials) contained in § 6.

[48] The case concerned the adequacy of procedures which were followed and were available where the applicant had been declared not to be a fit and proper person to control his company, by the Secretary of State for Trade, acting under powers conferred on him by the Insurance Comapanies Act 1974.

estimation revealing. The rationale for determining that the acts of administrative bodies fall outside the realm of Article 6(1) was based on a distinction between the acts of a body which is engaged in the resolution of a claim or dispute, and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it, and not to resolve a legal claim or dispute. Article 6(1) in the view of the Commission would not apply to the latter even if affecting 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations.[49] Any future reliance on this particular justification[50] as legal precedent for excluding administrative decisions in asylum and immigration affairs from the ambit of Article 6(1) would, I suggest, be mistaken. It would fail to appreciate the nature of administrative decision making in the application of the legal standard relating to refugee status in the 1951 Convention. Officials charged with the administrative responsibility for accepting or rejecting an asylum claim are not simply 'exercising or applying a legal power'. They are determining whether an individual is entitled to asylum, based on the applicant's testimony that they have suffered persecution or torture, or will suffer persecution or torture if returned home. That testimony must be investigated and its credibility resolved, prior to any application of the persecution standard contained in the 1951 Convention. Hence, officials are not simply applying a legal standard to an existing substantive entitlement, officials are examining the very basis of the claim to entitlement and then applying the legal standard. Although there are generally greater evidential and psychological difficulties involved in asylum determination, determining entitlement to social security benefits is, in principle, no different. There is an investigation into the applicant's claim prior to the application of the legal standards.

The second construction that may be placed on the decision in *Lukka v UK* is founded on the Commission's focus on the 'discretionary' character of asylum decision

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[49] 4 EHRR 64 at 88 para 154.

[50] As opposed to arguments based on the fact that: (1) asylum and immigration proceedings are not concerned with considering 'civil rights'; (2) the nature of the grant of asylum is discretionary; (3) the process is concerned with the application of a legal power vested in the administrative body as opposed to the resolution of a claim or dispute; (4) that the lack of any reference to asylum in the ECHR may account for the reluctance of the Commission or Court to apply the due process provisions in the Convention to asylum and immigration determinations; and (5) the ideological setting against which human rights instruments were drafted marginalises, *inter alia*, refugees.

making. It is the absence of an individual 'civil right' to asylum within the domestic law of states that may be advanced as the dominant influence on the decision taken by the Commission. For example, the 1993 AIAA transformed the 1951 Convention into domestic law in the United Kingdom, but the Convention does not contain any rights to asylum. The 1951 Convention imposes an obligation on states to prevent *refoulement*, but no more than that. Asylum seekers are not endowed with any rights themselves, as Henkin has appreciated: '[I]f it [*refoulement*] can be transformed into a right of the individual not to be forced back to the country of repression, it is only that: it is *not* a right of refuge.'[51] Moreover, during the drafting of the UDHR there was no right to immigrate, to complement the right to emigrate, because a right to asylum was regarded as an unacceptable encroachment on states' discretion to admit or refuse entry. The asylum applicant has only the right to seek asylum, and it may even be stretching matters to suggest that the right to seek asylum entails the right to make a claim and have it tested, to present their testimony, and have that testimony adjudicated upon.[52] In Galligan's judgment:

> [i]t is hard to think of good reasons for restricting the due process provisions of the European Convention to civil rights, rather than making them applicable to all legal and administrative processes which affect rights or significant interests.[53]

However, in his opinion, the need to show that civil rights are at issue suggests that it was not meant to be a comprehensive statement of procedural fairness.[54] The decision in *Lukka v UK* is of the utmost significance therefore. Effectively the Commission has disavowed an asylum seeker's right to procedural protection under Article 6 because it is not applicable to cases where discretionary decisions are made by public authorities. Is *Lukka* authority for the proposition that all discretionary decisions arrived at by public authorities are outside the ambit of Article 6, indicative of an approach common to administrative decisions which are wholly discretionary? Or is the decision of a strictly limited nature - applicable only to

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[51] Henkin, L., *op cit* 117.

[52] For a detailed discussion of the nature of the rights of asylum seekers see Chapter 4.

[53] Galligan, D., *loc cit*

[54] 'The result is that the Convention [...] provides inadequate guidance on procedural matters in the administrative field' (*ibid* at 222). Galligan's conclusion that Article 6(1) is a limited concept was identified by the dissenting judicial opinions in *Feldbrugge v Netherlands* (1986) 8 EHRR 425 at 439 para 4.

asylum and immigration decisions? It is possible to envisage a problematical situation arising in the context of social security for example. One wonders what position the European Commission or Court would adopt if an applicant from the United Kingdom alleged that the procedural arrangements for determining the distribution of urgent needs payments paid out of the Social Fund, were unfair and violated Article 6.

In order to meet the needs of individuals facing particular financial difficulties, the Social Security Act (SSA) 1986 provided for a system whereby specialist officers were employed to make discretionary decisions with a minimum of formality. The scheme was designed to avoid legalism and to control expenditure by the setting of a fixed budget.[55] Decisions in respect of the discretionary regulations are arrived at by Social Fund Officers (SFOs) and are subject to an internal review only. SFOs are constrained by: the legislation, any general directions issued by the Secretary of State, and any general guidance issued by the Secretary of State or by an SFO nominated by him to provide general guidance for a particular area. In respect of claims made on the Social Fund, SFOs are constrained by legislative requirements (SSA 1986 § 33(9)) but those requirements merely provide a framework which guides the exercise of discretion, and claimants have no right flowing from the SSA 1986 in respect of monies available from the Social Fund. This fact distinguishes this hypothetical case involving the Social Fund from the case of *Feldbrugge v Netherlands*.[56] In *Feldbrugge* the court determined that the applicant

> was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a *right* flowing from specific rules laid down by legislation in force.[57]

The Court stressed that 'only the character of the right at issue is relevant'.[58] The decision in *Feldbrugge v Netherlands*[59] cannot be advanced as supporting evidence for the assertion

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[55] The only non-discretionary provisions relate to the provisions to meet maternity and funeral expenses and cold weather payments.

[56] [1986] 8 EHRR 425.

[57] *Feldbrugge v Netherlands* at 434 para 37.

[58] *ibid* at 421 para 26.

[59] See also *Deumeland v Germany* [1986] 8 EHRR 448.

that all categories of welfare benefits available under systems of social security fall within the ambit of 6(1). One may state with any certainty only that the Court will examine each case, each category of benefits, one at a time adopting the balancing test. Hence, an application brought under Article 6 contending that the procedures established for determining claims made under the Social Fund were unlawful, might well fail under the balancing test because the SSA creates no rights for the individual to entitlement.

The importance attached by the majority of the Court in *Feldbrugge v Netherlands* to economic rights, to the private individuals means of subsistence has been echoed in a number of domestic cases in the United Kingdom. The courts have thwarted successive efforts by the previous government to exclude certain categories of asylum seekers from entitlement to income support payments and public housing.[60] The majority of the Court of Appeal in *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*[61] derived rights to welfare benefits from; 'the rights implicit in the 1993 [AIA] Act',[62] and, arguably, the right to life enshrined in international law. The rights contained in the 1993 Act provided; for determination procedures, afforded appeal rights to all categories of asylum seeker and encompassed those rights contained in the 1951 Convention - the right to protection from *refoulement*. Although the right to life was not referred to explicitly, there seems little doubt that that axiomatic principle was within the contemplation of the judges. Simon Brown L.J. stated that

> the 1996 regulations necessarily contemplate for some a life so destitute that, to my mind, no civilised nation can tolerate it. So basic are the human rights here at issue, that it cannot be nessary to resort to the Convention for the Protection of Human Rights and Fundamental Freedoms to take note of their violation.[63]

Similarly Waite L.J. asserted that the effect of the regulations would be to

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[60] Social Security (Persons From Abroad) Regulations 1996, as amended by the 1996 AIA § 9 and § 11. Those who did not seek asylum immediately on arrival in the United Kingdom and those whose initial claim had been rejected by the Home Secretary and were appealing against the refusal were affected.

[61] [1996] 4 All ER 385.

[62] *ibid* at 402.

[63] *ibid* at 401.

> deprive a very large number of asylum seekers of the basic means of sustaining life itself [thus] rendering their ostensible statutory right to a proper consideration of their claims in this country valueless in practice.[64]

After the government restored the effect of the 1996 regulations through primary legislation in the form of section 11 of the 1996 AIA, and limited entitlement to housing and accommodation and assistance through section 9,[65] the policy was frustrated by the decision in *R v Hammersmith LBC and Others, ex parte M and Others*,[66] where it was held that asylum seekers deprived of benefits were potentially entitled to the benefit of relief under section 21(1)(a) of the 1948 National Assistance Act. The court opined that if it really was parliament's wish that no assistance should be available to classes of asylum seekers it would have to say so: '[b]ut if it did, it would almost certainly put itself in breach of the European Convention of Human Rights and of the Geneva Convention'. This decision was upheld in the Court of Appeal where Lord Woolf stated that

> [T]o their lack of food and accommodation was to be added their inability to speak the language, their ignorance of Britain and the fact that they had been subject to the stress of coming to this country in circumstances which at least involved their contending to be refugees.

Returning to the thorny problem regarding the absence of a civil right to asylum as a rationale for the denial of the procedural protections enshrined in Article 6. It is possible to claim by analogy to the arguments advanced on behalf of the appellants in *R v Secretary of State for Social Security, ex parte JCWI,* that just as the right of access to refugee determination procedures is fundamental to the protection granted by the 1951 Convention, similarly, it is equally fundamental that basic standards of fairness are observed within those procedures themselves. If it is possible to derive rights to basic means of subsistence from the right of asylum seekers to claim refugee status (implicit from the provisions in the AIAA), it seems to me to be a logical step, rather than a leap of faith, to argue that basic due process rights may be derived from that statutory right too.

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[64] *ibid* at 402.

[65] Those classes of individuals to whom housing may be allocated are designated in the Housing Accommodation and Homelessness (Persons subject to Immigration Control) Order 1996 (SI 1996 No. 1982).

[66] [1996] *The Times* October 10 QB.

### 3.3.1 *Lukka v UK - An Example of Result-Oriented Decision-Making?*

In addition, there are, arguably, a number of other overarching influences which may have pervaded the thinking behind the Commission's determination in *Lukka v UK*. Firstly, it is conceivable that the absence of a direct right to asylum, or even a limited right to seek asylum in the ECHR, may have accounted for the reluctance of the Commission to apply the due process provisions in the Convention to asylum and immigration decisions.[67] The difficulties presented by the use of rights based language blights the applicability of Article 14 of the procedural protections in the ICCPR as well.

Secondly, the Commission may have been wary of the historical origin of the institution of political asylum, rooted as it was in the prerogative of the state - a privilege to bestowed on individuals. To be dismissive of the conviction of states that absolute control over immigration is inextricably linked to sovereignty, 'as a powerful expression of the Nation's identity and autonomy',[68] might be to jeopardise state's voluntary support for the regional system of human rights protection and thus the cohesion of the system itself. The practical concern of maintaining unity among states for human rights protection, may have resulted in the Commission's reluctance to resolve the dispute concerning the applicability of rights under Article 6(1) in favour of the applicants in *Lukka* and *Uppal*. Explicit reliance by the European Commission on an argument predicated on the notion that Article 6(1) is excluded from disputes arising between an individual and the state acting in its sovereign capacity was not possible, because such a contention was rejected by the ECtHR in *Konig v Germany*.[69] The court held that even where the state had acted in its sovereign capacity that fact was not conclusive, only the character of the right at issue was relevant. Nevertheless, perhaps it was the inroads into popular political conceptions of sovereignty which a decision to enhance procedural rights for asylum seekers would have signalled, that

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[67] The ECtHR noted in *Vilvarajah v UK* that: '[t]he right to political asylum is not contained in either the Convention or its Protocols' (14 EHRR 248 para 102).

[68] Schuck, P., 'The Transformation of Immigration Law' (1984) 84(1) *Columbia Law Review* 1, 6.

[69] [1979] 2 EHRR 170 at 193-194 para 90.

resulted in the unwillingness of the Commission to extend procedural protection to asylum seekers. It is reasonable to surmise that the decisions reached in *Lukka* and *Uppal* may have arisen as a consequence of the adjudicatory bodies balancing 'the protection of human rights in [the] individual cases against the potential long-term consequences of their decisions',[70] and resolving that the external demands of preserving political unity overrode the individual rights asserted. Garrity-Rokous and Brescia have argued that all legal structures occasionally have to suspend or subordinate the protection of a right for systemic reasons, but that being the case, it is of the utmost importance that such subordination occur in a principled and open fashion.[71] If the European Commission wished to exclude asylum seekers from the due process guarantees provided in Article 6(1) of the ECHR for reasons of political expedience, it should have done so explicitly.

Thirdly, and not unrelated to the last point, is the fact that where the ECtHR has adopted an evolutive approach to the meaning of Convention rights, it has taken notice of the evolution of law and practice in other Member States of the Council of Europe. For example, in *Marckx v Belgium*[72] in determining that the legal differences between unmarried mothers and children born out of wedlock, and married mothers and legitimate children, violated Articles 8 and 14, the court recognised the strides made towards greater equality of treatment in other Member States. At present the shared ethos among European states, reflected in contemporary law and practice, is that asylum seekers are a haunting spectre threatening the labour and welfare markets of Europe, and that this perceived threat must be tightly regulated. Thus, recourse to the shared values and practices of Europe would provide the ECtHR with no objective empirical evidence with which to inform an expansive interpretation of Article 6(1). If anything, those shared opinions and beliefs are regressive by comparison to previously held convictions. Accordingly, a necessary precursor to any dynamic interpretation of Article 6(1) will be attitudinal changes within the democratic societies of the Council of Europe. As a consequence of the association of asylum seekers with illegal immigrants, which carries

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[70] Garrity-Rokous G. and Brescia, R., 'Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals' (1993) 18(2) *Yale Journal of International Law* 559, 562.

[71] *ibid* at 565.

[72] [1979] 2 EHRR 330.

with it connotations of non-compliance with law and criminality, asylum seekers have been the subject of moral opprobrium in Western Europe. Increasing intolerance of their presence is the prevailing philosophy, as opposed to thoughts of concern regarding their legal treatment. This rather gloomy conclusion may be tempered by recognising that the moral precepts of a society or community can change, and this is illustrated by the decision of the ECtHR in *Dudgeon v UK*[73]. The court determined that the criminal laws in Northern Ireland that proscribed homosexual activity, violated the applicant's right to respect for private life enshrined in Article 8. Decades earlier similar complaints from male homosexuals were dismissed as not even disclosing a *prima facie* case of violation of the Convention.[74] It is to be hoped that a corresponding sea change of opinion and legal processes will occur in European states regarding the treatment of asylum seekers.

Fourthly, it is arguable that the failure to extend 'European' due process protection to asylum and immigration decisions could simply be attributable to the narrow conceptualisation of the ambit of Article 6 outlined above. However, it may be indicative of a wider problem concerning the universal applicability of human rights standards. Perhaps this disenfranchisement from universal human rights norms, this construction of human rights in terms which marginalises asylum seekers and limits the procedural protection contained in the due process provision should not surprise us. As Tuitt has articulated, asylum seekers are among a group including women, children and gays who are denied fundamental human rights.[75] It is a truism that before one can talk about human rights one must first ask the question: Which humans? Who constitutes a human within the meaning of human rights discourse is mirrors the powerful elite that establishes human rights normative systems and structures. Human rights ideology whilst purporting to be universal

> [i]s concretised in formal positive rules which [are] positioned according to the 'conceptual opposites' of woman, child, alien, gay, - that is to say, 'man', 'adult', 'national', 'heterosexual.' And these oppositions, so long as they remain

[73] [1981] 4 EHRR 149.

[74] Mahoney, P., 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11(2) *Human Rights Law Journal* 57, 62.

[75] See Tuitt, P., *op cit* at 66-80.

> oppositions, stand in the way of the discourse being universal - that is, free from ideology.[76]

Therefore, the fact that the procedural protection afforded to asylum seekers is qualitatively inferior to that which citizens expect when they are subject to an administrative decision, is symbolic of the limited nature of human rights. The interpretation of Article 6 by the European Commission in *Lukka v UK* perpetuated those limitations.

Thus, the current state of affairs for asylum seekers under the ECHR, is that they lack procedural protection at the outset because of the absence of any general requirement under Article 6(1) specifying that a hearing should be provided at a primary decision-making level.[77] For individuals refused asylum and facing expulsion there is no right to a public hearing within a reasonable time[78] by an independent tribunal.[79] It is the *general* position that the terms of the provision may be satisfied by a suitable appeals process, although an appeal is not an essential element of Article 6(1).[80]

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[76] *ibid* at 77.

[77] See *Albert and Le Compte* [1983] 5 EHRR para 29; *Brigandi v Italy* [1991] Series A No.7; *Editions Periscope* [1992] Series A No.234; and *R v France* [1992], Series A No.236. It seems incongruous that due process should apply to the appeals procedures, the tip of the procedural iceberg, and not to primary decision-making which is the bulk of the decision-making iceberg. Particularly when two recent studies have concluded that those who make the mass of primary decisions are ignorant of the most elementary legal principles. (Baldwin, J., Wikeley, N. and Young, R., *Judging Social Security* (Clarendon Press Oxford 1993); and Loveland, I., *Housing Homeless Persons* (Clarendon Press Oxford 1995)).

[78] What constitutes a reasonable time in the context of pursuing an appeal is not settled, but the ECtHR has considered the reasonableness of a six year period of detention during the pursuance of deportation proceedings in *Chahal v United Kingdom* [1997] 23 EHRR 413. It held that a period exceeding six years was not unreasonable or excessive, because of the 'serious and weighty nature' of the case, and that it was 'neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily' (*ibid* at 465-66 para 117). However, the Court did state that:

> the absence of an adequate opportunity to test the lawfulness of the decision to detain [was] all the more significant given that Mr Chahal [had] been undoubtedly deprived of his liberty for a length of time which is bound to give rise to serious concern.

*ibid* 489 para 132. Consequently it found a violation of Article 5(4).

[79] In the course of its judgement in *Vilvarajah et al v United Kingdom* [1991] 14 EHRR 248, the ECtHR indicated that an effective remedy entails allowing a superior court to review and overturn a decision on the asylum seekers case.

[80] *Belgian Linguistic Case* [1968] 1 EHRR 252.

> The process by which rights are determined, taken as a whole, must satisfy due process standards. The relationship between primary and appeal processes is governed by adequacy: if the standards are not met at the primary level, an appeal procedure should be available to make up the loss.[81]

Clark has advanced the proposition that some combination of hearings and appeals must always constitute an effective remedy.[82] The content of that combination remains unclear in asylum status determination.

### 3.4 American Convention on Human Rights

Article 8 of the ACHR would, unlike the correlative provisions in the ICCPR and ECHR, appear to leave little margin for argument. The text goes farther than the other instruments by referring to:

> the right to a fair hearing, with due guarantees, and within a reasonable time, by a competent, independent and impartial tribunal [...] for the determination of his rights and obligations of a civil, fiscal or *any other nature*.

This would seem to preclude any debate about the provisions applicability to asylum procedures. Moreover, Article 22(7) guaranteeing the right to seek *and* be granted asylum in a foreign territory, dilates upon the basic right to seek asylum contained in Article 14 UDHR, that, it should be stressed, is not in either the ICCPR or ECHR in any form. The ACHR theoretically provides the framework for a more comprehensive system of international procedural protection for asylum seekers than exists under other international accords.[83]

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[81] *Albert and Le Compte v Belgium* [1983] 5 EHRR 533.

[82] Clark, T., 'Human Rights and Expulsion: Giving Content to the Concept of Asylum (1992) 4(2) *International Journal of Refugee Law* 189, 200.

[83] Although Article 22(6) requires that an alien who is lawfully within the territory of a host state may only be expelled from it pursuant to a decision reached in accordance with law, it says nothing about the right to appeal such a decision. It is arguable that the language employed in Article 8 regarding the determination of rights and obligations '[o]f any other nature', has the potential to be interpreted as applying to the primary decision-making level.

> [However] whilst the major challenges confronting the European system are epitomised by issues such as the length of pre-trial detention and the implications of the right to privacy. [...] By contrast states of emergency have been common in Latin America, the domestic judiciary have often been extremely weak or corrupt, and large-scale practices involving torture, disappearances and executions have not been uncommon.[84]

Since both the Inter-American Commission and the Inter-American Court of Human Rights have been principally concerned with addressing gross, systematic violations of human rights, rather than individual complaints, there is an understandable dearth of jurisprudence on the ramifications of Article 8. This inhibits systematic appraisal of the provision's worth to asylum seekers.[85]

### 3.5 Procedural Fairness and Administrative Detention

Although the effect of Article 9 of the 1951 Geneva Convention is to explicitly acknowledge that states retain the power to limit the movement of refugees, for example, in exceptional circumstances or in the interests of national security, deprivation of liberty impedes and undermines the operation of accurate, fair and efficient procedures for the determination of asylum applications.[86] For example, detention can physically interfere with the provision of legal advice to an asylum seeker, may create an intimidating atmosphere for persons undergoing the interview process, lead to asylum seekers abandoning their claims or from pursuing appeals,[87] and can affect 'detainees psychological condition and ability to present cases'.[88] The practice of detention for immigration

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[84] Steiner, H. and Alston, P., *International Human Rights in Context* (Clarendon Press 1996) 641.

[85] See Davidson, S., The Inter-American Human Rights System (Dartmouth 1997) at 288-292.

[86] See Helton, A., 'The Legality of Detaining Refugees in the United States (1986) 14 *Review of Law and Social Change* 353; Bhaba, C., 'Uses and Abuse of Detention in US Asylum Policy' (1992) 6(4) *Immigration and Nationality Law and Practitice* 117; Goodwin-Gill, G., 'International Law and the Detention of Refugees and Asylum Seekers' *International Migration Review* 20(2) 193; and Asylum Rights Campaign and Churches Commission for Racial Justice, *Why Detention? - Report of a conference held on 6th November 1996* (Sumner Type 1997).

[87] Prolonged detention may result in violation of the principle of *non-refoulement*, because of asylum applicants abandoning claims rather than remaining in incarceration.

[88] Helton, A., *op cit* 365. Lengthy periods of detention have triggered numerous suicide attempts and hunger strikes. In the United Kingdom between 1987 and 1996 three people hanged themselves and one set fire to himself whilst in detention; See also Pougourides, C., *A Second Exile: The Mental*

purposes was the subject of one of the UNHCR's Executive Committee recommendations, which opined that: '[i]n view of the hardship which it involves, detention should normally be avoided'.[89] Freedom from arbitrary detention is contained within a number of human rights instruments, which unlike the uncertainty surrounding Article 14 ICCPR and Article 6 ECHR, is a universal human right which is certainly applicable to asylum seekers. Article 9(1) of the ICCPR provides that

> [N]o one shall be subjected to arbitrary arrest or detention. [...] No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as established by law.[90]

Article 7 of the ACHR and its regional counterpart in the ECHR also aim to subject arrest and detention to the rule of law.[91]

Reference to the importance of the procedural rights contained in Article 9(1) ICCPR for those subject to detention was raised in the standing committee which considered the 1993 AIAA.

> It is important to emphasise the phrase 'by law', which does not mean procedures established by administrative convenience or by the decision of some immigration officer or administrative adjudicator. Testing the legality of detention in court in the UK is denied.[92]

These concerns surrounding the lawfulness of the administrative arrangements for detention, and the effectiveness of the immigration advisory panel, utilised to review the decision and prevent arbitrariness, faced the ECtHR in *Chahal v United Kingdom*.[93] The

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*Health Implications of Detention of Asylum Seekers in the United Kingdom, Birmingham* (Northern Birmingham Mental Health Trust 1996).

[89] Para. (b) Conclusion No.44 (XXXVII) 1986 *Detention of Refugees and Asylum Seekers*.

[90] Freedom from arbitrary detention also requires that it must be

> [r]eviewed as to its legality and necessity, according to the standard of what is reasonable and necessary in a democratic society. Arbitrary embraces not only what is illegal, but also what is unjust.

Goodwin-Gill, G., *The Refugee in International Law* (Clarendon Press 1996) 248.

[91] Article 5(1).

[92] Standing Committee A (1992-93) col. 13, November 10, 1992, (Madden, M.).

[93] [1997] 23 EHRR 413.

court held that the detention of a Sikh separatist leader was lawful, and effected 'in accordance with a procedure prescribed by law',[94] that the executive had not acted arbitrarily in insisting on his continued detention, and that there were sufficient guarantees against the arbitrary deprivation of his liberty, therefore Article 5(1) was complied with.[95]

The ICCPR, ACHR and ECHR also contain similar guarantees regarding the need for legal proceedings to check the propriety of the decision to detain. Article 5(4) of the ECHR states that:

> [E]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[96]

In *Chahal v United Kingdom* the court considered whether, as the government of the day believed,[97] the detention of asylum seekers under the 1971 Immigration Act did conform with the ECHR. It was unanimously held that the detention for deportation purposes for a period of over six years dating from August 16, 1990, although falling within the meaning of Article 5(1)(f), violated Article 5(4).[98] Article 5(4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law. [99] However, neither the proceedings for habeas corpus or judicial review of the decision to detain Mr Chahal before the domestic courts, or

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[94] *ibid* at 466-467 at paras 119 and 122

[95] *ibid* at para 123.

[96] See ICCPR Article 9(4), and ACHR Article 7(6). In addition there are the principles and standards regarding the detention of asylum seekers formulated by the Executive Committee (UNHCR Executive Committee Conclusion No.44 (XXXVII)).

[97] HL Debs vol 573 col 465, June 20, 1996 (Baroness Blatch).

[98] [B]ecause national security was involved the domestic courts were not in a position to review whether the decision to detain Mr Chahal and keep him in detention were justified on national security grounds. Furthermore, although the procedures before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed, the panel could not be considered as a 'court' within the meaning of Article 5(4).

[1997] 23 EHRR 413 at 419.

[99] *ibid* at 418.

the advisory panel procedure satisfied the requirements of Article 5(4).[100] In response to the deficiencies identified in the ECtHR judgment in *Chahal v UK*, the Special Immigration Appeals Commission Act 1997 was enacted. This provides for a more formalised appeal procedure where a decision is taken to detain; either, in the interests of national security, or following a refusal of leave to enter, or pursuant to deportation proceedings. Where the interests of national security have traditionally overridden the requirements of procedural fairness,[101] in principle at least, this may be considered as a significant inroad into an area which has long been considered as the most sacrosanct within immigration control which is, *a priori*, within the exclusive domain of states. However, the Special Immigration Appeals Act is a disappointment in that it enables rules to be made for appeal proceedings to be heard without full particulars being given to the appellant and without the presence of either the appellant or their legal representative, nor is it clear that the decisions of the Commission will be binding on the Home Secretary.

### 3.6 Conclusion

Goodwin-Gill in his seminal work *The Refugee in International Law* has commented that '[a] refugee enjoys fundamental human rights common to citizens and foreign nationals.'[102] Whilst this may be true in general, it is unresolved in respect of the norms of procedural protection prescribed in Article 14 (ICCPR) and Article 6 (ECHR).[103] For the most part the juridical link between asylum seekers and the procedural provisions in international law,

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[100] For reservations regarding the utility of the habeas corpus mechanism see *Cell Culture: The Detention and Imprisonment of Asylum Seekers in the United Kingdom* (Amnesty International 1996) at 23-25.

[101] Previously determining whether to deport an individual in the interests of national security was considered a function that the Court of Appeal deemed to be within 'the exclusive responsibility of the Executive [...] confined only by the requirement that he [the SoS] should act in good faith' (*R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890). In respect of the non-statutory panel established by the Secretary of State to advise him on such cases, 'the three wise men', Lord Donaldson stated that the courts have a supervisory function, 'in so far as it may be alleged that it has acted unfairly, taking account of the fact that its procedures must necessarily be tailored to the unique nature of the subject matter of its remit' (*ibid* at 902). See also *R v Secretary of State for Home Affairs ex parte Hosenball* [1977] 1 WLR 766.

[102] Goodwin-Gill, G., *Refugee in International Law* (Clarendon Press 1996) 234.

[103] Protection provided for in the text of the ACHR is, theoretically, of greater use to asylum seekers.

seems at best tenuous. International law recognises that an asylum seeker's human rights should be protected after entry, but the applicability of the law relating to the manner in which entry is initially gained, and subsequently secured, is ambiguous.[104] Whilst it may be accepted that states have a sovereign right to choose who to admit, and that states legitimately exercise discretion (I prefer the term discrimination) over how to admit them: '[t]here is an important distinction to be made between the right to exercise discretion and the manner in which that discretion is used.'[105] Although the UDHR, ICCPR or ECHR do not go into specific detail regarding the determination of asylum seekers procedural rights, these instruments are infused with certain moral standards, of '[j]ust principles which laws must observe.'[106] Justice Laws has advanced the proposition that rights of due process posses an 'overarching quality' which substantive rights lack.[107] Arguably, it would be useful to adopt a purposive approach, such as that outlined by Dumett and Nicol,[108] and identified by the ECtHR,[109] of looking towards the general principles of law and the

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[104] In other important areas human rights instruments impact directly on the manner in which asylum seekers and their families may be treated. For example, ECHR Article 3, the right not to be subject to inhuman or degrading treatment or punishment, Article 5, the right to liberty and security and Article 8, the right to family life.

[105] Dumett A. and Nicol, A., *Subjects, Citizens, Aliens and Others* (Weidenfeld and Nicholson 1990) 262; See also Newton, P., *op cit* at 6:

> [T]he only logical approach to Article 6 is one based upon the object and purpose of the Convention: an acceptance that the decisive purpose is the right of access to independent tribunals in order to prevent interference with the freedom of the individual, whether through civil actions or acts of the Executive.

[106] *ibid* at 263.

[107] Laws, J., *The Limitations of Human Rights*, Gabriele Ganz Public Law Lecture (manuscript on file with author at 12. In a lecture delivered at the University Southampton, Justice Laws, argued against a construct of rights which was underpinned by morality, rather his thesis was that such rights should be regarded as having a distinctive legal, as opposed to moral background. However, this central thrust of his paper was qualified in respect of one particular category of rights:

> The nearest we get to absolute rights consist in access to justice, the insistence on fair and impartial judicial procedures. [...] It is no accident that anything approaching absolute rights is largely confined to the means by which disputes are adjudicated. Rights of that kind are not divisive, do not represent an isolated morality. They constitute, very obviously, an essential condition in a civilised State of the resolution of claims between man and man and between man and State [...].

Laws, J., *ibid* at 10-11. A version of the lecture appears in *Public Law* (1998) (Summer) 254.

[108] Dumett A. and Nicol, A., *op cit* 263.

[109] In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.

*Delcourt v Belgium* [1979-80] 1 EHRR 355 at 369; See also *Feldbrugge v The Netherlands*, Series A No.99 [1986] 8 EHRR 425 at para 28.

standards set by international agreements, in order to fill in, and flesh out those human rights which we cannot currently assert with conviction, apply to applicants for refugee status.

> [It is] necessary to recognise that the Universal Declaration, the Covenants and other human rights instruments apply to refugees as to all human beings who are or become subject to a state's jurisdiction in any manner.[110]

Nevertheless, even adopting a purposive strategy to procedural protection under international law, it would be inaccurate to characterise such an approach as the panacea for all the procedural difficulties facing asylum claimants. Article 14 ICCPR and Article 6 ECHR provide only a skeletal outline for 'fair and just' procedures. Although crucial as a framework for minimum guarantees, as a base from which to build upon, in truth the standards are not that exacting. For instance, the appeals procedures provided for in the 1993 AIAA, were the subject of scrutiny by the HRC, and its findings were recorded at its fifty-fourth session.[111] In their concluding remarks only one member of the Committee expressed concern about the rights of asylum seekers and about discrimination in the application of immigration laws.[112] This may be attributable to a number of reasons: Committee members felt that there were more pressing explicit human rights violations occurring in the UK worthy of comment; their almost universal silence on the matter in their concluding remarks may have been indicative of satisfaction with the prevailing arrangements for asylum determination; only the perceived benefits of the new appeals system were outlined in the country report;[113] and, the HRC, despite admirable intentions, lacks the time and resources to perform anything more that a cursory inspection of human rights guarantees.[114] Therefore, *prima facie*, the asylum determination procedures in the

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[110] Henkin, L., *op cit* at 119.

[111] ICCPR, HRC, fifty-fourth session, summary record of the 1434th meeting; *Fourth periodic report of the UK of Great Britain and NI considered*, CCPR/C/SR.1434, July 27, 1995.

[112] *ibid* at 16 para 89 (El Shafei).

[113] ICCPR, HRC, *Fourth Periodic Report of the UK of Great Britain and Northern Ireland* at 64 paras 294-297. Indeed the submissions on behalf of the United Kingdom government read like the opening remarks of the Secretary of State in the House of Commons during the debates on the Asylum and Immigration Bill. It would be unreasonable to characterise these remarks as representing a balanced view of the rights of asylum seekers in the United Kingdom. Indeed it is a persistent and trenchant criticism of human rights monitoring in general that state reports depict only a rosy portrayal of human rights because it is in their own best interests to do so.

[114] Again this is a comment on the flaws in the nature of the reporting process itself.

United Kingdom have not been found wanting in respect of the minimum procedural requirements described in Articles 13 and 14 ICCPR. This is particularly alarming because any dissent premised on an perspicacious understanding of the ideologically unsound procedural practices of states, may be opposed by a reliance on the findings of a human rights monitor which legitimises, or at the very least refrains from criticising the prevailing procedures. So although it may be possible to criticise current legislative and administrative arrangements as inconsistent with human rights standards in a moral sense, it is less easy to argue that they conflict with positive norms of human rights.

The position of the ECtHR assumes increasing importance when one considers that, realistically, it is the only supra-national judicial body with competence and machinery for dealing with disputes between asylum seekers and potential host countries. Without an authoritative determination on the application and influence of Article 6, individual demands for vindication of procedural rights may 'become little more than moral claims, readily ignored when the forces of government find it convenient.'[115] Yet, even if the ECtHR were to rule decisively that refugees positively fall within the ambit of these provisions, in their present guise these provisions lack the precision and subtlety to influence and alter domestic, 'Kafkaesque', asylum and immigration laws and processes which currently proliferate. This positively echoes the deficiencies in common law notions of procedural fairness or consitutitional requirements of due process. Indeed, even the procedural blow struck by the ECtHR decision in *Chahal v UK* may prove to be something of a pyrrhic victory when one considers the deficiencies in the legislative changes designed to remedy the violation of Article 5(4).

It will be of great interest to monitor the emerging common law in the United Kingdom after the Human Rights Act becomes operative in October 2000. Judicial administration of the widely formulated principles of the ECHR after its transformation into the municipal law of the United Kingdom, may enhance the detail of the content of the due process/fairness principles, in the manner which appears necessary.[116] Indeed given that

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[115] Einarsen, T., 'The European Convention on Human Rights and the Notion of an Implied Right to De Facto Asylum' (1990) 2(3) *International Journal of Refugee Law* 361, 362.

[116] To date the increasing vigour with which the judiciary assert principles of fairness in other areas of administrative law often appears to wane in the face of executive discretion involved in

domestic judges are not to be bound by the decisions of the European Commission or Court (they are only required to take account of relevant decisions)[117] the courts may ignore the decision of the Commission in *Lukka v UK*, and apply Article 6 to the asylum determination process. This approach would be in keeping with the morally censorious character of the judgments delivered by the courts in the recent domestic cases involving entitlements to welfare and housing benefits in the United Kingdom, where although it has been recognised that

> [n]o obligation arises under Article 24 of the 1951 Convention until asylum seekers are recognised as refugees. [T]hat is not to say that up to that point their fundamental needs can properly ignored.[118]

However, by contrast, where the interference with the rights of asylum seekers has not been so incontrovertible, for example the introduction of accelerated determination procedures for asylum applicants categorised as manifestly unfounded, the courts have countenanced the prioritisation of administrative efficiency to the detriment of asylum seekers interests in fairness.[119]

It appears to be the case, for the reasons adumbrated above, that for individuals who bear the heavy burden of geographical displacement the consequence is a forfeiture of, or at best limitations upon, fundamental human rights. Although the standards contained within the international human rights instruments may purport to extend protection to all individuals, in practice, that coverage is piecemeal. Put simply, the refugee-receiving states have, in recent years, demonstrated a political intention to legislate around, if not to legislate out of, their commitments under the 1951 Geneva Convention. If anything,

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administering the asylum determination system. Such deference to the executive may have its roots in the traditional judicial dislike for intervening in spheres of administrative law which are 'politically sensitive'.

[117] 1998 Human Rights Act § 2(1) provides: that a court or tribunal determining a question in connection with a Convention right must take account of relevant judgments, decisions, declarations and opinions made or given by the European Commission, the Court of Human Rights and the Committee of Ministers of the Council of Europe.

[118] *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 at 401.

[119] *R v Secretary of State for the Home Department, ex parte Abdi and Gawe* [1996] 1 WLR 298. The House of Lords determined that there was no obligation on the Secretary of State to disclose the material on which reliance had been placed in certifying a country as a 'safe third country'.

judicial bodies, both domestic and supra-national have been as much complicit in, as unable to prevent, the practices of industrialised refugee-receiving governments designed to frustrate the refugee protection regime.

# PART TWO

## Introduction

During the course of investigating the literature on the comparative asylum determination procedures, it became apparent that there was an absence of a principled and analytical discussion of some of the underlying legal and moral philosophical dilemmas confronting scholars researching the law and theory relating to the treatment of refugees in international and municipal regimes. References to the perceived need for fairer determination laws and procedures are asserted with an apparent lack of due consideration in respect of precisely why changes to the means of asylum adjudication are required, and how a coherent case for reform may be made out. For example, a characteristic of some of the literature which is critical of prevailing practices is that the arrangements may result in states failing to observe treaty obligations and in asylum seekers being erroneously refused refugee status.[1] In chapter four the aim is to demonstrate that sole reliance on such consequentialist conjecture, from which to base grounds for legal and administrative reform, is flawed and unlikely to convince the policymakers of the necessity for reform. Then the objective is to establish grounds for reforming asylum procedures which are free from those difficulties identified which have beset numerous claims advocating procedural change. This endeavour is the second step of a two stage task. The first task to confront, before engaging in the second enterprise, is the difficult question of how to relate the *interest* in fair procedures which asylum seekers possess, to the collection of legal rights contained in international human rights instruments which form the basis of refugee protection: the

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1 [T]he efficacy of Australia's implementation of its non-refoulement obligations under the Torture Convention and ICCPR can only be evaluated by *assuming* that a protection claim determination system which is procedurally flawed will necessarily fail to deliver on Australia's substantive obligations.

Taylor, S., 'Australia's Implementation of its Non-Refoulement Obligations Under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17(2) *University of New South Wales Law Journal* 433, 453. Note also for example, how the readmission agreements which European Union Member States have concluded with Eastern European countries, such as Poland and Czechoslovakia, have been criticised becasue these countries lack the infrastructure for an accurate determination of refugee claims (see Fitzpatrick, J., 'Flight From Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations' (1994) *Vanderbilt Journal of International Law* 35, 38).

*right* to seek asylum; the *right* to protection from *refoulement*; and the assortment of rights applicable under international human rights law - notably freedom from torture, inhuman and degrading treatment. Put another way; does position A1 - the right to seek asylum (the object of the right to seek asylum being to provide an opportunity for those individuals who believe they are in need of, and necessarily entitled to, refugee status, to present themselves, and their testimony, to the public authorities charged with adjudicating on asylum applications) lead to position B - an interest in fair procedures (which, following social recognition, may then become the subject of protection through legal norms). Does position A2 - the right to protection from *refoulement*, lead to position B. Finally, does position A3 - freedom from torture, lead to position B. This sort of difficulty was identified by Goodwin-Gill who stated that '[R]eceiving states cannot avoid responsibility for the protection of human rights, but their responsibility is duty-driven, rather than strictly correlative to any individual "claim-right".'[2] The interest in B does not necessarily flow from the right to A1, A2 or A3 which is precisely the correlation which needs to be established in some way.

The following inquiry is an attempt to address these issues which, to date, appear to have been neglected or insufficiently confronted. The intention is to develop the examination of asylum law and policy. From the perspective of the governments of Western states spiralling numbers of applicants, initial determinations of claims which result in low recognition rates, and escalating backlogs of claims awaiting adjudication are indicative of abuse of the system.[3] The perspective of those advocates more sympathetic to the plight of asylum seekers is coloured by the conviction that due to the complexities of the phenomenon which produce refugees a simple reading of

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[2] Goodwin-Gill, G., 'Asylum: The Law and Politics of Change' (1995) 7(1) *International Journal of Refugee Law* 1, 7.

[3] The number of people who are abusing the system appear to be increasing. I say 'appear to be' because the numbers of applicants are increasing and we know that the percentage of people who are being accepted has some signifcance. It is about 11 to 13 per cent. Last month it was 13 per cent. Over the course of last year it was about 11 per cent. Then we are accepting about 9 per cent for exceptional leave purposes, which leaves between 70 and 80 per cent of people whom we do not think have any right to remain in the UK. Therefore there does appear to be quite a large-scale abuse of the asylum system.

Mike O'Brien, Immigration Minister, *Minutes of Evidence, Home Affairs Committee*, Tuesday May 12, 1998.

statistics is inadequate. Falling recognition rates cannot be simply attributable to the lack of merit of most claims, rather: (1) that states have engaged in a restrictive application of the persecution standard enshrined in the 1951 Convention; (2) the reasoning of states in justifying the imposition of restrictive practices is circular - as numbers of applicants rose recognition rates lowered, and this in turn was used as the basis for the implementation of further restrictions. Put simply, as procedures were tightened to respond to the increase in applicants, it was bound to become increasingly difficult for genuine applicants to submit claims and prove the validity of their case[4]; and (3) the high refusal rates are not necessarily indicative of widespread abuse but that some claimants with arguable cases just fail to satisfy the narrow grounds for persecution contained in 1951 Convention. Thus, an individual fleeing from a civil war, or region experiencing widespread public disorder or environmental degradation, cannot be portrayed as abusing the system, merely because such general conditions of turmoil do not engage the obligations of states under international refugee law. Hence, symptomatic of the debate on asylum has been the positing of arguments for reform based on two conflicting views and interpretations of the statistics. Since statistics have been and will continue to be employed to support the contentions of both sides to the debate, an impasse is the inescapable result. What is required is a comprehensive principled reformulation of the aims of asylum policy and practice, that avoids the policy-driven, and polarised nature of, previous debates on the subject.

Procedural fairness, or procedural justice as it is also referred to in the literature,[5] has been characterised as including procedures which safeguard values related to outcome, and values which are independent of outcome. Taking outcome

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[4] The statisical impact of the 1993 [Asylum and Immigration Appeals] Act was almost immediate. In the six months prior to the Act, 13,335 asylum decisions were taken by the Home Office, 86 per cent of which were granted either asylum or exceptional leave to remain (ELR), and 14 per cent of which were refused. In an equivalent period following the Act, only 28 per cent were granted asylum or ELR and 72 per cent of cases were rejected. (See Stevens, D., 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum' (1998) 61(2) *Modern Law Review* 207, 209, citing Refugee Council, *Increase in refusals since the Asylum Act*, November 22, 1994).

[5] I will employ only the term 'fairness' when referring to certain process values and the propriety of procedures, as opposed to 'justice' in order to achieve consistency and prevent any confusion from arising. I make the point because some authors have utilised the concept of fairness in a more specific manner than I intend to: relating to the equality of procedures applied in similar cases as a means of promoting justice for example, in this sense fairness is conceived as a component of 'justice'. (See Bayles, M., *Procedural Justice:Allocating To Individuals* (Kluwer Academic Publishers 1990) 135).

values first, due process describes a procedure that justifies outcome,[6] and individuals are entitled to procedures which help prevent mistaken outcomes which hold grave consequences for them. For refugee advocates, refugee organisations, or human rights groups striving to discover and publicize the repercussions, the human costs, of the perceived failings of the asylum determination process, there are considerable evidential obstacles to navigate if they wish to do more than speculatively point to the possibility that the collateral consequence of an erroneous administrative asylum decision may be resulting persecution, torture or ill-treatment.[7] If evidence does surface subsequently which indicates that an individual was erroneously refused asylum and subsequently deported, it is not easily possible to rectify such a miscarriage of justice in a manner that may, to varying degrees, be possible within a criminal justice system. When miscarriages of justice are exposed they can provide the impetus for reforming the structure of the criminal justice system. Jackson has commented that

> [O]ne of the most effective ways of illustrating the need to introduce safeguards for accused persons has been to highlight particular miscarriages of justice. [...] Miscarriages of justice are able to create a consensus across the crime-control-due process spectrum that something has to be done.[8]

Creating such a consensus is harder to develop in the asylum context due to the documented obstacles to detailing instances of *refoulement*. It is not possible to assert blandly that alternative laws and practices are desirable, as if it were self evident, and expect the policy-makers and legislatures of refugee-receiving states to be persuaded and acquiesce. Whether existing asylum laws and administrative practices are appropriate is a major bone of contention among practitioners, academics, and public officials working in the asylum field. The difficulty is that in the absence of

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[6] Rawls, J., *A Theory of Justice* at 214, cited by Resnick, D., 'Due Process and Procedural Justice' in Pennock, R. and Chapman, J., (eds) *Due Process: Nomos XVIII* (New York University Press 1977) at 206.

[7] '[A]n asylum applicant whose claim is wrongfully denied returns to a country that is likely to persecute him'. (Aleinikoff, A., 'Aliens, Due Process, and Community Ties: A Response to Martin' (1983) 44 *University of Pittsburgh Law Review* 237, 248); Einarsen has referred to the: '[o]ften fundamental character of the interests at stake when asylum seekers are deported and the irreparable consequences deportation might have.' Einarsen, T., 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum' (1990) 2(3) *International Journal of Refuge Law* 361, 380.

[8] Jackson, J., 'Due Process' in McCrudden, C. and Chambers, G., (eds) *Individual Rights and the Law in Britain* (Clarendon Press 1995) at 124.

comprehensive empirical evidence concerning the objective consequences for putative refugees refused asylum under current asylum processing practices, there can be no real evaluation of the benefits (or not) which additional procedural safeguards might bring.[9] In addition to preventing 'bare harm', to borrow Dworkin's term, and provide a just outcome, procedures may guarantee values which are independent of outcome,[10] which prevent the loss of dignity and respect, 'moral harm', from occurring.[11] In the light of the difficulties associated with calculating the 'bare harm' which may be caused by deficiencies in the asylum process, it becomes difficult to predicate a sustainable argument for greater procedural protection solely on that basis.[12] Martin has observed that:

> [A]sylum adjudication differs markedly from criminal proceedings, to which it might otherwise bear a superficial resemblance, owing to the nature of the punitive treatment the individual says he faces upon return to the home country. In a criminal case, we know to a near certainty what the individual consequence will be. For example, we know the defendant faces imprisonment for twenty years to life if the factfinder determines that he was the one who committed the armed robbery. [...] In asylum processing, by contrast, the individual stakes form the central question in the adjudication. [...] Moreover, to speak of 'error' when the substantive standard [for asylum] is so indistinct, so dependent on predictions based on fragmentary historical information, remains problematic.[13]

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[9] This difficulty was appreciated by Taylor: '[E]mpirical data as to such matters as the percentage of valid protection claims identified and honoured by Australia is, for obvious reasons, impossible to gather' (Taylor, S., *loc cit*). The author uses this difficulty as a basis for making the assumption that flawed determination procedures will necessarily lead to international obligations not being met.

[10] Put in affirmative terms, a law-applying process that is procedurally, rational, humane, and respectful of individual dignity and personal privacy is good in those respects *as a process*, quite apart from whether it is also an efficacious means to good results.

Summers, R., 'Evaluating and Improving Legal Processes - A Plea For "Process Values"' (1974) 60(1) *Cornell Law Review* 60(1) 1, 3 *et seq.*

[11] Summers has also referred to the 'harm' that 'can be done merely by disregarding process values' (Summers, R., *op cit* 4).

[12] It is far from inappropriate to take into account the likely harm that a wrongful denial of an asylum claim would produce, and an arguable case may be made out on that basis alone, because the personal stakes of the individual in avoiding torture, incarceration or death are the highest possible (see Aleinikoff, A., *op cit* 249).

[13] Martin, D., 'Due Process and the Membership in the National Community: Political Asylum and Beyond' (1983) 44 *University of Pittsburgh Law Review* 165 at 222-223. For a critical response to Martin, see Aleinikoff, A., *op cit* at 248. However, whilst we cannot predict with certainty what the consequences of an erroneous legal determination will be, potentially, capital punishment aside, the consequences may have a finality to them which is worse than a period of imprisonment because it does not permit amelioration. Taylor, whilst conceding the point made by Martin regarding the *possibility* of future harm for an applicant

Galligan has stressed the importance of the relationship between rights and procedures, in which the latter are as vital as the right itself, without which the right will be incomplete and often of no value.[14] For Galligan '[t]he right holder does not appeal to decency or the goodwill of the community to provide suitable procedures; the claim to procedures is itself one of right.'[15] It should not come as much of a surprise that the consequence of recent immigration and asylum legislation, and subsequent judicial decisions, in industrialised refugee receiving states, has been largely to subordinate the interests of asylum seekers in fair procedures to instrumental concerns such as administrative ease and expedience, and fiscal considerations.[16] The proclivity of officialdom 'as a matter of course, to sacrifice process values in return for desired outcomes, whether or not the sacrifice is justified', was referred to by Summers twenty-five years ago.[17] Summers went on to explain precisely why process values are deemed expendable.

> First, of course, the value of the outcome served may simply outweigh or be thought to outweigh process values. Second, insofar as process values are difficult to articulate and hard to measure, decision makers probably accord less weight to them. Third, the legal precepts that purport to secure process values seldom wear their rationales on their faces; accordingly, the protected values are somewhat hidden from view and have to be 'unearthed' for consideration. Fourth, there is a widespread tendency merely to view procedures as technicalities or rules of thumb. Any values they protect are therefore assumed to be inconsequential.[18]

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whose valid claim was rejected, as opposed to the *certainty* of undeserved punishment for an innocent individual wrongly convicted, has argued that: 'the possiblity of great harm must surely be equivalent to the certainty of much lesser harm' (Taylor, S., *op cit* at 455).

[14] Galligan, D., *Due Process and Fair Procedures* (Oxford University Press 1996) 101.

[15] *ibid* at 102. The idea of a right to due process 'involves the recognition of those subject to authority as entitled to demand justification for its uses and entitled to protection against its unjustified use' (Scanlon, T., 'Due Process' in Pennock, R. and Chapman, J., *op cit* at 97).

[16] 'Inducements to curtail due process such as administrative flexibility and efficiency [has] prove[n] irresistible to legislators increasingly concerned about efficient allocation of scarce resources' (Sapphire, B., 'Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection (1978) 127 *University of Pennsylvania Law Review* 111, 141).

[17] Summers, R., *op cit* 42.

[18] *ibid.*

Long backlogs of asylum cases, created by, *inter alia*, a combination of scarce financial and human resources, and inefficiency, are an inadequate justification for procedures which curtail protection against mistakes in the asylum process. What is particularly galling is that these procedures are created under the guise of administrative measures designed to arrest such backlogs and prevent such an accumulation arising again.[19] Galligan has asserted further that

> [O]nce it is recognised that to have a right is to have an undertaking from the community that a certain interest will be protected in a certain way, it is a short step to the conclusion that the undertaking ought to include the procedures and institutions necessary for the purpose.[20]

The legal basis of the relationship between states and individual asylum seekers is a complex one, therefore there is a need for clarification before we may proceed any further. In the following section I propose to examine and analyse the legal bounds of asylum seekers' primary rights: the abstract right to seek asylum enshrined in Article 14(1) of the UDHR;[21] the protection from *refoulement* contained in art.33 of the Refugee Convention and Article I(1) of the 1967 Protocol; and the freedom from torture guaranteed by article 7 ICCPR, article 3 ECHR, and Article 3 UN Convention Against Torture. To borrow Galligan's phraseology, in what 'certain way' are the interests of asylum seekers protected? Having mapped the contours of the legal basis of the relationship between asylum seeker and the state, we may then proceed on to

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[19] The stated intent of those governments employing such practices and policies are that they are designed to tackle the problem of spiraling numbers of, as they perceive it, undeserving economic applicants, who use the legal regime of asylum to circumvent systematic immigration laws. This underlying motive is laudable because if the system of international protection is abused then the system may begin to fail in delivering the necessary entitlements for the truly meritorious asylum applicants. At present it appears to be the case that easier options are pursued which are seductive to Western governments because they reap almost instant rewards. First, in terms of a reduction in the number of overall applications for refugee status; asylum applications to Western European countries in total fell by 15% in 1996. (*Asylum Statistics United Kingdom 1996*, Home Office Statistical Bulletin at 3 para 1-2. Applications then rose in 1997 to 32,500 and to 46,000 in 1998, *Asylum Statistics United Kingdom 1997* and *1998*, Home Office Statistical Bulletin). Secondly, in respect of the number of applicants who arrive legally, i.e. with the correct documentation. If applicants do not carry the correct documentation, then they may be subject to expedited procedures as a result. This is still advantageous in the eyes of Western governments because undocumented or inadequately documented asylum seekers may therefore be processed and removed relatively quickly.

[20] Galligan, D., *op cit* at 101. Although Galligan may suggest that it is a short step from the 'is' to the 'ought' accepting such logical derivability is problematic. It is a question to which I shall return later.

[21] See also: Art 12 ICCPR; Protocol 4 Art 2 and Protocol 7 Art 1 to the ECHR; Art 22(7) ACHR; and Art 12(3) African Charter of Human Rights (AfCHR).

inquire what procedures and institutions ought'to be implied from the forms of undertaking to protect the rights which states have acknowledged. This analysis will entail an evaluation of the rights in the light of certain values: moral and political philosophy.[22]

# Chapter Four

# Establishing a Justificatory Claim[23] for Procedural Fairness Standards in Asylum Determination and Adjudication

## 4.1 Deriving an Interest in Procedural Fairness Standards from the Human Rights Applicable to Asylum Seekers

### 4.1.1 *The Right to Seek Asylum*

Is the right to seek asylum a significant legal position? There is a fundamental tension between the right to seek asylum and the absence of a right to asylum.[24] Article14 may be characterised as a half right - a right to leave but not a right to be received. There is no right to be granted asylum and there is no obligation on any state to grant asylum, 'an individual's right to enjoy asylum is therefore limited by the willingness of the government to proffer it.'[25] It has been suggested that the right lacks substance:

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[22] This evaluative role arises not from the analysis of the concept but from the existence of value pluralism. This value pluralism may be moral, it exerts an external influence over the use of a concept rather than being the product of conceptual analysis (see Halpin, A., *Rights and Law - Analysis and Theory* (Hart Publishing 1998) 21).

[23] My purpose is to signify a claim to a position that has yet to be *fully* determined. I am seeking to establish a justification for the acceptance of a particular set of procedural standards.

[24] Article 14 of the UDHR provides that: '[e]veryone has the right to seek and enjoy in other countries asylum from persecution.'

[25] Frelick, B., 'Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection' (1993) 26 *Cornell International LawJournal* 675, 676. The absence of a right to asylum reflects the reluctance of state signatories to open themselves up to far-reaching obligations which might prejudice their interest in controlling their borders, and which might give rise to large numbers of refugees who could not be absorbed without causing irreparable damage to the host state.

> The aspirational nature of the Declaration and the pervasive principle of state sovereignty have prevented Article 14 from being entrenched as a right of asylum seekers to enter the borders of countries. [...] [T]he manner in which a state exercises its sovereignty has a direct effect upon the ability of refugees to seek protection from persecution, and without a meaningful opportunity to make a refugee application, the 'right' to seek asylum is rendered illusory.[26]

States continue to be wary of making a binding commitment of a permanent and unlimited nature in a realm as unpredictable as international relations.

How have states limited the ability of individuals to seek asylum? It is possible to characterise the methods by which states have done this broadly in two ways: external strategies (policies of *non-entrée* or deflection)[27] and internal strategies. The external strategies employed are: the imposition of visa requirements for people from countries likely to produce refugees; the burden of financial penalties for carriers who accept passengers without the correct travel documentation; the concept of 'safe third country';[28] the use of international zones at ports of entry;[29] and interdiction of asylum seekers at sea. Internal strategies are: the use of expedited asylum status determination procedures and truncated means of appeal; restrictions on, or denial of, basic means of subsistence, health care and education; and the use of detention. The methods by which the right to seek asylum is restricted thwart asylum applicants in different ways:

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[26] Mateen, F. and Tittemore, B., 'The Right to Seek Asylum: A Dwindling Right?' *Human Rights Brief*, <http://www.wcl.american.edu/pub/JOURNALS/hrb/vol2n2/mateen.htm>.

[27] See Hathaway, J., 'The Emerging Politics of *Non-entrée*' (1992) 91 *Refugees* 40; and Hathaway, J. and Neve, R.A., 'Fundamental Justice and the Deflection of Refugees from Canada' (1996) 34(2) *McGill Law Journal* 1.

[28] The notion of 'safe third country' (or first country of asylum) enables governments to refuse to examine an asylum request from someone who has previously transited a country considered to be safe. The asylum seeker may be returned to that country without a substantive consideration of the claim for asylum. (See Shah, P., 'Refugees and Safe Third Countries' (1995) 1(2) *Public Law* 31; Byrne, R. and Shacknove, A., 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harvard Human Rights Journal* 185; and Trost, R. and Billings, P., 'The Designation of "Safe" Countries and Individual Assessment of Asylum Claims' in Nicholson, F. and Twomey, P., *Current Issues of UK Asylum Law and Policy* (Ashgate Publishing 1998)).

[29] International zones are a legal fiction created by states to deny applicants who are physically present in given state any legal recognition. Put simply states deem that individuals have never entered their territory in order to prevent individuals claiming to have come within a state's jurisdiction. Consequently they cannot establish any link with that state or invoke legal protection arising from international, or constitutional law (see generally, Marx, R. and Lumpp, K., '*Non-refoulement*, Access to Procedures and Responsibility for Determining Asylum Claims' (1995) 7(3) *International Journal of Refugee Law* 383).

carrier sanctions and the imposition of visa requirements may effectively deny applicants the chance to access the determination procedures of a given state by preventing their departure; interdiction at sea not only denies access to an intended state, but in addition, if individuals are returned directly to a country in which they are persecuted the principle of *non-refoulement* is violated. Internal mechanisms, operating after entry to the territory of a state, may produce similar effects to external mechanisms in that the procedures do not assist, and may well hinder, applicants in presenting their testimony. 'The right to seek asylum is certainly restricted, but state practice to date has not recognised directly correlative duties obliging states to adjust visa or immigration policies accordingly.'[30]

### 4.1.2 *Non-refoulement*

It is not possible to examine the right to seek asylum in isolation. Its significance may only be determined when it is considered in conjunction with the principle of *non-refoulement* contained in Article 33 of the 1951 Convention.[31] Increasingly the consensus among writers appears to be that it has developed into a customary international legal norm.[32] The most that may be said is that there may be a right to *non-refoulement* under the Convention for individuals residing within a state's borders, which is far from establishing a right to seek asylum. The principle of *non-refoulement*, like most human rights norms, is not an absolute right: it is limited by Article 33(2) which denies the benefit of the provision to refugees where

> [t]here are reasonable grounds for regarding [them] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

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[30] Goodwin-Gill, G., *ibid* at 252.

[31] In addition to the 1951 Convention, the principle is also contained in the 1967 Protocol Art I(1) and the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Art. 3.

[32] See Goodwin-Gill, G., *op cit* at 134-137; and Marx, R. and Lumpp, K., *supra*.

Articles 1D, 1E and 1F of the 1951 Convention also restrict the protection available under Article 33 from certain categories of asylum applicant. Article1D provides that the Convention shall not apply to persons who, at the time the Convention came into force, were receiving protection or assistance from organs or agencies of the UN other than UNHCR. Article1E provides that the Refugee Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations of nationals of that country. Article 1F: (a) excludes those who have committed a crime against peace, a war crime or a crime against humanity, from applying for refugee status; (b) excludes those who have committed a serious non-political crime outside the country of refuge prior to admission; and (c) excludes those who have been guilty of acts contrary to the purposes and principles of the United Nations. Moreover, the 1967 United Nations Declaration on Territorial Asylum made an exception to the concept of *non-refoulement*, 'for overriding reasons of national security in order to safeguard the population, as in the case of mass influx of persons.'[33] The precise scope of Article 33 has long preoccupied advocates, academics, NGO representatives and officials. In 1982 the UNHCR Executive Committee expressed the view that the principle '[w]as progressively acquiring the character of a peremptory rule of international law'.[34] Such statements whilst contributing to the formulation of *opinio juris* must be reviewed in the context of states' expressed opinions and in the light of what they do in practice. In a bid to trace the boundaries of Article 33 it will prove valuable to examine the approach of the courts in the United States in the early 1990s when they were propelled to determine the dispute which arose over the interdiction of Haitian asylum seekers at sea. It was in a series of judgments between June 1992 and June 1993 that a dispute over the extent of Article 33 was settled. The principle of *non-refoulement* itself was not at issue, rather it was whether putative refugees arriving in

[33] Article 3(2). See also (1977) Report of the United Nations Conference on Territorial Asylum, Art 3. Turkey's refusal to admit Kurdish refugees and the support or lack of objection of a substantial number of members of the international community certainly consolidated this exception according to Goodwin-Gill, although he maintains that mass influx is not in itself sufficient to justify *refoulement* (Goodwin, Gill., *op cit* at 141). In the case of the Kurds the international response was the creation of the 'safe haven' enclave established under UN Security Council Resolution 688 (April 5, 1991). This new form of protection was then relied on by Thailand in March and April 1994 when they *refouled* 25,000 Cambodians, claiming that the appropriate solution to the problem was a UN safe haven in Cambodia (see Fitzpatrick, J,. *op cit* at 23).

[34] ExComm Conclusion No.25 (XXXIII) 1982.

boats from Haiti could claim protection under Article 33 extra-territorially. On the one hand the Haitian Centers Council, with the backing of the UNHCR,[35] and the US Court of Appeals, Second Circuit,[36] deemed that art.33 applied to refugees regardless of location, and that to return them forcibly, without any determination of whether they would face persecution violated the *principle of non-refoulement*.[37] On the other hand, the US Executive, and definitively, the US Supreme Court[38] opined that neither the international principles, nor domestic legislative provisions, were meant to have an extraterritorial effect. However, the Supreme Court did conclude that 'gathering fleeing refugees and returning them to one country they had desperately sought to escape may violate the spirit of article 33'. Thus, the presumption[39] is that putative refugees may only secure protection from *refoulement* when physically located in a given state. Goodwin-Gill has concluded that declarations of intent by United States government officials to abide by the principle of Article 33, the utilisation of screening procedures for ten years until May 1992, to ensure that no refugees were returned, and the implication of the words in the 1951 Convention that '[N]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever', confirms the extraterritorial obligations of the United States.[40] Jones has concluded that the

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[35] UNHCR filed an *amicus curiae* urging the Supreme Court to uphold the appeals court decision. Additionally, the practice of allowing boat people ashore, or of rescuing and bringing those people ashore, and then permitting them the opportunity to apply for asylum, is formalized in ExComm Conclusion No.23 (XXXII) 1981, *Problems Related to the Rescue of Asylum Seekers in Distress at Sea*. Frelick has characterised this practice as 'a customary international norm' which the US government had previously actively promoted in Southeast Asia vis-à-vis the Vietnamese boat people (Frelick, B., *op cit* at 687).

[36] 969 F.2d 1326 (2nd Cir. 1992).

[37] On May 23rd 1992 President Bush issued Executive Order No. 12, 807, 57 Fed. Reg. 23133 (1992) (the 'Kennebunkport Order') which abolished the screening-in program for Haitians interdicted at sea, and directed the United States coast guard to return them to Haiti without determining first if they qualified as refugees. On May 8 1994 the Clinton administration altered the policy of repatriating Haitians without hearings, and provided for asylum hearings at sea. On July 6 1994 the policy was revised such that refugees were provided safe haven at Guantanamo Bay, Cuba and in other Caribbean countries (Jones, T. D., 'A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited' ('A Human Rights Tragedy') (1995) 9(3) *Georgetown Immigration Law Journal* 479, 488). The United States is not alone in utilising interdiction to deny access to asylum procedures, since 1991 Italy has been interdicting thousands of Albanians in the Adriatic sea.

[38] 61 U.S.L.W. 4864 (U.S. June 28, 1993) or 113 S. Ct. 2549 (1993).

[39] '[T]he presumption against the extraterritoriality of domestic legislation is a presumption and not a rule of law.' Jones, T. D., 'The Haitian Refugee Crisis: A Quest for Human Rights' (1993) 15 *Michigan Journal of International Law* 77, 112.

[40] Goodwin-Gill, G., *op cit* at 145. See also Schoenholtz, A., 'Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the UN Refugee Convention and Protocol' (1993) 7 *Georgetown Immigration Law Journal* 67.

judiciary, by sanctioning the interception and repatriation of Haitians (and Cubans) made 'the right to seek and enjoy asylum a meaningless legal principle.'[41] Frelick identified the Kennebunkport Order as the device which sacrificed both the right to seek asylum, and the right of refugees not to be *refouled* into the hands of their persecutors.[42] It is possible to temper the disheartening inferences drawn from the decision in *Sale v Haitian Centres Council* because the judgment is but one interpretation of Article 33, and does not bind the authorities and judicial bodies in other states. All that has been stipulated is that as far as the United States is concerned Article 33 has no extraterritorial effect. That position being clear, the practice of other states exhibits a worrying trend. For example, the response of Southeast Asian countries to the influx of Vietnamese boat people demonstrates that even the right to temporary asylum is on a foundation that can slip when compassion fatigue sets in and counter-veiling political pressures are brought to bear. In this instance countries of 'first asylum'[43] provided temporary refuge pending resettlement elsewhere. However, the right to seek asylum (however temporary) was constantly threatened by the first asylum countries who refused, sporadically, to automatically admit asylum seekers at the border. Tran has concluded that the principle of temporary asylum lacks *opinio juris*, and thus the force of customary international law. Rather states admit asylum seekers for temporary protection for humanitarian or political reasons, not because of a sense of legal obligation.[44] Accordingly we may not even reason that there is a right to seek temporary asylum as distinct from seeking durable asylum.[45]

In addition to the Supreme Court's decision in *Sale v Haitian Centers Council*, there have been other instances where domestic courts have been called upon to

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[41] Jones, T. D., 'A Human Rights Tragedy' *op cit* 484.

[42] Frelick, B., *op cit* at 688-89.

[43] Malaysia, Indonesia, Thailand, the Philippines and Hong Kong.

[44] Tran, Y., 'The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws' (1995) 17(3) *Houston Jouston of International Law* 464, 511.

[45] It should be noted that even so-called 'durable' asylum is temporary, strictly speaking (Article 1C of the 1951 Convention). Although the grant of asylum creates the expectation of, and almost inevitably leads to, permanent settlement. This may be contrasted with 'temporary asylum' where there is no such expectation of permanent resettlement.

resolve disputes, and delineate the finer detail, with reference to the entitlements which asylum seekers may derive from the right to seek asylum, and from the protection against *non-refoulement*. Whilst the policy of interdiction may be labelled an 'external' method by which individuals are hindered in seeking asylum, the use of a mechanism which may be characterised as an 'internal' strategy - the removal of basic means of subsistence, was considered by the Court of Appeal in the United Kingdom. In *R v Secretary of State for Social Security, ex parte JCWI*[46] the court frustrated the efforts of the government to remove entitlement to social welfare for certain categories of asylum applicant through regulations. The court relied upon, *inter alia*, the rights implicit in the 1993 AIAA, which had incorporated the 1951 Convention into municipal law. Accordingly, the requirement in Article 33 necessarily formed part of the courts reasoning. Furthermore, Waite L.J. considered that the effect of removing basic means of sustaining life would be to render a proper consideration of their asylum claim valueless.[47] In effect the court determined that two of the fundamental international principles relating to asylum seekers, the right to seek asylum and protection from *refoulement*, do not exist in isolation. They are not independent of any implied protecting rights. In order for the asylum seeker's interest in these rights to be meaningful, then entitlements to the means by which they may support and sustain themselves may be implied from the primary rights. By contrast in *R v Secretary of State for the Home Department, ex parte Abdi and Gawe*,[48] the House of Lords prioritised administrative expediency over the interest of asylum seekers in a fair and meaningful opportunity to seek asylum.[49]

While there is an association between the right to seek asylum and the right to *non-refoulement*, there is also a significant gap between the aspirational right to seek asylum and the norm of international law obliging states to protect asylum seekers from *refoulement*. This gap is well illustrated where: (1) states are faced with large-scale influxes of refugees fleeing environmental disaster, civil war, or from regions

[46] [1996] 4 All ER 385.

[47] *ibid* at 402.

[48] [1996] 1 WLR 298.

[49] See chapter three for a more detailed discussion of the case.

experiencing widespread civil disorder, such as the crisis in the Balkans in the early 1990s and Kosovo in 1998-99. Consequently, the UNHCR presented the concept of 'temporary protection' in order to provide protection from *refoulement* and respect for fundamental human rights while awaiting return in safety and dignity following a political solution to the conflict. Furthermore, it was designed to avoid overwhelming national determination procedures;[50] and (2) where refugees do not necessarily fulfil the criteria in the 1951 Convention/1967 Protocol, states retain the discretion not to grant asylum. However, their discretion is effectively qualified by the obligation not to *refoule* refugees, hence, states have *elected* to afford refugees 'temporary refuge' in order that individuals are not returned to territories where their lives or freedom may be threatened.[51] The magnitude of states' obligation not to *refoule* 'humanitarian' refugees is debatable. Barcher has suggested that under customary international law the protective scope of *non-refoulement* may have expanded to cover displaced persons,[52] while Hailbronner, for example, has argued that state practice does not support the characterisation of *non-refoulement* of humanitarian refugees as peremptory norm of customary international law.[53] He suggests that if there is such a customary norm, its applicability is limited to that group of humanitarian refugees who would be subject to torture, or inhuman and degrading treatment by their home states, in violation of the customary norm prohibiting torture. The relationship between *non-*

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[50] Luca, D., 'Questioning Temporary Protection' (1994) 6(4) *International Journal of Refugee Law* 535. Fitzpatrick has suggested that temporary protection schemes are no longer adopted as strategies to protect victims of armed conflict or generalized violence but to prevent individuals from developing the links that transform refugees into permanent migrants. In short that it has become a further device for constricting access to asylum (Fitzpatrick, J., 'Flight From Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations' (1994) 35 *Virginia Journal of International Law* at 16-18. One such example is 'Temporary Protected Status' (TPS) in the United States. Provided for in the Immigration Act 1990, this provided the Attorney General with a statutory basis for discretion to grant protection to those refugees who cannot return to their country of origin but do not qualify for asylum.

[51] A legal status which falls short of *de jure* refugee status whilst protecting individuals from the danger of refoulement, typically entails the provision of less generous legal and social rights than those afforded recognised refugees. Such measures of protection are known under a variety of terms; exceptional leave to remain, B-refugee status, and humanitarian leave to remain.

[52] Barcher, A., 'First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?' (1992) 24 *NewYorkUniversity Journal of International Law and Policy* 1253, 1276.

[53] Hailbronner has cautioned against simple acceptance of the normative character of *non-refoulement*. UNHCRs recommendations are one thing - they may eventually lead to state practice, however, they should not be confused with state practice at present (see Hailbronner, K., 'What is Refugee Protection' (1990) SPEISS *International Journal of Refugee Law* 869).

*refoulement* and the prohibition on torture, and the scope and significance of the international norms prohibiting torture for asylum seekers will now be explored.

### 4.1.3 *Non-refoulement and the Prohibition on Torture*

The principle of *non-refoulement* applies not only to those granted refugee status, but in respect of persons for '[w]hom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention'.[54] Unlike the principle of *non-refoulement* there is no debate about the peremptory nature of the right not to be subject to torture, inhuman and degrading treatment. Freedom from torture is guaranteed by Article3 ECHR, Article 7 ICCPR, and Article 3 UN Convention against Torture. These provisions offer an alternative remedy for applicants seeking refuge and protection against *refoulement*. Although there is no provision which explicitly deals with asylum in the ECHR, Article 3 may qualify the discretion states maintain in refusing refugee status,[55] and is capable of 'filling in some of the gaps left by the 1951 Convention relating to the Status of Refugees'.[56] Unlike Article 33 of the 1951 Convention, no derogation is possible from Article 3.[57] Moreover, the protection which may be implied from Article 3 may provide a better guarantee of protection than under the norms contained in the 1951 Convention: First, compared to the principle of *non-refoulement*, Article 3 can be triggered irrespective of whether the applicant's life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. Secondly, the individual's mental anguish of 'anticipating the violence' upon return is to be considered under Article 3. If a strong credible

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[54] ExComm Conclusion No.82 (XLVIII) 1997, *Conclusion on Safeguarding Asylum*, para (d)(1).

[55] Art 8 (right to respect for family life) also has implications for asylum seekers and their families but I do not propose to examine that provision (see MacDonald, I. and Blake, N., *MacDonalds Immigration Law and Practice* (Butterworths 1995) at 450-461.

[56] Einarsen, T., 'The European Convention on Human Rights and the Notion of an Implied Right to De Facto Asylum' (1990) 2(3) *International Journal of Refugee Law* 361. See also Lambert, H., 'Protection Against Refoulement From Europe: Human Rights law Comes to the Rescue' (1999) 48(3) *International and Comparative Law Quarterly* 515.

[57] *Soering v United Kingdom* [1989] 11 EHRR 439 at 467 para 88.

subjective fear of ill-treatment already exists the presumption must arise that the applicant will be exposed to mental anguish upon return, notwithstanding the objective circumstances of the case. That might trigger the implied right under Article 3. While subjective fear is a condition for recognition as a 'refugee' under Article 1 of the 1951 Convention, it may not be taken into account when assessing whether a fear is 'well-founded'.[58] Thirdly, under the 1951 Convention protection is available only for those individuals who are persecuted by the public authorities, or where persecution is tolerated by the authorities, or where they refuse or prove unable to provide protection from it.

> [T]he immediate focus of art.3 is on whether the applicant would be exposed to a real risk of ill-treatement upon return. Given the ordinary meaning of the terms 'inhuman or degrading treatment', an absolute distinction between State persecution and private persecution cannot be maintained.[59]

Therefore, even though the ECHR does not enumerate specific rights for asylum seekers, the protection available under Article 3, may augment the protection provided for in the 1951 Convention in instances where the specialised instrument fails to do so.[60] Article 13 of the ECHR guarantees the right to an effective remedy before a national authority to everyone whose rights and freedoms set forth in the Convention are violated. Einarsen has concluded that with due consideration given to this principle, and the 'internal logic' of the Convention, there is

> [an] argument in favour of extended procedural safeguards whenever an arguable claim is raised under article 3. This is supported by the irreparable nature of a deprivation of the right to freedom from ill-treatment in the receiving state.[61]

The UN Convention Against Torture, and the ICCPR, also provide protection from *refoulement* to some asylum seekers who fall outside the reach of the 1951

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[58] Einarsen, T., *op cit* 368.

[59] *ibid* at 369.

[60] Indeed the 1951 Convention also lacks enforcement mechanisms unlike the regional human rights instrument. For a contrasting view on the ability of the ECHR to offer protection to refugees see Goodwin-Gill, G., *op cit* at 315-321.

[61] Einarsen, T., *op cit* at 379.

Convention.[62] Arguably, the prohibition on torture contained in Article 3 of the Convention Against Torture, provides wider protection than its counterpart in the ECHR. First, Article 3 ECHR does not directly deal with the issue of *refoulement*, whereas the prohibition on torture in the Torture Convention is explicitly coupled with the prevention of *refoulement*. Article 3 of the latter Convention provides:

> No State party shall expel, return (*refouler*) or extradite a *person* to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Secondly, the standard of proof required to establish the existence of a risk to the individual is less exacting in the Torture Convention. It provides that there must be 'substantial grounds' for believing that a person would be in danger of being tortured, whereas the ECtHR has determined that Article 3 of the ECHR may only be applicable where there is a 'real risk' of being subjected to torture,[63] and not the 'mere possibility'.[64] However, Article 3 does not protect those individuals who face ill-treatment that falls short of torture upon their return. In this sense Article 3 protection under the Torture Convention is narrower than that of Article 33(1) of the 1951 Convention. In addition 'torture' within the meaning of the Torture Convention is conduct engaged in '[b]y or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Article 3 of the ECHR does not permit such a distinction between public/state and private bodies. Finally, in respect of Article 3 of the ECHR there is at least an arguable case for taking into account the individual's subjective fear, whereas Taylor has concluded that there is no basis on which to make the subjective fear of a claimant a criterion in assessing claims under the Torture Convention. Perhaps the most significant difference between Article

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[62] The competence of the Committee Against Torture to receive individual communications must be recognised by the state from within which an individual claims to be a victim of a violation of the Torture Convention (Art 22). All domestic remedies must have been exhausted (Art 5b). Art 1 to the First Optional Protocol to the ICCPR declares that state parties recognise the competence of the Human Rights Committee to receive individual communications in respect of violations of the ICCPR. The major downfall with both these committees is that they posses only the power to deliver written statements regarding whether an individual's rights have been violated. Neither body can make a binding decision on a state, it remains up to the state to determine what remedial action, if any, to take.

[63] *Cruz Varas v Sweden* Series A, No. 201

[64] *Vilvarajah v United Kingdom* [1991] 14 EHRR 248

3 of the Torture Convention (and by analogy Article 3 of the ECHR, and Articles 6 and 7 of the ICCPR) and the 1951 Convention may lie in the application of the treaty extraterritorially. The *non-refoulement* provision of the Torture Convention has not, as yet, been limited in the same fashion as Article 33 was limited in *Sale v Haitian Centres Council* by the United States Supreme Court.[65] Although it does not expressly prohibit the rejection of aliens at frontiers, it nevertheless holds out the most potential among the binding international instruments for the creation of a duty of a state not to reject aliens seeking asylum.[66]

Article 6 of the ICCPR, which forbids the arbitrary deprivation of life, and Article 7 which prohibits torture, or cruel, inhuman or degrading treatment or punishment are non-derogable,[67] and they are not limited by reference to reasons of race, religion, nationality, membership of a particular social group or political opinion. The protection from *refoulement* which may be implied from these articles is broader than the protection under Article 3 of the Torture Convention, as Article 6 encompasses the right to life, and Article 7 freedom from cruel, inhuman or degrading treatment or punishment. It is akin to the protection potentially available under Article 3 of the ECHR. If a state is bound by a *non-refoulement* obligation with respect to a given individual, and there is no other state to which that individual may be removed without the obligation being breached, the state in question has no choice but to tolerate that individual's presence within its territory. In such circumstances, performance of the *non-refoulement* obligation through time is functionally equivalent to a grant of asylum.

### **4.1.4** *Summary*

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[65] See Boed, R., 'The State of the Right of Asylum in International Law' (1994) 5(1) *Duke Journal of Comparative. and International Law* 1 at 19-21.

[66] *ibid* at 28.

[67] Art 4(2) ICCPR.

The aim of the foregoing analysis was to distil the essence[68] of the rights of asylum seekers contained in international and regional human rights instruments, and to verify the existence and the extent of obligations or duties incumbent on states. The position may be summarised in the following manner:

The right to seek asylum is not an entirely vacuous right. The accuracy of this statement may be supported by: (1) the number of refugees who have been, and continue to be, processed through in-country refugee status determination procedures; and (2) the number of refugees who are allowed refuge in those states that lack formal determination procedures. Yet to categorise this opportunity to seek asylum as a meaningful legal entitlement would be misleading. Not simply because, *strictu sensu*, the UDHR is not a legally binding instrument, not merely because of the absence of a corresponding duty on the part of states to grant asylum,[69] but perhaps more importantly because state practice has, particularly in the last fifteen years, undermined the right. The right to seek asylum has not achieved the status of a norm of modern customary international law. The UDHR, by purporting to grant a right to individuals without specifying who had a duty to give effect to that right, was merely a restatement of the existing position - historically, that position being that states have provided refuge to individuals pursuant to the inherent sovereign power which they possess over the control of their boundaries, and not because of a binding legal imperative. In the final analysis, states have allowed, and continue to allow, individuals to seek asylum out of humanitarian concern and for politically motivated reasons.[70] Equally indeterminate is the legal relationship between states of 'first asylum' and asylum seekers. The behaviour of states in Southeast Asia would indicate that the practice of facilitating the admission of temporary asylum seekers, pending their

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[68] For a detailed account of the right to asylum, see Boed, R, *op cit* 1 *et seq*. For a comprehensive account of *non-refoulement* see Goodwin-Gill, G., *The Refugee in International Law.*

[69] A few states have included a right to asylum in their domestic legislation for example, the Czech Republic, Germany and Italy (see Boed, R., *op cit* at 15-16).

[70] See generally, Zucker, N. and Zucker, N., *The Guarded Gate: The Reality of American Refugee Policy* (Harcourt Brace and Company 1987); and Loescher, G. And Scanlon, J., *Calculated Kindness* (Free Press, MacMillan 1986). For example, it is striking to compare the high recognition rates of asylum seekers emanating from former Communist block states with the rates of recogntion for those emanating from Central and Southern American states such as El Salvador and Guatamala.

resettlement elsewhere, is a humanitarian gesture, rather than the observance of a legal duty.

> (Position A1) For individuals fleeing from persecution and seeking durable or temporary asylum there are no meaningful legal entitlements which may guarantee that they will be allowed entry to a(ny) given state to present their claim. Hence, the asylum claimant's interest in seeking asylum (position A1) is actually a right belonging to states, which renders it extremely difficult to sustain an argument for implied associated procedural entitlements (position B), which may be enforceable against the refugee-receiving state. Indeed, the reality may be more disturbing than this, because if asylum seekers only possess an interest in seeking asylum, there may be no duty on states to refrain from interfering with that interest. This appears to be the case at present when the policies of *non-entree*, such as carriers liability and visa requirements, are surveyed.[71] Whether the right to seek asylum can exist without any implied rights is uncertain however.[72] It appears that, on the evidence of the decisions in *R v Secretary of State for Social Security ex parte JCWI*,[73], and *R v Hammersmith LBC and Others ex parte M and Others*,[74] that some members of the judiciary in the United Kingdom are of the opinion that the right to seek asylum is a lawfully protected opportunity, and that there is a duty on the judiciary, in the absence of the legislature fulfilling that duty, to protect that lawful opportunity. So it may be suggested that if there is a duty to protect the lawfully permitted opportunity to seek asylum, *once considered legally present in a state's territory*, then there must exist a correlative right which must be protected and not interfered with. It is important to recognise that a duty on Y not to interfere with X's exercise of an opportunity or entitlement, is not the

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[71] Such measures inhibit an unquantifiable number of putative refugees from invoking the protection of international law, and domestic courts have countenanced such interference. See Nicholson, F., 'Implementation of the Immigration (Carriers Liability) Act: Privatising Immigration Functions at the Expense of International Obligations' (1997) 43(3) *International and Comparative Law Quarterly* 586.

[72] For a full exploration of the merits of this claim see chapter three.

[73] [1996] 4 All ER 385.

[74] [1997] *The Times* February 19, CA.

same as a duty on Y to promote and support X's entitlement with explicit legal protection. Thus, although the opportunity to seek asylum is represented and labeled as a right, given the absence of any supportive legal entitlements to uphold that right (in order that it is meaningful and enforceable) it is legitimate to question whether in reality the right to seek asylum is no more than a licence. A licence that may be subject to interference without reprisal from the courts in some circumstances (visa imposition and carriers liability), but not in others (removal of basic means of subsistence).[75]

Does position A2, the right to protection from *refoulement*, enshrined in Article 33 of the 1951 Convention, give rise to any implied protecting rights? While the protection derived from the *non-refoulement* norm does not equip us with the tools with which to anlayse the policies which have extra-territorial ramifications, such as interdiction at sea, it may provide a sounder footing than the right to seek asylum, from which to reason for implied procedural fairness - position B. While there is no express duty on states to admit asylum seekers, it is accepted, by those signatories to one or more of the international or regional instruments, that there is a negative duty on states not to return a person to a place of persecution.[76] It must be reiterated that this is not tantamount to a positive duty to admit and protect an individual in that particular state. Nevertheless, if it is not possible to return the applicant to a third country where they would be free from persecution, then the effect may be similar to that which would subsist if there was a binding legal right to seek and be granted asylum.

(Position A2) Thus, *non-refoulement* may provide *de facto* asylum, however since it almost certainly does not entail a right to admission, the 'implied right to imperfect asylum'[77] cannot support rights to fair procedures extra-

[75] Arguably, it is the absence of a supra-national juristic body charged with the authority to determine disputes relating to refugees, which has led to the inability of asylum seekers to mount a successful challenge against those practices which have weakened the asylum institution. The right to petition to an appropriate United Nations body or other appropriate inter-governmental entity to enforce the right to seek asylum is required (see Helton, A., 'Forced International Migration: A Need for New Approaches by the International Community' (1995) 18 *Fordham International Law Journal* 1623,1627).

[76] Whether this has blossomed into a customary international norm is debatable.

[77] Boed, R., *op cit* 24.

territorially. However, *once refugees are deemed legally present in a given state*,[78] states are under a duty to safeguard refugees from *refoulement*, and by their determination systems must ensure that for individuals satisfying the well-founded fear of persecution criterion, freedom from persecution is assured. Certainly, Article 33 as a customary norm of international law, appears to qualify the sovereignty of states to a larger extent than the 'lawfully protected opportunity' to seek asylum. Furthermore, since it may be argued that there is a right to *non-refoulement*,[79] as opposed to a licence to seek asylum, there may be a sturdier case for deriving associated procedural entitlements from the former. Even if it proves problematical to derive certain legal entitlements for asylum seekers which promote protection from *non-refoulement*, perhaps it may be stated that the asylum seeker has, as a minimum, an entitlement that the state does not engage in any act or omission, which interferes with the provision of protection against *refoulement*.

The international and regional human rights instruments which prohibit torture, and other cruel, inhuman or degrading treatment or punishment, comprise *absolute* rights which individuals may assert, and which presently have not been subject to a judicial determination which has limited their reach. Therefore, the protection potentially available under such instruments is of a broader nature because, crucially, they do not focus on the reasons behind prohibited conduct, and they may apply in relation to non-rejection at the border and extra-territorially. Indeed, in respect of the latter question, Tomuschat has argued persuasively that

> [S]ince the paramount objective is protection from torture, one will have to conclude here that *refoulement* is to be interpreted in a broad sense as comprehending any form of state action, including rejection at the border.[80]

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[78] Legal and physical presence are not synonymous - the creation of 'international zones' at airports is evidence of this fact.

[79] Subject to those qualifications delineated, *supra*.

[80] Tomuschat, C., 'The Right to Asylum in Europe' (1992) 13 *Human Rights Law Journal* 257, 259.

It is perhaps significant that, in the United Kingdom, the extension of the 'special appeals procedure', contained in the 1996 AIA,[81] which removed one tier of the appellate order for certain categories of asylum claimant, was not applied to cases in which there was evidence indicative of a reasonable likelihood that the applicant had been tortured in the country or territory to which they were to be sent. This reflected the United Kingdom's obligations contained in the Torture Convention, and has profound implications of a practical and theoretical nature: By retaining the right of appeal to the Immigration Appeal Tribunal it preserved an important procedural safeguard for particular asylum applicants; and, it also demonstrated that the international human rights instruments may have implications of fundamental relevance for asylum determination procedures, and that this fact is recognised by states. As this illustration shows these implications can provide claimants, (albeit a certain category of claimant) with a procedural layer over and above that which was deemed necessary for applicants solely claiming a well-founded fear of persecution for a Convention reason.[82]

> (Position A3) Does position A3 - freedom from torture, lead to position B, an interest in fair procedures? It may be asserted that state recognition of the irreparable nature of the ill-treatment delineated in the human rights conventions, and acceptance of those standards as peremptory norms of customary international law, makes it reasonable to posit the strongest case for implied associated procedural entitlements from the negative right to freedom from torture. Again, it may prove problematical to derive 'extended' legal entitlements for asylum seekers that promote protection from *refoulement* to a country or territory where they may face torture or ill-treatment. However, in the 1996 AIA there was at least an implicit acceptance, by the legislature, of

[81] § 1, amending para. 5 of sch 2 to the 1993 AIAA. (These provisions are to be repealed by sch 16 of the Immigration and Asylum Act 1999 which is due to come into force in October 2000. The substance of the provisions are replicated in sch 4 (para 9) of the 1999 Act which relates to Part IV of the Act governing appeals).

[82] In this instance rather than providing a basis for the provision of additional procedural safeguards, the requirement that the United Kingdom observe Art 3 of the Torture Convention ensured that the status quo was maintained. For those claimants who were encompassed by the criteria in § 1 of the 1996 AIA (amending sch 2 para 5 1993 AIAA) and who could not show that they would be in danger of torture, then the effect was an erosion of procedural safeguards.

the need to adequately safeguard asylum seekers from an act (in this instance procedural reforms that curtailed appeal rights) which may interfere with the provision of protection against *refoulement*.

In the preceding analysis, I have sought to demonstrate that mapping the contours of the abstract rights of asylum seekers is a task that can only lead to a fragmented resolution. It is indeed rather like navigating the coast of Bohemia.[83] Consequently, to derive an interest in standards of procedural fairness as a particular instantiation of the rights relating to asylum seekers is not straightforward. In many instances the extent of abstract rights which are agreed upon, and championed, by signatories to the international conventions, are in need of domestic, or preferably, supra-national judicial determination, in order that uncertainties may be satisfactorily resolved.[84] For example, if the Torture Committee, Human Rights Committee, or notably the ECtHR, decided that freedom from torture and ill-treatment does include non-rejection at the border, and has extra-territorial application, then the legality of policies such as interdiction at sea would necessarily be tested. What may be submitted is that from the existence of the basic 'primary' right to freedom from torture and ill-treatment, 'associated' or 'second-order' procedural entitlements may be secured. Whereas, the respect given to asylum seekers' welfare needs in the United Kingdom, as a requisite element of a meaningful right to apply for asylum and protection from *refoulement*, is a conception of the rights of asylum seekers which is founded upon one High Court, one divisional court, and one unanimous Court of Appeal decision.[85] This conception could subsequently collapse in the same way in which the United States Court of Appeals Second Circuit was overruled by the Supreme Court in *Sale v Haitian Centers Council*, thereby negating the decision which

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[83] I have borrowed this analogy from David Martin; see Martin, D. A., 'Reforming Asylum Adjudication: On Navigating the Coast of Bohemia' (1990) 138 *University of Pennsylvania Law Review* 1247.

[84] International accords are notorious for remaining in the realm of the abstract, for which signatories take credit that is not in fact due until the rights have been instantiated at a concrete level.

Halpin, A., *op cit* at 171.

[85] *R v Secretary of State for Social Security, ex parte JCWI* [1996] 4 All ER 385; and *R v Hammersmith LBC, ex parte M and Others* [1996] *The Times* October 10, QB, and [1997] *The Times* February 19, CA.

had considered Article 33 to have extra-territorial effect.[86] The international legal norms prohibiting torture and ill-treatment are abstract rights that accorded with the conception of an ideal society that appealed to the founding fathers, draftsmen and women, and state signatories. These guarantees against torture and ill-treatment '[a]re of an absolute character, permitting no exception',[87] while Article 33 of the 1951 Convention guaranteeing freedom from *refoulement* is subject to certain exceptions, described earlier in this chapter. Whereas overriding considerations of national security, for example, may result in states falling short of the ideal observance of the *non-refoulement* norm, the norms prohibiting torture and ill-treatment are among only a few minimum rights which cannot ever be neglected.[88] Thus, freedom from torture and ill-treatment, along with the right to life, may be characterised as at the strongest end of rights on the linear scale, with *non-refoulement* in the middle, since it is not non-derogable, and the right to seek asylum at the weakest end of the order. Indeed, it has not developed into a rule of customary international law, and appears less of a legal right, and more akin to a licence. Positing a case for implied associated procedural rights derived from the prohibition on torture and ill-treatment may support and sustain a claim for procedural fairness in a manner which is not otherwise tenable.

## 4.2 A Moral Grounding for Procedural Fairness in Asylum Systems

It seems necessary to attempt to construct a claim to a right to procedural fairness on moral grounds for two reasons. Firstly, in the absence of verifiable empirical evidence

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[86] [W]e may get the appearance of coherence depending on who is deciding the case, where there is in fact not a single conception of society at work; and the appearance will crumble as a soon as a third case arises in which the conception favoured by the other tribunal will gain dominance in the sort of case where it was suppressed.

Halpin, A., *op cit* at 168.

[87] *Soering v United Kingdom* [1989] 11 EHRR 439 at 467 para 88; see also *Chahal v UK* [1997] 23 EHRR 413 at 457.

[88] [H]owever austere or pragmatic our policies have to be in the less than ideal circumstances we find ourselves in, there is a certain minimum of rights derived from the nature of man... which cannot ever be neglected - the strongest example being the right to life.

Halpin, A., *op cit* at 112.

relating to 'bare harm' suffered, there is a need to prevent 'moral harm' from arising.[89] Second, given the imponderables which currently surround the substantive legal rights of asylum seekers, where any '[G]overnment turn away an individual, there should be a moral responsibility to check to ensure that things are done correctly.'[90] Inappropriate procedures are tantamount to an admission that society does not value, or wish to value, the right to seek asylum, protection from *refoulement*, or freedom from torture and ill-treatment. Procedures are on one level the

> [p]ractical instruments to social goals, but they are more; as the means for upholding rights they are necessary elements in society's moral commitment to do so. If they fail in the task moral harm is caused.[91]

If it is possible to provide a justifying basis on moral grounds for procedures that protect the rights in question, then moral aspiration may be understood as a matter of normative necessity, and worthy of legal codification. In the following inquiry the intention is consider whether there 'ought' to be a 'right' to, or guarantee of, procedural fairness, specifically in the context of asylum determination.

### 4.2.1 *Why Ought There to be Procedural Fairness in Asylum Adjudication?*[92]

The first hurdle to overcome prior to any discussion regarding any claim to fair asylum procedures is the manner in which refugee and asylum law is conceptualised in industrialised refugee-receiving states. The current orthodoxy appears to be that asylum seekers are just another migrant category subsumed within an immigration law framework. Policymakers have come to discuss asylum seekers in the same breath as

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[89] In this sense, preventing moral harm or moral error from occurring is an instrumental end. Crucially, the means by which that goal or end is achieved is through non-instrumental values. Although these process values may have instrumental effects, in that in addition to moral harm being prevented, increased accuracy in decisions may also result, the latter effect is not the sole or even primary aim, it is purely incidental.

[90] HC Hansard, Standing Committee A col 22 Nov. 10, 1992 (Roche, B).

[91] *ibid* at 116.

[92] 'Morals provide the principles on which the political/legal order should be based [...] whereas law is about the autonomous enforcement of rules, morality is about the autonomous choice of principles.' (Brown, C., *International Relations Theory: New Normative Approaches* (Harvester Wheatsheaf 1992) 31).

other immigrants, and more worryingly have facilitated (or at best not prevented) the association of asylum seekers with illegal entrants. The primary concern of immigration law and policy is the control and management of migrants. Therefore, through its association with immigration policy, asylum policy has become preoccupied with control, and the management of asylum seekers imbued with a control ethos.

> If our priority were to reconcile an effective system of control over the asylum process with the requirements of justice toward refugees, there might be many possibilities to explore. But our real priority is only to have an effective system of control.[93]

The initial task of those who wish to press the claim for fair procedures is to reaffirm that the manner in which we think of, and treat asylum seekers is distinct from other immigrant categories.[94]

As Carens has recognised, it is impossible to avoid some normative evaluation of the moral legitimacy of popular demands. The widespread belief of many people that 'we can't absorb them all', that it is impossible to accept all who would seek refugee status, plays a role that must be addressed.[95] That we cannot accept all who seek asylum is a proposition which appears to rest upon the basic assumption that there are a growing proportion of applicants who have no moral claim, let alone legal claim, to refugee status because they do not face genuine persecution in their home country or

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[93] Carens, J., 'The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum' in Hailbronner,K., Martin, D., and Motomura, H., *Immigration Admissions: The Search for Workable Policies in Germany and the United States* (Berghahn Books 1997) 37. Carens makes the following point in relation to policies of deterrence but it applies with equal force to determination policies too:

> Suppose we accept the claim that there is a serious danger of an overwhelming tide of asylum seekers coming to the West and that some arrangement that effectively controls and limits the influx is a vital interest. The question ought to be whether we can find a way to protect that interest while still meeting asylum seekers' needs for safety.

Carens, J., *ibid.*

[94] [H]ow we think about controlling the influx of asylum seekers ought to depend heavily on whether we conceptualise the problem as primarily one of preventing abuse by economic migrants or one of restricting the number of successful claimants among people with potentially strong claims'.

(*ibid* at 9).

[95] Carens has pointed to the widespread popular support for 'keeping them out' as a reason for the adoption of policies of external deterrence; for example the Haitian interdiction programme (*ibid* at 35). See also Galligan, D., *op cit* at 232).

place of habitual residence. That individuals seeking economic advancement should not use the asylum process as a vehicle to circumvent orderly immigration controls is generally accepted. Of course when a community's vital interests are genuinely threatened - in this instance by an influx of asylum seekers many of whom may not have any sort of moral claim, or a much weaker claim than those fleeing from persecution - then in such a case of necessity the community cannot be expected, or indeed required, to endanger its interests for the sake of a moral aspiration - such as acceptance of all those refugees in need,[96] irrespective of whether they fulfil the requirements of the Geneva Convention.[97] This is particularly the circumstance when such a moral aspiration is the subject of fierce dissension in moral, political and legal philosophical circles, let alone among community members. Therefore stringent measures for the deterrence and control of asylum seekers, like other immigrant categories, are justified on the grounds of necessity.

But let us suppose for a moment that five hundred thousand asylum seekers suddenly arrived at the shores of an industrialised state. Let us hypothesise that they are all *bona fide* refugees who would all satisfy the legal criteria for refugee status contained in the 1951 Convention.[98] The country is under a legal and moral obligation to accept them. Would all the members of the receiving community embrace these new arrivals wholeheartedly? It is easy to surmise that many people would still rally behind the cry of 'we can't take them all in'. Now reliance on this argument in this context must necessarily be premised on a belief other than that which holds that many of the applicants are not *bona fide*: since I have already stated that they are known to the international community as genuine. Therefore the public, like the politicians, must

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[96] For example those fleeing environmental disaster, or civil war.

[97] [F]ree movement is an aspect of the liberal egalitarian ideal which we should ultimately try to achieve but to adopt the practice of open borders now would jeopardise those liberal egalitarian institutions and practices that currently exist and slow their development elsewhere.

Carens, J., Migration and Morality: A Liberal Egalitarian Perspective in Barry, B. and Goodin, R., (eds) *Free Movement* (Harvester Wheatsheaf 1992) 28).

[98] I will set aside the proposition that the failure to deport large numbers of applicants who fail to satisfy the narrow 1951 Convention criteria is indicative of the recognition by receiving states of the, albeit weaker, moral weight of the claims of those who failed to satisfy the exacting standards in the formal process. Whilst this suggestion may well be true in some instances - most obviously those who satisfy humanitarian grounds, in many other cases the failure to deport may be attributed to inadequate enforcement mechanisms; financial means and human resources.

play some form of the numbers game. Such a conviction might be rooted in a belief that self- preservation in the face of an overwhelming tide of non-community members justifies restrictions on entry. Then again it may also be rooted in racist prejudices and neo-facist beliefs. It *may* be the case that the numbers of refugees and the geographical size of the receiving state, is such that restrictions on entry are morally permissible even for genuine refugees.[99] However the word 'can't' seems to be being invoked all too easily in political circles at present. The magnitude of the threat which huge numbers of potentially *mala fide* asylum seekers are portrayed as presenting has been blown out of proportion by the governements of refugee-receiving states. It is worth remembering that the concept of necessity must be strictly construed. Thus, moral principles such as the right to seek asylum and to be protected from *refoulement* as in the present case, should not be constrained or overriden unless absolutely necessary for the protection of a political community. In the hypothetical scenario described above five hundred thousand applicants spontaneously arrived at the borders of a given industrialised state. This has never happened, to a single industrialised state, let us hope that it does not.[100] Yet given the responses of Western refugee-receiving countries over the last decade one would be forgiven for thinking that just such a phenomenon had transpired. The facts do not bear witness to such an understandable conclusion. Rather the facts bear witness to the conclusion that whilst asylum applications did rise appreciably in the late 1980s and 1990s, the response from

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[99] A threat to public order (because of sheer numbers of immigrants) could be used to justify restrictions on immigration on grounds that are compatible with respecting every individual as a free and equal moral person, because the breakdown of public order makes everyone worse off in terms of both liberty and welfare.

Carens, J., in Barry, B. and Goodin, R., at 30.

Equally, natural law theorists like Dummett recognise that even where a human right to free movement existed, that right could be limited and restrictions imposed by state authorities, where the sheer numbers of people about to exercise their right to move would threaten the human rights of the receiving state's citizens.. The principle of proportionality, adopted by the ECtHR, could be applied: a state may only impose restrictions to the degree proportional to the end to be served ie. protection of citizens fundamental human rights (see Dummett, A., 'Natural Law and Transnational Migration' in Barry, B. and Goodin, R., *op cit* 177).

Personally I cannot envisage a situation where even a modest sized country could not, at the very least, provide some temporary protection whilst an international solution was sought or burden sharing agreement reached among Western states.

[100] It is not an infrequent occurrence in parts of Africa, one only has to think about the hundreds of thousands who fled the civil wars in Rwanda, Somalia and Burundi.

receiving countries was far from even handed and proportional.[101] 'We cannot slide from the view that a threat to our very self-preservation justifies overriding the conventional restraints of morality to the view that whatever is in our interest is necessary and so morally permissible.'[102] It appears as though current asylum law and practice reflects the latter view and prefers to overlook or pay lip service to the moral perspective. It is highly questionable whether self-preservation and threats to political sovereignty were ever really a serious concern, but it could be depicted as such by refugee-receiving governments because asylum had become bound up with immigration control in general. A failure to successfully control immigration could conceivably pose a threat to state sovereignty and self-preservation.

> If we really care about moral principles, we are obliged to seek out and actively pursue alternatives that may reconcile our vital interests with the requirements of morality, at least to a large extent. Suppose we accept the claim that there is a serious danger of an overwhelming tide of asylum seekers coming to the West and that some arrangement that effectively controls and limits the influx is a vital interest. The question ought to be whether we can find a way to protect that interest while still meeting the asylum seekers' needs for safety.[103]

Presently the appropriate balance between the competing and legitimate moral concerns in respect of asylum applicants and control over admissions does not appear to have been struck, with policymakers preoccupied with protecting the community's interests from the supposed threat which asylum seekers pose whilst significantly neglecting the latter's interests. When members of the community express convictions

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[101] In discussing the policies of deterrence which have been adopted by the states of the West in response to the rise in asylum applications, Carens has observed that:

> [I]n signing an agreement like the Geneva Convention a state has committed itself, not others to accept refugees if they arrive. To try to prevent them from arriving so that one does not have to accept seems a bit underhand to put it mildly.

Carens, J., in Hailbronner, K., Martin, D. and Motomura, H., *op cit* at 32.

[102] *ibid* at 36. Although approaching the issue from a different philosophical position, the natural law tradition espoused by Dummett reaches a similar conclusion:

> That a state has discretion to admit or refuse aliens does not mean that a state can exercise its discretion without regard to just principles. [...] [I]t is not a knock-down argument to say that a state is 'sovereign' when defending immigration control: one must still ask whether immigration control in general, or any particular form of it, is just or unjust.

Dummett, A., in Barry, B. and Goodin, R., *op cit* at 175

[103] Carens, J., *op cit* at 36-37.

such as 'we can't take them all in', physical impossibility is never really the issue.[104] Such arguments appeal to political realist tenets.

> When those deeply immersed in the real world ask those with their head in the clouds to be 'realistic', the implicit point often seems to be that what idealists prescribe is simply impossible. [...] Typically, to say that something is 'politically impossible' is merely to say that it entails unacceptable costs for certain crucial political actors. That crucially transforms the matter though. The key question then becomes not whether it is possible for them to bear the costs, but rather whether it is somehow reasonable to expect them to do so.[105]

Even with the demands for restrictive admissions policies championed by certain sections of society borne in mind, as I have noted previously, the crucial distinction between the two types of migrant has, until recently, been a difference which was both accepted and supported by policymakers and public officials as crucial. Moreover at the level of principle, despite the numerous and varied philosophical approaches and views on the nature and extent of our obligations to non-citizens, there is widespread agreement and acceptance of the qualitatively distinct, and morally superior claim to entry which asylum seekers make. For Dummett, an adherent to the natural law tradition, the claim to freedom from persecution is a relatively stronger claim than the claim made by other categories of applicant for entry.[106] For those philosophers such as Carens who argue from the principle that in an ideal world there should be open borders, there is an acceptance that short of attaining that ideal in the world at present or in the immediate future, refugees have moral priority over those individuals who are seeking better lives. As such, the asylum determination process is a vehicle for recognising that priority.[107] Characteristic of the approach taken by realists is the view that action on behalf of the national interest is itself an ethical imperative, and that morality must give way before the necessities of the state.

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[104] Whereas in the case made out for open borders facilitating free movement, such invocations are germane.

[105] Goodin, R., 'Commentary: The Political Realism of Free Movement' in *Free Movement*, Barry, B. and Goodin, R. (eds) *op cit* at 252-253. Political realism appeals to the notion that 'ought' implies costs: '[m]ore often than not, costs are said to be prohibitive on the grounds that people are unwilling, rather than strictly unable to pay them' (*ibid* at 254).

[106] Dummett, A., *op cit* at 178.

[107] Carens, J., in Hailbronner, K., Martin, D. and Motomura, H., *op cit* at 7.

Hendrickson has expressed the view that it is a misconception to portray realists as always and absolutely concerned with elevating the interests of the state over every other human value: '[R]efugee policy [may not] be guided solely by considerations of self interest. The principle of asylum [...] constitutes an important limitation on purely self-interested criteria'.[108]

### 4.3 Morality and the Dignitary Theories

Heeding potential consequences is an integral part of any moral philosophical perspective. 'Most moral theorists concerned with public policies do regard consequences as central to, if not always dispositive of, the evaluation of policies.'[109] In the same way that it is inappropriate, if not impossible, to adopt a purely consequentialist approach to asylum law and policy (due to the evidential difficulties outlined earlier in this chapter), equally, blindly adopting a purely deontological approach (acting on the basis of moral principles and with moral motives) is unhelpful. Moral analysis has to satisfy two criteria according to Carens - criticality and feasibility:

> On the one hand moral language loses all its meaning if it does not provide some perspective from which to criticise prevailing practice. On the other hand, moral inquiry loses its point if it cannot guide practice, As the old dictum has it, 'ought implies can'.[110]

Public law and policy-makers will doubtless need some persuasion of the relevance of engaging in moral philosophy. What the morality of aspiration loses in direct relevance for the law, it gains in the pervasiveness of its implications. Axiomatic legal principles of today were not always so. Celebrated examples include; the abolition of slavery, the enfranchisement of women in the United Kingdom and blacks in the United States, and state-funded education. Legal positivists claim that a right exists only if it is enforceable. Legal rights which exist by virtue of legislative enactment and common law, are, therefore,

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[108] Hendrickson, D., 'Political Realism and Migration in Law and Ethics' in Barry, B., and Goodin, R., *op cit* at 221.

[109] Carens, J., *op cit* at 4.

[110] Carens, J., *op cit* at 4.

the only type of rights possible. Other theorists (such natural law theorists) hold that moral rights are prior to and independent of legal rights.

> The distinction can be crucial when the legal system makes no provision for a particular right. The argument that the system should be modified to incorporate the right will be fortified by the demonstrated existence of a moral right. Without moral rights it would be considerably more difficult to bring about changes in the law. The validity of legal rights can be based partly on the extent to which they correspond to moral rights. [111]

Policymakers turn their minds to moral inquiry because

> [t]hey want guidance about how to act responsibly in the world. [...] They want to consider the merits and demerits of policies that they regard as politically and administratively feasible. If we adopt this perspective, we will restrict our moral evaluation to immigration policies that have a reasonable chance of being adopted.[112]

To argue for determination procedures that are fairer by reliance on dignitary theories is not to make a fetish of moral ideas. It is by no means at the opposite end of the continuum from those policies and practices that may be considered as feasible by policymakers. Put another way, whilst from a principled perspective an arguable case may be made out for open borders and free movement of persons, such an idea is far from feasible: it simply cannot be implemented immediately without posing a serious danger to the existing Western liberal democracies. By contrast the claim to specific legal procedural standards for asylum seekers may be viewed as a small logical step, when such a proposition is examined in the light of the manner in which the individual's position vis-à-vis international law has altered over the last fifty years. There has been a global reassessment of the status of individuals in international law; fifty years ago the rights of individuals were virtually unknown under traditional international law. Moreover, developments such as the right of individual petition to the ECtHR for allegations concerning the violation of European Convention rights represented '[a] movement in political thinking as well as legal procedure; the

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[111] Renteln, A. D., *International Human Rights: Universalism Versus Relativism* (Sage Publications 1990) 46.

[112] *ibid* at 4.

acceptance that an individual's rights against a state do not arise from citizenship only.'[113] This process which re-evaluates the position of the individual in international law, which has transformed our understanding of sovereign states in the global order, is in its infancy but it is an ongoing process.[114] As Scaperlanda has noted 'The evolving rights of individuals provide the shears that have begun to cut through the barbed wire of territorial fences erected in an earlier period.'[115] Whilst it is true that to afford asylum seekers the same sort of legal procedural protections as citizens[116] will necessarily require changes to established political thinking, such changes are not illogical or implausible when contextualised in this fashion.

In conclusion, fair procedures may be adopted as a means to achieve more accurate substantive decisions, thereby potentially reducing the risk of *refoulement*, of 'bare harm' occurring. Alternatively, they may be adopted as an end in itself in order to prevent moral harm - the loss of dignity or self respect to individuals, and to imbue those institutions which exert power and control over the lives of others, with moral

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[113] Dummett, A., *op cit* at 173. The author refers to the steady progress of political and legal thinking in a natural law tradition towards guarantees for the human rights of every individual.

Yet whilst the assimilation of human rights norms into the international and national legal order has occurred has strengthened the position of the individual in respect of the state the drive to secure greater protection is hindered by two limitations: One is the ideological divergence between states which allows incorporation to be effected at the lowest common denominator or highest abstract principle, and the second limitation is the concept of state sovereignty which severely limits the obligations which governments accept.

> Those limitations to the recognition of human rights through the national and international legal order compel one to look beyond that necessary recognition to the creation of a moral consciousness, once firmly rooted, which could constitute the most permanent, and efficacious barrier against the enemies of human dignity.

Nino, C.S., *The Ethics of Human Rights* (Clarendon Press 1994) 3.

[114] That our understanding of human rights is evolving to reflect the attitudes of societies may be inferred from the additional Protocols and Conventions which are continuously drafted and ratified.

[115] Scaperlanda, M., 'Polishing the Tarnished Golden Door' (1993) *Wisonsin Law Review* 965, 1029.

[116] Naturally since citizens will never have to avail themselves of the asylum determination procedures of their own state it is only possible to draw analogies with the procedural safeguards pertaining to criminal hearings, because this is the only vaguely analogous decision making situation in terms of the potential seriousness of the decision. Arguably procedural rights should belong to asylum seekers because they, like criminal defendants and children may be especially vulnerable.

legitimacy and acceptability.[117] I share Summers' avowed desire to see legal processes designed

> [t]o implement or serve process values or even make some officials more conscious of process values and less disposed to 'short circuit' prescribed processes to secure desired results.[118]

Whilst the by-product of enhancing procedural fairness may be to reduce the risk of 'bare harm', resulting from more accurate substantive decisions, this objective cannot be the only basis for changing procedural practice. This is because in administrative decision making, and particularly in the asylum decision-making process, it is only possible to achieve a modest assurance of enhanced accuracy through more elaborate procedures. Thus, in the asylum context, we are concerned with what Rawls has termed imperfect procedural justice.[119] Whilst the desired outcome is the correct identification of individuals who fulfil the 1951 Convention criteria for refugee status, it is impossible to design legal and administrative rules that always lead to the correct result. Moreover, the dominant approach to administrative inquiry into claims is instrumental - i.e. purportedly preoccupied with accurate fact finding, and its adopted technique of evaluation is utilitarian - whereby the sum of the advantages of those who may be expected to gain from a particular act or policy is compared to the sum of the disadvantages of those who will lose by it.[120] Therefore, it unsurprising that given the imponderables which surround the effects of increased procedural protection on the accuracy of decisions, it is the burden of increased costs, both monetary and non-

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[117] Scanlon, T., *op cit* at 94. Scanlon continues by arguing that '[t]he way in which these rights and powers are distributed is one of the key features of social institutions that is most subject to moral criticism and most in need of justification' (*ibid.*).

[118] Summers, R., *op cit* 6.

[119] Perfect procedural justice is a procedure that always achieves the just outcome (Rawls, J., *op cit* at 85-86).

[120] The language employed by Western governments to justify recent changes to law and practice is couched in utilitarian terms. However, on closer inspection when scrutinising the effects of the changes in law and policy referred to above, one arrives at the conclusion that even when accepting utilitarianism as a justifiable means of considering the merits of a legal or procedural initiative, the conclusion is that more individual asylum seekers are disadvantaged than advantaged. The only benefactors appear to be public officials, since the changes prioritise administrative efficiency. Utilitarianism has been criticised because it does not give moral weight to the *separateness* and *independence* of persons. For being anti-individualistic and disregarding the fact that individuals should be treated as distinct, and not as a part of a unitary system. (Nino, C.S., *The Ethics of Human Rights* at 150-151).

monetary, which additional procedural safeguards usually entail, that are deemed to outweigh the benefits of some intangible increase in accuracy.[121] However,

> [S]urely it is bad to neglect or ignore such values as participation, fairness and rationality when embodied in legal processes. [...] And it is especially important to give process values their due in those circumstances [where] the facts required for applying agreed-upon standards are not ascertainable.[122]

### 4.4 The Dignitary Theories: An Appraisal

For the remainder of this chapter I will attempt a modest examination of some of the various dignitary theories, as Mashaw has termed them.[123] To examine legal and administrative proceedings in the light of the dignitary theories is not a particularly revolutionary undertaking,[124] however, the application of such concepts to the asylum determination process is a novel approach. Indeed, it is my contention that many of the ideas expressed by the authors of the dignitary theories find unique illustration when applied to the context of asylum determination and adjudication.[125] The theories which are connected by the common understanding that the effects of process on individuals, and not just the rationality of substantive results must be considered in judging the legitimacy of public decision-making. These approaches analyse the degree to which decisional processes preserve human dignity and self-respect. Mashaw shares

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[121] [Procedural fairness] norms impinge from the outside on decision making institutions, and require of those institutions more concern for the substantive rights which would be threatened or infringed by erroneous decisions than the institutions (or officials) would otherwise be inclined to show, given the natural balance those institutions are likely to strike between the competing claims of accurate decisions, cost, and institutional self-interest.

Grey, T., 'Procedural Fairness and Substantive Rights' in Pennock, R. and Chapman, J., *op cit* at 202.

[122] Summers, R., *op cit* 5.

[123] Mashaw, J., 'Administrative Due Process: The Quest For A Dignitary Theory' (1981) 61 *Boston University Law Review* 885, 886.

[124] See for example how Mashaw's justice model (*Bureaucratic Rationality*) was utilised in Baldwin, J., Wikely, N. and Young, R., *Judging Social Security* (1993, Clarendon Press) at 16-17. See also the reference to the process values of participation, dignity and trust, in Juss, S., *Judicial Discretion in Immigration Decision-Making* (Sweet and Maxwell 1998).

[125] There is an increased need to secure dignitary values when the government imposes risks because of the greater capacity of public bodies and officials to exert control over the lives of others; needless to say those situations involving individuals who are especially vulnerable are the situations in which dignitary values should be most carefully guarded - for example, children, welfare recipients and asylum seekers.

Galligan's view regarding the importance of procedures and procedural rights and of their 'intimate connection' with substantive rights.[126] The dignitary approach is especially attractive in the context of asylum decision-making because such a theory may view the question of the claimant's substantive interest (i.e. the right to seek asylum, the right to protection from *refoulement,* and protection from torture and ill-treatment) as irrelevant to the question of their process rights.[127] Yet whilst it may be attractive to conceive values rooted in dignitary theory as free standing human interests, as independent of substantive outcome values, in truth they are not mutually exclusive, rather, they are interdependent. It is just as pointless to create an entitlement process without adequate procedural guarantees, as it is to have procedural guarantees without substantively fair outcomes.[128] However, as Alexander has appreciated: '[P]rocedural rights are in some sense secondary to substantive rights because they are rights about official determinations of the facts governing the application of substantive rights.'[129] In his seminal article on process values, Summers illustrated how most process features capable of implementing process values are at the same time capable of serving as means to certain outcomes:[130] For example, participation by a party to a law-applying process will result in a better informed decision, factually and legally, (good result efficacy) and will realise participatory governance (process value efficacy). A requirement that an official grant (or deny) a welfare application within 30 days months after receipt will result in the early provision of the benefit where the need is demonstrated, (good result efficacy) and timeliness (process value efficacy).[131] While the process values identified above do have result implications, they are features which are 'prizable' regardless of its effect.

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[126] *ibid* at 887.

[127] *ibid* at 894.

[128] 'Process benefits contribute to both psychological and practical issue resolution' (Bayles, M., *op cit* at 130).

[129] Alexander, L., 'Are Procedural Rights Derivative Substantive Rights' (1998) 17 *Law and Philosophy* 19, 33).

[130] Summers, R., *op cit* 47.

[131] Summers, R., *op cit* 13 at footnote 32.

The body of literature examining dignitary approaches to administrative justice seeks to promote the explicit recognition '[t]hat there are values in consultation and interchange with affected individuals quite discrete from the aim of protecting their substantive legal rights'.[132] More recently, the contribution of the therapeutic jurisprudence scholarship[133] has been to stress the potential importance, and heighten the awareness, of the pertinence of legal rules as a therapeutic agent across all legal disciplines. What is common to both dignitary approaches to administrative justice, or therapeutic approaches to the law in general, is the emphasis placed on the process of decision-making - on procedures which are fair, and also sensitive to the circumstances of the case.[134] This is pertinent for the asylum process where there is a need to display value sensitivity - to do more than just consider which process values are important to Western societies, and which reflect Western ideals. It is important to exhibit cultural sensitivity,[135] and appreciate that an asylum seeker from Africa or South-east Asia may not identify, or place importance on, the same process values as someone from North America or Europe for example. Therefore, the first step is to understand ourselves better and then others too.

In order for the dignitary approach to administrative justice, to be convincing, some form of ultimate grounding for dignitary values must be identified. What underlying precept, or precepts, validate dignitary values: intuition; human reason; or natural law? The following account is an analysis of some of the theories upon which

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[132] Michelman, F., 'Formal and Associational Aims in Procedural Due Process' in Pennock, R. and Chapman J., *op cit* at 147.

[133] Therapeutic jurisprudence draws together a number of topics that have not usually been recognised as related. Such as how the criminal justice system might traumatize victims of sexual battery, and how cultural insensitivity will preclude the attainment of socially and culturally competent immigration decisions (see generally, Wexler, D. B., 'Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence' (1996) 35 *Revista de Deredio Puertorriqueno* 273.

[134] A rational theory of immigration adjudication would require us to be culturally sensitive at every stage of the immigration process. So that when we talk about due process we know that to be meaningful to diverse ethnic communities.

Juss, S., *op cit* at 7.

[135] Cultural jurisprudence aims to explore ways in which the development of the law can be informed by an understanding of culture so that values of justice can be enhanced to apply to all populations that come within the jurisdiction of the law.

Juss, S., *op cit* at 5.

dignitary approaches to administrative justice, and the law in general, appear to have been founded. The philosophical formulations explored are; Kantian theory, social contract theory, and natural law.

Pincoffs' analysis of moral rights and duties lead him to employ the second formulation of Kant's categorical imperative, the moral command which compels us never to treat anyone, including ourselves, as mere means. He argues that the requirements of *revelation* to the person affected, of reasons for the adverse decision, and of his *participation* in the decision by contesting, if he wants the reasons given, have a recognisable and solid moral ground:[136]

> Decency generally requires that a man seriously and adversely affected by an official's decision be told why the decision was made as it was, and that he be allowed to contest the reasoning that supposedly justifies the decision. [...] Decency requires that men who have a great deal to lose from an official decision be given an opportunity to contest it. But the decency in question is not a matter of small courtesy or propriety. It is, rather, the decency that prevails when a community is so governed that no man need fear that he will be treated as mere means.[137]

Adopting Pincoffs' analysis of Kant's principle, and applying it to the asylum determination process, would appear to preclude reliance on reasons of administrative efficiency and expediency by immigration and asylum officials, as a morally defensible justification for failing to provide adequate reasons for a decision. If officials do not reveal to an asylum applicant the reasons why his or her application for asylum has been unsuccessful, or do so only partially, then like a faulty part he or she is effectively eliminated from the process, a process which will purportedly function quicker without them in it. Little or no thought is given to the interest the individual possesses in appealing the reasons for the decision.[138] Pincoffs' application of Kant's moral

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[136] Michelman also hinted at this grounding when he said that allowing officials to proceed without interchange: '[w]ould have a meaning that clashes unbearably with a preferred conception of social and political life, in which self-respect is recognised as the fundamental human good which social life affects' (Michelman, F., *op cit* at 148).

[137] Pincoffs, E., *op cit* 172 and at 180-181.

[138] I have deliberately drawn on the language used by Pincoffs in his examination of the implications of the decision in *Board of Regents v Roth* 408 U.S. (1972) 564, a case in which a nontenured teacher, whose contract for a single term had expired, failed to have the contract renewed without any explanation.

command, has proved problematical for Mashaw, who has argued that the categorical imperative was not meant to be directly applicable to the phenomenal world, but rather an ideal toward which the rules of the phenomenal world can strive.[139] Moreover, Mashaw points to the apparent contradiction in Pincoffs' approach, because those seeking greater participation in a decision-making process, are arguably using those individuals within that process as mere means. Mashaw inquires

> [M]ay they [decision-makers] not wield the categorical imperative to demand privacy from [the] incessant pursuit of participatory governance? Where is the principle of limitation that would adjust competing claims or ends?[140]

Although Mashaw concludes that a fundamental demand for rational processes of social decision-making is a fair implication from Kantian moral theory, this 'rationality' portends that the process be merely comprehensible to the individual, the agency may nonetheless be mistaken in its determination.[141] Mashaw favours the liberalism of Rawls, and his approach to rendering Kantian theory more determinate. Mashaw has posited the strongest case for 'constitutionalizing' process values in pursuit of the Rawlsian primary value of self-respect, as this:

> [I]n a less than well-ordered state, in which legislation proceeds from bargaining rather than from a rational attempt to implement the two principles of justice,[142] a process of rational constitutional adjudication might legitimately restrain or supplement majoritarian institutions. And as a part of the judicial activity tending to promote the ultimate achievement of the just state, the court *may* find it beneficial, even necessary, to impose process restraints on administrative decision-making. Moreover, it ***might*** be beneficial in such a situation to construct process requirements in ways that not only promote attention to the rational ends of administrative decision-making, but that also support a sense of self-respect that is otherwise inadequately promoted by the existing organisation of society.[143]

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[139] Mashaw, J., *op cit* at 917.

[140] *ibid* at 915.

[141] *ibid* at 921.

[142] From the original position of self-interest neutrality Rawls generates two basic principles of justice. The first is a principle of strict equality with respect to basic liberties, and the second principle which requires (a) that inequalities be attached to positions and offices available to all under conditions of fair equality of opportunity and (b) that advances in the position of the worst-off be maximised.

[143] Mashaw, J., *op cit* 921.

Sapphire has also scrutinised the content of due process within the context of examining the consequences of governmental action and its impact upon the dignity of the individuals who are affected.[144] For Sapphire the nexus between fairness and human dignity is rooted in the social contract theory propounded by Locke, and basic notions of dignity may require that deprivatory acts on the part of a government

> [b]e premised upon the existence of facts or conditions that are generally believed to necessitate such action. In this situation, respect for human dignity would demand assurance that the facts upon which the action is based be determined by accurate and reliable means.[145]

To tolerate a process which does not reflect the importance of human dignity would be to signify '[t]hat what really counts are values born out of expediency, convenience and ease of administration'. Moreover, utilitarian reasoning which argues that the perceived benefits of procedural rights are outweighed by expense and the indeterminate contribution to accuracy that added procedural protection brings, 'ignores the importance of the underlying dignitary values'.[146] Again, the concern of the author is with safeguarding human dignity, and thus fairness, through the crucial relationship between individuals and their government during the decision-making process itself, independent of the substantive outcome of the governmental decision.[147] Sapphire refers to this aspect of dignity as 'inherent', but whatever the taxonomy, the thrust of the literature examining claims to procedural fairness, is that the processes of

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[144] Sapphire, R., *op cit* at 117. Sapphire's analysis was prompted by the view that:

> Because the concept of personal dignity is basic to humanity, it can serve as a useful focus for our attempt to apply moral values, such as fairness, to our perception of the persons, institutions, and forces confronting us.

*ibid* at 117-118.

[145] *ibid* at 119.

[146] *ibid* at 151.

[147] [T]he underlying concern of inherent dignity is that an individual subjected to deprivatory government action be given a meaningful opportunity to participate in the decision-making and/or decision implementing process at a meaningful time. [...] The opportunity for personal participation is the best assurance that the individual will understand what is about to happen to her and why, and is the essential prerequisite for satisfaction of the innate need to be treated as responsible and independent human entity.

*ibid* at 153.

interaction are vital in their own right, irrespective of any instrumental 'outcome' value. Van Alstyne has also advanced the social contract theory, as updated by Rawls, as a plausible concept for informing the view that administrative decision-making should be free from arbitrary adjudicative procedures. The basis of his argument was, in essence, that those operating from behind Rawls's veil of ignorance would not think that the ends of the social contract were well served by a government which had arbitrary power vested in it.[148] Not only did he associate the idea of freedom from adjudicative procedural arbitrariness as entirely congruous with social contract theories, but also as an element of personal liberty.

> [It is] wholly reasonable to regard the matter as one of liberty (freedom from something threatened by the government), rather than of right (an enforceable claim to something one does not already posses), insofar as all that one claims is an exemption or immunity from governmental action that proceeds by certain means, i.e. fundamentally unfair, biased, arbitrary, summary, peremptory [etc].[149]

The difficulty with utilising the social contract theory as the philosophical groundingfor dignitary values is that of 'privity of contract'. The contract exists between those individuals who are behind the veil of ignorance and the government. Therefore, it is an extension of the theory to accommodate others who are non-citizens - asylum seekers, who may at some point in the future come into contact with the government. Such an extension of the social contract theory may be unpalatable to some, yet its application to 'the other' may actually reflect the gradual decline of the importance placed on the citizen/non-citizen dichotomy,[150] and thereby represent a rational expansion of the social contract theory.

Several years after his analysis of Rawls' liberalism, Mashaw advocated the pursuit of natural rights criteria of due process after consideration of the dominant constitutional jurisprudence in the United States. His natural law approach derived

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[148] Van Alstyne, W., 'Cracks In "The New Property":Adjudicative Due Process In The Administrative State' (1977) *Cornell Law Review* 445 at 487-488.

[149] *ibid* at 488.

[150] The symbolic relevance of the post war universal human rights instruments is evidence of such an incremental reformation.

from his conclusion that the approach taken by the Supreme Court to due process was incoherent, because it was predicated on the existence of a positive right, and as such was absent from decisions involving absolute discretion. Decisions where official power is most in need of monitoring because the presence of absolute discretion carries with it the greatest likelihood of political oppression.[151] Mashaw's observation that the Supreme Court of the United States of America, appears to be under-protective of interests not well defined in positive law, whilst over-protective of rights that are so defined,[152] is a statement which is equally true of the jurisprudence of the ECHR. It is anachronistic that the administrative tribunals and executive bodies charged with the responsibility for dealing with issues concerning fundamental human rights, for example freedom from torture, inhuman and degrading treatment, are themselves largely unconstrained and unregulated by the procedural standards enshrined within human rights instruments. It seems incoherent to rely simply on positive rights as the trigger for procedural protection under Article 6 and depriving it to those who hold an 'interest' as opposed to a right.[153] Equally incoherent would be a free-standing right to a hearing, no matter what the interest at stake - 'a loose canon on the jurisprudential deck'.[154] Mashaw has also observed that the jurisprudence of the courts in the United States (like the Strasbourg jurisprudence) reflects the need to

> [c]ling to positive law triggers only because they provide some anchor for due process adjudication that otherwise will be adrift in a stormy sea of 'natural' or 'fundamental' claims with no navigational aids beyond the imagination of the justices.[155]

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[151] Mashaw, J., 'Dignitary Process: A Political Psychology of Liberal Democratic Citizenship' ('Dignitary Process') (1987) 39 *University of Florida Law Review* 433, 438.

[152] *ibid* at 442.

[153] Mashaw makes an analogous observation in respect of the constitutional parameters of due process protection in the United States (Mashaw, J., *op cit* 438).

[154] Alexander, L., *op cit* 33 footnote 22. Alexander's thesis is that procedural rights cannot be conceived independent of the substantive rights and interests they serve

> [U]nless we can attach constitutional significance to the benefits that increasingly costly procedures obtain, we have no gauge for determining when we have the procedures that are constitutionally required. [...] Moreover, because the procedure for applying a rule can always be viewed as part of the substance of the rule itself a concern for the procedure apart from a concern for substance verges on incoherence.

*ibid.*

[155] Mashaw, J., ('Dignitary Process') *loc cit.*

Perhaps this is the case, however the removal of the positive law trigger does not mean that whenever any interest is at stake the holding of a hearing will be the inescapable conclusion. Some form of significance needs to be attached to the benefits, and attendant risks, which accrue as a result of an administrative adjudication. It is beyond the scope of this chapter to examine what that threshold is - where the line should be drawn between interests that attract procedural protection and those interests that do not, nor how such questions may be resolved. However let us examine and consider the significance of the benefits which attach to a securing a fair hearing for asylum applicants: Firstly, protection from the applicant's own vulnerabilities; such as language barriers, cross-cultural difficulties and stress, all of which may contribute to an erroneous determination. Cases with merit may fail because of the 'social' problems identified, and by adhering to dignitary principles such 'social' problems may be addressed. Second, an indirect though anticipated benefit which following dignitary principles may provide is an increase in the numbers of asylum seekers securing protection from persecution, admittance into the community of the receiving state, and typicallly citizenship after a given period of residence. Consider now the attendant risks which may accompany an erroneous asylum determination; a risk of future persecution. The significance of the interest at stake in asylum adjudication in terms of the benefits which accompany a successful claim, and the risks which attach to any mistakes, carry a relatively greater weight than the significance of the interest which is at stake in, the manner in which school teachers grade exams and evaluate performances for example.

For Mashaw, some, but not all interests, would be worthy of attracting due process protection. He proceeds on the basis that the question to be tackled is not whether somebody has a positive right but whether the administrative scheme is structured so that it infringes on a conception of a citizen as the subject of a liberal democratic regime.

> Rather than a constitutional theory of individual interests worthy of due process protection, what is needed most is a constitutional theory defining what it means politically to be an individual, or to act as an individual.[156]

I would employ the term 'individual' for obvious reasons, but by employing the term citizen, Mashaw's theory presents the same difficulties outlined earlier in relation to the social contract theory. The present discussion would be intellectually flawed if one was to overlook this terminology, and simply suggest that little hangs on the usage of the word citizenship - not least because it is used in the title of the article. Mashaw's theory springs from three fundamental tenets. The first is that the due process provisions, like the Bill of Rights were designed to protect the political position of the individual. Second, protection of the individual involves protection of the politically necessary conditions of continued moral agency - the prerequisite for any liberal regime. Third, the constitutional polity in the United States has a history that emphasises the possibility of collective, democratic action as well as the necessity of individual protection. From these considerations Mashaw argued that it was possible to derive three essential elements of due process. That the law must maintain zones of privacy; it must be transparent and comprehensible to its subjects, in order to ensure the possibility for rational planning and independent moral agency;[157] and that the exercise of democratic decision-making must affirm, through majority rule, the equality of citizens as political agents. It is immediately apparent that the foregoing account may present problems because Mashaw derives the natural constitutional right to due process from the meaning of citizenship in a liberal democracy. Obviously asylum seekers have no political position vis-à-vis the state. Is there any use in taking Mashaw's ideas further in the present context? This question may be answered affirmatively. The influence of natural law has not been confined to expressions of the human rights of citizens.

> The international law framers who formulated the doctrine of international law in the seventeenth and eighteenth centuries, Hugo Grotius, Pufendorf, Vattel

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[156] Mashaw, J., *op cit* 439.

[157] 'Comprehensibility does not deny the possibility for bureaucratic regimes of considerable complexity' (Mashaw, J., *op cit* at 442).

> and many others, based themselves entirely on the tradition of natural law. They took as their starting point principles whose validity was considered beyond doubt, such as the right to life and freedom, the idea of equality, and the rule that agreements shall be kept (*pacta sunt servanda*).[158]

Certainly, the natural law tradition played a major part in specifying the basic beliefs of the founding fathers as to the values that were to guide the politics of post-revolutionary government in the United States and France. However, in the aftermath of the second World War, the idea of liberties, derived from secular natural law reasoning, has exerted a compellingly powerful hold on popular imaginations. Thus, in the introduction to the 1948 UDHR there is a recognition of 'the inherent dignity' of all men and of their 'equal and inalienable rights'.[159] Crucially, the development of natural law rights which are enumerated in the international and regional human rights instruments do not relate to individual rights only, but to rights applicable globally. Although Mashaw refers to the constitutional rights accruing to citizens in a liberal democracy which result from natural law, human rights enshrined in the international and regional instruments were also predicated on natural law theories - relating to the recognition that not only can states not be trusted to treat their citizens properly, but humanity has a common interest in the treatment of people by governments wherever they may be. Although human rights principles also draw on natural law, the difference between them and the rights specified in the French and American Declarations is that the function of the former is not primarily that of serving as a principle of legitimacy within a particular state. It has become part of an effort to develop standards of achievement within the international community.

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[158] Castberg, F., 'Natural Law and Human Rights: An Idea-Historical Survey' in Eider, A. and Schon, A., *International Protection of Human Rights* (Novel Symposium 1968) 29.

[159] Whilst the UDHR was not binding it was '[a] proclomation of morally binding norms' (*ibid* at 31). It is not settled that the claims postulated in human rights instruments are founded on natural law axioms. For example, Henkin has argued that the Charter is a positivist instrument:

> It does not involve natural rights or any other philosophical basis for human rights. [...] The Charter preamble links human rights with human dignity but treats that value as self evident without need for justification.

Henkin, L., 'International Law: Politics Values and Functions' 216 *Collected Courses of the Hague Academy of International Law* (Vol.IV, 1989) 215 in Slobo, I., 'The Theoretical Foundations of Human Rights' (Novel Symposium 1968) at 41).

Bayles has criticised the process value approaches adumbrated above for being general and vague, offering no determinate guidance.[160] This evaluation may be accepted as valid, but that should not detract from the significance of such theoretical moral formulations. The value of such moral arguments is in providing a foundation, a point of departure for constructing substantive criteria of procedural fairnes - for our present purposes procedural fairness in the asylum determination system, because the features of administrative procedures that enhance fairness will differ from one legal field, one set of procedures, to another. The need for clear delineation of process values is because

> [o]ne reason some process values are ignored is because they are inherently elusive and vague. [...] The value significance, for instance, of legitimacy, procedural legality, and procedural rationality lack instant intelligibility. Moreover, even when such values are readily understood, their practical dictates in the context at hand may not be perceived.[161]

In order to address the perceived shortcomings of the theoretical approaches to procedural fairness, Bayles has suggested that participation, fairness, intelligibility, timeliness and confidence in the procedure, should be understood as process values or benefits.[162] These criteria do not provide an absolute account of the meaning of procedural fairness, and further scholarly literature on the issue reveals a number of other putative elements of procedural fairness. This indicates the uncertainty that surrounds the question of what it is about a legal process that leads those subject to it to consider it to be fair. For example, Paternoster *et al,* have identified six other frequently cited components of procedural fairness; representation, consistency, impartiality, accuracy, correctability and ethicality.[163] Summers has proposed a lengthy catalogue of process values that include; participatory governance, humaneness and respect for individual dignity, procedural fairness, procedural rationality, and, timeliness and finality.[164] I do not propose to examine in detail all of the points on

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[160] Bayles, M., *op cit* at 130.

[161] Summers, R., *op cit* 39.

[162] Bayles, M., *op cit* 135.

[163] Paternoster, R., Brame, R., Bachman R. and Sherman L., 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault' (1997) 31(1) *Law and Society Review* 163, 167.

[164] Summers, R., *op cit* at 23-27.

Summers list because as he recognises himself it '[w]ould not be sound to design every legal process to implement or serve every one of the values listed'.[165]

An examination of the purported content of these criteria uncovers a substantial degree of convergence between the criteria identified by Bayles as bases for evaluating procedural fairness, and those identified by Paternoster *et al* and Summers. Where criteria share the same or similar meaning, but are promoted under different labels, it will prove useful to jettison one of the labels, or adopt a completely new one to identify the process value described. Then, having derived a recognised set of criteria for procedural fairness, potentially, I may have a useful collection of standards to use when evaluating the fairness of comparative asylum determination procedures. Bayles has defined 'participation' as the '[p]ervasive human desire to have a say in decisions that significantly affect one'.[166] Summers's definition of 'participatory governance' is selective in that it refers to the participatory roles of citizens, but the underlying logic is the same. He suggests that '[I]f litigants present evidence and argument in a law-applying process, it is more likely that the truth will 'out' and the right law be applied, thereby yielding good results', and as a process value a participatory role affords a 'measure of self-determination'.[167] Paternoster *et al* define the process value 'representation' in the following manner. '[T]he extent to which the party or parties to a dispute with legal authorities believe that they had the opportunity to take part in the decision-making process'. Since it is clear that 'participation', 'participatory governance' and 'representation' represent broadly similar process values, I propose to adopt Bayles's taxonomy. It is my belief that Bayles's second process value criterion, that which he has termed 'fairness', corresponds to, and encompasses three values specified by Paternoster *et al*; 'consistency',[168] 'impartiality'[169] and 'correctability'.[170]

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[165] Summers, R., *op cit* 20.

[166] Bayles, M., *op cit* at 135.

[167] Summers, R., *op cit* at 20-21.

[168] 'To the extent that legal authorities provide equal and invariant treatment, [individuals] are more likely to view their experiences in a positive light, perceive authorities as moral and legitimate' (Paternoster *et al*, *op cit* at 168).

[169] Impartiality occurs when legal authorities suppress any biases they have about the parties or the outcome of the dispute. [...] persons are more likely to impute fairness and legitimacy to legal authorities [...] when they perceive that authorities have acted in an impartial and unbiased manner.

Moreover, such requirements correlate with the set of values which Summers has included as a sub-set of what he has termed 'procedural rationality'. Its dictates include the following: (1) carefully ascertain relevant evidence and carefully canvas relevant argument, (2) carefully weigh that evidence and argument, (3) deliberate calmly and carefully, (4) resolve issues impartially and therefore solely on the basis of their merits, (5) be prepared to give reasons for what is decided. Summers is of the opinion that

> [O]f two legal processes yielding more or less the same results, only one of which is a rational process, we should generally the rational one. This is because it involves scrutinizable effort to use human reason and is therefore intelligible to us in a way that the other kinds of processes are not. Those who participate in, or are affected by rational processes generally have a better chance of knowing 'what is going on' - of knowing what is happening to them and why. This knowledge, in itself, is worth having.[171]

Since use of Bayles' term 'fairness', to characterise defining qualities of procedural fairness, may lead to confusion, instead I shall substitute Summers' term 'rationality' in an attempt to preserve clarity. Accordingly, I will deal with the values of 'consistency', 'impartiality', 'correctability', and 'intelligibility'[172] as sub-categories of 'rationality', thereby encompassing what appears to be the broad thrust of all the approaches examined. 'Timeliness' will be treated as an element in its own right. Prompt determination and adjudication of applicants claim, clarifies the status of individuals, thereby precluding long periods in limbo with attendant uncertainties in respect of the future, and also helps prevent the accumulation of a backlog of claims awaiting processing. Not included is 'confidence in the procedure' which I regard as stemming from the presence, and realisation, of those values encompassed within 'rationality'.

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*ibid.*

170 [C]onsists of the existence of other, higher-level authorities to whom one can appeal the current decision. To be perceived as procedurally fair, authorities must supply some mechanism by which decisions thought to be unfair or incorrect can be made right.

*ibid.*

171 Summers, R., *op cit* at 26-27.

172 Intelligibility involves making decisions perspicuous, especially to those persons whom they apply. It can promote a persons ability to plan, regardless of whether a decision is favourable or unfavourable, correct or incorrect.

Bayles M., *op cit* at 135.

The final criterion that I intend to draw on from the literature, is 'ethicality'. A commitment to 'ethicality' may be considered to be the most explicit means by which legal authorities can demonstrate that individuals are treated with respect and dignity.[173] This equates with Summers's criterion, 'humaneness and respect for individual dignity'.[174] 'Accuracy' relates to the correct adherence to procedures and the correct application of the law, as opposed the accuracy of the outcome. All values may be considered independent of outcome, even though they may contribute to good, accurate, results. Moreover, an individual may be treated with dignity and respect by the legal decision-makers and yet an inaccurate decision may still be reached. For example, decisions attributable to incontrovertible but dated and, therefore, obsolete country of origin information contrary to the claims of the asylum applicant. This state of affairs may often not be the fault of any party to the decision, but quite simply an occupational hazard associated with obtaining information from inaccessible and inhospitable parts of the world. Naturally no administrative body is going to make decisions which are 100 per cent accurate, but the acute evidential difficulties inherent in the asylum decision-making process, more than any other administrative adjudicatory process, may mean that current and objective facts concerning country conditions central to the applicant's claim may be absent from the decision-makers' files and databases.

## 4.5 Conclusion

The human rights conventions of the last fifty years have attenuated the absolutism of states vis-à-vis their treatment of individuals: asserting sovereignty over immigration and asylum matters may no longer justify the exercise of naked power. A convincing basis for immigration and asylum policy is required, just like any other governmental policy. In this chapter I have sought to highlight the deficiencies in focusing on: (1) the potential consequences for refused asylum seekers as a basis for reform; and (2)

[173] 'Respectful treatment by legal authorities is seen to be directly related to perceptions that authorities are moral, legitimate, and are deserving of compliance' (Bayles, M., *op cit* at 135).

[174] Summers, R., *op cit* 24.

how the constant reliance on the low success rates of asylum claims as evidence for either abuse of the system, or the failures of the determination system, does little to move the debate on. It only results in marginal developments to asylum law and policy. Rather than speculating over the precise level of abuse or numbers of genuine or deserving applicants which will never be agreed on, the time may be more productively spent on ensuring that fairness is not compromised.[175] Therefore, I have explored arguments rooted in liberalism, natural law and in the realist tradition, all of which recognise that special moral duties are owed to asylum seekers. However, states are likely to dismiss such philosophical approaches as utopian, and too vague as to be instructive: rules which are not meaningful when the policy-makers sit down to discuss the objectives behind law reforms. Hence, it would appear that the foundation of this critique is in danger of being impaled on the horns of Koskenniemi's dilemma: the predicament being that international lawyers in seeking to avoid the dangers of international law becoming a mere reflection of the lowest common denominator or highest abstract principle, are driven to rely on arguments based on morality and natural law.[176] In order to blunt Koskenniemi's point, and to respond to the criticism that moral arguments lack specificity and so loses practical relevance, I have endeavoured to build on the general assumption that asylum seekers have a stronger moral claim to enter a country to which they have fled than other non-citizens. This I have done by examining dignitary theories: theories which are connected by the common understanding that it is the effects of process on participants, and not merely the rationality of substantive outcomes, that must be weighed in judging the legitimacy of public decision-making. However, even the dignitary theories may be considered an insufficient grounding for the reform of the asylum legal system. Again, the criticism is that they offer no determinate guidance for policy-makers. Their relevance is in providing a principled foundation for the formulation of a schema for standards of procedural fairness. The explicit delineation of principles of procedural fairness

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[175] Either by administrative preoccupations with efficiency-expedition and cost-effectiveness, and political concerns regarding the maintenance of popular support for their policies - the need to be seen to maintain firm control in the face of increasing numbers of applicants.

[176] See Koskenniemi, M., *From Apology to Utopia* (Lakimiesliiton Kustannus (Finnish Lawyer's Publishing Company 1989). He describes international legal argument as a constantly shifting interplay between ascending arguments based on State will and descending arguments based on natural law or morality.

renders the ultimate moral grounding for the fair treatment of asylum seekers, and the various dignitary approaches to procedures more determinate. In short, policy-makers will have something tangible to draw on, but crucially there is a nexus between those precepts and moral principle.

In the following chapter I propose to tackle the inquiry into the presence (or absence) of procedural fairness in the asylum determination process in the United Kingdom, by addressing the question: 'Why should not following or violating principles of procedural fairness; participation, rationality, timeliness and ethicality, make the treatment of asylum seekers unjust?' In the process I shall compare the prevailing practices in the United States, Canada and Australia in an effort to determine what comparative methods best guarantee that unjust procedures are not employed or that the effects of such procedures are minimised. It would be unwise to commit oneself to devising a framework of ideal administrative justice in the asylum field, not least because it would prove virtually impossible to do with any degree of finality given the respective differences between states' legal, political, sociological and historical traditions. However, it may be possible to have an imperfect notion of what would be better by eliminating what is plainly unjust and unfair.[177]

> It is perfectly proper that we should [put options out of our minds that are utterly unrealistic] provided these options are and inevitably will remain impossible. But if the only reason the options are unrealistic is that people are unwilling to make sacrifices that they could and arguably should in pursuit of morally important goals, then these options could and arguably should be very much on the table.[178]

[177] Fuller appreciated that it is possible '[t]o know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like' (Fuller, L., *op cit* 12).

[178] Goodin, R., *op cit* 254.

# PART THREE

## Introduction

Chapter five will explore, and critically assess, the prevailing legal and administrative systems employed to process asylum claims submitted in the United Kingdom, Australia, Canada and the United States. Attention will be paid to both substantive and procedural rules, and components vital to the administration of justice, such as the provision of legal advice for claimants, and the institutional culture of decision-making. Contemporary determination procedures will be examined and evaluated taking account of the significant legislative and administrative changes made in the recent past, and reform proposals currently being mooted. In addition, there will be limited consideration of other factors critical to the determination of asylum claims: the ethos and culture of the institutions responsible for processing and determining claims; the environment in which claimants are placed during the examination of their case; and the provision and proficiency of decision-makers, legal representatives and interpreters.

Chapters six and seven consider, in greater detail, two factors: the value of education and training for all those agents involved in refugee status determination and adjudication; and the importance of the development of information resource centres and use of information technology as means of informing the decision-making process. These particular features were selected because of the contemporary nature of the subject matter and because of the differences in approach, discernible between the four states, in respect of the weight afforded to those factors in policy and practice.

The comparative examination and evaluation in chapter five will not be a mechanistic account of the comparative procedures, detailing all the requisite forms which need completing and so forth. It will be selective, focusing on the initial examination and determination of claims. Observations on the administrative and judicial review stages of the adjudication process will be concise by comparison. Many of the comments made in

respect of the initial determination procedures are applicable to the appellate procedures too.

# Chapter Five

# A Comparative Analysis of Administrative and Adjudicative Asylum Determination Systems

## 5.1 The Significance of First Tier Decision Making

It is apparent that states consider speed to be the primary desideratum in the asylum determination process. However, it must be balanced against the need for procedural justice.[1] The four states under consideration have attempted to meet this challenge in divergent ways. The primary focus on the law and practice relating to initial determination procedures, in this chapter, is deliberate.

> When decisions relate to elderly people, disabled people, single parents, small business people or *immigrants*, there are large numbers who suffer from erroneous decisions without filing a complaint. Indeed, the total volume of injustice is likely to be much greater among those who accept initial decisions than among those who complain or appeal. For this reason alone, thoroughness and procedural fairness are more important in primary adjudication than they are in appellate process.[2]

This stage of the process has been the focal point for Canada and the United States since the late 1980s, whereas in the United Kingdom the trend throughout the 1990s, primarily, has been to reform the appeals process. Australia's approach to asylum determination and adjudication is less easy to compartmentalise. It shares some of the characteristics of both regulatory strategies summarised above.

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† A version of this chapter appears in (2000) 51 *Administrative Law Review* (forthcoming March 2000)

[1] See Harvey, C. J., 'Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy' in Nicholson, F. and Twomey, P., *Current Issues in UK Asylum Law and Policy* (Ashgate Publishing 1998) 213.

[2] Ison, T., 'Administrative Justice: Is It Such a Good Idea' in Harris, M. and Partington, M., *Administrative Justice In The 21st Century* (Hart Publishing 1999) 23).

In Canada, and more recently the United States, attention has centred on the legislative schema (both substantive and procedural rules)[3] for processing asylum claims, and importance has also been attached to the 'front-loading' of resources. In short, human and financial resources have been directed to the initial stages in order to try and develop well informed, and thus, accurate, decision-making. By contrast, in the United Kingdom, refugee advocates have been left perplexed by the resistance displayed by policy-makers towards reforming the initial decision making process comprehensively. Particularly when past history has revealed that piecemeal reforms deliver neither timely decisions, nor procedural justice. Equally, although the United States and Canada may be perceived to have adopted a more holistic approach to the regulation of asylum claims than the United Kingdom, their laws and procedures are not without fervent critics.[4]

## 5.2 Strategies for Managing the Growing Volume of Asylum Cases

Individualised determination procedures have been afflicted by long delays in processing claims and consequently backlogs of undetermined cases have accrued. States have taken remedial action by adopting policies which have limited the ability of individuals to petition for asylum. Some of those policies are completely divorced from those determination procedures which are often the source of the debilitation. For example, external strategies such as the imposition of visa requirements, the practice of interdiction, or carrier's liability, affect genuine and non-genuine asylum seekers alike[5] and are unconnected to determination procedures. Other measures operate to prevent the submission of claims even though individuals are physically present in the state, such as the

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[3] This distinction is often blurred in asylum determination systems. In the context of the system in the United Kingdom see Care, G., 'Working With the Asylum Regime: an Adjudicator's Perspective' in Nicholson, F. and Twomey, P., *op cit* 166.

[4] See for example, Blum, C.P., 'A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms (1997) 15(1) *Berkeley Journal of International Law* 38; and Report of the Auditor General of Canada, *Citizenship and Immigration Canada and Immigration and Refugee Board: The Processing of Refugee Claims* (December 1997) <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/ch9725e.html>.

[5] A fact accepted by Mike O'Brien M.P. (Immigration Minister (UK)) in oral evidence to the Home Affairs Committee (May 12, 1998) at 3.

designation of 'international zones'. There is also the designation of 'safe' countries whereby asylum seekers may be returned to the first safe country they entered in order to seek protection, without the substantive merits of their claim being heard first. Then there are those internal policies which may produce similar effects to the external policies. They are inextricably bound up with the determination process, and are arguably the most insidious of the strategies used by states to solve the perceived problem which asylum seekers pose. In general terms these practices fall within the umbrella of abbreviated procedures, but can be distinguished thus:

(1) Preliminary screening (or summary eligibility) to sift out unfounded claims at the earliest opportunity;
(2) Legislative or administrative presumptions of unfoundedness in respect of certain claimants;
(3) Truncated time-lines for the submission of claims and supporting evidence.

These categories are not mutually exclusive. For example, legislative presumptions of unfoundedness may be utilised in preliminary screening procedures as the basis for the swift removal of asylum seekers. Furthermore, legislative presumptions of unfoundedness utilised in full determination procedures may act as the trigger for restricted appeal rights. It may be that the submission of appeals must be completed within a strictly limited period of time, and/or access to appellate organs may be limited or denied altogether.

## 5.3 Abbreviated Procedures

### 5.3.1 *Preliminary Screening*

Satisfying pre-screening requirements (either in the guise of a credibility test or eligibility requirements) 'is a prerequisite to the acquisition of a right to status determination'.[6] Reliance on procedures designed to screen out, and to remove, expeditiously, those

[6] Hathaway, J. and Neve, R.A., 'Fundamental Justice and the Deflection of Refugees From Canada' [1996] 34(2) *Osgoode Hall Law Journal* 214, 229.

individuals who do not obviously merit asylum or have an arguable claim, has been a common characteristic of the strategies employed by all four states under consideration. Such procedures were motivated by the perception that increasing numbers of individuals who did not merit asylum were abusing the refugee protection regime: This was either to gain admittance to states and to live and work for as long as possible,[7] or having gained admittance, to use the legal protections available to asylum seekers to prolong their stay and take advantage of welfare benefits available.[8] It was perceived that the institution of asylum was being utilised as a way around orderly immigration controls and that growing delays in determining claims acted as an incentive to individuals. This was because applicants knew that they could either secure work authorisation or access to public benefits for many months or even years whilst determination of their claim was pending.

Expeditious procedures are not, *per se*, objectionable, providing there are adequate procedural safeguards. It would be mistaken simply to dismiss truncated procedures without prior investigation of the implementing measures. Eligibility criteria contained in Canadian legislation in force over ten years ago, which was intended to protect genuine refugees while controlling widespread abuse of the system by spurious applicants,[9] drew this adroit observation from one commentator which remains pertinent today.

> Is the goal of the whole system to deter as many refugee claimants as possible from reaching our shores, whether genuine or not, while providing a reasonably fair system if the claimants are ingenious enough to traverse all the hurdles put in their way? Or is the goal to ensure that all refugees in need of protection are fairly and considerately treated and that Canada accepts a fair share of the burden of this obligation?[10]

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[7] Schrag, P. and Pistone, M., 'The New Asylum Rule: Not Yet A Model of Fair Procedure' (1997) 11*Georgetown Immigration Law Journal* 267, 269.

[8] See for example, the deliberations of the Special Standing Committee on the Immigration and Asylum Bill 1999 (UK) (16 and 17 March 1999).

[9] See Bill C-55 § 2.1 which came into effect on January 1, 1989, amending the Immigration Act 1976. All the legal rules which apply to refugees are contained in the Immigration Act 1976, c.52 (as amended, notably the by successive Immigration Acts in 1985, c.I-2 (commonly referred to as Bill C-55) and again in 1992, c.49 (Bill C-86).

[10] Adelman, H., 'Refugee Determination - Bill C-55 Revisited' (1991) 11(2) *Refuge* at 3. Additionally, in respect of the significant changes introduced in the United States by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) one analysis concluded: '[T]he new immigration law, with its emphasis on early filing and speedy adjudication claims, makes obtaining asylum even more difficult for refugees' (Schrag, P., and Pistone, M., *op cit* 268).

Summary procedures were first introduced in Canada in 1989. The asylum claimant had to satisfy both eligibility criteria and establish a credible basis for their claim. However, the system failed to deliver quick, equitable and efficient resolution of claims. By March 31 1990 it took on average nine months to process a claim. Moreover, enormous logistical and personnel resources were expended and yet ninety-five percent of claims passed the initial screening stage.[11] Subsequently, Bill C-86 removed the initial screening process from the responsibility of the quasi-independent immigration adjudicators and expanded the decision-making powers for civil servants. It is a feature of all the asylum systems under examination that immigration officials conduct initial eligibility enquiries or initial interviews at ports of entry, rather than officials from the authority competent to determine the claim.

In Canada any claim to be a refugee is referred to a senior immigration officer (SIO).[12] There are five grounds on which an SIO might deem an applicant ineligible and exclude them from the determination process.[13] They are: prior recognition of refugee status in another country; coming directly or indirectly from a prescribed country; repeat claims; prior recognition of refugees status in Canada; and undesirable persons: criminals, security risks and the like. The following are examples of the concerns raised about the eligibility criteria: the eligibility provisions may result in refugees being denied access as a result of fear, ignorance or change of circumstances. It can invite abuses by immigration officers who have every opportunity during the private interview to intimidate potential claimants, or simply refuse to hear their clear request to make a refugee claim. The provision that excludes refugees who have been granted refugee status in another country runs the risk of immigration officers making mistakes about the person's status and entitlements in the country in question; and excluding persons who have returned to Canada within 90 days fails to take account of the possibility of change of circumstances in

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[11] Stobo, G., 'The Canadian Refugee Determination System' *Journal* (1994) 29(3) *Texas International Law* 393. See also (1992) *Refuge* (*Special Issue on Amendments to the Immigration Act*) 12(2); and Hathaway, J., 'The Concept of "Safe" country and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 *International Journal of Refugee Law* 31, 40.

[12] Immigration Act (1976) (Can) § 45(1)(a).

[13] *ibid* § 46(01)(1)(a-e).

the country of origin or the existence of new information.[14] Furthermore, there are question marks over the *ethicality* of the port interviews, which although designed for a limited purpose, have often in practice been up to seven-hour interrogations addressing the substantive claim, and conducted in manner designed to break down the claim.[15] A scheme was introduced to try and regulate the eligibility screening process in September 1996. Forms are used so that only the minimum information necessary to establish identity is noted.[16]

Where an SIO concludes that an asylum applicant is eligible the claim is referred to the Convention Refugee Determination Division (CRDD).[17] If, however, the applicant is deemed ineligible, on grounds other than that they have arrived from a prescribed safe country, then they have only seven days in which to remain in Canada after a removal order is made.[18] If found ineligible because they came from a 'prescribed safe country'[19] then removal can be immediate. In all cases of ineligibility an application for judicial review raises only the possibility that such a petition might delay removal. Given the importance of the role which immigration officer's perform in processing asylum seekers at the border, the presence of monitoring mechanisms is paramount in order to observe whether the principles of *consistency* is maintained. At present the observance of such principles at the eligibility stage may be wanting given the inadequacies of current monitoring strategies.[20] The manner of the initial interview is crucial if the procedure is not to be considered unjust. If interviewing officers are confrontational, this is inimical to the dignitary principles of: (i) *rationality* (the claimant may apprehend partiality); (ii) *ethicality* (because it is disrespectful); and (iii) *participation* in the process (they may feel intimated and unable to

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[14] Canadian Council for Refugees (CCR), *Legislative Review Brief* (July 1997) at 7, <http://www.web.net/ccr/legrev.htm>. For a comprehensive analysis of the 'safe country' provision see Hathaway, J. and Neve, R. A., *op cit* 214.

[15] Justice, *Providing Protection: Asylum Determination in Canada*, (Supplementary Report 2) (August 1997) at 6.

[16] *ibid.*

[17] Immigration Act 1976 § 46.02. The CRDD is a part of the Immigration and Refugee and is independent of the Department of Citizenship and Immigration (see Stobo, G., *op cit* at 385-390).

[18] Immigration Act 1976, § 49(1)(e).

[19] *ibid* § 46.01(1)(b).

[20] CRR, *Legislative Review Brief, op cit* at 6.

present their testimony). It can delegitimise the process in the eyes of the claimant. The provision of good quality interpreters is also paramount. It has been suggested that the quality of interpreters at this stage of the process is not conducive to an accurate presentation of claimants' testimony, which may impair *participation* in the process.[21]

The entitlement of asylum seekers to undergo full status determination has also been qualified in the United States recently.[22] Pre-screening procedures employed to determine whether individuals may be expeditiously removed operates in two stages: Claimants have to demonstrate a fear of return, and a credible fear of persecution. An individual who arrives at a port of entry, and who, upon primary inspection by an INS inspection officer appears to lack valid documentation, is immediately referred to a secondary inspection. If that second inspection indicates that an alien is inadmissible for misrepresentation, or for lack of proper documentation, then the officer may order the removal of the alien from the country without any further proceedings if the alien does not indicate an intention to apply for asylum or a fear of persecution.[23] This removal order has the same weight as one issued by an Immigration Judge and is reviewed by a senior-level supervisory immigration inspector.[24] The inspecting officer is obliged to afford the asylum seeker the opportunity to claim asylum by reading them a statement about the asylum process, and by asking three specific questions concerning whether they have a fear of being returned home.[25] They are instructed to use verbal and non-verbal indications of fear, such as shaking, perspiration, sweating, hysteria and even silence.[26] No individual can be

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[21] Justice, *Providing Protection: Asylum Determination in Canada, op cit* at 6.

[22] 1996 IIRIRA § 302 revises Immigration and Nationality Act 1952 (INA) § 235 by providing for summary pre-screening procedures called 'expedited removals'.

[23] INA § 235(b)(1)(A)(i)(ii). No court has jurisdiction to review that decision (INA § 242(a)(2)(A)) except to determine whether an alien has been ordered removed under § 235(b)(1), and whether the order relates to the petitioner. There is no review of whether the alien is actually admissible or entitled to any relief from removal (INA §242(e)(5)). Habeas corpus is available to those who can prove permanent resident status (INA § 242(e)(2)).

[24] 8 CFR § 235.3(b)(7) (1998).

[25] See Cooper, B., 'Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996' (1997) 29 *Connecticut Law Review* 1501, 1516. In every credible fear interview, the applicants must be asked questions relating to the applicability of the Convention Against Torture. (INS Memorandum, *Guidance on Compliance with Article 3 of the Convention Against Torture* (site visited April 27, 1998) <http://www.bender.com/bender/open/Webdriver?MIval=chan&channelID=immig>.

[26] INS, *Update on Expedited Removals*, (March 24, 1998) Fact Sheet <http://www.ins.usdoj.gov/public_affairs /news_releases/ExReFS.html>.

expeditiously removed from the United States until this process is performed. This process of self-identification is of the utmost importance, and whether this aspect of the pre-screening process complies with the requirement of *rationality* turns on whether the language used in the explanatory statement and questioning is sufficiently clear and *intelligible* to the asylum seeker.

The answers given in response to the questions are summarised in writing by the official and the person is given an opportunity to read (or have read in a language he or she understands) the recorded answers and make any necessary corrections.[27] However, the communication barriers which confront many asylum seekers, appear inadequately balanced by the provision of 'some relevant information during the secondary inspection',[28] and the Lawyers Committee for Human Rights (LCHR) has suggested that 'the INS should inform individuals before the secondary inspection interview that the interview will be their only opportunity to inform US authorities that they need protection.'[29] At no stage during the secondary inspection is the word 'asylum' ever used. Can this omission be justified given the importance of the interview? Perhaps it reflects a belief that economic refugees are coached to use this word in order to avoid exclusion, and that by failing to mention 'asylum', they avoid inviting fraudulent claims. The avoidance of simple language could jeopardise the *intelligibility* of the process for claimants.

If the circumstances surrounding the interview are not humane, a claimant's ability to reveal the reasons for migrating may be adversely affected. Such a suspicion, though probably well-founded, is difficult to verify.[30] Therefore, it is helpful to assess whether the manner in which aliens are treated leading up to, and during the interview, is *ethical*. For those claimants who arrive by plane, the secondary inspection will take place at the airport.

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[27] Cooper, B., *op cit* 1517.

[28] LCHR, *Slamming the Golden Door: A Year of Expedited Removal* (*Slamming the Golden Door*) (March 1998) at 10.

[29] *ibid.*

[30] An information vacuum envelops secondary inspection. A study pioneered by Musalo K. and Anker, D., *(Expedited Removal Study: First Year Report* (May 1998) and *Expedited Removal Study: Second Year Report* (May 1999) was unable to collect primary data through on-site observation of removal procedures at ports of entry. The INS denied this, and other requests for assistance, and so secondary sources became the focus. A Freedom of Information Act request targeting the INS bore little fruit <http://www.uchastings.edu/ers/>).

Individuals are immediately escorted to the waiting area without opportunity to rest, eat, or to contact anybody. This prohibition on contact may be accounted for on the grounds that it may delay proceedings, however such a fixation with *timeliness* may be costly. The significance of the secondary inspection is such that it is vital that the individual is able to *participate* fully. Without the presence of a lawyer, or a UNHCR representative to explain the need for disclosure, then a distressed or confused refugee may fail to make a meaningful contribution in the interview. The presence of a representative at the secondary interview also enhances the *consistency* of procedures by ensuring that the correct approach is followed.

Meaningful *participation* in the expedited removal process, indeed any interview relating to an asylum claim, for many individuals, will be inhibited if there is not an effective translation of the questions posed, and the responses provided. Current practice utilises *ad hoc* translators at times,[31] which appears incompatible with the express conviction of the courts that '[T]he very essence of due process is a meaningful opportunity to be heard.'[32] It is questionable whether the secondary inspections will afford the chance to *participate* properly, and be *rational* in the sense that they are *impartial* and *intelligible*.

The conditions in which claimants are expected to elucidate their fears and past experiences, merit scrutiny because oppressive surroundings, or those which lacking privacy for the individual, can compromise the claimant's ability to reveal their experiences. The absence of confidentiality during secondary inspections does little to put the asylum seeker at ease and may fetter the claimant's *participation* in the interview. The general environment in which secondary inspections takes place, does not appear to promote a feeling of trust and security, but demonstrates scant respect for the dignity of the individual.[33] The *ethicality* of the entire process of secondary inspection is highly dubious.

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[31] LCHR, *Slamming the Golden Door op cit* at 14. Reliance is sometimes placed on passengers arriving on the same plane or airline personnel to translate). The INS does have a policy which precludes any government official from acting as a translator (The author wishes to acknowledge Beth Lyon (Visiting scholar, American University, Washington College of Law) for providing that information).

[32] *Augustin v Sava* 735 F.2d 32, 37 (2d Cir. 1984).

[33] See LCHR, *Slamming the Golden Door op cit* at 13-14.

The emphasis which the IIRIRA 1996 places on speed of decision-making, results in the absence of any external hearing or review of the decision to remove an individual who fails to express a fear of persecution or ask for asylum. Mistakes cannot be *corrected*, and the *rationality* of a process which allows inspection officers, with limited expertise in recognising *bona fide* refugees, to immediately deport migrants is suspect. The value of additional procedures is high where 'the decision of admissibility [is] in the hands of an individual immigration inspector, and [...] the law bars administrative and judicial review of the inspector's determination'.[34] The preceding law entitled those migrants who arrived without the correct documentation to an evidentiary hearing before an Immigration Judge.[35] A negative decision could be appealed to an administrative appellate tribunal and then to a federal court. In attempting to balance the interests of the individual and an efficient administrative process, policy-makers in the United States have done a volte-face and provided too few procedural guarantees.[36]

Those claimants, who, in the opinion of a secondary inspector indicate a fear of persecution or a desire to apply for asylum are detained and referred to an asylum officer who determines whether they have a credible fear of persecution.[37] The INS has claimed that in its implementation of the expedited removal provision, it 'is taking steps far beyond what is required in the statute and ensuring that aliens affected by expedited removal are treated fairly and that their rights are protected'.[38] To what degree is such an assurance deserving?

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[34] Grable, D., 'Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996' (1998) 83(3) *Cornell Law Review* 820, 849.

[35] These are referred to as defensive asylum applications because claims are raised as a defence to removal proceedings. The alternative procedural route is the affirmative filing of an asylum applications from those people who are already in the United States.

[36] See Grable, D., *op cit* 853.

[37] INA § 235(b)(1)(B)(ii)(v).

[38] INS, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Fact Sheet (24 March 1997) <http://www.ins.usdoj.gov/public_affairs/news_releases/953.html>. See also Cooper, B., *op cit* 1516.

According to the INS, one of the ways in which the fair treatment of asylum seeker is secured, is by conducting credible fear interviews in detention centres,[39] at least forty-eight hours after arrival. Purportedly, this period of time allows individuals to rest and consult with someone prior to the interview.[40] The preoccupation with *timeliness*, contributed to the decision to hold interviews in detention facilities as opposed to either asylum offices or the airports themselves. It has been suggested that '[t]he reason behind this decision may have been to ensure that the credible fear interview occurs contemporaneously with a refugee's arrival.'[41] Whilst the absence of undue delay in the asylum determination process is in everyone's interests, the *ethicality* of restricting an individual's liberty in order to hasten the process is highly questionable. An exception would be the presence of a genuine national security risk for example.

Particularly troublesome, is that while asylum seekers are entitled to have their representative present at this interview, the combination of being in detention[42] and the forty-eight hour window of opportunity for consultation, may combine to restrict the representative's chance of rendering assistance. Whilst consultation with a representative is expressly provided for in the 1996 Act, the government does not bear the cost, nor can any meeting 'unreasonably delay the process.'[43] Whether the Congressional desire to promptly remove those who would otherwise remain in the United States with little or no chance of acquiring asylum, is counterbalanced by the INS's decision to allow forty-eight hours for a 'meaningful opportunity' for consultation is doubtful.[44] It does appear that the INS has attempted to take into account the unique nature, and characteristics, of those migrants seeking asylum by providing for a consultation period. Whether this is a reasonable period of time given the context in which many arrive is doubtful. *Participation* has been subordinated to the avowed interest in *timeliness*.

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[39] Mandatory detention is prescribed for in the Act (see INA § 235(b)(1)(B)(iii)(IV); See generally, see Morante, P., 'Detention of Asylum Seekers: The United States Perspective' in Hughes, J. and Liebaut, F., *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (Kluwer Academic Publishing 1998) 85.

[40] INS, *Illegal Immigration Reform and Immigrant Reform Act of 1996*, *op cit* at 4.

[41] Schrag, P. and Pistone M., *op cit* 292.

[42] Some detention centres are so remote as to make representation unfeasible.

[43] INA § 235(b)(1)(B)(iv). The role of a representative during the interview process is limited. They may make a statement at the end of the interview but at the discretion of the asylum officer (8 C.F.R. § 208.30(b)).

[44] Cooper, B., *op cit* 1517.

Moreover, there is also anecdotal evidence which suggests that not all interviews are conducted in a manner which corresponds with the purpose of the credible fear interview. Critical variances between asylum officers, in some cases has resulted in essentially full-blown asylum interviews.[45] Procedural inconsistency is not *rational*.

In conclusion, the expedited removal provisions contained in the IIRIRA 1996 violate dignitary principles. With all asylum status determination procedures the devil is in the detail. The primary legislation provides the skeleton framework, which is fleshed out in secondary legislation, quasi legislation,[46] and other documents.[47] These are of instrumental importance in determining whether individuals will have a procedurally just opportunity to make their asylum claim. They may make the process fairer, or they may exacerbate existing inequities in the primary legislation. The INS has, through its operating procedures, attempted to ensure that the summary nature of the expedited removal provisions do not have a deleterious effect on asylum seekers. Cooper has concluded that the procedures 'appear susceptible of fair application meeting the international standards', and that the executive has taken key steps to ensure the 'adequate protection of asylum seekers who fall within those procedures'.[48]

Two points are worth making in response to this opinion: First, appearing to fulfil the requirements of the abstract formulations in international legal standards is not that exacting, and it is possible for states to pay lip service to them. Moreover, the broad formulations of principle may facilitate varied and uneven compliance. Second, far from adequately protecting asylum seekers, the summary screening process is unjust because it fails to adhere to dignitary principles of procedural fairness which have been used to evaluate it. They do not ensure that applicants will fully understand the intention behind the process, and it is not certain that every asylum seeker will be given the opportunity to thoroughly explain their eligibility for asylum.

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[45] See LCHR, *Slamming The Golden Door op cit* at 15.

[46] Internal memoranda, and departmental instructions etc.

[47] For example, training manuals for immigration officials and guidelines issued on gender persecution.

[48] Cooper, B., *op cit* 1524.

The approach in Australia differs slightly from that taken in North America. Preliminary screening is conducted, upon arrival to determine who are unauthorised arrivals. Those who are deemed to be unlawfully in Australia are subject to mandatory detention[49] whilst their claims are being examined. Section 193 of the 1958 Migration Act compounds the circumstances of being detained. It provides that the obligation to inform the detainee of their right to apply for a protection visa on asylum grounds does not apply to detainees who have been refused entry to the country, who have been caught after 'bypassing' immigration clearance, or who have been refused permission to leave a vessel unauthorised to land in Australia. Further, the legislation specifies that an immigration officer is not required to advise such a person if they have a right to apply for a visa, give him or her an opportunity to do so, or allow access to any advice in connection with applications for visas.[50] This can undermine the asylum seekers' *participation* in the determination process. The Refugee Council of Australia (RCOA) has provided anecdotal evidence that supports this inference.[51] This is question begging: How many individuals in similar circumstances have been deported because no friends, or family knew they were in the country or what to do to prevent their removal? If the preliminary screening is *unintelligible* to the individual, and mistakes made by the Department of Immigration are

[49] Australia is the only Western country which has a policy of mandatory, non-reviewable detention for unauthorised entrants. 'Boat people' make up the largest group of those detained. (RCOA Briefing Papers, *Detention of Asylum Seekers* at 6 <http://www.refugeecouncil.org.au/rcoa.htm#RCOA Briefing Paper 3>).

[50] Migration Act 1958 § 193(2) and § 198(4).

[51] Latest News: RCOA Refugee Update (June 22, 1998) <http://www.refugeecouncil.org.au/latestne.htm>. Although there can be much persuasive force in anecdotes which detail the human costs of restrictive asylum laws, one should be careful about reliance on such a medium. However, whilst it is important to be cautious about making generalised statements about the presence or absence of procedural fairness based on a few reported cases, it is worth bearing in mind the following: first, the difficulty in unearthing information about the precise operation of asylum determination systems is a characteristic which is encountered by those working or researching in the area in most refugee-receiving states. The information which is unearthed may be the tip of the iceberg and indicative of common practice; secondly, this is precisely the mode of appraising asylum policy and practice which is adopted by governments. For example, the Australian Minister for Immigration and Multicultural Affairs when announcing new asylum measures in 1996 stated that '[c]ircumstantial evidence suggests that some people are using the protection visa system to prolong their stay in Australia.' (Ruddock, P., MP, Immigration, Multicultural Affairs: Minister for Immigration and Multicultural Affairs, *Speedier Processing for Asylum Claims* at 1 <http://www.minister.immi.gov.au/media96/r96053.htm>).

only *corrected* if legal representatives happen to be present, then the procedure violates the principle of *rationality*.[52]

To summarise, in the United States the pre-screening procedures exist to test the credibility, and in Canada the eligibility, of all claimants, and to remove swiftly those individuals who fail to satisfy the requisite tests. In Australia the practice of pre-screening is designed to check the lawfulness of all entrants and to subject those found to lack a valid visa to administrative detention pending a determination of their claim. Repeat applicants and those emanating from safe third countries are ineligible to apply for refugee status.

### **5.3.2** *Legislative or Administrative Presumptions of Unfoundedness*

#### **5.3.2.i** Port of Entry Claimants in the United Kingdom

In contrast to the other states considered, the United Kingdom lacks formal eligibility or credibility pre-screening procedures for claimants. Rather, claimant's are subject to an administrative procedure called the Standard Procedure (SP).[53] What was particularly insidious about this scheme was the manner of its introduction: it was an internal policy change, introduced without any debate in Parliament. It provides the basis for differential treatment of asylum seekers, not for individualised reasons, but by reason of the nationality of the applicant.[54] The SP presents a serious obstacle to asylum applicants, particularly those applying at a port. Under the SP scheme applicants may be interviewed on the same

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[52] On Australian practice generally, see Mediansky, F., 'Detention of Asylum Seekers: The Australian Perspective' in Hughes, J. and Liebaut, F., *op cit* at 125; and Crock, M., (ed) *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Sydney: The Federation Press 1993).

[53] Introduced in May 1995, initially as the 'Short Procedure'. The Home Office announced on March 20, 1996 that the procedure would apply to the 'great majority of claims' with a list of twelve nationalities exempted.

[54] The SP was the precursor to the authorisation of a system of designating countries of origin as 'safe', and was given legislative form in the 1996 Asylum and Immigration Act (AIA) §1(2). Designation had the effect of triggering an expedited appeals process for applicants emanating from countries designated as 'safe' (see generally, Trost, R. and Billings, P., 'The Designation of "Safe" Countries and Individual Assessment of Asylum Claims' in Nicholson, F. and Twomey, P., *op cit* at 86-90. Schedule 16 of the Immigration and Asylum Act 1999 repeals § 1(2) - but special appeal procedures continue to apply to those arriving from a 'safe third country' (see § 71 and § 72). (See also Home Office, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum* paras 9.9-9.10, Cmnd 4018, July 27, 1998).

day or shortly after by an immigration officer. The demand for instant disclosure of their experiences flies in the face of expert psychological opinion about the difficulties in recounting to third parties the details of traumatic events. Persecution, alienation, and the culture shock felt by people who have uprooted themselves and fled to a foreign country, and the psychological impact of separation, are factors which health care professionals have accepted may result in refugees suffering from illness, psychological disturbance and a withdrawn state of mind.[55] To insist on abbreviated procedures at the outset of the determination process prioritises *timeliness* over *participation* and *ethicality*.

There is a lack of *consistency* in the determination procedures. Detainees, like those processed through the SP, are interviewed swiftly, whereas those granted temporary admission may be recalled to the port to complete a long questionnaire,[56] and/or are given a self-completion questionnaire (SCQ) to complete themselves usually within four weeks.[57]

Consideration of the role of immigration officers is apposite, because they cannot be considered as mere gatekeepers to the asylum determination process. In the United Kingdom their function is central to the investigatory process. They share the task of investigating the basis of the claim with the executive branch agency - the Integrated Casework Directorate (ICD).[58] Their role is crucial in shaping the flow of information passed on to the caseworkers at the ICD and this can materially affect the outcome of an application. In the United States the point may be made with greater force given that immigration officers may order the removal of individuals. In Canada and Australia they fulfil a screening function which may preclude participation in full status determination. Moreover, the power invested in immigration officers to detain unlawful entrants is hugely

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[55] UNHCR *Training Module on Interviewing Applicants for Refugee Status 1995 (Training Module)* at 29 and 33.

[56] Webb, D. and Grant, L., *Emergency Procedures* (Legal Action Group 1995) 175, detail the questions which immigration officials will ask asylum applicants at the port of entry.

[57] In-country applicants - those individuals who are already in the United Kingdom for another purpose, are given an initial interview at the ICD, and then asked to return a month later with a completed SCQ for a further interview.

[58] Acts on behalf of the Secretary of State for the Home Department in respect of asylum applications.

significant in Australia because those detained cannot be released by the courts unless they meet the criteria for a bridging visa.[59]

The proviso that an applicant who has arrived from a prescribed country other than their country of nationality or place of habitual residence, enshrined in the Canadian[60] and American legislation,[61] also constitutes a ground for ineligibility in the process of determination in the United Kingdom. Immigration officers will gather information from applicants, the purpose of which is, *inter alia*, to determine whether they have travelled through a safe third country.[62] If the immigration officer is satisfied that the application should be dealt with in the United Kingdom then the details of the claim are forwarded to the ICD. Claimants may be granted temporary admission or detained.[63]

In the United Kingdom immigration officers fulfil a pivotal role in the initial phase of the determination process. It is an important and arduous task, and it is therefore disturbing to note a number of procedural deficiencies: The governmental view, that permitting representatives to accompany clients at the screening interview is entirely discretionary, has been upheld by the courts.[64] This is alarming given that immigration officials may decide at this stage that an individual has transited via a safe third country, which may lead to removal without an appeal. The importance of the presence of a legal representative has been affirmed by the UNHCR.[65]

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[59] A bridging visa entitles individuals to remain in Australia until determination of their claim.

[60] § 46(01)(1)(b). The safe third country sift is not presently enforced in Canada.

[61] IIRIRA 1996 § 604(a), INA § 208(a)(2)(A). No treaties have been concluded vis-à-vis third country returns.

[62] See AIA 1996 § 2(2) relating to AIAA 1993 § 6 (Now see § 11 IAA 1999).

[63] Whether applicants are detained pending consideration of their claim appears 'in many instances [...] to be quite arbitrary, dependent on the availability of detention spaces' (Witherow, R., 'Detention of Asylum Seekers: A Continuing Cause for Concern' (1995) 9(2) *Immigration and Nationality Law and Practice* 59, 60). The Immigration and Asylum Act 1999 (Part III) introduces routine bail hearings for detained persons.

[64] *R v Secretary of State for the Home Department, ex parte Vera Lawson* [1994] Imm AR 58. However to exclude either a legal representative, who had asked to be present, or an interpreter, would raise a presumption of unfairness that would help on appeal (Stanley, A., 'Political Asylum Interviews' (1994) 8(3) *Immigration and Nationality Law and Practice* 79).

[65] *Training Module* at 15; and ILPA, *Breaking Down Barriers: A Report on the Conduct of Asylum Interviews at Ports* (Russell Press 1999).

There is no right to an interpreter in the United Kingdom. Official interpreters are not examined in their competence in either English or the foreign language of the asylum applicant which is being translated. Nor are interpreters vetted for political or cultural bias. A number of mistranslations, resulting from either incompetence or bias on the part of the interpreter, may portray a picture of incompetence on the part of the applicant and cast doubt on the credibility of their testimony.

To summarise, the presence of legal representation and competent interpreters at all stages of the determination process, is axiomatic: First, it ensures that applicants *participate* meaningfully. It can prevent misunderstandings from arising and ensure that important matters are covered in sufficient depth. Asylum applicants are likely to be disadvantaged by the absence of legal representation[66] because information which is vital to many claims will not be obvious to someone who does not know the law. Secondly, it means the process is *rational* in the sense that it is *intelligible* to the claimant and *impartially* administered. Representation can act as an independent check on the manner in which the interview is conducted. Thirdly, it enhances *consistency*, because counsel can prevent any procedural or substantive errors being made by interviewing officers. Fourthly it may contribute to *timely* decisions because representatives instructed by an applicant before they have been interviewed may find that they will not need to submit further representations because the client is more likely to have done themselves justice during the interview.

Arguably one can place the seriousness of the inquiry into the nature of an asylum claim on an equal footing with being the subject of a criminal inquiry a police station. Why should procedural safeguards which apply to interviews in a police station not apply in an asylum interview. It is accepted that safeguards are required in police interviews to secure

[66] Any unfair omissions by an interviewing officer in an asylum interview may lead to a re-interview or to refusals being overturned on appeal (*R v IAT ex parte Murat Akdogan* QBD [1995] Imm AR 176). Appealing, or re-interviewing is costly in terms of money and time and will decrease efficiency. These costs could be avoided if refugees had an opportunity to seek legal advice and complete a statement before a first substantive interview.

the observance of the *participation* of the individual, the *ethicality* of the process. It may also contribute to the *timely* disposal of cases.[67]

**5.3.2.ii** Initial Decision-making on the Substantive Claim - How the Systems Compare

In the United Kingdom initial decisions on port arrivals are made by the ICD on the basis of the information forwarded to them from the immigration officer at the port of entry. '[That] gap between the decision-maker and interviewer is a fertile ground for misinterpretation and error'. [68] The caseworker may request that the applicant attend a further interview but there is no requirement to do so. Thus, the decision-maker may have no direct contact with the applicant. Following an adverse decision the asylum applicant may exercise rights of appeal to a Special Adjudicator. The reasoning employed, and evidence relied on by the Home Office in making decisions, has been the subject of criticism.[69] The appellate authorities are not shown the evidence that the ICD have relied upon to come to that finding. Access to this evidence would improve the quality of decisions made by Adjudicators. Hence, the *rationality* of the process would be improved because the basis of the initial decision would be more *intelligible*. [70] The appellant will be able to *participate* more effectively if they have the opportunity to respond to the specific evidence utilised by the ICD. Furthermore, if initial decision-makers are aware that the reasoning and evidence they adduce, are to be presented on appeal, then awareness alone can contribute to a more careful assessment of the evidence.

Whilst arriving in the United States without the correct documentation results in the individual being subject to the expedited removals process, in the United Kingdom

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[67] For example, the use of tape-recorders in asylum interviews (see Justice, *Providing Protection: Towards Fair and Effective Asylum Procedures (Providing Protection)* (July 1997) at 42). A pilot study in the United Kingdom began in May 1999 (Immigration Law Practitioners' Association (ILPA), *Breaking Down the Barriers* (Russell Press 1999) at 80-82.

[68] Justice, *op cit* 39. In-country applicants are considered by the ICD alone.

[69] *Note submitted by the ILPA*, Home Affairs Committee, Minutes of Evidence (May 12, 1998) at 22; see also Asylum Aid, *No Reason At All - Home Office Decisions on Asylum Claims* (1995), and Refugee Legal Centre, *Reviewing the Asylum Determination Procedure A Casework Study: Part One, Initial Decision Making* (July 1997).

[70] RLC *op cit* chapter seven.

inadequate documentation may result in the applicant's claim being certified as 'without foundation'.[71] Certification results in the individual being placed in an abbreviated 'fast-track' appeals process. Thus, just as with the pre-screening process in the United States, lack of documentation is prejudicial to the asylum applicant's case. States would appear content to penalise asylum seekers for who they are, and the circumstances by which they have fled. Asylum seekers must often flee their country of persecution and travel covertly, outside of the normal channels and with false documents.[72] In addition to lack of adequate documentation, section 1 of the 1996 AIA lists several other grounds which form presumptions of unfoundedness,[73] that 'in reality may constitute the majority of asylum claims in the United Kingdom'.[74] They may serve as the basis of refusal and limit avenues of appeal.[75]

The Australian system parallels the United Kingdom's, insofar as civil servants take the initial decision on asylum claims. The primary decision is made by a case officer in the Department of Immigration and Multicultural Affairs (DIMA) in a non-adversarial and informal manner. Sections 52-64 of the 1958 Migration Act govern the procedures for dealing with applicants. They afford the claimant, *inter alia*, the opportunity to comment on any adverse information personal to the claimant, which is taken into account when a claim is considered. Moreover, the Minister is duty-bound to explain the relevance of the information relied upon, and the applicant to submit material to the Department up to the time of the decision. These are important procedural details which may safeguard the

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[71] Certification is made in the name of the Secretary of State for the Home Office by caseworkers in the ICD.

[72] Failing 'to produce valid documents on arrival bears little relationship to the validity of the refugee claim, and the use of false travel documents is often the only means of escape'. (LCHR, *Slamming the Golden Door op cit* at 4).

[73] If an asylum seeker arrives from a country designated as one in which there is in general no serious risk of persecution (so-called 'white listed' countries); where they fail to show persecution for a 1951 Convention reason; or who show fear of persecution which is manifestly unfounded or the circumstances which gave rise to the fear no longer subsist; where the application is made after a refusal of leave to enter, a recommendation for deportation or where the applicant is an illegal entrant; and where the claim is deemed fraudulent, where evidence adduced in its support is manifestly false or it is frivolous or vexatious (§ 1 1996 AIA substituting sch 2 para 5 of the 1993 AIAA. See now sch 4 (para 9) IAA 1999).

[74] Stevens, D., 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum' (1998) 61(2) *Modern Law Review* 207, 211.

[75] *infra* section 5.3.3 Truncated Appeals Procedures.

dignitary values of *rationality* and *participation*. Those who are part of the refugee determination section in DIMA deal only with refugee status applications.

The legislative framework appears to promote, a decision making culture imbued with fairness. Yet the true test of any determination system is whether it stands up during testing times - whether its commitment to procedural justice is more than exhortatory. Recently, the department's efforts to address the backlog of applications, and deal more quickly with claims, has led to concerns about the primary stage of refugee status determination.[76] Such concern is supported by the success rate of appeals before the Refugee Review Tribunal (RRT) for the ten month period ending in April 1998. For the countries recorded at least double the number of claims were granted at the review stage.[77] The figure also casts a shadow over the government's laudable initiative to concentrate resources on those applicants who are at the beginning of the process, and to ensure high quality primary administrative decisions are made.[78]

In the United States, those applicants who demonstrate a credible fear of persecution, like those individuals who cannot establish that they are admissible to the United States, but who do not fall within the scope of the expedited removal procedures of section 235(B)(1), are placed in regular removal proceedings.[79] The claim to asylum may be raised as a defence to the removal proceedings.[80] These procedures will be appraised

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[76] See Crock, M., 'Privative Clauses and the Rule of Law: The place of Judicial Review Within the Construct of Australian Democracy' in Rubenstein, K. and Kneebone, S., *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australian Institute of Administrative Law Forum 1998) at footnote 76 and associated text; and RCOA, *Latest News: RCOA Refugee Update op cit* at 2.

[77] The country is listed first followed by the percentage of claims granted at the primary level, and then on review: Iraq, 46.67% - 93.00%; Algeria, 32.93% - 82.69%; Albania, 0% - 72.73%; Iran, 33.33% - 69.39%; Somalia, 38.71% - 68.63% (RCOA, *ibid*).

[78] Minister for Immigration and Multicultural Affairs, Ruddock, P., MP, 'The Broad Implications for Administrative Law Under the Coalition Government with Particular Reference to Migration Matters' *National Administrative Forum* (May 1, 1997) at 2 <http://minister.immi.gov.au/trans98/sp010597.htm>.

[79] INA § 240. For example Cubans arriving by air (8 CFR § 235.3(b)(1)(i)).

[80] It is also available under two other conditions; see INA § 208(d)(5)(A)(4) and INA § 208(a)(2)(B).

later.[81] First attention will focus on the procedures which govern the manner in which affirmative asylum claims are processed.[82]

In 1989 the consensus among refugee commentators in the United States was that the system was in need of reform.[83] Asylum adjudication officials were few in number, insufficiently qualified, and were often perceived as having an enforcement perspective. Moreover, State Department preferences frequently dictated the outcome of certain cases.[84] The twin goals of the asylum reforms introduced in 1990,[85] designed to expedite approvals of meritorious applications and expedite denials for those with little or no claim, were to be attained by; the non-adversarial asylum interview, and thoughtful analysis and decision-making.[86] A corps of asylum officers, independent of government, was mandated to be trained in international law and international relations divorced from enforcement responsibilities and foreign policy influences.[87] The Quality Assurance Unit within the Asylum Division was made responsible for monitoring and reporting on matters of quality assurance. Such a body may enhance the extent to which the principles of *consistency* and impartiality are complied with, but is no substitute for an appellate body.

In the non-adversarial interview, the importance of which is acknowledged by its inclusion in the final asylum rule,[88] the asylum officer takes an active role in the interview process, in an effort to 'elicit all relevant and useful information bearing on the applicant's eligibility for... [asylum].' The conditions are fostered so that the applicant has the best possible opportunity for giving a comprehensive account of all the important elements of the claim.[89] Such an approach is distinguishable from the 'culture

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[81] *infra* section 5.3.3 Truncated Appeals Procedures.

[82] A request for protection under the Torture Convention will not be considered until an applicant has received a final order of removal and exhausted all avenues for seeking review (INS Memorandum, *Guidance on Compliance with Article 3 of the Convention Against Torture loc cit*).

[83] Beyer, G., 'Establishing The United States Asylum Corps'(1992) 4(4) *IJRL* 455, 466.

[84] *ibid.*

[85] 27 July 1990, 55 Fed. Reg. 30,674, codified at 8 CFR § 208.

[86] Beyer, G., *op cit* 475.

[87] 8 CFR § 208.1(b) (1990), as amended (1995).

[88] 8 CFR 208.9(b) (1992).

[89] See generally Beyer, G., *op cit* 480.

of disbelief' which has been attributed to the decision-making process in the United Kingdom.[90] However, the inquisitorial, informal, nature of the asylum officer interview has attracted criticism.[91] The essence of the criticism was that the informal interview weakens procedural safeguards and insulates the asylum officers from due process requirements.

Despite these reforms, new regulations, restricting access to determination process, were proposed on March 30, 1994, on the grounds that the earlier reforms had not adequately dealt with spurious applications from economic migrants. The statistics did not bear out the presumption that most asylum seekers were attempting to violate immigration laws.[92] Administrative, non-statutory, asylum reforms were introduced, designed to achieve prompt adjudication of all incoming claims and to de-link work authorisation from applications for asylum.[93] Beyer concluded at the time, that 'almost everyone finds the current system and level of funding, even as reformed in 1990, inadequate'.[94] By contrast, a comprehensive non-governmental study of the implementation of the 1990 reforms,[95] concluded that the asylum 'crisis' was a media misrepresentation.[96] The study pointed to

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[90] For example, see Harvey, C., 'Taking Human Rights Seriously in the Asylum Context?' in Nicholson, F. and Twomey, P., *op cit* 215.

[91] See Anker, D., 'Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment' (1992) 10 *New York University Review of Law and Social Change* 433, 442. For example, there is no meaningful role for the asylum applicants counsel and no record of the proceedings. This lack of transparency in the decision making process may prove to be an impediment to administrative or judicial review.

[92] See Ignatius, S., *Immigration and Refugee Program, An Assessment of the Asylum Process of the Immigration and Naturalization Service* (1993) (*Immigration and Refugee Program)* (Harvard Law School) at 3.

[93] The underlying assumption was that asylum applications were lodged simply to secure work authorisation.

[94] Beyer, G., 'Reforming Affirmative Asylum' *op cit* 65.

[95] Conducted by Ignatius, S., *Immigration and Refugee Program, supra.*

[96] See Anker, D., 'The Mischaracterised Asylum Crisis: Realities Behind Proposed Reforms' (1994) *American University Journal of International Law and Policy* 29. The motivations behind both the Clinton administrative regulatory reforms, was the perception that the asylum system was too generous, and that fraudulent claims were discrediting and overwhelming it. The media reinforced, amplified and mobilised such popular misconceptions, in a similar way to sections of the media in the United Kingdom prior to the passage of the 1993 AIAA, and 1996 AIA.

the management and related problems attributable, largely, to a failure to fund and otherwise resource the program at an appropriate level.[97]

Prompt adjudication of applications was to be attained by returning incomplete applications instead of allowing for their completion at the initial interview and by eliminating the need for an advisory opinion from the State Department in all cases. Accepted applications are referred to an asylum officer, who after an interview, either grants asylum or refers the case directly to an Immigration Judge. This system allows asylum officers to quickly grant meritorious cases.[98] This may be contrasted with the approach taken in the United Kingdom where the only fast-tracking relates to cases deemed to be unfounded. The goal of the new processing system was *timeliness*, with final decisions to be rendered, and collected on or before the 60th day of receipt of applications.[99] The reforms were championed as 'preserving legal protection for legitimate asylum seekers while at the same time requiring the departure of denied applicants promptly at the end of the process.'[100] One year after the new regulations took effect the INS announced in January 1996, that there had been a sharp decrease in the number of claims filed and a doubling of the cases completed by the agency over the previous year.[101] Despite this, on Capitol Hill the perception remained constant - individuals were abusing the asylum system.

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[97] See also Centre for Equal Opportunity, *Abolish The INS: How Federal Bureaucracy Dooms Immigration Reform*, <http://www.ceousa.org/ins.html>.

[98] Parallels may be drawn with the Canadian system whereby manifestly well-founded applications may be quickly approved.

[99] Coven, P., 'Implementation of Revised Asylum Procedures' in *In Defense of the Alien: Proceedings of the 1995 Annual National Legal Conference on Immigration and Refugee Policy* (Centre for Migration Studies, New York 1996) at 159-160. Furthermore, in order to expedite the process the number of asylum officers was doubled to 300, and the number of Immigration Judges increased to 170. This increase in personnel reveals a willingness to invest resources at the front-end of the determination process in order to secure *timeliness*, in addition to reforms made to the legislative and administrative process.

[100] *ibid* at 160-163.

[101] INS reported that new asylum claims dropped from 122,589 in 1994 to 53,255 in 1995. Additionally, asylum officers completed 126,000 cases in 1995 compared with 61,000 in 1994, with the result that the backlog was reduced by over 60,000 cases ('One Year Later: Asylum Claims Drop by 57 Percent', 73 *Interpreter Releases* 45, 46 (1996)).

Claimants who successfully traverse the eligibility screening procedures in Canada are given a hearing notice and 28 days to file a Personal Information Form (PIF)[102] with the CRDD.[103] If the deadline is not met steps can be taken to declare the claim abandoned.[104] An extension of the time limit may be made by the CRDD on application by the claimant.[105] Along with the PIF claimants receive a package of information on immigrant-serving agencies and legal aid centres, as well as an explanation of the refugee determination process.[106] That such information is available and *intelligible*, is axiomatic: without recourse to credible legal representatives *participation* in the process may be hindered, and by explaining the law and procedures to the applicant the system may be *intelligible* to the individual.

In Canada an expedited process is initiated if the Refugee Claims Officer (RCO) is of the opinion that the claim would be likely to succeed.[107] This conclusion may stem from a preliminary conference, which enables the parties to discuss the evidence they intend to produce and to try to agree how to simplify the hearing.[108] The conference is 'in order to provide for a full and proper hearing and to dispose expeditiously of the claim'.[109] This process can serve to secure a prompt approval of a meritorious case, thereby fulfilling the principle of *timeliness*, and the legislative requirement that the CRDD deals with all proceedings as informally and expeditiously as fairness permits.[110] Moreover, through the active *participation* of the applicant at this early stage of proceedings, even where the RCO is of the opinion that a hearing is necessary, the meeting and exchange of information between the parties will yield a full and proper hearing.[111] A negative decision cannot be

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[102] Convention Refugee Determination Division Rules (CRDD Rules) SOR/93-45, Rule 6 (January 28, 1993).

[103] Or thirty-five days where the PIF is filed by mail (CRDD Rule 14(2)(**b**)).

[104] Immigration Act 1976 § 69.1(6)(b) and CRDD Rule 32.

[105] CRDD Rule 38.

[106] *ibid.*

[107] Immigration Act 1976 § 69.1 (7.1); CRDD Rules (SOR/93-45) Rules 18 and 19.

[108] CRDD Rule 20(2).

[109] CRDD Rules, SOR/93-45, Rule 18(1).

[110] Immigration Act (1976) § 68(2).

[111] CRDD Rule 20(1).

rendered by the expedited procedure.[112] The expedited process is a mechanism which, *prima facie*, secures the *timely* adjudication of manifestly well founded claims and consequently contributes to the overall efficiency of the process. However, a recent report suggested that the process is being utilised less and less, and that there is an absence of *consistency* in the practices used in the process from one region to another.[113] Additionally, Board members and RCOs submitted that the results of the expedited process were not as reliable as those obtained through the normal hearing process.[114]

Two CRDD Members conduct a hearing, with the exception that one Member of the CRDD may determine the claim with the applicant's consent.[115] The preference for non-adversarial hearings reflects a belief that the features of an adversarial procedure are detrimental to cross-cultural fact-finding.[116] However, whilst it was intended that hearings should be non-adversarial,[117] many of the trappings of an adversarial procedure remain.[118] The IRB claim that '[e]very effort is made to ensure that claimants can put forward their cases as thoroughly and completely as possible.'[119] To what extent is this proposition accurate?

First, the RCO assumes a proactive role in proceedings. Prior to the case they will conduct research into the human rights conditions in the claimant's country and relevant

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[112] Claims are not typically expedited if; (1) there are concerns about credibility; (2) the case is particularly complex; (3) it is one that may raise the spectre of an exclusion clause; or (4) the claimant is from a country where the CRDD's overall acceptance rate is low. (See ALR)

[113] 43 percent of favourable decisions in 1993-94 were reached through this procedure, compared with 30 percent in 1996-97 (Report of the Auditor General of Canada *loc cit*).

[114] *ibid.*

[115] 1976 Immigration Act § 69.1(8).

[116] Glenn, H.P., 'Rebuilding Procedures: The Immigration and Refugee Board and Rebuilding Trust' (1994) 14(4) *Refuge* 1, 3.

[117] See generally, Hathaway, J., *Rebuilding Trust-Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993); and Plaut, G., *Refugee Determination in Canada*, Minister of Supply and Services (Ottawa 1985).

[118] See Glenn, H.P., *loc cit*, who points to the adversarial nature of the cross-examination in the hearing process, and the contradiction between the assertion that the role of the RCO is non-adversarial, while at the same time asserting that they have a duty to ask questions to elicit the essential facts of the case. Also, Hathaway referred to the tendency for counsel, who are trained in the adversarial tradition, to show little inclination to adapt to an inquisitorial mode (Hathaway, J., *op cit* 9).

[119] IRB, *Convention Refugee Determination, loc cit.*

jurisprudence. In order that claimants and their counsel take part in a meaningful manner, disclosure of that research must be *timely*, 'to allow counsel to fully and effectively fulfil his or her role and to allow the party requesting disclosure to prepare.'[120] Hearings are only commenced when it is practicable to do so,[121] and not upon the expiration of a rigid time-limit. During the hearing the RCO assists the panel by ensuring that all available and relevant evidence is presented. Where detailed probing of the case is called for, the RCO's appearance of neutrality may be compromised. If CRDD Members require further elucidation on the part of the claimant then they may ask questions too,[122] but their involvement is kept to a minimum in order to avoid creating an apprehension of bias, which would undermine the *rationality* of the process.

Secondly, the presentation and acceptance of evidence at the hearing is not restricted by any legal or technical rules of evidence,[123] because the aim of the process is to elicit all the relevant information pertaining to a claim. This facilitative approach has allowed evidence to be taken account of which would otherwise be excluded in a civil or criminal court. By allowing physicians and psychologists to testify as to the medical condition of claimants the principles of *ethicality* and *participation* may be satisfied. Such experts may be able to bolster the credibility of the claimant's testimony by providing reliable evidence about the condition of an individual. In the case of a torture victim for example, this is an *ethical* practice since, quite naturally, the claimant may well be averse to discussing past torture. The physician or psychologist may become the mouthpiece for the claimant and *participation* in the process, albeit by agency, may be secured.

Thirdly, the Refugee Division may take notice of any facts that may be judicially noticed, and any other generally recognised facts and any information or opinion that is within its specialised knowledge.[124] Thus, CRDD Members are entitled to use extra-record information that was not formerly introduced as evidence during the proceedings, in order

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[120] *Nrecaj v M.E.I.*, [1993] 20 Imm. L.R. (2d) 252 (F.C.T.D.).

[121] Immigration Act 1976 § 69.1(1).

[122] *Sivaguru v M.E.I.* [1992] 2 F.C. 374 (C.A.); *Manhedran v M.E.I.* [1991] 14 Imm.L.R. (2d) 30 (F.C.A.)

[123] Immigration Act 1976 § 68(3).

[124] Immigration Act 1976 § 68(4).

to support or rebut the claimant's testimony. This may contribute to the *timely* resolution of claims, but CRDD Members must be confident that the any extra-record facts are accurate, and that all Members are aware of such facts, otherwise *consistency* in decision-making may be undermined. Thus, Members must disclose fully the generally recognised facts, or facts within their specialised knowledge, to the parties, and the claimant must be afforded a reasonable opportunity to make representations in respect of those facts.[125] In this way the process is *rational*, because the basis of information crucial to the determination of the claim is made *intelligible*. Moreover, the claimant is afforded the opportunity to respond, thereby fully *participating* in the decision.

Applicants are given the benefit of the doubt in the event of a split decision,[126] except in certain circumstances where there is reason to believe that: claimants have destroyed or disposed of identity documents once in their possession; that they have returned to their country of a nationality since making the claim in Canada; or that their claim is against a country which has been prescribed pursuant to section 102(7) to be one that respects human rights.[127]

The Canadian determination process has, historically, been championed as the Rolls Royce of all systems.[128] Yet whilst believing that Canada's international commitments are satisfied, only half of the CRDD Members, and a minority of RCOs, perceive that current practices instil confidence in the fairness and integrity of the system. Moreover, only a minority believe that the 1976 Immigration Act can protect Canadian society and prevent abuse of the system.[129] Among the factors cited in support of the majority's conviction were the non-adversarial nature of the refugee determination system, the generosity of the legislative provisions concerning refugees, and the absence of sanctions against abuses.[130]

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[125] *ibid* § 68(5).

[126] The decision favourable to the [claimant] shall be deemed to be the decision of the CRDD (Immigration Act 1976 § 69.1(10)(10.1)).

[127] § 69.1(10.1).

[128] 'Canada's refugee determination system is regarded by many as the standard by which other determination systems are measured' (Stobo, G., *op cit* 402).

[129] Report of the Auditor General of Canada, *op cit* at 14.

[130] *ibid*

To summarise, the most obvious distinction between the manner in which the four systems operate at the primary decision-making stage, is that in the United States and Canada decisions are rendered by authorities which are independent of the executive branch of the government, in contrast to the United Kingdom and Australia. Moreover, although the legal traditions of all four states are adversarial, this need not be determinative: asylum status determination does not have to be regarded as contest between claimant and the executive.[131] The Australian model demonstrates that applicants may be the recipients of an informal, non-adversarial approach, where the decision is reached by a government agency. This is instructive because political realities dictate that there will be little support for removing initial decision-making power from the executive branch in the United Kingdom.[132]

### 5.3.3 *Truncated Appeals Procedures*

Brief consideration of the respective appeals procedures in this section is not intended to detract from the importance I have attached to first tier decisions. Far from it. In fact the significance of first tier decision making has assumed even greater importance in recent years as states have curtailed or cut-off avenues of review.

In the United Kingdom the approach has been to set truncated time-scales for the lodging and hearing of appeals, and to remove rights of appeal altogether. For example, the imposition of a two day time limit for the submission of appeals for those claimants whose cases were certified as 'without foundation'.[133] This is in contrast to ten days permitted in non-certified cases. For those certified claimants whose appeals to the Special

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[131] See Care, G., *op cit* at 174.

[132] Pearl, D., 'Immigration and Asylum Appeals and Administrative Justice' in Harris, M. and Partington, M., *op cit* at 58.

[133] Where the applicant is in detention or the refusal was served personally (1993 Asylum Appeals (Procedure) Rules, SI 1661, Rule 5(2); as amended by 1996 Asylum Appeals (Procedure) Rules, SI 2070, Rule 5(1)). The Asylum Appeals (Procedure) Rules are currently under reconsideration in the light of the changes wrought by the 1999 IAA and draft proposals are expected in Spring 2000. (Lord Chancellor's Department, *Immigration and Asylum Bill - Immigration Appellate Authorities: Appeal Procedure Rules* (October 1999).

Adjudicator are refused there is no right of appeal to the Immigration Appeals Tribunal (IAT).[134] Moreover, for applicants deemed to have arrived from a safe third country there is no in-country appeal against the substantive decision to refuse asylum.[135] The basis of the certificate may be challenged on the ground that the conditions relating to the safety of the country were not fulfilled or have ceased to be fulfilled. It is only if the certificate is set aside that there may be an in-country appeal against the substantive claim.[136] For applicants arriving from North America, Switzerland, Norway and European Member States, a substantive appeal may only be conducted from the state to which they have been removed.[137]

Paradoxically, these efforts to speed up the final resolution of claims may contribute to delays rather than arresting them. Firstly, abbreviated time constraints severely hamper the ability of all appellants to lodge and prepare a successful appeal. The factual basis, ergo enquiry, required in asylum cases is unlike that in most other aspects of public law decision-making. It requires determinations based on predictions, and legal representatives face a potentially time-consuming task in striving to verify the existence of human rights abuses in inaccessible and inhospitable regions of the world. The enormity of the appellate body's task must be appreciated too, in order to assess the impact of truncated time-lines on adjudications. Their ability to give an asylum appeal careful scrutiny may be compromised by time-frames which subordinate quality to quantity.[138] Resources are diverted from other parts of the appellate system in order to attempt to satisfy unrealistic deadlines, with the consequence that delays are prolonged for substantive cases and those caught up in the backlog.

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[134] 1996 AIA § 1(7) (See sch 4 para 9(2) IAA 1999). The IAT interprets questions of law and policy as opposed to the Special Adjudicators who conduct a merits review. As a specialised tribunal, the IAT is in a better position to offer guidance for lower levels in the administrative system in order to enhance the *consistency* of the jurisprudence and in the application of the law, than judges who have a generalist perspective.

[135] *ibid* § 2.

[136] AIA 1996 § 3(1)(a)(b). (See §§ 71-72 IAA 1999).

[137] *ibid* § 3(2). (As amended by § 11 and §§ 71-72 IAA 1999). Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996 (SI 1996 No.2671)). It must be submitted within 28 days from the time of departure (1996 Procedure Rules 5(5)).

[138] A certified case must be determined by a Special Adjudicator within ten days, whereas 42 days is set in other cases, and five days for reasons of refusal (1996 Procedure Rules, Rule 9(1)and (2), and 11(2)).

For those asylum applicants arriving via a safe third country the substantive appeal from abroad is risible. The practical effect is to insulate the government department from review, thereby compromising the dignitary principles of *rationality* (*correctability*) and *participation*. This is dangerous because special adjudicators have determined that certain EU Member States are unsafe for some individuals.[139] Judicial review may be obtained prior to removal,[140] however the Immigration and Asylum Act 1999 section 11(2) amends section 2 of the 1996 AIA, and provides that nothing may prevent a claimant's removal if the conditions in section 11(1)and (2) are satisfied. This new provision prevents judicial review of the process of certification, on the grounds that the availability of judicial review unnecessarily lengthens proceedings.[141]

The policies of successive governments in the United Kingdom in the 1990s are incongruous. They have remained steadfast in their commitment to streamlining and curtailing appeal rights as the elixir for the ills of the system, and appear blind to any alternatives.[142] Representatives necessarily place their trust in the appeals process to detect and remedy errors made,[143] but the substance of procedural rules can render the appeal rights nugatory. The principle of *rationality* is not adhered to where there is no realistic opportunity of *correcting* mistakes made at the primary level.

In Australia, the system is comparable to the United Kingdom in that an independent appellate authority reviews the primary decision rendered by civil servants in a government department. However, after the review conducted by the RRT an unsuccessful

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[139] See Wilsher, D., 'Safe Third Country removals Under the Asylum and Immigration Act 1996' (1999) 13(2) *Immigration and Nationality Law and Practice* 63; this has been upheld by the courts: see for example *R v Secretary of State for the Home Department, ex parte Canbolat* [1997] Imm AR 442 .

[140] *ibid*

[141] In 1998, the time taken between application and initial decision was 1-2 years in fourteen percent of cases, and 2-3 years in 4 percent of cases and over 3 years in 5 percent of all cases determined (see Home Office Statistical Bulletin, *Asylum Statistics United Kingdom 1998* (27 May 1999) at para 17).

[142] For example, Lock, D., Special Standing Committee, Immigration and Asylum Bill 1999, Second Sitting, March 17, 1999, col 182.

[143] The suggestion that decision-makers and claimants' representatives *rely* on the latter processes of appeal to deal with contentious issues has been confirmed by the Chairman of the IAT (Pearl, D., *op cit* at 59).

appellant may only seek judicial review. The approach adopted by the RRT is non-adversarial. The 1958 Migration Act provides that the review is 'fair, just, economical, informal and quick',[144] and that the Tribunal is not bound by technicalities, legal forms or rules of evidence.[145] The draconian time-lines imposed on the submission and hearing of appeals in the United Kingdom is less a feature of the Australian system. Refused claimants have 28 days in which to appeal,[146] or seven if they are in administrative detention.[147] Having considered the grounds for appeal, the RRT may make a decision favourable to the claimant based on the papers alone, without an oral hearing.[148] If that proves impossible then the Tribunal notify the appellant that they are entitled to appear at an oral hearing and give evidence.[149] The appellant is afforded 21 days to respond to the invitation, and if an oral hearing is requested a further 21 days notice from the date of the letter notifying them of the date of the hearing.[150] In the case of detainees the RRT will make an offer of a hearing and seven days notice will be provided, if they are unable to make a decision on the papers.[151] The shortened time-frame for detainees is a source of concern because it may undermine the ability of the applicant to *participate* fully in the review. Particularly when the main detention facility (Port Hedland) is located in a remote part of northwestern Australia.[152]

It is notable that the DIMA is not a party to the appeal,[153] it is a forum to further investigate the claim. Extra-record materials may be introduced by the Tribunal. In

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[144] Department of Immigration and Multicultural Affairs (DIMA), *1996-97 Annual Report* (Sub-program 3.2: Onshore Protection) at 1.

[145] 1958 Migration Act § 420(1) and (2)(a).

[146] *ibid* § 412; see also 1997 Migration Regulations, Statutory Rules 109, Regulation 23.

[147] RRT, *Practice Directions*, para 3.4 (October 1, 1998) <http://www.austlii.edu.au/au/other/rrt/practice.html>.

[148] 1958 Migration Act § 424(1).

[149] *ibid* § 425(1)(a) and § 426(1)(a).

[150] RRT, *Practice Directions*, para 5.1.

[151] *ibid* para 5.2.

[152] It has been argued that the location of the Port Hedland facility hinders access to fully qualified legal advisers, interpreters with the necessary languages, culturally appropriate medical practitioners, counsellors and religious leaders, as well as to ethnic and cultural support groups (Mediansky, F., *op cit* at 133).

[153] The DIMA may make written submissions concerning the appeal issues when the appellant has filed their evidence and arguments (1958 Migration Act § 423(2) and § 427(1)(d)).

keeping with the inquisitorial approach, the Tribunal itself has the power to summon individuals and request documentation.[154] There is no legal right to representation, although in practice they are usually present,[155] albeit in a limited role.[156] Although the regulatory regime for the RRT is supposed to ensure procedural fairness, the RRT is constituted by a single member, not all of whom are lawyers and there is no hearing code, only practice directions which are non-binding.

The introduction and commencement of hearings by the RRT in June 1993[157] was the first stage of 'a radical overhaul of Australia's migration legislation.'[158] It had much to do with governmental concern about the increasing use of the regular courts by unsuccessful asylum claimants, and judicial activism.[159] The second stage of the reforms, created a special regime for the judicial review of migration decisions.[160] In short, the Australian government narrowed the grounds on which individuals can test the lawfulness of asylum decisions before the Federal Court. The 1992 Migration Reform Act removed natural justice (or procedural fairness) and unreasonableness as grounds of review.[161] Such derogation from the Rule of Law was exceptional at the time but subsequently restrictions on judicial review have occurred in the United States and are a feature of the 1999 Act in the United Kingdom.

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[154] *ibid* § 427(3).

[155] Fonteyne, J-P. L., 'Refugee Determination in Australia: An Overview' (1994) 6(2) *International Journal of Refugee Law* 253, 256.

[156] 1958 Migration Act § 425(2).

[157] Migration Reform Act 1992 (the Reform Act).

[158] Crock, M., 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18 *Sydney Law Review* 267, 269.

[159] See for example, Fonteyne, J-P. L., *op cit* at 258; and Crock, M., *op cit* at 267 *et seq*. The portals to judicial creativity were opened in *Kioa v West* (1985) 159 CLR 55. The effect of the decision was to subject all migration decisions to the force of the common law principles of procedural fairness.

[160] Effective from 1 September 1994.

[161] 1958 Migration Act § 476(2). The grounds on which the Federal Court may review a decision are set out in § 476(1) and elaborated on in § 476(3). The inter-relationship between § 476, and § 420 - which requires the RRT to review decisions in accordance to 'substantial justice and the merits of the case', has proved troublesome for the courts; see *Eshetu v Minister for Immigration* (1997) 145 ALR 621, and *Sun Zhan Qui v Minister for Immigration* (1997) 151 ALR 505, which suggested that §§ 420 could give rise to review rights under § 476. The constitutionality of part 8 of the Migration Act was affirmed in the High Court in *Abebe v Minister for Immigration and Multicultural Affairs* [1999] 162 ALR 1 (for a detailed critique of the decision see Crock, M., 'The High Court and the Judicial Review of Migration Decisions' *op cit* footnote 60 and associated text.

In 1997 further restrictions on access to the Federal Court and High Court were tabled. Justified on the grounds that there had been significant growth in cases going to courts in recent years which had added to delays,[162] costs to the taxpayer, and that individuals were using litigation to delay their departure (an assumption which is contentious) it was announced that the Government intended to introduce a full 'privative clause' for many decisions made under the Migration Act.[163] According to one commentator they had more to do with the executive's preoccupation with controlling the migration system.[164] The Government recognised that the effect of restricting access to the Federal Court was simply to deflect many cases up to the High Court. However, restricting access to the High Court could only be achieved through constitutional amendment, therefore the chosen means for achieving the aim of the government was a 'privative clause'. Such a clause serves to expand the legal validity of the acts done and the decisions made by decision-makers. In practical terms it narrows the scope of judicial review to that of narrow jurisdictional error and *mala fides*.[165] The Judicial Review Bill (year) extends the restrictions placed on access to judicial review in the Federal Court to the High Court, effectively imposing a blanket restraint on judicial review of all but a small number of migration rulings.

The impact of the privative clause is to place the burden of fulfilling a supervisory function onto the RRT. Thus, a merits review body is forced into considering the lawfulness of decisions.[166] Moreover, entrusting the examination of how powers have been exercised and how legislation is being interpreted by the executive, to a Tribunal whose

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[162] Ruddock, P. MP., 'The Broad Implications for Administrative Law Under the Coalition Government with Particular Reference to Migration Matters' *loc cit.* Changes proposed by the Migration legislation Amendment Bill (No 4) (1997) (Bill No 4) and Migration Legislation Amendment Bill (No 5) 1997 were rejected by the Senate in November 1997, but was subsequently reintroduced on 2 December 1998 by Migration Legislation (Judicial Review) Bill 1998 (the Judicial Review Bill).

[163] Ruddock, P. MP., Minister for Immigration and Multicultural Affairs) 'Government to Limit Refugee and Immigration Litigation' Press Release (March 25, 1997 <http://minister.immi.gov.au/media_ releases/media97/r97032.htm>.

[164] Chaaya, M., 'Proposed Changes to the Review of Migration Decisions: Sensible Reform Agenda or Political Expediency (1997) 19 *Sydney Law Review* 547, 567.

[165] See Crock, M., 'Privative Clauses and the Rule of Law' *op cit* footnote 6 and associated text.

[166] Chaaya, M., *op cit* 560.

non-judicial members tenure is dependant upon the Minister for renewal is plagued with difficulties - not least the lack of perceived impartiality. The concern about delay and cost is a valid one, but there are alternative reforms[167] that can address the issue of *timeliness* without undermining the *rationality* of the system. Whilst wishing to echo the sentiments of Legomsky: '[w]hen important individual interests are at stake, the benefits of judicial review overwhelm the costs', I would add that it is the costs to key dignitary principles which outweigh the financial costs and potential loss of *timeliness*.

The assault on access to means of redress in the United Kingdom and Australia, is paralleled in the United States. If an applicant fails to meet the burden of demonstrating a credible fear of persecution they may seek review of that decision before an Immigration Judge within twenty-four hours. It will be reviewed within forty-eight hours to the maximum extent practicable, but no later than within seven days. Moreover, the Immigration Judge may conduct the hearing by telephone, on video or in person.[168] Given the cross-cultural communication difficulties which exist for many applicants, to conduct interviews on the telephone or through video, when the review is the last opportunity an individual may have to prevent removal, is unjust. *Participation* in the process is sacrificed at the altar of *timeliness*. *Rationality* is also subordinated to the perceived need for haste because the review may be *unintelligible* to the asylum applicant. First, the seven-day time bar on reviews may be insufficient time for applicants to obtain a lawyer and meet with them to prepare. Second, lawyers are not legally entitled to participate in the review. What role they have, if any, is left to the discretion of each Immigration Judge.[169] It is difficult to justify precluding a right to legal consultation at the secondary inspection stage as well as at the review stage, on the grounds of *timeliness*. The presence of legal representation contributes to the *rationality* of a process because the facts adduced and the arguments advanced may be more *intelligible* to the judge when outlined by a lawyer rather than someone who probably has no legal education and the language, let alone the oral competence to make an argument to a judge. Judicial review is available in limited

[167] See conclusion and recommendations, *infra*.

[168] INA§ 235(b)(1)(B)(iii)(III).

[169] See generally, LCHR, *Slamming the Golden Door*, *op cit* at 17.

circumstances for those claiming to be lawful permanent residents or to those who have been previously admitted as refugees or granted asylum status.

For those individuals who successfully appeal against a negative credibility finding they will then receive a full hearing on the merits of their claim before an Immigration Judge.[170] In exactly the same way as those who navigate both secondary inspection and the credible fear interview without appealing, and those affirmative applicants who have had their claims referred to an Immigration Judge by an asylum officer. The process is called 'removal proceedings'. Applicants who are denied asylum, or other forms of relief from deportation, may appeal to the Board of Immigration Appeals which is the administrative appeals body.[171] After an applicant has exhausted administrative remedies they may seek a review in the federal courts.[172] The 1996 IIRIRA not only placed limits on the availability of judicial review in expedited removal cases, but also narrows judicial review in full asylum status determinations. The standard of review of legal issues has been heightened: '[a] discretionary judgment whether to grant relief under section 208(a) [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion.'[173] Disagreements between the BIA and court often involve issues of law. The inhibitive effect that this may have on the ability of the Federal Court to fulfil its vital function,[174] and the deleterious consequences of abdicating responsibility, has been appreciated in the United States,[175] just as it was in Australia.

In Canada there is neither a review on the merits, nor on the lawfulness of the primary decision, which are deemed unnecessary because of the nature of the quasi-judicial

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[170] INA § 235(b)(1)(B)(ii).

[171] INA § 208(d)(5)(A)(iv).

[172] INA§ 242.

[173] INA § 242(b)(4)(D).

[174] 'In the absence of judicial review, grave injustices could take place for which our government and our people would have to bear the moral responsibility' (*Rodriguez-Roman v INS* 98 F.3d 416, 433 (9th Cir. 1996).

[175] Hall has pointed to the dangers which an absence of judicial oversight can give rise to: First, whether the system is inherently fair will not be scrutinised; and secondly, it eliminates the potential for the courts to have a positive influence on the development of asylum law and practice (see generally, Hall, S., 'Quixotic Attempt? The Ninth Circuit, The BIA, and the Search for a Human Rights Framework to Asylum Law' (1998) 73(1) *Washington Law Review* 105.

proceedings at the initial stage. Leave for judicial review may be sought in the Trial Division of the Federal Court. The absence of an appeal on the merits is the biggest flaw in the Canadian system, the possibility of recourse to the Federal Court is in no way adequate to *correct* mistakes when they are made, and this casts a shadow over the *rationality* of the entire system. Although reviews examining risk, and humanitarian and compassionate grounds may be considered, neither constitute an appeal against the refusal of asylum, and the operation of both grounds is currently under review.[176]

[176] See the White Paper, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*, (January 6, 1999) <http://www.cicnet.ci.gc.ca/english/about/policy/lr/e_lr01.html>.

# Chapter Six
# Education and Training

## 6.1 Introduction

The basic axiom that underpins this chapter is that due to the complexities of the asylum determination and adjudication process, the task must necessarily be fulfilled by individuals who are well educated, trained in refugee law, sensitive to the nature, and particular needs of, claimants, and who are knowledgeable about country of origin conditions. This chapter assesses the training practices adopted in the United Kingdom in the light of the developments in Canada and the United States vis-à-vis intitial examination and determination of asylum claims. This selective focus reflects the fact that developments in the latter jurisdictions, have been pioneering in terms of policy and practice in industrialised refugee-receiving states. The examination and evaluation of the level and nature, of the training that the appellate bodies in the UK receive, draws on empirical, and comparative research.

The critical evaluation will be conducted using a range of criteria: international and regional documents; the recommendations of UNHCR's Executive Committee; EU resolutions; caselaw; and finally the relevance of education and training from a dignitary perspective.

## 6.2 Recognition of the Importance of Education and Training

An inspection of the relevant basic international and regional documents relating to refugees reveals a paucity of explicit declarations, recommendations or conclusions in respect of the need for thorough training policies and procedures for those authorities who process and adjudicate asylum applications. In only one regional document, the 1984 *Cartegena Declaration On Refugees* is there specific reference to a commitment '[t]o train the officials responsible in each state for protection of and assistance to

refugees, with the co-operation of UNHCR and other international agencies.'[1] It was not until 1977 before the Executive Committee (ExComm) of UNHCR officially recognised that a vital element in ensuring that applicants receive a fair determination of their claims for refugee status is guaranteeing that the competent officials are well informed and equipped to deal with the application.[2] Even this recommendation was of limited value in that it did not extend to any of the decision making authorities.

References to training in subsequent ExComm Conclusions do not exhibit any coherence nor do they reveal a comprehensive training plan designed to address the needs of all asylum applicants throughout the various stages of national determination procedures. Any statements relating to training are in isolation, reflecting the fact that the recommendations and conclusions of ExComm were formulated as responses to specific problems and issues arising in the refugee context as those problems and issues were identified. For example, in ExComm Conclusion No.30, the added importance of 'fully qualified officials' interviewing those applicants who were subjected to expedited procedures was acknowledged,[3] and the necessary, though often lacking commitment at national level, to 'allocating sufficient personnel and resources to refugee status determination bodies'[4] was also recognised as essential. Conclusion No.39 relating to refugee women, refers to the need for tailoring training programmes in order to meet the special requirements of female asylum seekers. It 'stressed the importance of a more detailed knowledge and understanding of the special needs and problems of

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[1] Part II para (j). 1984 *Cartegena Declaration on Refugees*, adopted in November 19-22 1984.

[2] ExComm Conclusion No.8 (XXVIII) 1977, *Determination of Refugee Status*, para (e)(i):

> The competent official (eg immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant legislation.

[3] ExComm Conclusion No.30 (XXXIV) 1983, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, para (e):

> *Recognised* the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by procedural guarantees and therefore recommended that; (i) as in the case for all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority normally competent to determine refugee status.

[4] *ibid* para (f)(i).

refugee women in the international protection field'.[5] Five years on and Conclusion No.64 urged states, relevant UN organisations, as well as NGOs, to '[P]rovide where necessary, skilled female interviewers in procedures for the determination of refugee status',[6] and '[E]nsure that all refugees and the staff of relevant organisations and authorities are fully aware of, and support the rights, needs and resources of refugee women and take appropriate specific actions.'[7] In 1993 the Executive Committee called upon the High Commissioner to make every effort to ensure that the needs of refugee children, particularly unaccompanied minors are fully met in UNHCRs overall protection and assistance activites, through *inter alia*, appropriate management support, *training* and monitoring.[8] Conclusion No.73 on Refugee Protection and Sexual Violence,

> supports the High Commissioner's efforts, in co-ordination with other intergovernmental and non-governmental organisations competent in this area, to develop and organise training courses for authorities, including camp officials, eligibility officers and others dealing with refugees on practical protection measures and responding to sexual violence.[9]

The Committee also recommended 'the establishment by States of training programmes designed to ensure that those involved in the refugee status determination process are adequately sensitized to issues of gender and culture.'[10] In 1994 The Council of Europe, *Committee of Ministers Recommendation on Guidelines regarding the Arrival of Asylum Seekers at European Airports*,[11] stated

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[5] ExComm Conclusion No.39 (XXXVI) 1985, *Refugee Women and International Protection*, para (h)(i).

[6] ExComm Conclusion No.64 (XLI) 1990, *Refugee Women and International Protection*, para (a)(iii).

[7] *ibid*, para (a)(iv). '[S]taff of international organisations and... government officials, often do not know what are the particular protection needs of refugee women, or how to solve them.' Johnsson, A., 'The International Protection of Women refugees - A Summary of Principal Problems and Issues' (1989) 1(2) *International Journal of Refugee Law* 230.

[8] Conclusion No.72 (XLIV) 1993, *Personal Security of Refugees*, para (x).

[9] Para (i), ExComm Conclusion No.73 (XLIV) 1993, *Refugee Protection and Sexual Violence*.

[10] *ibid* para.(j).

[11] Recommendation No.R(94)5, adopted on 21 June 1994 at the 515th Meeting of Ministers' Deputies.

> [T]he authorities entrusted with the receipt of applications at the border shall receive training adopted to the specific situation of people seeking asylum. Such authorities should, moreover have precise instructions on the procedures to be followed.

A fair determination procedure which is predicated on providing reasonable access to the procedure, a fair hearing and an effective right to appeal,[12] does not by itself ensure a fair determination. *Prima facie* the removal of measures of non-entrée adopted by states would ensure that *reasonable* access to determination procedures exists. Yet even when physically present in a host country of asylum, applicants *effective* access may be hindered because officials have not received adequate training and are therefore unable to appreciate the difficulties facing asylum seekers and satisfactorily assist them in submitting all relevant factual details.

Not only is there a need for the formal apparatus to exist for there to be a fair examination of the application but

> [T]o meet the requirements of international protection and in the interest of the refugee requesting asylum, a careful and sympathetic examination of the claim by a qualified knowledgeable and impartial decision-maker is of critical importance.[13]

Therefore, the body or bodies responsible for processing and adjudicating on asylum claims, must receive specialised training in order to fulfil that role. It would be misplaced to put faith in a determination system which purported to adjudicate fairly by reason of the mere existence of that determination body. Individuals employed by that body should receive instruction in: international human rights law; international refugee law; relevant domestic asylum law, regulations, policies, procedures and operational instructions; country of origin and regional conditions; and skills training in interviewing techniques and cross-cultural sensitivity for example, as a minimum. 'An institutional commitment involving both resources, to encourage a case by case

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[12] Amnesty International EU Association Brussels, *Europe: The need for minimum standards in asylum procedures*, June 1994 at 5.

[13] UNHCR, *Note On International Protection* 1993.

comparison of country profiles with individual claims is necessary to overcome... bureaucratic tendencies.'[14]

The training of the appellate authorities is obviously of crucial importance by reason of the fact that it is their task to ensure that any erroneous decisions taken at first instance are identified. Equally essential is the need to maintain consistency in decision making which may be accomplished with coherent, comprehensive and regular training sessions. Moreover in determination systems where there is a low level classification of officials at first instance, combined with the inability of applicants to adequately prepare their case, and communicate effectively with legal practitioners and NGOs, due to the increasing use of expedited procedures within truncated timescales, consequently, it effectively falls to the appellate authorities to consider the case in a comprehensive manner for the first time. Important though training is for all agents in the determination system its importance must not be overstated, because if adequate training programmes are not bolstered by the presence of a sufficient number of reliable legal representatives and interpreters,[15] then many of the perceived benefits realised by the presence of highly proficient asylum personnel may be rendered nugatory.

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[14] Byrne, R. and Shacknove, A., 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harvard Human Rights Journal* 185, 220.

[15] ExComm Conclusion No.8 (XXVIII) 1977 para (e)(iv) provides that; '[T]he applicant should be given the necessary facilities, including the services of a competent interpreter for submitting his case to the authorities concerned.'

See also Shah, P., 'Access to legal assistance for asylum seekers' (1995) 9(2) *Immmigration and Nationality Law and Practice* 55; Stanley, A., 'Political asylum interviews: a fresh look at the role of clerks and independent interpreters' (1994) 8(3) *Immigration and Nationality Law and Practice* 79. If the use of interpreters in the examination process is to be successful, to be a link and not a obstacle, to borrow from Goodwin-Gill's phraseology, to eliciting all relevant information, then the complexities of cross-cultural communication need to be appreciated. Like the examination process, 'translation is not a mechanical process, but a two-way, sometimes three way street, that places particular responsibilites on every participant in the refugee determination process.' (Goodwin-Gill, G., *The Refugee in International Law*, (Clarendon Press Oxford 1996) at 355). The role of the interpreter is central to the whole procedure because a failure to communicate clearly and intelligibly, may severely prejudice the chances of an asylum seeker. Furthermore a lack of familiarity with the real meaning of non-verbal signs, and values of the applicant, on the part of interpreter and interviewer, may also lead to misunderstandings which prove mortal to the applicants case. It as critical for interpreters to appreciate cultural differences as it is interviewers or adjudicators.

Those who are responsible for examining applications for asylum should be able: to elicit all relevant information from the applicants account; consider the credibility of applicants, witnesses and experts; to evaluate the relevant evidence objectively; and employ the applicable law to the facts of the case.[16] An important and arduous task exacerbated by the need to verify foreign conditions which may prove exacting, resulting in evidentiary lacunae, which may be aggravated further by cross-cultural and linguistic misunderstandings. This

> requires a degree of competence, even skill in the art of questioning, interviewing and examination, and the capacity to bring out the relevant elements from an individual narrative; the use of interpreters; the use of country of origin and jurisprudential information, and discrimination in the selection of such information; and evaluation and assessment.[17]

Although Excomm Conclusions offer only a modest outline of what is 'a practically necessary minimum if refugees are to be identified and accorded protection...',[18] in the municipal law of the United Kingdom there is no formal incorporation of those minimum standards relating to the training of IO's or civil servants in the ICD of the IND. There is not even any apparent recognition of the significance of the guiding priniples adumbrated in the ExComm conclusions.

It is ironic that UNHCR's recent pronouncement that '[A] fundamental requirement of any effort to combat irregular migration while maintaining protection standards must therefore be to develop appropriate expertise and institutions',[19] was made with reference to Central and Eastern European countries, which are for the first time subject to inward migratory movement. Whilst endorsing the call in ExComm Conclusion No.72, for 'the High Commissioner to continue to expand and strengthen

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[16] Para 196 of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* provides that during an asylum interview

> the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.

[17] Goodwin-Gill, G., *op cit* at 350. See also Hyndman, P., 'The 1951 Convention and its Implications for Procedural Questions' (1994) 6(2) *International Journal of Refugee Law* 245 at 248.

[18] *ibid* at 328.

[19] UNHCR, *The State of the World's Refugees - In Search of Solutions*, 1996 OUP, at 224.

the Offices promotion and training activities with the active support of states...', it would seem appropriate for all industrialised states too. There can be no doubting the importance of programmes designed to promote an awareness and understanding of international refugee protection principles. Indeed the joint UNHCR/ECRE initiative which has 'allowed hundreds of people in the countries of Eastern Europe and Central Europe to acquire a deeper knowledge of refugee law and protection problems', is to be welcomed.[20] However, if one accepts Goodwin-Gill's proposition that the Executive Commitee is drifting towards irrelevance,[21] and that vital principles and standards established in earlier Conclusions[22] are increasingly compromised by governments keen to pursue restrictionist agendas, then one might point to the emphasis placed on expanding UNHCR's promotion and training activities in Eastern Europe as further evidence of industrialised governments efforts to contain the refugee problem outside their borders. Yet as ECRE has observed, the 'restrictive policies from Western European states will have a negative impact on the refugee policies of Central and Eastern European states.'[23]

## 6.3 The United Kingdom

### 6.3.1 *Entry and Initial Examination*

All new IOs in the United Kingdom attend a five week induction training course followed by four weeks at their post where they are mentored by an experienced IO for the first three weeks. Following this they return to formal training for one final week.

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[20] By conducting a series of workshops and seminars in the region and by establishing a system of staff exchanges and internships, ECRE is enabling the fledgling refugee organizations and legal networks of Central Europe to develop expertise in areas such as public and political advocacy, policy development, fundraising, as well as social and legal counselling. Western states play an important example in establishing standards to the countries of Eastern and Central Europe (UNHCR, *op cit* at 225).

[21] Goodwin-Gill, G., 'Developments' (1994) 6(1) *International Journal of Refugee Law* at 63.

[22] ExComm Conclusion No.8 (XXVIII) 1977 *Determination of Refugee Status*; Conclusion No.22 (XXXII) 1981 *Protection of Asylum Seekers in Situations of Large Scale Influx*; and No.30 (XXXIV) 1983 *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.*

[23] UNHCR, *op cit* at 225.

There is no specialised asylum training, asylum applications are examined along with all other categories of immigrants, visitors, business men and women and students. The training programme covers the 'Operation of immigration control': policy; procedures; and the relevant Acts, regulations and appeals systems. Furthermore IO's receive instruction on 'attitudes and awareness, cross cultural and disability awareness, interview skills and techniques and language study'.[24] Other 'key areas" identified in the programme are 'technical skills, effective office practises and management'.[25] What is lacking from the programme is any reference to international human rights law, international refugee law and no mention of tutelage vis-a-vis prevailing conditions in asylum applicant countries of origin.[26] Yet the UNHCR have emphasized 'that knowledge of the country of origin of the applicant is crucial for preparing for the interview.'[27] Following the introduction of the SP, for the vast majority of asylum applicants IOs are '[T]he authorities entrusted with the receipt of applications at the border'.[28] However, it is questionable whether the training program, which exists at present, satisfies the Council of Europe Committee of Ministers Recommendation that such authorities 'receive training *adopted to the specific situation of people seeking asylum*'.[29] (Authors emphasis added).

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[24] IND letter to the author 23 September 1996 (on file with the author).

[25] *ibid*

[26] If the Standard Procedure scheme subsists, IO's at ports assume a position which is more than that of mere gatekeeper. As interviewers their role is crucial in shaping the flow of information which is passed on to the caseworkers in the Asylum Directorate, which can materially affect the outcome of an initial decision.

[27] *Training Module on Interviewing Applicants for Refugee Status*, UNHCR (1995) at 4. This point has been reaffirmed in respect of female refugee applicants:

> [the] interviewer must be familiar with pertinent country of origin information. In general such information would include: the position of women in the law; the political rights of women; the social and economic rights of women; and the incidence of reported violence against women and the form it takes.

(*ibid* at 37). This statement is equally applicable to child refugee applicants.

[28] Council of Europe Committee of Ministers, Recommendation No.R(94)5, *op cit.*

[29] *ibid*

> If the asylum seeker is required to undergo an interview before a government official, especially military or uniformed personnel, without the aid of counsel, the situation may become still more difficult. Rarely are immigration officers trained to detect trauma victims or to recognise that their behaviour may not be linked to deception. Immigration officers cannot be expected to possess the same expertise as doctors or psychologists. They require support from medical professionals but may have neither the time nor the authorization to

It is equally doubtful that the induction course is suitably detailed and tailored to meet the special needs of refugee women, a requirement recognised in ExComm Conclusion No.39.[30] Whether ExComm Conclusion No.64[31] and the European Resolution on Minimum Guarantees for Asylum Procedures,[32] which exhort the need for adequate provision of skilled female interviewers in determination procedures, are adhered to in any manner is unknown, but would seem unlikely.

Correspondence received reveals no indication that interviewing officers receive training in order to deal with traumatised applicants who may be suffering the effects of torture or other forms of persecution. '[I]t is of great importance to recognise that the empathetic way of conducting an interview will to a great extent determine the quality of the disclosure of violent acts'.[33] Nor is there any indication that staff are equipped to recognise when applicants are suffering from other psychological or physical problems. The UNHCR in their Training Module state that

> [T]he interview process could in itself trigger off anxiety symptoms... the need for medical intervention should be understood in order to assist the applicant with his or her mental state before any further interviewing can take place.[34]

With no indication that the training course provides instruction in international human rights law, it is highly questionable whether IOs are cognisant of the significance of the

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seek such help when implementing expedited procedures. (Byrne, R. and Shacknove, A., *op cit* at 221).

[30] ExComm Conclusion No.39. (XXXVI) 1985, *op cit.*

[31] ExComm Conclusion No.64 (XLI) 1990, *op cit.*

[32] EU *Resolution* 5585/95 adopted 20 June 1995, Brussels. Paragraph 28 provides:

> Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin.

The UNHCR recommends that there should be a trained staff member of the same sex to conduct interviews unless the applicant expressly requests otherwise where the claimant alleges to have been the victim of sexual attack (*Training Module*, *op cit* at 40-41).

[33] Excerpt from UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence, contained in UNHCR *Training Module*, at 87.

[34] *Training Module*, *op cit* at 33.

UN Convention on the Rights of the Child, which UNHCR uses as its guiding light in relation to child asylum seekers.[35] A key principle is that relating to the 'best interests of the child', (article 3) which is enshrined in the UNHCR Policy document on Refugee Children.[36] One issue which arises under the 'best interests' principle, in the context of refugee status determination, is the use of trained personnel. It is important 'that interviewers and others involved in the refugee status determination procedure be made aware of the applicable rights and standards contained in the Convention on the Rights of the Child'.[37] Moreover, the Guidelines developed by UNHCR in the Training Module, designed to take account of the very special needs of unaccompanied minors, provides that '[F]or individual status determination interviews, the interviewer and interpreter should ideally share the culture and language of the refugee child'.[38] The instruction IOs receive in processing 'sensitive cases', in interview skills and techniques, and languages, may partially equip them with necessary skills to meet the standards outlined above. However in the absence of a distinctive, detailed module within the existing induction course, designed to enable IOs to respond sensitively to the needs of refugee women and children, it is doubtful whether the standards established in ExComm Conclusions and UNHCR Guidelines are being met.

Within the UK the supervisory role at ports of entry is provided by a Chief Immigration Officer (CIO). There is no explicit reference made to a continuing education requirement, only that 'training is given an ad hoc basis when needs are identified', and that 'IO's attend a consolidation course when they have been in post for at least twelve months.'[39] The need to keep abreast of country of origin

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[35] ExComm Conclusion No.72 (XLIV) 1993, para (w) stresses 'the importance of the Convention on the Rights of the Child as a normative framework for action to protect and care for children...'.

[36] EC/SCP/82, 6 August 1993, para 26(a) provides: 'In all actions taken concerning refugee children, in particular his or her best interests are to be given primary consideration'. ExComm Conclusion No.47 (XXXVIII) 1987 para.(d) provides '[A]ll action taken on behalf of refugee children must be guided by the principle of the best interests of the child...'.

[37] *Training Module, op cit* at 46.

[38] *ibid* at 48.

[39] IND letter to the authors 23 September 1996. The consolidation course reviews practices and covers areas such as interviewing and general procedures. (The training remains substantially the same today for new asylum caseworkers in the ICD (Telephone conversation with Julia Judge, ICD, 27/1/00).

developments through a continuing education requirement, would appear to be a fundamental component of any training progamme.

In view of the foregoing examination of the induction course, it seems reasonable to conclude that, under current immigration practices which have altered the responsibilities of IOs, the existing training programme fails to meet the principal standard defined in the UNHCR Handbook which provides that the application should be examined '...by qualified personnel having the necessary knowledge and experience, and understanding of an applicants particular difficulties and needs'.[40]

### 6.3.2 *Initial Decision*

New caseworkers in the ICD attend a general induction course covering what the Immigration and Nationality Directorate (IND) deem

> the main areas of immigration work such as: The various aspects of immigration control; legislation and reference sources; passenger categories; world religions; refusals and the appeals system; professional standards and equal opportunities issues.[41]

Caseworkers then spend one week at a training course run by the Asylum Training Unit (ATU), followed by four weeks at their post and conclude with one final week at the (ATU). During the two week training course run by the ATU, the procedures appertaining to asylum applications are examined in detail. The Handbook on the criteria for determining refugee status is studied and there are 'contributions' from bodies such as UNHCR, ILPA and RLC. The Handbook provides an introduction to the universal and regional legal instruments, and in respect of refugee status determination procedures the recommendations, contained in Part Two, are

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[40] Para.190 *UNHCR Handbook, op cit.* A similar provision is contained in ExComm Conclusion No.30 (XXXIV) 1983, para. (a)(i), which recognised that those applicants subject to expedited procedures as in the case of all asylum requests, "should be given a complete personal interview by a *fully qualified official* and whenever possible, *by an official of the authority normally competent to determine refugee status.*" (Authors emphasis added).

[41] IND letter to the author, *ibid.*

largely '...inspired and guided by the principles defined in this respect by the Executive Committee itself'.[42] It is also significant that attention is focused on mentally disturbed persons and unaccompanied minors, applicants who are likely to experience difficulties.[43]

In the month spent at their post, caseworkers have the opportunity to consider applications made at the port of entry and make initial decisions. The proposed decisions are reviewed by a senior immigration officer for approval. Following three months in post and prior to interviewing any applicants caseworkers are required to attend an interview skills training course. It is designed to 'equip staff with the necessary skills for interviewing asylum applicants, paying particular attention to style, techniques, cultural awareness, sensitivity and equal opportunities.' This broad statement of aims could be construed as indicating that there is provision for adequate training for dealing with the 'sensitive' cases, but without further information it is impossible to say with any certainty. As with the Immigration Service there appears to be no other continuing education requirement other than an *ad hoc* arrangement to train staff in procedural and legislative changes when necessary. The importance of having detailed knowledge of country of origin conditions, affirmed in the UNHCR Training Module,[44] is once again reflected in the organisation of the ICD. Changes made to the organisation of this branch of the Home Office had resulted in the loss of 12 specialised gepgraphical teams in 1998.[45]

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[42] *UNHCR Handbook*, *op cit* at 2.

[43] *UNHCR Handbook*, paragraphs 206-219. What is also striking is the categories of cases which may give rise to specific difficulties that are omitted from the Handbook. For example there is no mention of the need for sensitivity towards refugee women. Nor indeed to the needs of children, who although not unaccompanied may have psychological disorders as a result of one or more members of their close family being killed, or as a consequence of having experienced particularly traumatic events. There are inherent limitations in a Handbook of this type. The multifarious circumstances surrounding the personal features of individual asylum applicants and the conditions which precipitate forced migration preclude the compilation of a definitive document. Despite these intrinsic difficulties, it is difficult to fathom the omissions outlined above, given that the Handbook purports to reflect ExComm Conclusions, and prior to the publication of the updated Handbook in 1988 there were ExComm Conclusions on *Refugee Women and International Protection* in 1985, and *Refugee Children* in 1987 (No.39 (XXXVI) and No.47 (XXXVIII)).

[44] *Training Module*, *op cit* at 4.

[45] Telephone conversation with Julia Judge (ICD) 27/1/00.

Utilising the UNHCR Handbook in conjunction with the expertise provided by UNHCR, ILPA and the RLC, assures that caseworkers are informed of the content of the basic international and regional legal documents. Furthermore, because the Handbook's recommendations are predicated upon some of the principles contained in ExComm Conclusions, caseworkers are apprised of the need for particular understanding in respect of some, although not all, of the most vulnerable applicants. To what degree the practice administered by the ICD fulfils and builds on the basic minimum standards identified in the Handbook, is questionable. The overall importance attached to the Handbook, and the extent to which the guiding principles pervade all aspects of the training course is indeterminable at present. However, it is important not to lose sight of the fact that the Handbook 'was prepared for and at the request of states members of the Executive Committee of the High Commissioners Programme for the guidance of governments.' [46]

Ensuring that there is good-decision making at the initial stage is a desirable goal in and of of itself. Within the asylum sphere of adjudication and decision-making, one must be careful about advancing the proposition that where the initial decision is of a high quality, whichever way it goes, then there are likely to be fewer appeals. This may be true of other jurisdictions like Social Security for example, however an asylum appeal is rather different because the appellant is not contesting a decision which affected their fiscal situation, rather their life or liberty may depend on it. The individual is hoping to remain in the country so they are likely to pursue every available avenue of redress and the suspensive effect which appealing has on deportation, in all but safe third country cases, means the appellant can stay longer which is exactly what they wish. Since the most that one can do is to hope for a reduction in the number of appeals, such an aspiration cannot be relied on as the justification for enhanced

[46] *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958 (HL) at 981(e). Per Plender, R., on behalf of the intervener, in response to Lord Bridges inquiry as to the importance to be attached to the Handbook. 'Although due weight must be given to the principles laid down in the Handbook they are not rules of English law, per Neil LJ in *Birungi v Secretary of State for the Home Department* [1995] Imm AR 331, at 335. A case in which the appellant contended, inter alia, that the Special Adjudicator had not given due attention to the guidance in the UNHCR Handbook on giving the benefit of the doubt to the applicant.

training. We should 'want good decisions at first instance because it is essential as a matter of natural justice that there should be a good decision.' [47]

### 6.3.3 *Appeal*

Those applicants who are refused refugee status, are entitled to an appeal to Special Adjudicators of the Immigration Appellate Authority (IAA), and are the authority with sole and exclusive responsibility for dealing with such appeals. Adjudicators at the IAA hear immigration appeals, however only those designated as Special Adjudicators can hear asylum appeals. Since the adjudicators are a body independent of the IND, in contrast to the AD, their decision-making is, *prima facie,* independent and based only on human rights and other considerations relevant to asylum, and not susceptible to the influences of other factors such as immigration policy, foreign policy or foreign relations. Therefore, the guidelines established in the recommendations of Amnesty International,[48] concluding that the appeal should be taken by a different body from the one which took the first instance decision, which are in fact more exacting than the those contained in ExComm Conclusion No.8,[49] are met.

A fair determination of appeals will, necessarily, only be secured under a system exhibiting consensus. 'Not only the ability to apply different criteria to different countries with *consistency*, but consensus on the situation in a country are necessary conditions... for fair determination of appeals.'[50] However, the conclusions

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[47] Interview conducted with his Honour Judge David Pearl, Thanet House 17 April 1997 (transcript in full in the appendix). Judge Pearl is currently the Director of Studies at the Judicial Studies Board (JSB).

[48] Amnesty International EU Association Brussels, Europe: *The need for minimum standards in asylum procedures, supra.*

[49] ExComm Conclusion No.8 (XXVIII) 1977, para (e)(vi):

> If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

[50] Harvey, A., *The risks of getting it wrong: The Asylum and Immigration Bill session 1995/96 and the determinations of special adjudicators*, Asylum Rights Campaign (ARC), April 1996, at 18. The nature of asylum adjudication means that there are intrinsic difficulties in achieving consensus, difficulties which were identified in *R v Secretary of State for the Home Department, ex parte Kumar* [1996] Imm AR 385. Judicial review was sought in respect of the SoS's refusal to grant asylum on the

in a study of the determinations of a sample of adjudicators,[51] suggest inconsistency in the manner in which the 1951 Convention is interpreted, and contradictory conclusions about the situations in the countries from which applicants have migrated.[52] It was therefore recommended that there be continual monitoring of determinations and that

> [R]esources and time be allocated to giving adjudicators opportunities to receive in-depth training on countries from a plurality of sources, and for exchange of views, particularly where lack of consensus is identified.[53]

The former Chief Adjudicator and Chairperson of the IAT, has publicly affirmed his commitment to the prioritization of training of Special Adjudicators.[54]

> I think that training is the key to high quality decision-making. If one does not have Adjudicators who are properly trained then you are likely to end up with mistakes being made whether it be fact finding or the application of the law. [...] [W]hat we must offer to everyone is a Tribunal which provides a fair hearing, [...] and which reaches a decision which is in accordance with the law and one way of trying to reach that aim is through good quality training.[55]

By the time an individual first sits as a Special Adjudicator they will have undergone the following training: Basic Adjudicator training which is usually about two days in length and its main aims; are to cover the basic sources of law and show the ways to

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grounds that Germany was a safe third country, a decision upheld by the Special Adjudicator. Popplewell J. rejected the appellants contention that the Special adjudicator had erred in law for failing to refer to the determinations of other Special Adjudicators who had concluded Germany was not a safe third country. It was held that

> There were hundreds of determinations relating to various countries some concluding those countries were safe others concluding they were not. It was undesirable to require a Special Adjudicator to go through all the evidence and analyse all those cases. The obligation of the Special Adjudicator was to set out the reasons why he had come to his conclusion and indicate the material on which he reached that conclusion.

Where they differ in their conclusions from their colleagues full and cogent reasoning must be provided. (See *R v Special Adjudicators, ex parte Turus and others* [1996] Imm AR 388).

[51] *ibid,* 722 written determinations of adjudicators on the merits of asylum applications promulgated between 1 july 1995 and 31 December 1995 constituted the sample.

[52] *ibid* at 54, para 9.1.3.

[53] *ibid* at 20.

[54] Lecture delivered by his Honour Judge David Pearl at the Refugee Studies Programme (RSP) Oxford, November 1996.

[55] Interview conducted with his Honour Judge David Pearl, Thanet House 17 April 1997.

find the rest.[56] The full-time Adjudicator responsible for training is assisted in the actual teaching of the course by two other full-time Adjudicators who have been Professors in the past, and around half a dozen part-time Adjudicators of at least Professorial level which provides a training base of expertise in teaching to call on. In addition to human resources the training officer utilises a video camera which has facilitated the production of tapes of mock hearings which are used in role-play exercises. People are initially appointed as Adjudicators and then if they wish to become Special Adjudicators there is a second two day training session, at which the UNHCR has a representative, the Medical Foundation for the Victims of Torture have attended from time to time, the Research and Information Officer at the IAA outlines what service they can be called on to provide,[57] members of the academic world,[58] trainers from other countries,[59] and once a representative from the Home Office was present.

> I think that what I try to do in training is to let people be exposed to the input from as many sides as possible whilst, and I regard this as very important, maintaining their independence and our independence. It would be ideal if we could have longer training, we know the atmosphere I come from, the atmosphere the judge [Pearl] comes from, [...] and one of the things people find is that [...] it takes a hell of along time to learn anything.[60]

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[56] [W]e have got to try to get them to know some law,... you can introduce them to the sources of law, you can cover the very basics in order to give the map of what may be a completely new jurisdiction. [...] I think some people survive for quite a long period of time without knowing very much about quite a lot of it, you look at a few immigration rules from time to time. I've been criticised by UNHCR for spending too much time on procedure but I think people have got to learn the procedural rules they have got to get it right.

Interview conducted with Mark Ockelton (full-time Adjudicator responsible for training) Thanet House, 17 April 1997 transcript in full in the appendix).

[57] If the Special Adjudicator wishes to obtain some material pertaining to a particular case, which may for example not have been provided by the Home Office Presenting Officer (HOPO) or the appellants representative, then they may ask the Research Information Officer to find it.

[58] Dr Andrew Shacknove, Faculty of Law and Department of Continuing Education, Oxford University.

[59] Rick Stainsby, IRB Canada, travelled to the UK to lecture on one of the induction courses.

[60] Interview conducted with Mark Ockelton.

> It is also important to remember that whilst academics can on the whole be allowed leave to attend training sessions, many of those appointed as Special Adjudicators are lawyers in practice. Whilst those attending training courses are paid about £135, when considering the amount a reasonably earning counsel would be earning, and for a solicitors practice it could be worse, because they are losing a fee earner, time is an important constraining factor.

Following Special Adjudicator training there is a period of three days of sitting with another Adjudicator observing on the first day, and on the second day a list may be split between the two. The mentor would then examine those determinations and offer some guidance on how to write them. In terms of ongoing instructive training there is very little in the way of training which is identical for everyone. There is a plenary conference about once every two years lasting a couple of days, to which all Adjudicators are invited.[61] In addition there are funds for a training day in each centre every year. The regional adjudicators set up a programme of things which they think are of importance to colleagues in their centre.[62]

In addition to a systematic induction course for Adjudicators, a great deal of time and energy has been invested in producing written materials, in the form of an Adjudicators Bench Book, which contains a collection of precedent decisions, 'in the hope that we [Adjudicators] can have consistency in decision-making.'[63] There are, arguably, insurmountable difficulties in quantifying and evaluating whether the quality of decision-making has improved. Does one examine the number of cases that are judicially reviewed, the number of appeals which are successful in relation to the cases going to the IAT, or in a case management fashion?

> Certainly our disposal rates have gone up,[64] I believe we have a much better case management technique, which is partly because of the new [asylum] rules,

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61 [T]here are workshop sessions, there are plenary lectures and there is also at other residential courses plenty of time for socialising which is actually an important part of training. [...]

*ibid.*

62 'So for example, particularly at Hatton Cross, the training has in recent past been almost exclusively on asylum matters.' (*ibid*).

63 Judge Pearl, interview conducted at Thanet House, *supra.*

64 [W]e have a notional disposal rate for each adjudicator per day (if I may put it like that) whereas about a year ago it was something like 1.7 its now gone up to 2.7 so each adjudicator is dealing with more cases per day than they were a year ago. It may well be that the most important reason for that is that the case management techniques have been introduced under the 1996 rules but I'd like to think that it has something to do with this [training] as well.

*ibid.*

Under the The Asylum Appeals (Procedure) Rules 1996 (SI 1996 No.2070), rule 23 paragraph 2 governing conduct of appeals provides: 'The overriding objective shall be to secure the just, timely and effective disposal of appeals...'.

> and partly because we have more members sitting hearing cases, but I would like to think that it's also because we are using our time more effectively in dealing with the cases in an efficient way which has something to do with training. The quality of the decisions again I would like to feel have gone up, but [...] it's very difficult to quantify that.[65]

In the same way that it is possible to point to the intrinsic importance of high quality training for IO's, in the light of the foregoing difficulties involved in quantifying the effects, the perceived benefits of the improved training programme for Adjudicators, similarly it is possible to point towards certain inherent advantages. It creates an

> ethos in which people are made constantly aware that they are doing a difficult job and a job in which time is going to be made, even if not very much time, for thinking about what it is they are doing.[66]

## 6.4 The United States

### 6.4.1. *Entry and Initial Examination*

In the US it *was* recognised that

> [O]fficers initially receiving claims for asylum should obtain only the basic facts about the applicant - name, job, country of origin and marital status. [...] There should be no interview on the substance of the claim made by the asylum seeker at this time. Because of their experiences, asylum seekers arriving at ports of entry or at the border are likely to be apprehensive of authorities, afraid to speak freely, or at a disadvantage becuase of language and be exhausted.[67]

However this advice predated the introduction of the expedited removals process as a consequence of section 302 IIRIRA 1996. The pre-screening function is exercised by immigration officers and claimants are dependant on the inspecting officer's initial

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[65] *ibid.*

[66] Interview with Mark Ockelton, *supra*. 'Moreover 'it elevates professionalism in the job to a status which it might not otherwise have.' (*ibid*).

[67] *Asylum Procedures and the Integration of Refugees, Training Manual*, at 3.

assessment of their credibility, and their assessment of the representations made and documentation adduced by the claimant. Given that individual claimants may be deported on the basis of an immigration officers determination, without any further review, the need for specialised training is axiomatic, just as it is for their counterparts in the United Kingdom.

### 6.4.2 *Initial Decision*

Asylum Officers (AOs) act as a preliminary filter, hearing all cases but only deciding on uncomplicated applications.[68] The regresive step taken by recent regulations[69] which has resulted in AOs referring all but the most straightforward of cases to IJs exposes the system to the same criticisms which have been levelled at the system prevailing in the UK, where the interviewing process is separate from the decision making.[70] It also fails to satisfy the requirement in ExComm Conclusion No.30 which identifies that the interviewer should also be an official of the body competent to determine the claim.

The asylum rule promulgated on 27 July 1990,[71] mandated the creation of the corps of professional Asylum Officers who were to be trained in international relations and international law.[72] The most basic objective of the INS was identified as:

> the significant improvement of asylum and refugee adjudication primarily through enhanced training of adjudicators, improved policy and procedural

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[68] Pursuant to the directive contained within the Refugee Act 1980, the Department of Justice promulgated Interim Regulations on June 2 1980. INS published final rules on July 27 1990, 55 Fed. Reg. 30674) that became effective October 1 1990, and additional rules on 5 December 1994, 59 Fed. Reg. 62284, effective from 4 January 1995.

[69] 59 Fed.Reg. 62284-62303 (Dec.5 1994), ammending 8 CFR.

[70] The Secretary of State has an intensely difficult task in analysing the validity of these claims for asylum. It is intensely difficult because the people who take the decisions... are not the people who conduct the interviews who can form a view as to credibility and state of mind of the person in front of them, the way he or she talks and so on.

Brooke J, *R v SoS for the Home Department, ex parte Murat Akdogan* [1995] Imm AR 176 at 182.

[71] 55 Fed. Reg. 30,674 (1990) (codified at 8 C.F.R. § 208).

[72] 8 C.F.R. § 208.1 (b) (1990), as amended (1995).

guidance on various aspects of adjudication, and closer supervision of the adjudication process.[73]

In addition to the increased training asylum officers were to receive, asylum adjudication functions and enforcement responsibilities were separated.[74] From the outset of planning, several NGOs had expressed interest in helping to develop procedures and training for the new Officers. Under the direction of INS senior management, interested NGOs, with INS and asylum programme officials, established a small informal working group. It coordinated NGO input into the development of what became the INS *Basic [Asylum] Law Manual*, the *Asylum Procedures Manual* and the *INS [Asylum] Operations Instructions* (OIs).[75]

Initial training for AOs and supervisors began in late February 1991 and lasted four weeks.[76] It comprised a one week overview of the Immigration and Nationality Act and the INS, and three weeks of specialised asylum training. The latter covered a variety of topics, including: the policy context and the political and legal challenges which the new programme sought to address; international human rights and international refugee law; an in-depth review of U.S. asylum law, regulations and policies; asylum procedures and operations instructions; conditions in asylum applicant

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[73] Inzunza, R., 'The Refugee Act of 1980: Ten Years After - Still the Way to Go' (1990) 2(3) *International Journal of Refugee Law* 423. Improvements were also made in respect of the training received by those officers responsible for the on-board interviewing process within the Alien Migration Interdiction Operation (AMIO), and in respect of increased access to the latest information on country conditions. (*ibid* at 425).

[74] The asylum rule also sought to reaffirm the neutral refugee definition and diminish the role of the State Department in deciding domestic asylum claims.

[75] The INS Law Manual contains significant elaboration of principles of law related to interpretations of the substantive provisions of the asylum statute... [It] does constitute a statement of the INS position on various legal issues, and because of its comprehensiveness and generally high quality, with time it may increasingly be viewed as a source of authority.

Anker, D., *The Law of Asylum in the United States:A Guide to Administrative Practice and Case Law* (American Immigration Laywers Association 1991) at 16.

[76] AOs selected included some with experience as refugee resettlement officers overseas; domestic resettlement officers; human rights monitors; international affiars specialists (most with bachelors and many with masters degrees); attorneys; refugees and recent immigrants. (Beyer, G., *op cit* at 471. There were 82 asylum officers initially in February 1991, with an additional 68 trained in March 1992, totalling 150. This was the position until the Violent Crime Control and Law Enforcement Act 1994 (hereafter the Crime Bill) authorised enough funding so that the number of asylum officers could be doubled to 327. Contrast this position with that which prevails in the UK, where at the first level of decision-making, those charged with the responsibility may not even have a first degree.

countries of origin; interviewing techniques and role-playing (including sessions devoted to 'confronting one's baggage of preconceptions and presumptions regarding eligibility for asylum'); cross cultural interviewing and sensitivity; and concluded with, assessments of each Asylum Officer's interviewing techniques, analytical abilities and writing skills.[77] The orientation of the training was designed so that when conducting asylum interviews, AOs conformed to the standards in the INS regulations:

> The asylum officer shall conduct the interview in a non-adversarial manner... The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibiity...[78]

The specific training on interviewing techniques included role playing sessions and AO`s were provided with a whole volume of materials on interviewing techniques.[79] The INS Asylum Procedures Manual serves to explain and expand on the requirement contained in the regulations:

> Do not attempt to disprove the applicant's account of events or fears of persecution. Maintain an interested and friendly demeanour while guiding the applicant through [the] application and eliciting as much information as possible from the applicant on these events or fears. The purpose of the interview is to elicit all relevant facts on which to make an informed adjudication; it is not to break the applicant`s story.
>
> [T]he written questions of the I-589[80] are important but are only starting points for the interview. ...Do not allow interviews to become disjointed, unfocused, or too general. Keep to specifics and elicit as many details as possible directly before the applicant.[81]

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[77] Asylum case analysis and decision-writing, supervision and quality control and, stress management and burnout prevention were also covered. Beyer, G., *op cit* at 472.

[78] 8 CFR § 208.9(b).

[79] See Office for Refugees, Asylum and Parole, *Training for INS Refugee/Asylum Adjudicators: Interviewing and Decision-Making Techniques for INS Refugee/Asylum Adjudicators*, March 1991. (Hereafter Training Materials).

[80] Asylum application form.

[81] INS, *Asylum Procedures Manual*, at 17-18. Other components of a quality interview include: 'questions...framed to carefully to avoid suggestive or leading questions'; 'avoidance of statements, questions or attitudes... which discourage communication'; 'active listening' through 'empathy and acceptance'; and coverage of 'all possible avenues' for refugee status.

A comparison of the quality of the initial training programme and the provision of extensive training materials for AOs in the US, with that which is provided for those who interview and examine claims in the UK, reveals why the asylum policies and practice performed in the US are more likely to attain the twin goals of compassion and control.[82] This is illustrated, by the sample questions contained within the training and reference materials, designed to offer guidance to AOs in respect of suitable questions to pose, depending on the applicant's country of origin. The suggested questions are framed so that the applicant's awareness of the most basic facts in relation to their claim may be discovered,[83] for instance, concerning the current political status in the country of origin, and the government's record on human rights. Significantly however, the ability of the examiner to elicit the personal situation of the applicant is strengthened by examples of questions which go beyond that which merely establish whether the applicant can correctly clarify country conditions.

The results of a review of the new corp of AOs in the US, published in 1993,[84] demonstrated a marked improvement in the quality of asylum interviews when compared with those conducted by previous INS examiners. It was demonstrated that AOs had conducted 69% of the asylum interviews in a manner that elicited the applicants claim, and 70% of interviews in a non-adversarial manner consistent with the regulations and training.[85] Whilst these figures represent a major accomplishment, there was still a notable minority of interviews where the AOs had failed to elicit the claim successfully, and where the interview had not been conducted in a non-adversarial style.[86] In spite of the training session devoted to eliminating any preconceptions and prejudices which AOs may have unconsciously had, Ignatius' study points to, '[A]n infrequent although serious problem... of pre-existing biases about

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[82] The stated aims of the 1990 asylum reforms. Cited by Beyer, G., 'Affirmative Asylum Adjudication in the United States' (1992) *6 Georgetown Immigration Law Journal* 253 at 279.

[83] Which are capable of verification because the conditions are common knowledge or because there is authoritative documentation describing those conditions as they were, or are currently.

[84] Ignatius, S., Harvard Law School, Immigration and Refugee Programme, National Asylum Project, *Assessment of the Asylum Officer Corps*, 1993.

[85] *ibid* at 77.

[86] *ibid* at 77-78, 22% and 23% of cases respectively.

country conditions'.[87] Many of the accomplishments realised as a result of the creation of the professional AO corp, and the comprehensive training programme which accompanied its conception, have, to a degree, fallen victim to a problem identified earlier in this chapter.[88] That is, in the absence of adequately proficient interpreters, the benefits accrued by competent examiners may be nullified.[89] The use of non-professional interpreters resulted in confusion surrounding the testimony of some asylum applicants.[90] The absence of a full and accurate interpretation in each case compromises the ability of asylum officers to arrive at a fair determination. The review of the AOC pointed to the need to

> [A]ssign female asylum officers to interview women alleging forms of gender-based persecution, including rape and discrimination, and train asylum officers about appropriate questioning in rape and sexual assault cases.

This may indicate that at that time the AOC had not achieved all the goals stated in the INS Asylum Manuals, and UNHCR ExComm guidelines. The Manuals indicate the necessity of maintaining 'poise and tact' when interviewing, with an 'interested and friendly demeanour',[91] while the latter refer to the importance of understanding the special needs of refugee women,[92] the provision of skilled female interviewers[93] and

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[87] *ibid* at 87. 'Some asylum officers exhibited preconceptions interviewing applicants from their origin or country where they had lived, or otherwise had difficulty overcoming pre-existing biases about certain countries or regions'.

[88] The AO corps has also been hampered through inadequate financial backing and insufficient numbers of AOs themselves. See Beyer, G., 'Reformng Affirmative Asylum Processing in the US: Challenges and Opportunities' (1994) *American UniversityJournal of Internationall Law and Policy* 43 at 64.

> The problems in asylum processing could however, have been addressed by improving management and increasing the allocation of resources to the new system, which from its inception, was operating with minimal staff and little technical support.

Butterfield, J., 'The New Asylum Regulations: A Practitioner's Guide', *Immigration Briefings* January 1995, at 3.

[89] 8 CFR § 208.9(g), provides that any applicant who cannot proceed with the interview in English, 'must provide, at no expense to the INS, a competent interpreter fluent in both English and the applicants native language.'

[90] 39% of applicants relied on a friend or relative without formal experience. Ignatius, S., *Assessment of the Asylum Officer Corps*, *op cit* at 89.

[91] INS Asylum Procedures Manual, *op cit* at 17-18, 142-143, 146-147 and 230.

[92] ExComm Conclusion No.39 (XXXVI) 1985, para (h)(i).

[93] ExComm Conclusion No.64 (XLI) 1990, para (a)(iii).

that decision-makers should refrain from asking women refugee claimants for details of sexual abuse.[94] The shortcomings of the AOC in this regard were addressed by the guidance profferred to all AOs in a memorandum on the adjudication of claims from women based wholly or in part on gender.[95] The memorandum was an outgrowth of the gender guidelines issued by UNCHR in 1991, the 1993 Canadian guidelines and a proposed set of guidelines submitted by the Women Refugees Project (WRP) of the Harvard Immigration Programme, Cambridge and Somerville Legal Services, in 1994.[96] The aim was 'to enhance the ability of US Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims...'[97] Each Asylum Office was required to initiate four hours of in-house training, which was identified as critical in order for AOs to use the guidance effectively. The guidance is to be included in all future training sessions as a separate module. Moreover, whether 'special attention [is given] to the needs of unaccompanied minors',[98] in, for example, the form of an interviewer and interpreter who 'share the culture and language of the refugee child',[99] is not made explicit.

The guidance provided is supplemented by over 1,200 pages of specialised training materials, and in particular the UNHCR ExComm conclusions. Furthermore, forty-two instructors were involved in the training, drawn from organisations such as, Human Rights Watch, Amnesty International, and the US State Department.

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[94] UNHCR ExComm, *Guidelines on the Protection of Refugee Women*, EC/SCP/67, 22 July 1991.

[95] *INS Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, issued by Phyllis Coven, Office of International Affairs, 26 May 1995. Published in 7(4) *IJRL* 700. Recognising that some women claimants would have inhibitions about disclosing delicate issues about past sexual abuse to male interviewers, the memorandum submitted that, personnel resources permitting, female AO's should interview such cases. Furthermore, officers were instructed to move onto sensitive issues such as sexual abuse and violence only when well into the interview, and that it was unnecessary to ask for specific details of the abuse. Finally, appreciating that the demanour of an applicant informs an AO's decision on credibility, almost as much as the testimony itself, officers were reminded that women who have experienced sexual abuse may suffer from psychological trauma which may have an impact on their ability to present their account. (Of course trauma can be suffered by any applicant regardless of gender). 'Poor interview techniques/cross-cultural skills may cause faulty negative credibility findings'. (*ibid* at 706).

[96] *ibid* at 700.

[97] *ibid* at 700.

[98] ExComm Conclusion No.59 (XL) 1989, para (g).

[99] *Training Module, op cit* at 48.

The importance of keeping abreast of developments in conditions in countries of origin, is reflected in the condition which requires all AOs to spend at least four hours per week in continuing education activities.[100] This entails monitoring the evolution of the law, on changing conditions in refugee-producing countries, and inter-office issues of quality and consistency.[101] The importance attached to keeping abreast of current country conditions is apposite:

> Because the aliens fear of persecution must have an objective base, the asylum officers knowledge of human rights and other conditions in the country in question is critical to to a proper evaluation of the aliens claim. Thus an AO should make every effort to become and remain knowledgable about country conditions.[102]

Not only does country of origin information provide an objective 'check' on an asylum applicants account of events, but it may also prevent AO`s deciding cases on the basis of unconscious preconceptions or prejudices about country conditions or certain kinds of applicants.

### 6.4.3 Hearing Before an Immigration Judge

Under the reformed asylum regulations which were published in December 1994,[103] the functions performed by the AOC have become streamlined, consequently they may only grant asylum in uncomplicated cases and refer all others to an Immigration Judge (IJ) for a formal hearing. This will effectively increase the number of cases heard by IJs. The regulations create a peculiarity because although IJs have more decision-making responsibility than AOs, the regulations make no provision for any specialized training or instruction for them. IJ`s are given ongoing training at their annual judges

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[100] Beyer, G., 'Establishing the United States Asylum Officer Corps' at 475.

[101] The Quality Assurance Unit within the Asylum Division is responsible for all quality assurance activities.

[102] INS, *Basic [Asylum] Law Manual*, at 12 § III(b)(iii) 'The role of information about country conditions'. See further Chapter seven.

[103] 59 Fed. Reg. 62284-62303, ammending 8 CFR.

conference, which includes presentations by staff members of the INS Asylum Branch.[104] Good quality decisions arrived at in a timely, efficient and compassionate manner will fail to be realised if '[t]raining for IJs in refugee and asylum law, country conditions and human rights [is not made] ...mandatory for any IJ who adjudicates asylum cases'.[105] The lack of specialised training

> has been a long standing concern of many [but] this problem has been greatly exacerbated because of the expanded role for IJ's in asylum determinations under the new regulations.[106]

## 6.5 Canada

### 6.5.1 *Entry and Initial Examination*

In spite of the changes which current immigration practices have brought to the function of IO in the UK, there is still a degree of convergence between the role they serve and that fulfilled by Senior Immigration Officers in Canada. A Senior Immigration Officer will determine questions of eligibility in order to establish whether applicants can have their claim heard by the CRDD.[107] Although SIOs have not, as yet, assumed the same responsibilities as IOs in the UK, there is a parallel provision to sections 71 and 72 of the 1999 IAA, that allows the Governor General to 'prescribe' certain countries to which Canada can return applicants without first hearing their case,[108] This has serious ramifications for claimants, and as such, there are compelling reasons for SIOs to be *au courant* in respect of country of origin conditions. Following the development of the role which IOs discharge at ports of entry, parallels may also be drawn between their purpose and the function fulfilled by Refugee Hearing Officers (RHOs). The jobs are analogous in the sense that they both interview

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[104] Butterfield, J., *op cit* 18 at footnote 9.

[105] *ibid* at 17.

[106] *ibid* at 11.

[107] The Immigration Act sets out the categories of persons who are not eligible. (Immigration Act § 36, 1992 S.C. 1432 (Can.)). See chapter five for further discussion.

[108] § 36(1) Immigration Act, ch 49.

applicants with a view to eliciting all relevant information pertaining to the application for asylum. Where they differ is in the fact that applicants upon arrival in Canada are issued with a Personal Information Form (PIF) to complete within twenty-eight days, and the interview is conducted in the light of the information contained therein, rather than immediately after the applicants has arrived in the country without reasonable time to consult with legal representatives or ethnic community groups. Furthermore, RHOs play an enhanced role in the determination procedures in Canada because they question and examine claimants and their witnesses in the hearing before the Convention Refugee Determination Division (CRDD).

### 6.5.2 *Initial Decision*

The stated aim of the Canadian IRB is 'to make well-reasoned decisions on immigration and refugee matters, fairly, and in accordance with the law'.[109] When IRB Members are appointed, they undergo several weeks of training. The training component is comprised of four components: pre-course reading; orientation week in the regional office; two-week new member training course; and follow-up training.

The pre-course reading helps to ensure that Members have the basic information about the IRB and their roles, thus making for a more participatory and informative training course. Materials include; a Briefing Book for Members, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, examples of CRDD Reasons for Decision, Enhancements to the Refugee Determination Process, and Legal Services' Paper: 'Interpretation of the Convention Refugee Definition in the Case Law'. In the orientation week new members receive briefings about the Refugee Claims Officers, Registry and Information Systems and visit the IRB Documentation Centre. An opportunity is provided to observe hearings, and there is an introduction to law for members without a legal background, and for all new members sessions on the principles of natural justice and the Immigration Act and

[109] IRB, CRDD, *New Member Training Course*, titles page, (October 1996). Sources supplied by Richard Stainsby, Assistant Deputy Chairperson, Members Professional Development Branch, IRB.

CRDD Rules. The two week training course examines the role of the IRB in a national and international context, it provides an in-depth knowledge of the convention refugee definition and the manner in which the definition is interpreted in case law. Extensive instruction is given on preparation for a hearing,[110] so that members are able to weigh evidence, assess credibility and apply the relevant legislation to the facts of a case, and to write decisions which are clear and which are factually and legally sound. Crucially the importance attached to 'sensitive' cases in the ExComm Conclusions is reflected in the training programme. Victims of torture, gender claims, child refugee claimants and cross cultural awareness, are the subject of particular scrutiny in the second week of the training programme.[111]

In addition to the new member training, CRDD Members and RHOs benefit from a core development programme of continuing education comprising three half day components a month. This encompasses national and regional workshops, legal updates and sessions on country conditions. National workshops reflect a diversity of pressing issues in the refugee determination context, for example, state protection, natural justice,[112] women refugee claimants who have been subject to domestic violence, and assessment of credibility in a cross-cultural context.[113] The importance of the legal updates is reflected in the monthly sessions which focus on modifications to the state of the law as well as illustrating those changes, and in the recent establishment of two compendiums of leading cases updated regularly. Members also continue to receive summaries of cases, which although not significant enough for inclusion in either of the compendiums are selected for there interesting application of the law. The Members Professional Development Branch arrange for regional experts from the UNHCR to provide expert briefings for CRDD members on regional and country

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[110] The hearing itself, presiding skills, rules of evidence and evidentiary issues (*ibid*).

[111] Representatives from UNHCR and the Canadian Centre for the Victims of Torture (CCVT) led the sessions on cross-cultural awareness and victims of torture, for example (*ibid*).

[112] 1994 National Workshop. Other workshops carried out in 1994 were; The International Context and the Role of the IRB, The Convention Refugee Definition and Exclusion. Stainsby, R., *Professional Development Programme for CRDD Members*, at 8 (IRB, Dec. 1994).

[113] Proposed 1996 workshops. Stainsby, R., *Report on Professional Development 1995-1996*, at 6 (IRB, Dec. 1995).

conditions,[114] reflecting the importance UNHCR have attached to an appreciation of country of origin conditions by the examiner.[115] Judges, lawyers, academics and other governmental and non-governmental organizations are regularly involved in the training.

The training of members is further augmented through a range of other activities. For example the IRB-UNHCR Memorandum of Understanding (MOU), facilitates a sharing of training materials, exchanges of personnel to assist in the development and delivery of workshops and cooperation with other refugee determination systems in the area of professional development. Furthermore the MPDB liaises with governmental and non-governmental bodies outside the Board who are interested in the professional development activities of Members. Not only is the professional development programme based on the ideas of the Members themselves, but implementation of the programme also depended greatly on Members. Experienced CRDD members were employed as presenters and facilitators in the New Members Training Courses as well as in the On-Going Professional Development Programme.

### 6.4.3 *Appeal*

The avenue available for reviewing a decision to refuse refugee status includes an appeal to the Federal Court, a post-claim humanitarian review[116] or an appeal to the Minister of Immigration. There is no review mechanism within the IRB itself, nor is there a review before an administrative body. Hence, there is no means of correcting factual errors or considering new country of origin information. Refugee advocates can apply for a rehearing only if they can demonstrate that there has been a violation of

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[114] For example in 1994 MR Mohamed Boukry (Chief of Section for the Middle East in UNHCR HQ) gave briefings by conference call. 'Mr Boukry's knowledge of the region expertise in refugee law and experience in refugee status determination were greatly appreciated by the Members'. Stainsby, R., (Dec. 1994) *op cit* 7.

[115] *Training Module, op cit* at 4.

[116] Section 114.2 1976 Immigration Act, R.S.C., as amended . The A114.2 application or review is made to the Case Management Branch Canada Immigration Centre (CIC).

natural justice. The appeal to the Federal Court is by permission only and is granted only on errors in law, not the facts of the case, and it does not allow new evidence to be submitted.[117]

## 6.5 Conclusion

> [In the United States] [t]he conditions are fostered so that the applicant has the best possible opportunity for giving a comprehensive account of all the important elements of the claim. Such an approach is clearly distinguishable from the sterile questioning and the 'culture of disbelief' which pervades the interviewing process [...] in the UK.[118]

In the English case, *ex parte Murat Akdogan,* Brooke J, in the course of his judgement, stated that if the questions addressed to the appplicant are in essence 'Do you have anything to say about that?' and 'Do you wish to add anything?', then 'the examiner is not performing the the duty the law requires of him in these very anxious cases.'[119] Placing the onus squarely on the applicant to demonstrate all the facts on which they rely, results in interviewing practices in the UK which may fall short of the obligation incumbent on states to share in the onerous task of eliciting the necessary evidence from the applicants testimony.[120] For those applicants who are not subject to

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[117] As a matter of course there is a post-claim review conducted at the originating Hearings Office of a Canada Immigration Centre (CIC) which is performed when the removal order or departure notice is effective. The purpose is to assess whether the individual would likely be subjected to 'unduly harsh or inhumane treatment if returned to his or her country of origin' and decision-making discretion lies with the Hearings CIC manager. (Centre for Refugee Studies, 'Postclaim Review of Rejected Refugee Claims' (1993) 12(6) *Refuge* 4 at 12-13). There is also a preremoval review which is conducted when removal is imminent, and decision-making discretion lies with the Detention and Removals CIC manager.

[118] Trost, R. and Billings, P., The Designation of "Safe" Countries and Individual Assessment of Asylum Claims' in *Refugee Rights and Realities:Current Issues of UK Law and Policy* (Ashgate Publishing 1998).

[119] Imm AR 176 at 181. Since there is no prescription in the municipal law of the UK or indeed international law, vis-a vis any explicit duty incumbant on an examiner during the course of an asylum examination, it appears that whilst desirable, Brooke J is erroneously referring to the principles in the UNHCR Handbook as legal rules. Although it is perhaps revealing that he used the phrase '*in my judgement*, the examiner is not performing the duty the law requires...'. It is conceivable that the phrase is indicative of the legal importance which the judge would like to see attached to the Handbook's principles, or maybe it was that nebulous concept, due process which the judge had in mind. It is far from clear.

[120] Para 196, *UNHCR Handbook, supra* note 21.

the SP it is only marginally better. There is only provision for the very basic elements of the asylum claim on the pro forma referral, and even Part C of the SCQ is stilted by comparison to the questions submitted in the American system.[121]

In Canada the recruitment practices and training infrastructure of the IRB would appear to satisfy the requirements of international protection established in paragraph 190 of the UNHCR Handbook,[122] and may reasonably be said to ensure that the best interests of asylum applicants are served by competent and well informed officials. Whilst the quality of the training CRDD members receive is not in doubt, it is less certain that RHOs receive such thorough instruction.[123]

The determination of asylum claims requires specialised education and on-going training. A measure of self-determination, of *participation* in the process, is more likely to be felt by asylum seekers whose claims are examined by those conversant in good interviewing skills, adept at dealing with cross-cultural barriers and at recognising cues that are indicative of torture or PTSD. Moreover, they may serve to promote the observance of procedural *rationality*, in that decisions may be reached with greater *consistency* and *impartiality*. Education and training may form the bedrock of *intelligible*, reasoned decision-making,and may also establish the basis for *ethical* treatment by those public authorities charged with interviewing and decision-making responsibilities. Some Western refugee-receiving states have made greater strides towards attaining this ideal than others, none can presume to have mastered the process. If the perceived wisdom in some refugee-receiving states is that asylum adjudication should be assigned to specialists who are well trained in refugee law, highly knowledgable about conditions in source countries, and cross-cultural sensitvity, successive governments in the UK have yet to demonstrate such an understanding in respect of first tier decision-making.

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[121] If the Home Office is not satisfied from the information in the questionnaire that the applicant qualifies for refugee status or ELR a further interview will be arranged. The Home Office will not normally refuse someone purely on the basis of the answers provided on the SCQ and will afford the claimant an opportunity to adduce further information and evidence.

[122] *supra* note 40.

[123] The most I have been able to glean from the materials obtained from Rick Stainsby (IRB) is that RHOs are invited to attend Member training.

# Chapter Seven

# The Use and Abuse of Information in Asylum Status Decision Making

## 7.1 Introduction

This chapter focuses on the potential advantages that an information resource centre, and information technology in general, may have for all those actors in the asylum determination process. The approach adopted mirrors chapter six. The role that information technology plays in the United Kingdom, is compared and appraised in the light of the developments in Canada and the United States. Again this focus reflects the fact that developments in the latter jurisdictions, have been forerunners in this area of asylum practice among industrialised refugee-receiving states. The critical evaluation will examine state practice in the light of criteria contained in international and regional documents; the recommendations of UNHCR's Executive Committee; EU resolutions; and finally the relevance of education and training from a dignitary perspective.

## 7.2 Information and Procedural Fairness

The belief that a maximum of knowledge, both of the asylum applicant's country of origin, and of pertinent law, will greatly promote the reaching of fair decisions, was recognised over a decade ago in the report of Gunther Plaut on the Canadian refugee determination process.[1] Similar sentiments have found expression in the literature of other academics,[2] in

[1] Plaut, W.G., *Refugee Determination in Canada* (Ottawa 1985).

[2] 'Credible and trustworthy information is... the essential foundation for good decisions.' (Goodwin-Gill, G., *The Refugee in International Law* (Oxford University Press 1996) at 352). See also Rusu, S., 'The Development of Canada's Immigration and Refugee Board Documentation Centre' (1989) 1(3) *International Journal of Refugee Law* 319; and Thoolen, H., 'The Development of Legal Databases' (1989) 1(1) *International Journal of Refugee Law* 90.

the publications and reports of the UNHCR[3] and NGOs,[4] and, belatedly, in the 'soft law' of the ExComm Conclusions. Conclusion No.72 noted:

> the importance of availability and access to objective and accurate information concerning the various causes of forced displacement in order to facilitate informed decision making at all stages of refugee situations.[5]

Information, and especially information technology, plays a key role in the protection of refugees. This role begins just prior to, or at the inception of a crisis, and may, through alerting the governments of the world and international agencies to an impending problem, provoke some kind of response which prevents any large-scale forced migration. Should such a response fail to happen and displacement occur, and absent any durable solution in the particular region, information is of vital importance at the resettlement end of the spectrum. It is important both in terms of assessing credibility, and in terms of revealing when country of origin conditions may have improved sufficiently so that refugees may return home in safety. Without adequate information those officials who examine and adjudicate on asylum applications will find it difficult to respond *rationally*, ie *consistently*[6] to the asylum applications they receive, and applicants will lack the necessary tools to provide objective evidence in support of their subjective fear.[7] Moreover, it may assist the authorities achieve the expeditious determination of claim they crave. Gathering together

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[3] 'Gathering information and disseminating it effectively are central to the assistance and protection of refugees.' UNHCR, *The State of the World's Refugees - The Challenge of Protection* (Penguin 1993) (*The State of the World's Refugees* hereafter) at 51.

[4] Officials examining and deciding on asylum claims should be provided with the services of a documentation office whose task should be to impartially collect and provide objective and independent information on the human rights situation in particular countries.

(Amnesty International, *Europe: The Need For Minimum Standards in Asylum Procedures* (June 1994) (*Minimum Standards* hereafter) at 12).

[5] ExComm Conclusion No.72 (XLIV) 1993, *Personal Security of Refugees*, para (ff). ExComm Conclusion No.75 (XLV) 1994, *Internally Displaced Persons*, para (jj), reiterated 'the importance of securing access to current and reliable information on involuntary displacements in the interests of promoting solutions at all levels of the refugee situation'.

[6] The aim of an adjudicatory system which purports to be fair, must be to achieve consistency on cases which exhibit similar characteristics, and consistent understanding and appreciation of the conditions in a given country or region between decision-makers.

[7] Information has found a powerful medium in the camera, and if exposure begins when a crisis is unfolding, it may evoke a response from the international community and prevent or limit migration. When employed in this fashion information is a 'resource' for refugees, it alerts governments and the whole international community. Information is also a resource because it may allow refugees to choose the safest and most appropriate channels for migration (UNHCR, *The State of the World's Refugees*, *op cit* at 52).

publicly available and verifiable sources of information from human rights monitors and analyses by NGOs, the media, and from the governments of the states under scrutiny, is fundamental to safe-guarding a meaningful right to petition for asylum. If states are truly committed

> [t]o fair and efficient procedures for the determination of refugee status, in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted [that] protection,[8]

this objective may only be attained if states consider themselves under a duty to use reliable and current information.[9] It is insufficient for the governments of industrialised states to simply rely on reports from diplomatic missions in refugee-producing countries. These may be subject to political prejudices, and such influences are extraneous to human rights considerations. It is essential that such information 'be complemented by information from a wide range of other, independent sources, such as non-governmental organisations, academic institutions and independent media.'[10] Information which documents the historical context of the prevailing conflict or humanitarian disaster, provides details of those allegedly responsible for the migration, and their policies, practices and tactics, will enhance the ability of decision-makers to assess credibility and may point to future developments and possible persecution in the country of origin.

The Canadian IRB established a Documentation Centre in 1989, in an attempt to address the difficult task of assessing the relative credibility of disparate sources of information, upon which states and decision-makers drew their conclusions about country conditions. The Centre was charged with the task of collating and issuing digests of information on country of origin conditions, and jurisprudential questions.[11] The IRBDC

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[8] ExComm Conclusion No.72 (XLIV) 1993, para (i).

[9] Houle, F., has referred to a 'duty' incumbent on IRB Members in Canada to use such information in order to make fair asylum determinations ('The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience' (1994) 6(1) *International Journal of Refugee Law* 6, 13-14.

[10] Amnesty International, *Minimum Standards*, *loc cit.*

[11] Among the objectives which the IRBDC set itself in its mandate of 1989 were: to be the principal resource for the provision of credible and trustworthy evidence relevant to the process of refugee determination; to provide actively and regularly, the latest country of origin information to the major actors in the process; to offer objective and authoritative, but not expert analysis of a wide range of trustworthy and

has two main databases, a bibliographic database and a legal database. The former database contains broadcast transcripts, video, films and unpublished manuscripts. The legal database covers: Canadian law and jurisprudence; comparative law and jurisprudence; and international law and jurisprudence, including the texts of international instruments concerning refugees and human rights.

Information on human rights in countries of origin, recorded by international and domestic monitors, is assessed and evaluated and forms the basis of the *Country Profiles* which constitute the primary form of documentation provided to Members of the Refugee Division. They document the geographic, historic, political, and social dimensions of the country of origin. They also provide general statistical information about a country's institutions, organisations and peoples'.[12] *Country Profiles* are complemented by the *Question and Answer Series*, which provide updated information on situations and policy changes in claimant-producing countries. Other products of the Documentation Centre include, the *Weekly Media Review*, the *Perspectives Series*, *Responses to Information Requests*[13] and *Country files*.

The United States was the next country to develop a documentation facility based on the Canadian model. The Resource Information Centre (RIC) opened on April 2, 1991 in accordance with the mandate of the July 1990 final asylum rule.[14] The objective of the RIC is

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current country information and available relevant case law; and to acquire, treat, store and disseminate such information, using both hardcopy and electronic means (cited by Rusu, S., *op cit* 323).

[12] IRBDC holdings include reports, articles, analyses, periodicals and monographs from traditional human rights monitors, including media accounts, Amnesty International Reports, US State Department reports, reports of the UN organs and regional human rights rapporteurs, and analyses by NGOs such as the Minority Rights Group, the Netherlands Institute for Human Rights, the Danish Centre of Human Rights, the Norwegian Institute of Human Rights and the Lawyers Committee for Human Rights. These holdings are extended by a collection of analyses by Canadian individuals, officials, NGOs, church, and human rights groups which appear to be of specific interest to Canada (see Rusu, R., *op cit* 324).

[13] Undertaken by staff in response to requests by Members and RHOs and are produced on a daily basis.

[14] 8 CFR § 208.1(c) (1990), as amended (1995), provides that

> [t]he Assistant Commissioner, Office of Refugees, Asylum and Parole, shall coordinate with the Department of State, and in cooperation with other appropriate sources, to compile and disseminate to Asylum Officers information concerning the persecution of persons in other countries... and shall maintain a documentation centre with information on human rights conditions.

> to meet the needs of the Asylum Officers domestically and Immigration Officers determining refugee status overseas by actively and regularly providing credible and objective information on conditions in the countries of origin of asylum/refugee applicants.[15]

The significance attached to the RIC in the decision making process is manifest from the requirement in section 208.12 of the final asylum rule. It provides that in determining either asylum or withholding of deportation applications, asylum officers may rely on information from a variety of sources, including international organisations, private voluntary agencies, or academic institutions.[16] However, the Clinton administration, as part of its effort to respond to public perceptions of the United States as vulnerable to exploitation by an overwhelming tide of economic migrants, streamlined and expedited the determination process. Supplementary instructions issued to Asylum Officers (AO) in tandem with new regulations published in December 1994, stated that where the need for additional information would delay decision making (an unremarkable and frequent occurrence given the nature of asylum status determination) the decision should be referred to an Immigration Judge for a final adjudication.[17] This step has, to an extent, been countered by steps taken by the INS to ensure that each AO will have the information provided by the RIC available on their own computer workstations.[18] Furthermore, the INS is working towards means by which country of origin information is more generally available to attorney's, advocacy groups and applicants.[19]

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[15] Mission Statement for the Resource Information Centre, *INS Asylum Officer Training and Reference Materials*, February 1993.

[16] 8 CFR § 208.12 (1990), as amended (1995).

[17] '[a]dditional research should not normally delay Asylum Officer decision-making. If it may, such cases should usually be included in those referred to IJs for final adjudication' (INS Public Information Handout § 4(c) (December 1994). Cited by Butterfield, J., 'The New Asylum Regulations: A Practitioner's Guide' *Immigration Briefings* January 1995, footnote 122).

[18] INS, *Public Information Handout* § 4(b) (Dec. 1994) (Cited by Butterfield, J., *op cit* at 9).

[19] 59 Fed. Reg. 62293 (Dec.5 1994) (Cited by Butterfield, J., *loc cit*). This may be contrasted with developments in Canada where initially information was publicly accessible, however the Documentation Information and Research Branch (DIRB) has now closed providing some documentation collections and ceased providing 'information request' services to 'external clients' (including counsel and claimants). Hathaway, J., *Rebuilding Trust - Report of the review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board*, December 1993 at 59.

The INS specifically chose hardware and software which was compatible with those of the documentation centre in Canada, and initially the only information resources available were those resources in electronic form which had been downloaded from the Canadian databases. The information holdings of the RIC fall into two categories, legal and country of origin/human rights. The legal database, 'REFLAW" ensures online access to the Basic Law Manual: Asylum, related to which is 'REFLAP' or 'Refugee/Asylum Law and Practice' to ensure access to the sources of law and legal standards related to asylum adjudication. The country of origin\human rights material holdings include information of a general and historic nature on country of origin conditions in respect to countries of interest to the United States in asylum and refugee claims.[20] The main documents produced by the RIC which are used by AOs are *Country Profiles*, which collate publicly available human rights reports about 'populations at risk'. *Alerts* provide explanations of events or problems likely to induce numerous asylum applications. *Information Packet Series* supply a full range of details regarding a country's human rights record and prevailing conditions until supplanted by a *Country Profile*.[21] The RIC is the primary means by which AO's maintain 'knowledge of human rights and other conditions in the country in question [which] is critical to a proper evaluation of the aliens claim'.[22]

In the countries of the European Union, developments in asylum law and practice have been increasingly influenced by the inter-governmental discussions held by the Justice and Home Affairs Council.[23] As a participant in this forum the UK Government[24] resolved

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[20] The Centre acquires information from sources such as Amnesty International, Human Rights Watch, Freedom House, the International Commission of Jurists, US State Department Reports, the Lawyers Committee on Human Rights, the Minority Rights Group and United Nations studies (INS, *Asylum Officer Training and Reference Materials*, February 1993 at 8-9)

[21] Other documentation available from the RIC are: *Perspectives*, these are contributions from recognised experts on a particular issue; *Queries*, which are simply responses to inquiries from AOs or Pre-Screening Officers; *Master Exhibits*, are collections of credible documents including news reports and reports by human rights organisations on a given group "at risk"; and finally *News Summary*, a bi-weekly summary of news articles drawn from leading domestic and international publications and news services. (INS, *Asylum Officer Training and Reference Materials* at p.13).

[22] Excerpt from Basic Law Manual, Section III 4(b)(iii), contained in *Asylum Officer Training and Reference Materials* at 12.

[23] The EU *Resolutions* and *Conclusions* were drawn up in secretive meetings by a group known as the Ad Hoc Group Immigration from its inception in October 1986 until the Maastricht Treaty came into force in 1993.

[24] Neither the European Parliament, UK Parliament or the national parliaments of any of the other member states of the EU were privy to the discussions or reports of the working groups which meet prior to

in the *Resolution on Minimum Guarantees for Asylum Procedures*,[25] to take account of all the[se] principles in the case of all proposals for changes to their national legislation. This is significant because at present there is no legal prescription in any of the UK's asylum and immigration legislation or accompanying secondary legislation, which imposes a duty on those actors responsible for processing asylum claims to consult documentation from a range of independent sources concerning the applicants country of origin or pertinent case law. However, whilst the *Resolution* suffers from the same defects affecting ExComm Conclusions, in that it is informal and in no way legally binding,[26] if the UK is committed to bringing national legislation in line with the *Resolution's* principles,[27] then attention ought to be drawn to paragraph 6.[28] This declares that examining officers must have access to precise and up-to-date information from different sources, regarding countries of origin and transit countries, including information supplied by the UNCHR. It proceeds by advocating that the authorities responsible for the examination have the right to request information from experts. Of course the term 'access' lends itself to a number of interpretations, and it is likely that despite the absence of a comprehensive resource centre in the UK, containing holdings available to all those involved in the determination of refugee status, the government would consider the existing arrangements as fulfilment of the requirement established in paragraph 6. This difficulty is symptomatic of the state-centric character of international law, whereby states 'undertake' to observe obligations enumerated in international instruments, but for the most part it is the state government which is the sole authoritative judge regarding the adequacy of its efforts. Under existing arrangements it is unknown to what extent there is adequate consideration of, among others, the US State Department's *Country Reports on Human Rights Practices*, Human Rights Watch's *World*

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the meetings of the Interior Ministers (includes the Home Secretary of the UK). The meetings of officials, police, immigration, customs officers and internal security services were secretive and the minutes of their reports routinely rubber stamped by the Interior Ministers.

[25] EU Resolution 5585/95, adopted by the Justice and Home Affairs Council on 20 June 1995. (The *Resolution* hereafter).

[26] The lack of legal consequences for failure to fulfil minimum guarantees is characteristic of the absence of enforcement mechanisms of international legal norms. This results from the fact that enforcement rests largely on national action, there is no international authority with responsibility for implementation and enforcement.

[27] As it appears from the legislative actions if not the rhetoric of ministers. In successive Conservative Party Conferences in 1995 and 1996, the Home Secretary has boasted that immigration policy belongs in, and will be decided in, Britain and not in Brussels.

[28] Section III 'Guarantees concerning the examination of asylum applications', *Resolution on Minimum Guarantees for Asylum Procedures*.

*Report* and Amnesty International's annual report, which 'are the very minimum required to make an assessment of human rights in countries of origin'.[29] The basis of the UK's country reports is in marked contrast to the approach adopted in North America, where a wide range of information in the public domain constitutes the basis of the Country Profiles. At present, the UK as a member state of the European Union, appears to rely heavily on the information provided by diplomatic missions of member states, and produced by the Centre for Information, Discussion and Exchange on Asylum (CIREA).[30] Its objectives are 'to gather, exchange and disseminate information and compile documentation on all matters relating to asylum', the aim of which is to develop within the clearing house greater informal consultation, thus facilitating harmonisation of asylum practice and policy.[31] Conspicuously absent from the text is any mention of the importance such a database could have in assisting all actors in the determination procedure in ensuring reliable decision-making and in reducing the prospect of erroneous decisions. Indeed, the information produced by CIREA is only disseminated to EU ministers, national authorities participating in the work of the clearing house and the Commission. Section IV of the Decision Establishing the Clearing House is ambiguous.

> Ministers shall determine the framework and conditions for the clearing house to disseminate information to international organisations, non-governmental organisations, universities and the media in particular. [D]epending on national procedures, [the joint reports on third countries drawn up on the basis of information gathered, may] be made available to the parties involved in a dispute where there is an *appeal* against a decision by the authorities responsible for matters concerning asylum. (Authors emphasis added).[32]

The clearing house produces reports on countries of origin which 'form the basis of secret 'joint assessments' and are likely to be used as a basis for policy-making and as evidence in

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[29] Fletcher, T.,'A Comment on documentary problems involved in countering "Safe Country of Origin" proposals', (Refugee Legal Centre), contained in *Safe Countries of Origin and Safe Third Countries*, ILPA Conference Materials, (8 July 1996).

[30] Set up by EU Immigration Ministers in Lisbon in June 1992, giving effect to the Declaration on Asylum annexed to the Treaty on European Union. Referred to as the 'clearing house'.

[31] *Decision Establishing the Clearing House* Section II, EU Ministers Responsible for Immigration; Laveau, D., Council of the European Union, fax to the author 4 November 1996.

[32] Annex III.4 *Circulation and confidentiality of joint reports on the situation in certain third countries*, adopted by the European Council 20 June 1994. This is annexed to the *Decision Establishing the Clearing House*, *ibid.*

the determination of individual asylum applications.'[33] Whilst Baroness Blatch, in the House of Lords during the passage of the Asylum and Immigration Act 1996, spoke of independent evidence available to ministers upon which to base country assessments,[34] it is far from certain that there is a comprehensive assessment of reliable and impartial information, which is critical to determinations of whether a country is a safe country of origin,[35] or a safe third country.[36] In addition to the hazards which accompany generalized assumptions about the relative safety of certain countries, if the country reports are not open to public scrutiny and verification, it is impossible determine whether they are objective designations made in good faith and without bias.[37] The Secretary of State is under no obligation to consult the authorities of the receiving country, nor is the Secretary of State under an obligation to disclose all the material on which the certification that a

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[33] ECRE, *A European Refugee Policy in the Light of Established Principles* (April 1994) at 5. ECRE have called upon states to base their country reports and country of origin `joint assessments' on reliable and impartial information, obtained from a variety of sources, including NGOs and research institutes (*ibid*).

[34] [I]n addition to reports from the Foreign and Commonwealth Office we take *account* of the views of other western governments, independent press reporting and reports from organisations such as Amnesty. [...] I mention just three independent sources of advice: the US State Department; the Carter Centre; and Amnesty International.

(HL debs vol 571, col 1086 & 1088, 23 April 1996).

[35] Asylum and Immigration Act 1996 § 1(2), amending sch 2 para 5 to the 1993 Act, extended the 'fast-track' special appeals procedure to asylum applicants

> if the country or territory to which the appellant is to be sent is designated in an order made by the Secretary of State by statutory instrument as a country (...) in which it appears to him that there is in general no serious risk of persecution.

The creation of the 'white list' countries was specifically provided for in the EC *Resolution on Manifestly Unfounded Applications for Asylum* (SN 4822/92 WGI 1282 AS 146), para.8, and the EC *Conclusions on Countries in which there is Generally No Serious Risk of Persecution* (SN 4821/92 WGI 1281 AS 145), para.1, which were signed by the then Home Secretary, Kenneth Clarke, in December 1992 at a meeting of the EU Justice and Home Affairs Council in London.

[36] Asylum and Immigration Act 1996 § 2(2), relating to § 6 of the 1993 Act, provides conditions for the removal of an asylum claimant to a safe third country. The concept of safe third country, was developed and agreed to in the 1992 EU *Resolution on a Harmonized Approach to Questions Concerning Host Third Countries* signed by the then Home Secretary, Kenneth Clarke, 1 December 1992 at a meeting of the EU Justice and Home Affairs Council in London. See now § 11 IAA 1999.

[37] The presence of foreign policy considerations was clearly evident from the manner in which the Home Secretary attempted to deport the Saudi dissident Mohammad al-Mas'ari in January 1996, in order to preserve good foreign trade and diplomatic relations with Saudi Arabia. The ability of the Home Secretary to objectively and fairly assess evidence prior to designating countries as safe, appeared questionable in the light of his attempt to remove Mr al-Mas'ari to Dominica. The Chief Immigration Adjudicator at the time, Judge David Pearl, in his judgement on March 5, stated that the actions of the Home Secretary were illegal, and that the islands recent history revealed a 'considerable degree of political vulnerability'. (*The Guardian* March 6 1996).

country is 'safe' is made.[38] Doubts concerning the safety of countries such as Belgium and France, due to the possibility of *refoulement*, the inadequacy of procedures or time limits for access to those procedures, have been stressed by both the courts and commentators.[39] Furthermore the increasing number of bilateral readmission agreements, including ones between European Union and central or eastern European countries in which effective protection from *refoulement* cannot be guaranteed, heightens an asylum seekers vulnerability to these uncertainties.[40]

Alluring though the use of information databases may be, to those who press for fairer and expeditious determination procedures, the seductive air of electronically accessible country reports should not be deemed the panacea for all the evidentiary problems which can plague asylum applications. The utility of documentation centres and the information contained therein is tempered by the following limitations: Firstly, situations are in a constant state of flux, therefore country reports may only provide a general impression of what is occurring in the country of origin. Second, information is a limited commodity because its composition and manner of its distribution will inevitably be coloured by the aspirations of those responsible for that source.[41] Modern communications technology has largely eradicated the problems of obtaining information, the challenge is to identify what is relevant to the claim and may reasonably be relied upon as credible and authoritative by the asylum officer or government official.

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[38] Immigration Rules HC 395 para.345 and as amended 1996; *R v SOS Home Department ex parte Abdi*, (H.L.) 1 WLR 298 at 300. Per Lord Mustill, 'in the very special context of his abbreviated procedure no such duty [to disclose all material information] can be implied'.

[39] *R v Secretary if State for the Home Department, ex parte Gashi* [1999] Imm AR 231 and [1999] Imm AR 415; *R v Special Adjudicator, ex parte Turus; R v Immigration appeal Tribunal, ex parte Bostem* [1996] Imm AR 388; *R v Secretary of State for the Home Department, ex parte Martinas* [1995] Imm AR 190; *R v Secretary of State for the Home Department, ex parte Kanapathypillai* [1996] Imm AR 116; Shah, P., 'Refugees and Safe Third Countries: United Kingdom, European and International Aspects' (1995) *European Public Law* 259; Amnesty International, *Playing Human Pinball: Home Office Practice in "Safe Third Country" Cases* (1995); Symes, M., *The Law relating to "without foundation" asylum claims* (Refugee Legal Centre, 1996); and Trost, R. And Billings, 'The Designation of "Safe" Countries and Individual Assessment of Asylum Claims' in Nicholson, F. and Twomey, P., Current Issues in UK Asylum Law and Policy (Ashgate 1996) at 78.

[40] ECRE, *Safe third countries: myths and realities* (1995) para 21 and appendix D.

[41] In order to overcome the biases and limitations inherent in each source of information, reliance on a number of sources, will, in the eyes of examiners lend greater credence to the picture they portray.

> The range of relevant material is broad. Information on political, economic, social and legal structures is important, as are reliable facts about human rights problems. Several layers of information are needed: not only about what the law of a country says, but also about the relationship between the law and usual practice. [42]

A third limitation, which is prejudicial to those applicants striving to provide corroborating evidence for their testimony, is the denial of access to a region or country experiencing conditions which are producing outflows of refugees. If relief agencies or NGOs are denied access to such places then their may be an 'information vacuum'[43] and it is likely to prove a more onerous task, for both examiner and refugee to substantiate the accounts of any asylum applicants.[44] Obtaining information from Haiti, El Salvador, Argentina and eastern European countries for example, proves particularly difficult.[45] Four, the ways in which the observance of human rights in states is assessed and measured, and the practices which are accepted as indicators of a 'repressive' state,[46] should not be too readily accepted as adequate and wholly decisive. Even if an assessment of a state's human rights performance is predicated on its observance of principles enumerated in the International Covenant's, or a 'short list' of core rights derived from the Covenant's,[47] this will be amount to an approximate assessment of a country's overall human rights record. Difficulties associated with using rights indices for measuring human rights include; problems with constructing indicators,[48] defining, validating and measuring indicator data with precision,[49] and methodological considerations, for example, ensuring that the indices

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[42] UNHCR, *The State of the World's Refugees op cit* 61.

[43] *ibid* at 56.

[44] For example the civil war in Sudan which has been ongoing for thirty years, is one of the world's most under-reported humanitarian disasters, largely because of the unwillingness of the government and the rebel authorities to allow independent media into the country. Similarly in Cambodia the human atrocities committed by the Khmer Rouge government was prevented, for along time, from coming to the attention of the international community.

[45] Houle, F., *op cit* 15.

[46] For example, arbitrary arrest, detention, and torture.

[47] Donnelly, J., and Howard, R., 'Assessing National Human Rights Performance: A Theoretical Framework' (1988) 10 *Human Rights Quarterly* 214.

[48] It is misleading to define 'indicators' as indirect measures of underlying 'concepts' which cannot be observed directly, because few indicators are directly observable either. The example provided is torture, which although is possible to 'see' directly, is unlikely to observed in every instance, therefore reliance is placed on secondary data like news reports. It is the news reports which are the indicators not the torture. (Barsh, R., 'Measuring Human Rights: Problems of Methodology and Purpose' (1993) 15 *Human Rights Quarterly* 90)

[49] *ibid* at 92-94.

are conceptually clear, and that data sources are reliable.[50] The complex dynamics of the relationship between information and the governments of the receiving 'host' nations of the Western world, means that to portray that relationship in simply a positive fashion would be to oversimplify the correlation. While human rights monitoring and reporting may facilitate informed decision making, the usefulness of such information is destroyed if states allow ideological imperatives to override methodology. Increasingly industrialised refugee-receiving states are tying the provision of asylum closely to human rights performance in the country of origin and countries of first asylum. If that information is not gathered systematically, is disseminated to officials selectively, or is employed as a pawn in pursuing certain domestic or foreign policies,[51] and for validating those policies,[52] it is not difficult to see the potentially destructive and negative effect which information can have for asylum applicants. Furthermore, if states are exposed to media coverage which indicates an impending humanitarian crisis, policies of *non-entrée*[53] may be adopted, designed to deny refugees the opportunity of availing themselves of the protection obtainable under international law.

## 7.3 Conclusion

With the limitations outlined above borne in mind, the advantages of information resource centres are twofold: *rational* decisions based on credible sources of information may be reached because decisions may be based on verifiable information, thereby promoting

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[50] Indices which lack conceptual clarity fail to state the values they incorporate and lack consensus on those values. Data problems arise when efforts are made to focus on human rights violations which are not concrete abuses, like the numbers of persons killed or detained, but are categories like due process and discrimination. Furthermore if the focus of the research is solely on concrete forms of abuse and repression, a state could replace torture with censorship and longer prison terms for example, which avoid measurement. (*ibid* at 98-101).

[51] The decision-making bodies, responsible for examining applications for refugee status, should not be governed by considerations of domestic politics, fear of provoking racism or increasing economic difficulties, or of international politics, the risk of causing complications in relations with countries from which asylum-seekers come.

[52] Punitive trade and aid decisions were based on human rights indicators during President Carter's Administration. (de Neufville, J.I., 'Social Indicators of Basic Needs: Quantitative Data for Human Rights Policy' (1981) 11 *Social Indicators Research* 393).

[53] For example, interdiction at sea, or the imposition of a visa requirement on nationals of the country experiencing the conflict, disturbance or disaster.

*consistency in* decision-making and the *intelligibility* of the process; documentary evidence may benefit the applicant by corroborating their testimony, conversely it will aid those processing the claim in identifying contradictions and inconsistencies in accounts of persecution.[54] This will facilitate the timely identification of meritorious applicants and prevent the unmeritorious claimants from deceiving officials and clogging up the system. In addition to its intrinsic value and significance in the determination process itself, within the political sphere, 'information systematically gathered and presented according to a sound theoretical framework may allow policy-makers the opportunity to take into account most of the essential information.'[55] Recognising that 'situations remain fluid and [...] drawing the right sorts of inference from evidence acknowledged as credible and trustworthy are [...] the hallmarks of sound decisions.'[56]

[54] In Canada, where documentary evidence is employed to demonstrate that the applicant is not truthful, the evidence serves 'as a rebuttable presumption in [the] determination process.' (Hathaway, J., *The Law of Refugee Status* (1991) at 83).

[55] Donnelly, J. and Howard, R., *op cit* 216.

[56] Goodwin-Gill, G., *op cit* 354.

# Chapter Eight

## Conclusions and Recommendations

The critical challenge facing those individuals and groups with an interest in this area of public law and policy, is to devise an asylum system that delivers protection to those who are in need of it, that swiftly identifies those who do not, and treats all applicants with dignity. The prompt removal of those not deserving of either *de jure*, or *de facto* refugee status, will act as a disincentive to those who migrate for reasons that do not fall within the ambit of international and regional laws. Without fully acknowledging, or successfully identifying the complexities of the problems that trouble their administrative and adjudicative systems, the states considered have reformed their laws and procedures in a manner that may prejudice the ability of those deserving of protection from receiving it, and which appears to violate dignitary values.

The repeated reform of asylum laws and procedures in recent years, has resulted in complex areas of law. However, at a conceptual level, some of the emerging patterns are relatively simplistic. For example, the existence, and continual extension of pre-entry controls,[1] in practice, may operate to prevent those in need of

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[1] Among current proposals for reform, in Australia, Canada and the United Kingdom, are:

(1) higher penalties for carrier's bringing illegal passengers (See Ruddock, P. MP., 'Increased Penalties for Airlines Carrying Illegal Passengers' (Minister for Immigration and Multicultural Affairs) MPS 106/99, June 30, 1999 <http://www.minister.immi.gov.au/media_releases /media99/r99106htm>, and the 1999 Immigration and Asylum Act § 32(1)(a) which extends liability to all vehicles, ships or aircraft);

(2) increased numbers of immigration officials at ports overseas from which asylum seekers arrive (see, Ruddock, P, MP., 'New Initiatives to Stop Illegal Boat Arrivals Wins Minister Ruddock's Approval, MPS 102/99, June 27, 1999, <http://www.minister.immi.gov.au/media_releases/ media99/r99102htm>, and *Firmer, Faster and Fairer - A Modern Approach to Immigration and Asylum*, Cmnd. 4018 (July 27, 1998); and

(3) people smuggling legislation (Ruddock, P, MP., 'Ruddock Welcomes the Senate's Passing of People Smuggling Legislation', Press Release, MPS 107/99, June 30, 1999, <http://www.minister.immi.gov.au/media99/r99107htm>, interdiction has been identified as one of the means by which people smuggling may be tackled in the Canadian White Paper, *Building on a Strong Foundation for the 21st Century* (January 6, 1999) <http://cicnet.ci.gc.ca/english/about/policy/lr/e_lr12.html>).

protection from seeking asylum at all.[2] The streamlining of the application process through the imposition of filing deadlines may serve to exclude[3] or disadvantage individuals.[4] Abbreviating procedures, by imposing stringent time-limits on the submission and hearing of claims, or by removing procedural layers completely, appear disingenuous. The real decision may be remitted elsewhere; initial decisions, taken at speed on claims that result in refusals, become almost automatically appealed. The review process becomes not the exception but the rule. Moreover, this forces refugee advocates to seek other legal routes, such as judicial review, to ensure fairness is done. The whole process is lengthened. Even where mistakes are corrected on appeal the delays create an impediment to settlement. Such policy responses do a disservice to the complexities of refugee determination and adjudication.

It is trite but nonetheless true to state that refugee policy will never be driven purely on the basis of the needs of asylum seekers, isolated from domestic political pressures and obligations in the international arena.[5] Although one must remain realistic about how these complexities are managed, it is possible for economic and political realism to co-exist with principle, in the design of administrative and adjudicative systems.[6] Public dissatisfaction with expensive, inefficient and cumbersome procedures, is understandable, but cost saving must not be at the expense

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[2] Alternately, it may force them into travelling covertly and entering refugee-receiving states clandestinely, which may result in their marginalisation and criminalisation. Legal vulnerability can manifest itself in the guise of labels of unfoundedness or expedited determination procedures.

[3] Premised on the belief that some claimants were only filing for asylum in order to prevent deportation, states have taken measure to ensure there is prompt submission of claims. The IIRIRA 1996 mandated that an applicant must file for asylum within one year, and the Canadian government's White Paper, *Building on A Strong Foundation for the 21st Century*, contains a proposal to place a thirty day limit for making a claim, with exceptions in "compelling circumstances". This proposal has been heavily criticised (see CCR, *Comments on Building on a Strong Foundation* (March 1999)) at 11, <http://www.web.net/~ccr/whitepa.htm>).

[4] In the United Kingdom filing for asylum and access to welfare benefits were wedded through the 1996 AIA § 9 and § 11: any individual failing to apply immediately on arrival had their rights to welfare curtailed. Australia's measures, introduced in July 1997 through Regulation, precluded asylum seekers from securing work rights unless they lodged their application for asylum within 45 days of arrival (Ruddock, P., MP., 'Measures to Discourage Abuse of Refugee Applications', MPS 62/97, 25 June 1997, <http://www.minister.immi.gov.au/media97/r97062.htm>).

[5] Hathaway, J., 'Selective Concern: An Overview of Refugee Law in Canada' (1988) 33 *McGill Law Journal*, 676, 678.

[6] See CCR, *Building on a Strong Foundation*, <http://cicnet.ci.gc.ca/english/about/policy/lr/e_lr04.html> at 3).

of justice. Presently, the emphasis that states place on fairness in decision-making appears cosmetic, almost an afterthought, tacked on to the end of reforms which are otherwise restrictive and procedurally suspect. There needs to be a diminution of the prominence afforded to speed, economy and deterrence. '[J]ustice, not speed, should be the cardinal principle in refugee determination [...] [R]igidly enforced, narrow timelines cannot serve the interests of refugees - or of justice.'[7] I shall endeavour to demonstrate how it is feasible to adopt a value-based approach, rooted in dignitary principles, whilst ensuring that (to adopt the watchwords) the system is also firm, fast, and efficient.

The general policies delineated above are designed with firmness, efficiency and economy firmly in mind. What of the fairness espoused? The measures adopted by states, which may contribute towards the observance of procedural fairness, can be summarised: Technical developments which have embraced information technology- notably the development of information research databases and case-management tracking systems; organisational arrangements whereby the decision-making agencies are independent of the executive branch, and highly specialised - attributable to recruitment, training and geographical expertise; increasing numbers staffing the system; and a legislative or regulatory framework that has either facilitated an inquisitorial approach to decision-making, or a more conciliatory style within an adversarial system. States should look towards innovations such as these, in order to achieve the holistic approach to asylum policy to which they aspire.[8] These structural, institutional and technological modifications, along with other strategies outlined below, may restore the integrity to the administration system, which is sought after by policy-makers, without compromising dignitary values - indeed they may promote such values.

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[7] CCR, *Comments on the Report of the Legislative Review Advisory Group: Not Just Numbers* (March 1998) at 13-14.

[8] Ruddock, P., MP., 'The Broad Implications for Administrative Law Under the Coalition Government with Particular Reference to Migration Matters' *National Administrative Forum* (May 1, 1997) 1 <http://www.minister.immi.gov.au/trans98/sp010597.htm>; and Straw, J., MP, (Secretary of State for the Home Department) HC Debs vol 326 col 37, Feb. 22 1999.

Using more subtle means of reform as opposed to the removal of procedural layers or welfare benefits, may not be so attractive to the political parties because they are less perceptible to the polity. Thus, the political parties lose the opportunity to be seen to be tough on abuse of the system, and in control of territorial borders.[9] However, it is only as a result of the invidious association of asylum seekers with broader types of migrant by governments - particularly illegal immigrants, that it has become the norm to discuss asylum seekers and other forms of migrants in the same breath. Consequently, this has allowed policy-makers to legitimise employing the same, or similar restrictive practices, to immigrants and asylum seekers alike: to the public there was no discernible difference between asylum seekers and the 'other[s]'.[10] It is axiomatic that the two are conceived as separate phenomena so that the preoccupation with controls will be less intrusive when the issue of asylum seekers is raised.

The traditional approach of lawyers to administrative justice has been to recommend additional layers of process, and that of economists has been to subtract something.[11] In respect of the former approach, simply adding procedural layers will exacerbate the problems of delay. In any event the political tide is moving firmly in the opposite direction. The latter approach is flawed too, as I hope to have demonstrated. The complexities of the credibility issues involved in asylum cases, and the gravity of the subject, necessitates a sophisticated approach. Panaceas such as those described above lack the necessary subtleties. The following section aims to highlight some of the factors and considerations crucial to the system design of the administrative and adjudicative process for asylum claims if dignitary values are to be safeguarded. The first part will investigate the institutional culture of decision making, and the second part will advance some basic proposals for consideration.

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[9] This is ironic when one considers that the political parties had at least as much to do with manufacturing the moral panic about floods of illegal entrants and abuse of the asylum institution, as the media (see Kaye, R., 'Redefining the Refugee: The UK Media Portrayal of Asylum Seekers', in Koser, K. and Lutz, H., (eds) *The New Migration In Europe: Social Constructions and Social Realities* (St. Martins Press 1998) at 177-78).

[10] See generally, Koser, K. and Lutz, H., 'The New Migration in Europe: Contexts, Constructions and Realities' in Koser, K. and Lutz, H., *ibid.*

[11] Ison, T., *op cit* 33.

## 8.1 Culture

The elements which combine to determine the nature of the culture of the administrative and adjudicative institutions are as follows: whether the state has a historical commitment to asylum and a tradition of sheltering the oppressed;[12] whether the language employed when policy issues are debated is couched in primarily negative or positive terms;[13] whether the institutions are separate from the executive branch;[14] the nature of political pressures exerted on the system, which may become manifest through ministerial statements, public opinion or the law itself;[15] whether the legal system, or legislative or regulatory framework, promotes or favours an adversary or inquisitorial mode of investigating and adjudicating claims; the allocation and availability of resources - human, financial, and technological; the recruitment, training and tenure of all those involved in the system; and whether those who operate the system perceive that it is fair and efficient.

The decision making culture (and those elements that can shape it) is as important as the legal and procedural rules. Legislative biases, such as those that label applicants as manifestly unfounded, can be struck off the statute books. Institutionalised biases are less easy to eradicate. An examination of Canada, which

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[12] Unlike the United Kingdom, the United States and Canada, Australia has no specific tradition of asylum (see Nicholls, G., 'Unsettling Admissions: Asylum Seekers in Australia' (1998) 11(1) *Journal of Refugee Studies* 61).

[13] See O'Brien, M. MP., HC Debs vol 326 col 120, Feb. 22, 1999.

[14] Independence from governmental imperatives is no assurance of higher recognition rates, but is does ensure that decision-makers are not enmeshed in departmental culture.

[15] The tenor of the government, its ethos, will pervade the system. During the debates on the Immigration and Asylum Bill 1999 in the United Kingdom, reference was made to the ethos of the Conservative government during the 1990s, and of how it verged on coded racism at times. That resulted in the type of legislative biases which are a feature prevailing asylum laws and policies. This is what can happen when the tone of the debates is replicated in the law. This in turn may feed any prejudices in the community. (See HC Debs vol 326 cols 109-110, Feb.22, 1999).

has consistently recognised a higher percentage of applicants as refugees than other industrialised refugee-receiving states,[16] may prove instructive.

The higher approval rates cannot be attributable to differences in source countries alone, nor the progressive approach to interpreting the refugee criteria taken by the Canadian courts. The nature of Canadian society, and of its values,[17] and thus, of the political institutions and environment, is one important factor that has shaped the development of the law and policy relating to asylum seekers. Other factors are instrumental too. For example, the announcement by the Canadian Minister of Citizenship and Immigration, which accompanied the proposals for reforming immigration and refugee policy in January 1999 was couched in constructive terms.[18] Another factor is the independence of the CRDD from the executive branch, and the legal framework that governs the decision-making of that body.[19] Other factors that may contribute to the high recognition rates in Canada are the inquisitorial approach to hearings,[20] and the qualifications and training of the CRDD members.[21] One of the greatest strengths of the Canadian system has been its use of information technology.[22]

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[16] The average acceptance rate for the period 1994-98 was 48% (CCR, *Facing Facts: Myths and Misconceptions about Refugees and Immigrants in Canada* (1999) <http://www.webnet /~ccr/myths.htm>.

[17] 'Canadian values have been influenced by the need to welcome and integrate people from many cultures, religions, languages and national experiences.' (White Paper, *Building on a Strong Foundation for the 21st Century* (January 1999) <http://cicnet.ci.gc.ca/english/about/policy/lr/e_lr02.html>, at 1.

[18] *Building on a Strong Foundation* <http://cicnet.ci.gc.ca/english/about/policy/lr/e_lr01.html> at 1.

[19] Hearings into refugee claims are held when it 'is practicable' and afford 'the person a reasonable opportunity to present evidence, question witnesses and make representations' 1976 Immigration Act § 69.1(1) and 69.1(5)(i).

[20] This mode of dealing with claims is by no means universally favoured by CRDD members however (see Report of the Auditor General of Canada, *Citizenship and Immigration Canada and Immigration and Refugee Board: The Processing of Refugee Claims* (December 1997) <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/ch9725e.html> at 14).

[21] Concerns about the independence and composition of the IRB have been raised because of the political nature of appointments and re-appointment process (CCR, *Comments*, *op cit* at 3). The possibility of the introduction of 'legislation selection criteria' for members has been raised (CCR, *Comments*, *op cit* at 9).

[22] See generally chapter seven.

In the interests of brevity I propose to focus particular attention on three of the elements enumerated above, which can mould an institution's culture: the mode of decision making; resourcing; and the legal rules themselves.

### 8.1.1 *Inquisitorial or Adversarial?*

Whether a strictly adversarial[23] or inquisitorial model[24] is favoured, may make a significant contribution to the culture of decision-making institutions, and to whether key dignitary values are secured. It need not be a question of either one or the other, and such an approach should be discouraged. Flexibility is the key. In the context of initial decision-making in the United Kingdom, where the factual inquiry and the claimant's credibility is investigated by a combination of immigration officers at ports of entry, and caseworkers at the ICD, the adoption of an inquisitorial approach to the factual inquiry is recommended on the basis that this would augment the productivity of the procedure for all parties concerned.[25] Indeed a recent report concluded that current interviewing procedures in the United Kingdom were not serving the interests of asylum seekers.[26] One of reasons for this conclusion was that many immigration officers considered the purpose of the interview to test the claimant's credibility rather than simply gather information.[27] I consider it preferable to have a broadly inquisitorial approach to fact-finding at the primary level of decision-making, such as that adopted in the United States by the AOC, with an adversarial form of hearing at the appellate

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[23] The United Kingdom would appear to adopt the archetypal adversarial model, however Special Adjudicators are encouraged to be proactive, in the context of issuing directions and at the hearing, and because there is no potential for discussion of the issues prior to the appeal, it is unlike other disputes (For a detailed discussion of this point see RLC, *Reviewing the Asylum Determination Procedure - A Casework Study (Part Two: Procedures for Challenge and Review)* (July 1997) at 130).

[24] Canada is cited as the prime example of an inquisitorial system, but this is only superficial (see Justice, *Providing Protection: Towards Fair and Effective Asylum Procedures* (1997) at 36).

[25] Trost, R. and Billings, P., 'The Designation of "Safe" Countries and the Individual Assessment of Asylum Claims' in Twomey, P. and Nicholson, F., *Current Issues in UK Asylum Law and Policy*, 94.

[26] ILPA, *Breaking Down Barriers, supra.* An invaluable 'blueprint' for initial decision-making, made all the more valuable because it was research conducted with the consent and co-operation of the Immigration Service.

[27] *ibid* at 50-52. See also Refugee Legal Centre (RLC), *Reviewing the Asylum Determination Procedure - A Casework Study* (*Part* One) *op cit* at 51.

level. The precise nature of the appellate hearing will differ according to the particular traditions of the states concerned. In the United States the trial-type hearing before an Immigration Judge is likely to be more rigidly adversarial than the approach taken by the appellate authorities in the United Kingdom or Australia, because of the tendency for administrative tribunals to provide a less formal kind of justice.

Moreover, I would recommend that only one individual be charged with the responsibility of gathering the information and making the initial determination. Where one individual gathers the information and another interprets it before rendering the decision there is scope for misinterpretation. Such a role is onerous. Whether a part of an independent decision-making body or not, they need to be equipped in order to fulfill that task. If governments are serious about adopting a comprehensive strategy to asylum regulation, and to date, their deeds have not matched their bold sound-bites, then it is at the primary stage that the nettle must be grasped. This is not a ground-breaking conclusion,[28] but similar observations appear to have fallen on deaf ears; the proof is in the 1999 Immigration and Asylum Act in the United Kingdom,[29] recent Ministerial announcements in Australia, and the White Paper tabled by the Canadian Government.

### 8.1.2 *Resourcing*

First, recruitment is the key. I believe that only those with a University degree (and it need not be a law degree either) should be employed to make the difficult decisions on credibility, and deal with cross-cultural communication barriers.[30] The wisdom of employing highly educated people is evidenced by the progress made by the

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[28] See Legomsky, S., 'Managing High-Volume Asylum Systems' (1996) 81 *Iowa Law Review* 671, 701; and Justice, *Providing Protection, supra.*

[29] The Act does not refer to any aspect of the asylum procedure, but IND instructions to asylum staff deemed 'disclosable' are published on the internet <http://www.homeoffice.gov.uk/ind/adint.htm>. In March 1999 an Asylum Process Project was announced by the Asylum Policy Unit of IND.

[30] This is the view of Dr Andrew Shacknove (interview May 29, 1997). Dr Shacknove (Faculty of Law and Department of Continuing Education, Oxford University) has been involved with the training of Home Office asylum decision makers since 1992.

AOC in the United States in recent years. Recruitment is not just a critical issue at the initial stage. At the review level appointments must be made under a transparent selection process, and re-appointments must not be dependent upon political patronage. Such is the situation in Australia where members of the RRT are threatened with redundancy if their decisions are not to the liking of the Minister.[31] Aside from raising questions of constitutional importance regarding the separation of powers, this undermines the *rationality* of the administrative process. Secondly, and closely related to the first point, is the length of tenure, and it may be an important detail for those decision makers working in government departments. The consequence of a high turnover of employees is to negate the value which training can have and of any continuing education provided. Being on a short term contract is no incentive to learn the job properly and develop the experience to do it well. A third, related, point is the level of remuneration. It would be intellectually flawed to ignore the obvious fiscal constraints so uppermost in the minds of the politicians today. To suggest that initial decision-makers should be graduates, with the commensurate increase in starting salary that such employees can expect, might be considered fanciful. However, it is false economy to be too frugal at the primary decision-making stage. In North America the investment of resources into the administration of asylum claims at the primary level demonstrates what is achievable if the political will is there. Compare this approach with the United Kingdom's, where no attention has been paid systematically to equipping primary decision makers. The appellate body has become an extension of the primary decision making process in order to compensate for the poor reasoning contained in Home Office refusal letters that leave matters open.[32] Fourthly, a recurring theme in many of the recent publications on asylum procedures has been the benefits which specialization can bring.[33] Geographical specialization, coupled with the appropriate language skills, and knowledge of the cultural and

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[31] Legomsky, S., 'Refugees, Administrative Tribunals, and Real independence: Dangers Ahead for Australia' (1998) 76 *Washington University Law Review* 243, 248.

[32] This practice has been criticised because it perpetuates poor practice - the issuance of directions to clarify the position of the Home Office could enable the appellate authorities to change the culture of decision making and yield better reasoned decisions at first instance (RLC, *Reviewing the Asylum Determination Procedure (Part One)*, *op cit* at 65.

[33] For example, Legomsky, S., *op cit* 703, and Trost, R. and Billings, P., *op cit* 97 in respect of primary decision makers; and RLC, *Reviewing the Asylum Determination Procedure (Part Two)*, *op cit* at 133 vis-à-vis appellate authorities.

political systems prevailing in refugee hot-spots, may promote the dignitary value of *consistency*, and secure efficiency goals - in terms of expeditious and well-reasoned decisions. The creation of the ICD had resulted in the absorption of the specialized Asylum Division into the generic, Integrated Casework Directorate in the United Kingdom. This was a retrograde step, and the restoration of specialised caseworkers is to be welcomed.[34] Irrespective of whether the new computerized system, designed to create a paperless system, will eventually speed up the process. Question marks over levels of *consistency* in decision making would have been raised where a caseworker with experience of claims from, say, the Horn of Africa was switched to deal with claims from Kosovo. Enhanced *timeliness* that the introduction of information technology may have heralded could have been undermined.

The importance of the role information technology may play in the asylum system cannot be overstated. It is important both in terms of lending credibility to a claimant's testimony, and in terms of revealing when country of origin conditions may have improved sufficiently so that refugees may return home in safety. Without adequate information those officials who examine and adjudicate on asylum applications will find it difficult to respond expeditiously and *consistently*[35] to the asylum applications they receive, and applicants will lack the necessary tools to provide objective evidence in support of their subjective fear. Gathering together publicly available and verifiable sources of information from human rights monitors and analyses by NGOs, the media, and from the governments of the states under scrutiny, is fundamental to safe-guarding a meaningful right to petition for asylum.

Finally, those who are responsible for examining applications for asylum should be able: to elicit all relevant information from the applicants account; consider the credibility of applicants, witnesses and experts; to evaluate the relevant evidence objectively; and employ the applicable law to the facts of the case.[36] This is an important and arduous task

[34] Confirmed in a telephone conversation with Julia Judge (ICD) 26/1/00.

[35] The aim of an adjudicatory system which purports to be fair, must be to achieve consistency on cases which exhibit similar characteristics, and consistent understanding and appreciation of the conditions in a given country or region between decision-makers.

[36] Para 196 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* provides that during an asylum interview 'the duty to ascertain and evaluate all the relevant facts is shared

exacerbated by the need to verify foreign conditions, which may be aggravated further by cross-cultural and linguistic misunderstandings, often leading to evidentiary lacunae. Training is the key to high quality decision-making. If decision makers are inadequately trained then mistakes are likely to be made whether it be fact finding, or the application of the law. A comprehensive knowledge of refugee law and protection problems may stem from a systematic induction programme for newly appointed decision makers, and a continuing education programme. The United States and Canada appear to have grasped the nettle in this regard, whereas the United Kingdom has been slower to recognise the wisdom of the need for specialized knowledge, training and experience.[37]

### 8.1.3 *The Legal Framework*

The consequences of a statutory framework or administrative procedure[38] that facilitates the categorization of claimants based on; their nationality, the country from which they have fled, the state of their documentation, or the circumstances surrounding their arrival, are twofold. Asylum seekers are disadvantaged by the truncation, or removal of procedural safeguards if they fall within indices that delineate the characteristics of their claim as unfounded or frivolous. The adverse impact on dignitary values which such classification brings, is reason enough for their removal. Additionally, the message transmitted to decision makers reads - 'the process is being abused', and this perception can have a negative effect on the ethos of an institution.[39]

Thus far, the focus has been on the significance of creating the right environment for the staff who administer and adjudicate asylum claims. The symbiotic relationship that exists between the institutional culture and the legal framework should be apparent. The second section will focus on the submission of some general

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between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application'.

[37] See for example Trost, R. and Billings, P., *op cit* at 90-94.

[38] Where the administrative regulations are not well publicised difficulties are exacerbated.

[39] See for example, ILPA, *Breaking Down the Barriers*, *op cit* at 25-28 which concluded that assumptions and understandings about genuine refugees were reinforced by the legislative certification of certain claimants.

proposals for consideration in respect of asylum determination and adjudication systems.

### 8.2 Basic Principles

Interviewing claimants on arrival should be confined to elementary questions, such as those relating to identity and age. It should not be connected with the substantive basis of the asylum claim, nor serve as a basis for denying access to a full asylum interview or hearing, unless there are national security interests at stake for example. This proposal rests on the following grounds: first, there are the documented dangers posed to dignitary values by conducting interviews immediately upon arrival; secondly, it is questionable whether it is an efficient use of resources. Few claimants are actually removed under the expedited procedures in the United States,[40] and Canada disposed of an elaborate screening procedure for similar reasons in 1992;[41] thirdly, immigration officers at ports of entry have a demanding job in dealing with all the other categories of immigrants besides asylum seekers.

My second basic proposition is that applicants should be provided with forms to fill out the details of their claim prior to the interview or hearing. If the rubric used in the forms is readily understandable, explains the overall asylum process and the significance of the document they are reading (or having read to them), and facilitates the task of documenting the evidential basis of the claim, then the values of *participation* and *intelligibility* may be enhanced: instances of claimants misunderstanding the process will be diminished.[42] Moreover, those responsible for the initial examination may be able to ask more refined questions if they have seen the basis of the claim in advance of the interview. This may contribute to a *timely* determination, thereby serving a dignitary function and, additionally, efficiency gains.

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[40] In a study conducted between October 1, 1996 and March 31, 1997 it was found that 92% were admitted (General Accounting Office, *Illegal Aliens: Changes in the Process of Denying Aliens Entry Into the United States* (March 1998) at 71.

[41] See *Refuge* (1992) 12(2) (*Special Issue on Amendments to the Immigration Act*).

[42] See ILPA, *Breaking Down the Barriers*, *op cit* at 13-15; and Lawyers Committee for Human Rights, *Slamming the Golden Door: A Year of Expedited Removal* (March 1999) at 9-10.

The third proposition is simple: complex matters take time. To determine whether a person who claims to be a refugee is such, can be a long period of time. As such reasonable time-frames prior to the first substantive examination of the claim must be allocated,[43] and similarly where there is a negative decision, before an appeal must be lodged and heard. At present, in the United Kingdom the rigid time-lines serve only as declarations of political intent. It seems preposterous that claimants should have to submit claims within hours or days of arriving while primary decision makers subsequently take months to render a decision.[44] It is not only unrealistic and unfair on claimants to impose truncated time-lines for the asylum procedures, but the impact on staff cannot be underestimated either. Important questions of morale aside, there is the serious issue of the calibre of decisions delivered where appellate bodies are required to dispose of increasing numbers of cases, in shorter periods of time.[45]

The fourth point to consider in the process of system design is the need for access to procedures for challenge and review. As a minimum there must be an avenue available to challenge the merits of the decision,[46] and a means of reviewing the application of the law by a specialized organ. There should be no restrictions on the availability to seek leave for judicial review. This proposal is defensible for the following reasons: where procedures for review are not merely eroded by abbreviated time-lines for filing but are washed away completely, the result tends to be bottlenecks farther up the appellate pyramid. Delays are not tackled, merely displaced and exacerbated. Mindful of the consequences which severing means of legal redress has had, it is distasteful to witness the current trend favoured by states that places restrictions on the ultimate means of securing good governance in administrative law - judicial review. The removal of rights of review (either partly or wholly) or the grounds on which review may be sought, is procedurally unjust. It can weaken an

[43] Two weeks as an absolute minimum, with the possibility of an extension where is a likelihood that the claimant is suffering from PTSD.

[44] The long delays involved in asylum decision making are as attributable to problems in the administration of claims as they are to frivolous claimants pursuing every legal means of redress.

[45] ILPA *op cit* chapter ten.

[46] I would exclude Canada from this statement due to the nature of its primary hearing,

asylum seeker's ability to *participate* in the process, and undermines the *rationality* of the process because mistakes may go uncorrected, and a lack of *consistency* in the application of the law at early stages of decision making may go undetected.

It is in the nature of a comparative study such as this, that the conclusions drawn and palliatives[47] prescribed can only be at a fairly high level of abstraction.[48] For those readers familiar with recent research conducted in this area, it will be apparent that my conclusions share some of the basic elements contained in the 'soft law' recommendations of the UNHCR Executive Committee. However, I suggest that my recommendations go further and are more detailed and are based on detailed studies of four *contemporary* refugee status determination systems.[49] However, policy makers must be continually reminded of the basic principles adumbrated as the pace of reform in this area of administrative law appears unrelenting. At the time of writing the 1999 Immigration and Asylum Act in the United Kingdom has recently reached the statute book, and in Canada the White Paper has yet to crystallize into a Bill. Some of the policies replicate and extend paradigms established earlier in the decade, paradigms which attracted sustained criticism from scholars and refugee advocates alike. For example, the United Kingdom has imposed restrictions on access to judicial review,[50] whilst in Canada the practice of imposing restrictive filing deadlines and designating countries as 'safe' has been proposed.[51] In Australia an inquiry by the Senate into refugee determination system has been undertaken.[52] Like those 'comprehensive'

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[47] I choose the word carefully because the proposals I have advanced cannot cure the malaise affecting asylum procedures. Pressures will remain until issues such as tackling root causes of forced migration are addressed earnestly too.

[48] To delve into the minutiae of potential reforms in each state would require several volumes, and generally be of little relevance and utility for comparative purposes.

[49] For example see ExComm No. 8 (XXVII) 1977 *Determination of Refugee Status.*

[50] It is less explicit than in either Australia or the United States; see Immigration and Asylum Act 1999 § 79. A financial penalty is imposed on appellants who, having been notified that their appeal to the IAT has no merits prior to a final determination, elects to continue with the appeal which is then dismissed. The effect of this is to deter unmeritorious claimants from appealing. Claimants may be deflected from seeking judicial review because they may abandon appeals before the IAT under financial duress.

[51] *Building on a Strong Foundation,*, <http://cicnet.ci.gc.ca/english/about/policy/lr/e_lr11.html> at 6.

[52] In May 1999 the Australian Senate passed a motion that refugee determination procedures be subject to an inquiry by the Senate Legal and Constitutional References Committee (see Crock, M., 'The High Court and the Judicial Review of Migration Decision' *op cit* at footnote 16.

reviews that have taken place in the United Kingdom and Canada recently, this presents a real opportunity for systematic reform rooted in dignitary values that reflect shared moral aspirations. It is to be hoped that it is an opportunity that is not spurned.

# APPENDICES

## A. Full List of Acknowledgments

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Kate Paradine (PhD candidate, Faculty of Law, University of Southampton).
† Judge David Pearl (Director of Studies, Judicial Studies Board; formerly Chairman IAT; and Chief Adjudicator).
Dr Ben Pontin (Faculty of Law, University of the West of England, Bristol).
Dr Liza Schuster (Department of Sociology, South Bank University; formerly Department of Politics, University of Southampton).
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† - Subjects of qualitative interviews.

**B. Interview Transcripts**

Interviewee - His Honour Judge David Pearl
Location - Thanet House, 231 Strand, London
Date - 17/4/97

*Why have you decided to prioritise and stress the importance of in-depth training for Special Adjudicators in such a fashion?*

"I think that training is the key to high-quality decision-making, if one does not have adjudicators who are properly trained thenyou are likely to end up wioth mistakes being made whether it be fact finding or the applicaiton of the law. The law is very complex and training is the key to that. Especially in the context of a rapidly expanding jurisdiction - we have gone up to not quite 200 but 170 adjudicators now in 1997, three years ago there was under half that number so a large number of new people do have to be trained. The Judicial Studies Board (JSB) quite rightly emphasise training, the Council of Tribunals which has a supervisory function emphasise training, so I am not a lone voice in this."

*Is the emphasis on training primarily driven by efficiency considerations, demands of fairness or to rebut criticisms of the appellate tier?*

"There is always going to be criticism in what is a very sensitive area, when people son't get what they want they are going to criticise and there are going to be a large number of people who are disappointed who claim asylum and don't get it. If they fail in their appeal they they are going to be unhappy for obvious reasons so we are not going to get rid of crticisms so I don't think that that is the reason for training. What we must offer to everyone is a Tribunal which provides a fair hearing which courteous and listens to everything which is being said and which reaches a decision which is in accordance with the law and one way of trying to reach that aim is through good quality training. So that is the reason for it not just to alleviate criticism and I don't think anybody worries too much about that. If criticism is founded then we do our best to correct it.

*Is the prioritisation of training institutionalised?*

I hope so. I think the first point to make is that the JSB is a active liveluy organisation and the Training Tribunals Committee of the JSB which is exclusively concerned with training standards of various tribunals and I'm a member of that so I suppose to that extent I'm ivolved in the central thinking behind training and I suppose that my own academic background is of some relevance in the sense that I honestly believe in training because it is something that I have been doing all my life, so it would be wrong of me to say that training is a minor factor I actually think its very important. But at the end of the day I

would hope that it would continue regardless of who was in charge it seems to me that it is essential, the key factor in decision-making in all jurisdictions. Lord Woolf says the same thing in his report *Access to Justice*, the Master of the Rolls is very much behind these sorts of things, the Lord Chief Justice has said these things in relation to training for criminal judges, we are not alone the problem is money."

*How has this prioritisation manifested itself?*

"In the last couple of years we have set up a systematic system for induction courses, we have got an Adjudicator's bench-book, a collection of precedents, so certainly in the last couple of years we have devoted quite a lot of time and energy into actually producing written material, in the hope that we can have consistency in decision-making."

"[UNHCR] training officers participate in the induction courses we do quite a lot of in-house but we also use people who are involved in other agencies such as UNHCR or in the academic world, a chap called Andrew Shacknove has spoken to us and a man from Canada who is the training officer with the IRB and he has actually come over to lecture to our people in one of our induction courses so we are using the skills available from amongst academics, trainers in other countries and UNHCR who have been extraordinarily helpful to us."

*Is it possible discern whether there has been an improvement in decision-making - in the consistency for example?*

"It is difficult to tell because what one is doing is judging quality and how does one do that? Do you judge it on the number of cases that are judicially reviewed successfully or the number of appeals which are successful in relation to the cass going to the Tribunal, or do you judge it in a case-management way - how many cases have been disposed of? Certainly our disposal rates have gone up, I believe that we have a much better case management technique, which partly because of the new rules, and partly because we have more members sitting hearing cases but I would like to think that it is also because we are using our time more effectively in dealing with the cases in an efficient way which has something to do with training. The quality of the decisions again I would like to feel have gone up, but it is very difficult to say yes, it is very difficult to quantify that."

"Our disposal rates have gone up, we have a notional disposal rate for each adjudicator per day (if I may put it like that) whereas about a year ago it was something like 1.7 it is now gone up to 2.7 so each adjudicator is dealing with more cases per day than they were a year ago. It may well be that the most important reason for that is that the case management techniques have been introduced under the 1996 rules but I would like to think that it has something to with this [training] as well."

*Do you believe there is a case for ensuring that there is in-depth training for other individuals (Immigration Officers at ports of entry for example) and institutions involved in the determination process?*

"Yes, I think that if the initial decision of the entry clearing officer or the asylum caseworder is of a high quality whichever way it goes then one would expect that there would be fewer appeals. Now that is true in other jurisdictions take Social Security for example. If the initial decision is a good one, then one would hope that the number of appeals would go down. In this area it is slightly different, one has to be slightly hesitant about the proposition because of course if the person is hoping to stay in this country claiming asylum, and the first decision is against them, all they can do is appeal, whereas in the social security area it is a question of money and there is another day, it is rather a different type of appeal. Whereas here there is everything to play for and there is an in-built delay which is to the advantage of the appllant. The more appeals built into the system the longer you can stay which is what you want in the first place. Therefore one would hope that the better the decision at first instance the fewer the appeals, but I'm not entirely convinced that would happen. Having said that obviously we do want good decisions at first instance because it is essential as a matter of natural justice that there should be a good decision."

*Progress made towards access to information databases for adjudicators to access, inter alia, country of origin information?*

"We are putting all the Triubunal decisions onto a file which will be scanned and then hopefully they will go onto an electronic network, there are some problems of confidentiality which we have to tackle but in the long run I would hope that we would be able to pull out all Tribunal decisions for instance on agent of persecution. So that [information technology] is very important and Country Profiles are equally important."

"The adjudicator will rely upon the documents which are referred to by the appellants and by the Home Office. There will be occasions when the adjudicator does a search for background country of origin information and then has to provide that information to the parties because obviously the parties require the opportunity to comment on documents which have been provided. Now an adjudicator with say a case on China on an issue of child policy in China and whether a person was entitle to refugee status, you need to know what the Chinese law is on that, if in fact neither side has provided the information you may want to as the Research Information Officer to find it. UNHCR RefWorld some of which is on the internet, the rest is on CD Rom, is the first port of call, and then the abundance of material that comes our way. Amnesty, US State Deparment Reports which are all on the internet anyway all of coaurs in the public domain. The essential thing is to make sure that the parties are made aware fo this documentation and then asked to comment on it."

Interviewee - Mark Ockleton (full-time Adjudicator responsible for Training).
Location - Thanet House, 231 Strand, London
Date - 17/4/97

*What role and functions are fulfilled by the Adjudicator responsible for training?*

"Two or three separate things really. I come froma an academic background, before I was an adjudicator I was an SL in law at the University of Leeds. So one of the things I do is the teaching, not all of it. I have a great deal of assistance some of whom have an academic background some do not. There are two full time adjudicators who have been Professors in the past and perhaps half a dozen part-time adjudicators of at least that level so there is a training base of expertise in teaching to call on. There is also my colleague in Leeds, David Parkes, who has done a lot of basic training recently. One of the parts of it is involving myself in the hands-on training from time to time. Secondly there is the course preparation for those courses trying to assemble together the sorts of things which people will need to know, to build up the materials and so on. My one other tool other than human resource is that we have a very expensive video camera. We have been able to produce one or two quite convincing tapes of hearings in order to use them in training. The third job is the preparation and circulation of what might be called texts. There was for many years run by Victor Calender who was a full time adjudicator (retired in 1994), he not only did most of the basic training but he also produced a book which called a book of precedents - its a digest of some of the Tribunal's determinations which might affect adjudicators in their daily work. The last edition of that was April 1994, one of the jobs I was employed to do in my spare time was getting this up to date, and this is actually impossible because however fast you run the determinations are coming out faster still but I decided to call a halt on this edition. It is supposed to come out every six months, anew edition next week, it will be much easier now to keep up to date on a six month basis, it was catching up that was the difficulty. There is another project that has started immediately for another digest of particular Tribunal case material into annotation on the procedural rules and so on. What I don't do is very much circulation of texts on asylum matters partly because my own experience of asylum matters is by no means as wide as some of my colleagues and partly because we have the Research room which is sometimes staffed and that means that material on countries and up to date materia on the sitauation in particular countries is readily obtainable from her and it is usually much better. I'm more into the laywers end of circulation.

*What form does the training take?*

"Two days roughly speaking [is the length of the initial course of adjudicator training how we actually organise it varies a bit depending on where it is and where the people who are going to do it are coming from. The last one we ran was in Glasgow and that was rather an odd one, we involved also the training of lay members of the Tribunal. We met at tea time on a Tuesday and we gave the lay members of the Tribunal a training pack, a video which was produced by the JSB, which went on for two hours. The following day was devoted entirely to basic training of a different group of people, the adjudicators and then

the day after that we had the lay memberes again and they were being trained by the first ever sitting of the Tribunal in Scotland, so they came in and watched that and came in on the deliberations. The three people who were mostly involved in the basic training, well two of the three, were sitting as Chairman of the Tribunal. The lay member training was probably eight or nine hours altogether."

"Lay members do not require training in law and its rather important that they shouldn't, they are there as non-lawyers so they need to be trained a bit in procedure a bit in the background a bit in the way appeals come up through the system and in the very basic matters of procedure in court. I think the basic training is doing it. Lay tribunal members habe the advantage that they are never by themselves, adjudicators have a very lonely job."

*Role of the UNHCR?*

"Of course they are concerned with asylum training not with the basic training which is what we have beeen discussing so far. People are appointed initially as adjudicators only after a certain amount of time which may not have to be a very long time they then go on to be special adjudicators and there is a separate second tow day training session at that point, and under the legislation for asylum appeals the UNHCR has an official role. Certainly the opportunity to take an official role which they sometimes take. Mostly they don't, it may be a matter which is routine, but particularly where there is an issue of law arising which they think is being got wrong at a level at which they can intervene. They are entitled to be made a party to any asylum claim and now that fgives them an additional status we have been very fortunate in the links that we have had with the UNHCR, the training officer has been very anxious to come to our training conferences and take as full a part as he can. Of course the roles are very different, the very fact that the UNHCR can be a party to an appeal shows that they will have some sort of interest in training adjudicatos and although that interest is not as strong, I think one has to be cautious in the same way that one would be cautious about having the Home Office training us.. On the other hand having a Home Office person from time to time at conferences to say 'well this is how we are getting on and this is the sort of thing we are doing, and did you know what a lowly level some of our decisions are being made. We need to be clear about the aims of training adjudicators and there are two I think: One is that we have got to try to get them to knwo some law, you can introduce then to the sources of law, you can cover the bvery basics in order to give themap of what may be a completely new jurisdiction. I think some people survive for quite a long period of time without knowing very musch about quite a lot of it. I have been criticised by UNHCR for spending too much time on procedure but I think people have got to learn the procedural rules they have got to get it right. We have got to get the law right and show the way to find the rest, a bsic legal introduction. The other part is someting about judicialism, and tha is the point at which I think we have to be rather careful about training because people are appointed as individuals, we sit as individuals and I think all one can do during training and in the ocurs of monitoring immediately after the basic residential programme is try to expose people to the ways in which experienced adjudicators make decisions without necessarily saying that it is right or wrong or tihs is the way you do it, but having them sitting round tryuing their ideas

comparing it with some of the other ways of doing it. Some people appointed have jjudicial experience elsewhere in other jurisdictions sometimes outside of this country, sometines as Social Security Chairman, and sometimes they don't. What we have to do over a relatively short period of time is to get our teeth into both aspects. There is a fair amount of law to learn up, they won't need to learn it all at once but as they come across it they are going to have to be able to looki it up and appreciate it. The other that they are going to have to develop for themselves is their approach to judicial skills."

"At the next conference Rick Towle is going to lead the principal session and wanted three days as the basic introduction and we're going to spend a little more than three hours exposing people to the bery basic bones of it and after that they are on their own. It would be ideal if we could have longer training, we know th tatmosphere I come from, the atmospheer the judge comes from, but we have to decide the cases as well unfortunately, and one of the things that people find is tha it takes a hell of a long time to learn anything."

*External constraints on training programmes/sessions?*

"This is actually a matter which I have been very conscious of intraining that its alright with academics, on the whole they will be allowed to go off and do the training indeed when I first started I was actually astonished to hear that I was going to be paid to go to a training cnference, but that is academics. Of course many of the people being appointed are laywers in practice and most fairly successful because if they are not fairly successful they may not be appointable for training. We pay a half a days fee, that is about £135. Well to a certain extent you can tell people this is part of the the cost of doing the job, that they are going to have to attend training. But if you are goint to take them out of work for a day for £135 when you consider that a reasonably earning counsel would be earning and it is much worse for solicitors who are losing a fee earner and the whole partnership is going down, for the day you have to give them something that is worthwhile."

"We have also had the Medical Foundation for the Victims of Torture, from time to time and we have had a representative from the Home Office at the special adjudicator training. We have Sandy Jackson the research officer who comes along usually and says something."

"It is the law that in asylum appeals one is concerned with situationa t the date of the hearing, in asylum appeals we are concerned with the situation at the date of 'if we put them on a plane today would that be a breach of the Geneva Convention?' Now that means that one is supposed to be considering the situation today, in practical terms that is slightly unrealistic because what you want to know is what the situation will be when the Home Secretary decides to put him on the plane which may be many years. There is a sort of compromise that we (the adjudicators) reckon is today. We are never going to know what the sitaions is today, we may know what it was last week through press reprots, in a country in which for example an uprising rather distantly from any centres of the populatin as ther ehas been from time to time in Ehiopia for example, it may be getting on for months before there is any reliable information about what is going on. There are things

like the Amnesty International Reports (not the yearbook) the individual reports, which may be sporadic, the US state department reports are on RefWorld, you may be able to get some other things as well. The chances of getting anything up-to-date are actully pretty small, all you can do is take the latest information you have.. There is a case, and I appreciate that to a certain extent it is the judge's case that we should be up-to-date with the siutation with all the countries in the world at any time. It doesn't happen and there is a legal reason which makes it rather unlikely to happen which is that although special adjudicators are always said in parliament to have built up a special expertise you try and use it and you get into trouble.. The Tribunal has often criticised people including the Chief Adjudicator for this, you are not allowed to use in an appeal your own expert knowledge that you have built up hearing numerous appeals from the same country. All you can do is say to the parties 'I am aware of the following document what have you got to say about that?'. If the position is that however well informed the adjudicator is he either has to wait and see what the parties tell him, or be in a position to reveal to them the whole of his information before reaching any conclusions on it then it may better that he remains in ignorance better to wait and see what the parties show you. If you do build up information, expertise, knowedge as for examplea considerable number of adjudicators have by now of a situation like the position of Tamils in Sri Lanka, young male Tamils being returned to Colombo whether the situation into which they were being launched if they were placed there, it is actually extemely difficult to make a decision in which you can say for certain that you have not taken anything into account other than that which was put before you in the case. So I see that the ideal is there, but I'm not sure that as the law is at the moment and as the attitudes are at the moment whether it isn't better to just sit and wait and see if there isn't a new Amnesty report and read it and just try and forget afterwards. You may have another case on the same country in which they don't show it to you."

*Your view on the fact that adjudicators cannot use their expert knowledge.*

"I think its silly but it may be the best we can do because transparency in an adversaril system requires that the parties are aware and are able to control to an extent, beetween them, the material on which decisions are made and it is an adversarial system no doubt about tha. We build upon expertise but I think on the whole that expertise must remain on the whole in techniques because there is a certain unfairness otherwise. Judges taking into account matters which have not been on the table in the form of evidence is dangeroud. On the other hand ideally, they should do it the other way around we should educate our special adjudicators perhaps by dividing them by countries or parts of the world and make sure you have got adjudicator experts on everything and perhaps direct the cases tha way and assume the adjudicator would know all about the country or be criticised if he didn't, rather than being criticised if he does know too much about it."

*Is geographical allocation a road down which you would like to go?*

"I thin it would be possible to do to a very limited extent, I don't think it would be unrealistic if one were to be thinking about alimited extent. It might be silly to divide

people up into Pacific Rim people and Subcontinental people because there are a lot of Subcontinental cases and not very many Pacific Rim cases. But it does seem to me that bearing in mind what is always said about us special adjudicators and about our special expertise that we have got to this rather curious situation in that the one thing you can't use when deciding a case is your specialist knowledge of the country . Of course if you are just about to find against somebody on the facts then you put it to thema anyway 'what have you got to say about this?'. This is just a matter of judicial technique, the restriction on using information is a pity."

*Basic programme of training and on-going education?*

"By the time you first sit as a special adjudicator you will have had the following training. Basic training, special adjudicator training and probably a period of three days sitting with another adjudicaotr, probably the first day just watching, the second day you mightsplit alist with him. That adjudicator would then look at your determinations and so on and give some guidance on how to write them. The programme is then as follows: Very little in the way of training which is identical for everyone. We have a plenary conference about once every two years, to which everyone is invited and which people have historically gone. That is in a sense training there are workshop sessions, there are plenary lectures and there is also at other residential courses plenty of time for socialising which is actaully an important part of training. particularly people sitting at different centres sitting with the different types of cases sometimes just getting the opportunity to chat to people they don't see. So that is about a couple of days once every two years now there are funds for training day in each centre. Those [funds] are mostly used and they are laeft to the regional adjudicators to use and what happens is tha the regional adjudicators will fix a day and usually they will set up a programme of things which they think are of importance to colleagues at their centre. So for example down here particularly at Hatton Cross, the training has in the rcent past been exclusively on asylum matters."

*Response to the new training programme?*

"I did start off with some questionnaires which I sent out asking people to assess various aspects of the course and they were of a form which a former colleague at Leeds University (Rogers) used to use at least to assess his teaching, and it used to ask you to rate it ona scale of one to five, underneath there was thing asking for further comments, and you get a few of these and they have lots of fives and you think we're doing pretty well and then you come across one with five and the comment at the bottom is 'I though this was hopeless'. Then you come across another of those and it becomes apparent that you haven't given people good enough instructions as to what five was and one was. Having realised this I did in fact work out that we would have to do it on the basis of smiley faces, I didn't have the nerve to do it on that basis. As a matter of fact I don't have a very positive view about the role of trainees in assessing training. We have observation from the tribunals chap at the JSB who has been to the alst two or three of these different things and I think he has seen the whole range of regular introductory training, and he has made some comments which have been positive, the one negative comment is what on

earth do you do about assessment. I son't know it is something which I have to think about, but actually I do regard it as rather a low priority I would rather get the training right. What you really want to do is have a target group, a control group have some people trained and some not trained and see if it makes any difference at all.".

"I think that it is worthwhile having an ethos in which people are made constatntly aware that they are doing a difficult job and a job in which time is going to be made, even if not very much time, for thinking about what it is they are doing and I take it that we would both assume that trained people are better than not trained people. We do have an enormous amount to grasp, in some ways a very high profile jurisdiction and I think that providing that sort of opportunity actually just getting people together for a scial event would almost do the trick. I think I would see the basic advantage it eleveate professionalism in the job to a status which it might not otherwise have. Though again one doesn't know because one does not have the control to see if untrained people are just the same."

*Inquisitorial system the way forward?*

"Well no, I don't think so. I think we refgard our proceedings as mildly inquisitorial on the basis that we do not regard ourselves as working in a jusrisdiction in which the judge will ever be ctiricised for stepping into the arena. Not like a judge sitting over the road [Royal Courts of Justice], where if something is not mentioned on the whole he will shut up about it and if it wasn't something to come before him it isn't. so I think we are mildly inquisitorial in that sense but we are basically adversarial. I am not qualified to reach a decisin on which is best because I have been brought up in an adversarial system and I do not really understand the inquisitorial system. There would be some advantages as you say in that one would be dealing with an expert, as the judge. One of the difficulties which could easily arise is the point at which you have an appeal from an inquisitorial judge to a body which is definitely not inquisitorial."

Interviewee - Dr Andrew Shacknove
Location - Kellogg College, Oxford University
Date - 29/5/97

*Previous involvement with the asylum training in the past*

"I have been conducting originally one day and now two day training sessions with the Home office asylum unit. I started about 1990 - started training on a trial basis in 1991 and it worked out to our mutual satisfaction so we fairly quickly changed the one day meetings to two day meetings as of fairly early on 1992 at the latest. I have been running meetings down there on two subjects - one is Article 1, and the other is credibility determination and cross-cultural communication which was very interesting. It was especially interesting to develop and I have worked closely with Dr Keith Lloyd who is

now a senior lecturer in Psychiatry at Exeter and he has a background both in anthropology and psychiatry and has worked a lot with minority communities especially Afro-Caribbean groups in the United Kingdom and knows a lot about, did not know anything about asylum at the time, but he did know a lot about cross-cultural communication and post-traumatic stress which of course relates closely to the asylum situation. So we put on seminars every month or two for quite some time down there on credibility and cross-cultural communication.
[...]
They thought that our training was better suited to people who had been there a while and we had no brand new people - about 20% of the people had been there around three months most of the people had been there six months to eighteen months and then there were around 20% of the people were longer term.

*Any discernible differences in their practices as a consequence of the seminars being run?*

"We had no follow up in any systematic way in terms of did people apply the knowledge that they received in our seminars or concepts that they learned for the first time, we had no follow up at all. I suppose that that was a design failure in the programme I strongly suspect that if we did a follow up it would have been a very depressing tail. I think it would have been a depressing tail for a variety of reasons - I think to some limited extent that concepts weren't taken on board OK so for example, I think that some of them they not have understood what we were saying about social group or about the concept of persecution of whatever, but more importantly than that were the operating procedures in the Unit that they talked a lot about and how that this was all well and good what they were learning from us but that really they were going to have an extremely difficult time applying it once they got back to their desks because of essentially mandates to approach things a certain way or bureaucratic consequences if they didn't approach things in a certain way and also due to the sheer pressure of numbers and all. So I think that the consequences of what they learned for actual practice would be fairly limited. And also because there's such a high turnover there, the people move out very quickly."

*The nitty-gritty of the training - role-play?*

"We did a lot of workshop, the seminars tended to involve a minimum of 15 and a maximum of about 25/26 people ... those seminars would involve 30% lecturing from me or from Keith and I, and they would involve about 30% plenary discussion and more or less 30% small group workshop. Where we would give them abstract cases which usually would involve only one paragraph to focus in on a key aspect of status determination of a case.. and they would go back to their groups to discuss it and then come back and we would discuss it in plenary. So basically it would be me lecturing on a topic, their doing case-work on a topic and then plenary discussion of a topic and then we would move on to the next topic."

New development in the training - "Based on something that Rick Towle from UNHCR and I did this last time, we has a couple of sessions with the senior executive officers where we had somewhat longer cases which ran to a page or so a piece, that were composites of paragraphs taken from real HO cases for example involving a Kurd, or a Sri Lankan or whatever, and we would take from a series of maybe six or ten SL cases and synthesise it down or condense it down to one case involving key issues so that the fluff was taken out of the real cases and we basically fed these cases back to them which was absolutely mortifying for them, they learned a lot they were very embarrassed by what they read from their own cases, and when we went through it had very good pedagogical value. Because they were raising key issues and the text that they were feeding - these are rejection letters, and the argumentation in the rejection letters was really very weak indeed, which is an uncontroversial statement because they saw it as well. There is no question that they saw it. They thought it was actually quite entertaining. They got back to us and they said that our rejection letters are inadequate so we would like you Mr Towle and Dr Shacknove to help us draft better rejection letters which was not the purpose of the exercise. It is interesting that that is their response and its not a question in their minds of improving the status determination process its a matter of drafting tighter rejection letters presumably I suppose to legitimate the exercise, both in terms of the rejected claimant but also on appeal to tighten it up on appeal."

"In any representative democracy the immigration part of the HO or its equivalent is not a post that bureaucrats want to be in, they want to move out to more prestigious and more appealing and often better funded positions. So that I wouldn't expect Ann [Williams] to be there for very long just like her predecessors."

"Systematic external training is not going to happen because there is a very very small budget. Not unless things change very dramatically in terms of the financial resources to do that."

"There are problems with measuring the success of training, but that aside there are fiscal constraints and a high turnover of personnel which undermines training. As even questioned whether external training is a good use of their money; given that most of the personnel at the Asylum Unit are on two year contracts they don't have job security, there is no point, its just not long enough for them to learn the job properly and develop the experience to do a good job and I think it s in the interests of both the Home Office officials and asylum seekers that they extend the tenure of people there, it may not be good for the Home Sec in terms of his costs of employment for his staff but its highly destabilising and demoralising for the people to come in and be looking for a job almost immediately, and training people in that situation doesn't make a whole lot of sense, they are going to come and go - its not a good use of money."

"Crucial that executive officers doing the interviewing, de facto the decision-making, be University graduates. Now he may consider me a toff for suggesting that but I'm sorry, these people are making decisions that implicate peoples lives, and that there is nothing in

the domestic setting, certainly not in the criminal law setting which implicates peoples lives so severely. [...] In the criminal law setting we have this whole panoply of highly educated highly expert people from people providing legal aid all the way through to High Court judges, who are protecting the criminal defendant, who in most cases, in the vast majority of cases we know are guilty. [..] In the asylum context a lot of these people are unfounded but a lot of them aren't, we need to provide some type of protection for them and the best protection that they have is a decent first instance interview. That needs to be conducted by someone who at least has a first degree, they need to be able to analyse facts and I'm sorry but there's a significant percentage of people at the HO who cannot do that. I know this from six years of experience, there are a lot of people who cannot analyse things satisfactorily. Incidentally, these graduates needn't be or even should be law graduates I think that they should be political scientists, sociologists, anthropologists, historians... they do need sensitivity to foreign cultures and the ability to analyse to cross-cultural factual situations and the best thing they could do would be to hire a bunch of (the above) to do that. And frankly it wouldn't be very expensive there are a lot of graduates out there."

*What are the qualifications, the level of people, the requirements of decision makers?*

"The number of University graduates is increasing, but there is still a high percentage of people who are not University graduates, and some of these people I wouldn't buy a pair of shoes from. There is a wide variation in terms of their abilities and their commitment.. There are some very serious, very intelligent people there who are doing the best they possibly can under bad circumstances, and there are other people there who are just not up to the job."

*The extent to which the UNHCR Handbook is utilised*

"There are people who say they have not consulted it since they first read it, [...] and there are other people who read it and it made an impression on them, and I don't know how often they re-read it but they are familiar with the notion of benefit of the doubt and the subjective element and other things which I may or may not believe in but that it does indicate that many many people there have taken on board the Handbook, I don't think that its as pervasive as it should be by a long shot, it seems to be that significant group of people, I don't know who big, who really do not take it on board or do not refer to it. The other thing is, I think it is absolutely staggering that the overwhelming majority at the HO do not know the Sivakumaran case by name and more importantly do not know the standard of the burden of persuasion included in it and how many people at the HO believe that the burden of persuasion is well above that in normal civil litigation somewhere between the civil litigation standard 'more likely that not', and up to and including the criminal law standard. They have not taken on board the pronouncement by Lord Keith and Lord Goff in Sivakumaran, and that is just shocking to me."

"The HO are very proud of the fact that over 50% of the asylum caseworkers are women, and I say do you arrange therefore to have the women interview the women claimants, no they don't. To my knowledge, at least as of the last time I trained down there which is some months ago, they had made no moves whatsoever to sensitize themselves to the issues related to women claimants or the interview of women claimants and also they claim its not an issue because they say the overwhelming number of women claimants are basically attended to their male claim, partner, and they get some perfunctory if any kind of opportunity at the end to add additional comments and I think that that is in the presence of the male claimant well, that just doesn't work I mean there seems to be a fundamental gap in their understanding about gender relations, and also cultural issues. Its one of the easiest things that could be changed down there, and also I should say the most gender insensitive and horrific thing that I have ever heard are said by women executive officers, absolutely shocking. So just because you have a woman doing it doesn't mean that you have a sensitive party conducting the interview."

"They have no where near adequate expertise in country of origin information, not even close, if I were to identify the single area the most needs to be most improved it would be country of origin information, I have no evidence about this but I am absolutely convinced that they do not want there executive officers to have decent country of origin information because that would mean it would be harder to reject people if they really knew what was going on they do not know what is going on, they will tell you in public in front of their peers on a regular basis that they really have poor country of origin information. There country of origin information comes primarily from second rate Europa encyclopedia facts of the world or something like this and they also get country of origin information on an unsystematic basis from their colleagues at the FCO, the desk officer, or in some cases the embassy which takes God knows how long to get information out of the embassy. [Intervention] FCO have another agenda, there relations with the FCO are in some cases good in some cases aren't depends on the individuals in question, and they are people have told me that they consider the Amnesty reports as quote unquote, "Amnesty international is a suspect organisation with an axe to grind," quote unquote, now there is no such thing as neutral information, that quote could just as easily apply to the FCO or to any other organisation and they are largely dismissive of information that isn't provided by the FCO, it is one of the most regressive Ministries of the Interior in that respect that I have studied, there sources of information are perhaps the narrowest of any I know in Europe, and they are not confirming the FCO information they are not confirming the Amnesty information they are not doing anything systematicically with information, only a tiny minority of the people there know about the computer equipment the databases from UNHCR or from Canada or from elsewhere, they don't even know about it."

"I offered to give seminars on the use and abuse of country of origin information, how to gather and use country of origin information , methodologies available databases, and I'll bring in an academic expert on your favourite country [...] and answer questions for you on this demonstration or that social group or whatever, and you can hear it unedited from the source. They are not interested, they have never taken me up on it, and I can only

think that the reason they don't want to take me up on it is because they will get information that will make it harder for them to decline cases."

"Often the information available is at a level of generality which does very little good in an individual asylum case there needs to be a quick on-line way of following up information and I think that is quite easily and cost effectively achievable, but they are it seems to me inappropriately dismissive of the information in these alternative sources of information and where they are getting conflicting views from the FCO on the one hand and Amnesty on the other hand it shouldn't just be a matter of opinion to choose one over the other they should go back and get further information, to corroborate one side or the other."

"UNHCR is playing no where near the role it should be playing it helping both identify the information and analyse the information, I think that they have been not taking a strong enough role in this area."

"If you take the Handbook seriously the burden of persuasion is on the asylum seeker but the burden of presenting a full story is shared by the asylum seeker - his or her counsel, and the HO, they are supposed to work together to produce a whole evidentiary record. I don't think the HO is sufficiently taking advantage of the lawyers and the counsel, and I think that both the HO and the Adjudicators ought to be demanding more of the asylum seekers counsel than they are currently doing in terms of providing specific, or at least group related information in order to help the HO and eventually in some cases the Adjudicators make an informed decision. I don't think it is adequate that the asylum seeker and her counsel plunk down every Amnesty and Human Rights Watch reports on their particular country, that does nobody any good. We should be moving towards a system where that basic information is known thoroughly by evey HO official conducting interviews on that particular country that we take for granted that the Amnesty and the FCO and State Department and other reports are read, and that they are not simply photocopied and added to the asylum seeker's pile of information. The asylum seeker should be providing both the HO and where appropriate the Adjudicator with supplementary information. Affidavits by academics about that particular district in the country or that particular social group or that particular political group or whatever it may be so that the asylum seekers is really helping the HO to make both an accurate and efficient decision. I think it is disgraceful both that the lawyers are providing these wadge of duplicated information and that the HO is letting them get away with it."

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