



Whither Refugee Protection in the changes to the Canadian and British Asylum Systems?

Alison Harvey for Refugee Law Initiative seminar 17 October 2012 – version as amended post the seminar

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Changes to the UK asylum system

The UK asylum system has changed constantly since at least the early 1990s and the current changes in the Canadian system are foreshadowed by changes in the UK since at least 1996. At the moment the UK Border Agency is promising not mere change but “transformation” of initial decision-making. The *UK Border Agency News* for September 2012 says:

Working alongside transformation projects in other agency business areas, the project is considering how best to allocate resources across the NAC. After collecting evidence of good practice from across all the regions of the asylum command and consulting senior business experts, the AOM is proposing a model which focuses on early triage of cases in order to direct them into conclusion pathways with specialised teams. A robust process for early identification and appropriate action on vulnerable cases such as unaccompanied asylum seeking children (UASCs) and victims of trafficking will be embedded into this approach.¹

“AOM” stands for Asylum Operation Model. “NAC” stands for “National Asylum Command.” What “Asylum Operational Model” and “National Asylum Command” stand for is a much greater mystery. But this is old wine in new bottles, even if the officials working on the new model do not realise this. *Plus ça change, plus c'est la même chose.*

¹ Issue 15, September 2012. Available from <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/ukba-news/>

The UK System: overview

In the UK refugee status determination is undertaken first by civil servants, part of the mis-named “UK Border Agency,” mis-named because it has no special “Agency” status, although it has a Chief Executive and a Board. It is a part of the Home Office. The functions of the Agency have expanded and shrunk over the years. It deals with immigration as well as asylum but, as of March 2012, no longer deals with border control which has been hived off into a separate “UK Border Force” with immigration control and customs functions.

The UK has had a system of asylum appeals before independent tribunals, as opposed to before a panel of appointees, since the Immigration Appeals Act 1993 came into force. As with the UK Border Agency, the size, shape and remit of the tribunals have changed. Many UK tribunals have been joined in a ‘unified’ two tier system: the First tier Tribunal and the Upper Tribunal. There is now an Immigration and Asylum Chamber in each tribunal.

The UK had a two-tier tribunal system until the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 made provision to collapse the tribunal into a single tier. However, the Asylum and Immigration Tribunal that was thus created functioned to a large extent as though it were a two tier tribunal save that all the adjudicators in it were nominally on the same level and thus, rather than asking to appeal a decision, one asked for it to be “reconsidered.”

The reason for collapsing the two tier tribunal into a single tier in 2004 was to attempt to reduce the number of judicial reviews. Refusals of permission to appeal to the equivalent of today’s Immigration and Asylum Chamber in the Upper Tribunal were made the subject of judicial review applications. Alongside the single tier tribunal, a system of “statutory reviews” was set up whereby High Court judges considered the tribunal’s refusals of reconsideration on the papers.

The then Government’s project of limiting judicial reviews led at the time to the notorious “ouster clause” in the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003² whereby the then Government attempted hermetically to seal the decisions of the tribunal from review in any court, even if they were *ultra vires*, vitiated by bias, or irrational. Lord Woolf, then Lord Chief Justice, said, in a lecture to Faculty of Law at Cambridge University on 3 March 2004 of this ignoble attempt,

Extensive consultation took place with myself and other members of the judiciary before the Bill was introduced....Our advice was that a clause of the nature now included in the Bill was fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law....We advised that the clause was unlikely to be effective and identified why....In addition we argued that ouster was not necessary and action could be taken which was more likely to be effective than a clause of this nature. Importantly, we pointed out

² Clause 10 of the Bill as introduced in the House of Commons. For the death of the Ouster clause, see *Hansard* HL Report, 15 March 2004, col 51.

*that the danger of the proposed ouster clause was that it could bring the judiciary, the executive and the legislature into conflict. Apparently this was of little concern.*³

The creation of two tiers of tribunals, echoing the old two-tier tribunal (the old Immigration Appellate Authority) came following passage of the Tribunals, Courts and Enforcement Act 2007 and the consultation *Fairer decisions, faster justice* in 2008.⁴ There is now a First tier and an Upper Tribunal.

The tribunal is an administrative body and the Supreme Court has fairly recently held⁵ that decisions of the Upper Tribunal are susceptible of judicial review by the courts provided certain, fairly stringent, conditions are met.

A suspensive right of appeal to the First tier Tribunal is available to most, although not all of those refused asylum. To appeal further involves a permission stage. Permission will be granted if there is an arguable error of law in the decision of the immigration judge, formerly called a special adjudicator, in the First tier Tribunal.

Those with no, or no suspensive, right of appeal may be able to challenge a decision to refuse them asylum by applying to the High Court for judicial review. It is already the case that judicial reviews of decisions about fresh applications from persons who have already gone through the asylum procedure and lost are transferred to be heard in the Upper Tribunal. Laws are in the process of being passed that will allow more immigration and asylum judicial reviews to be heard in the Upper Tribunal.⁶ Exactly which ones will be transferred will only be known when the relevant order is made. The imminent loss of the oversight of the High Court is very much lamented by practitioners, less lamented by some of the judges of that court.

There is a right of appeal from the Upper Tribunal to the Court of Appeal. Permission must be granted for this, and the test for a grant of permission is "(a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the [Court of Appeal] to hear the appeal."⁷

This has been the subject of controversy and clarification by the courts – the latest decision being *JD (Congo) v. Secretary of State for the Home Department* [2012] EWCA Civ 327 which is better news than, although it purports to confirm, *PR (Sri Lanka) v. Secretary of State for the Home Department* [2011] EWCA Civ 988. Then, with permission, a case may progress to the Supreme Court.

³ For this and other criticism see ILPA's *A Briefing for Peers on the Asylum and Immigration (Treatment of Claimants, etc.) Bill Second Reading in the House of Lords 15th March 2004 Clause 14 - the Unification of the Appeal System. A challenge to the Rule of Law*. Available at <http://www.ilpa.org.uk/data/resources/12992/04.03.334.pdf>

⁴ For ILPA's response to this, which is critical, *inter alia*, the Home Office's leading a consultation ILPA considered should be led by the Ministry of Justice, not to mention the Home Office's desire to retain control over the procedure rules in the Tribunal, see *ILPA's Response to UKBA consultation on immigration appeals: Fair decisions; faster justice* 31 October 2008 available at <http://www.ilpa.org.uk/data/resources/13076/08.10.569.pdf>.

⁵ *R(Cart) v Upper Tribunal*, *R(MR) v Upper Tribunal and SSHD* [2011] UKSC 28; *Eba v Advocate General for Scotland* [2011] UKSC 29.

⁶ Crime and Courts Bill 2012-2013, Government Amendment 135 at House of Lords Committee Stage: After Clause 19 Transfer of immigration or nationality judicial review applications. See ILPA's briefing at <http://www.ilpa.org.uk/data/resources/14902/12.06.21-Transfer-of-JR-G-amendment-135.pdf>

⁷ Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and The Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834)

The UK system is situated within two linked broader European systems which are extremely significant for refugees. The European Convention on Human Rights⁸ applies to all those within the jurisdiction and an individual claiming asylum who has exhausted all domestic remedies can take his/her case to the European Court of Human Rights. Rules of court allow the court to request a State to suspend removal until the court has dealt with the case.⁹ UK courts must have regard to judgments of the European Court of Human Rights although they are not bound by them.¹⁰ The European Convention on Human Rights has been incorporated into UK law¹¹ so it can be pleaded before the UK Courts. It extends protection from *refoulement* beyond the 1951 Refugee Convention. A person may not be removed to a place where s/he will face torture, inhuman or degrading treatment or punishment in violation of Article 3 of the Convention and breaches, especially flagrant breaches,¹² of other rights may also found a prohibition on removal. There is thus no need to demonstrate a Convention reason and nor do exclusion clauses apply.

The Common European Asylum System is also very significant. First, there is the question of the country responsible for the determination of the claim for asylum. There is a sophisticated system within the European Union, governed by a European Union regulation “The Dublin Regulation”¹³ as to which European state is responsible for determining a claim and for the transfer of persons between States. The High Court, not the tribunals, has oversight of these cases by way of judicial review, in circumstances which the UK legislature has attempted to limit in ways that are still on the statute book,¹⁴ despite the Court of Justice of the European Union holding in *NS v UK* (C-411/10, December 2011) that a State may not operate an irrebutable presumption that the rights of the person seeking asylum will be respected upon return to another member State.

There are also European directives governing the reception¹⁵ of persons seeking asylum, asylum procedures¹⁶ and the criteria for refugee status determination.¹⁷ References in this paper are to those versions of these directives by which the UK. These are not the most recent, “recast” versions as the UK did not opt in to the recast directives. This did not preclude its being very active in their negotiation. It is arguable that the inspiration for many of the new Canadian measures is these European instruments and would be worth

⁸ CETS 5

⁹ Rules of Court, into force 1 September 2012 Rule 39, Interim measures. See http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf

¹⁰ Human Rights Act 1998, s 2 (1)(a)

¹¹ Human Rights Act 1998

¹² *R v Special Adjudicator ex p Ullab* [2004] UKHL 26

¹³ *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.*

¹⁴ Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

¹⁵ *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers: “Reception Directive.”*

¹⁶ *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status: “Procedures Directive.”*

¹⁷ *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: “Qualification Directive.”*

Canadian representatives studying them and studying the commentaries of UNHCR and others upon them, in great detail.¹⁸

The original directives have been implemented in UK law. Where there are shortcomings in the implementation, provisions of sufficient specificity may be given direct effect in UK law, otherwise provisions are justiciable before the Court of Justice of the European Union. The European Union now has a Charter of Fundamental Rights,¹⁹ which informs the interpretation of these instruments and may also be pleaded. Its status in UK law²⁰ was the subject of judicial consideration in *NS v UK* (C-411/10, December 2011). Consideration of the Charter provides one means by which rights also protected by the European Convention on Human Rights may be debated before the Court of Justice.

Legal Aid

This year saw the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which makes sweeping cuts to legal aid in England and Wales (Scotland has a separate, very different, scheme). Funding for asylum cases was a stated priority to be protected. The Ministry of Justice said in its consultation response “9. *The Government considers that it is appropriate to retain legal aid for asylum cases, given the potential risks to the individuals involved and their particular vulnerability.*”²¹

Some thoughts on the Canadian proposals

I am no expert on the Canadian proposals; what I can offer is my expertise on similar approaches within the UK system, which may or may not be relevant to what Canadian is doing. A couple of times when reading in preparation for this seminar I did wonder whether someone had gone to the UK and said “Hey, what works really badly in your system? Because that’s what we want.”

Designated States

The literature for the seminar says that the Canadian system is to see a designated country of origin list that will preclude those refugee claimants from designated states from a right to appeal to the new Refugee Appeal Division.

I quoted above from the UK Border Agency newsletter with its statement on “triage.” The proposal, which is anything but new, is to divide persons seeking asylum into sheep and goats: refugees and the unfounded, at the earliest possible stage. Whatever the pious

¹⁸ See

ILPA Comments on Commission Proposal for a Directive of the European Parliament and Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM(2009) 551, 21 October 2009. (16 September 2010) available at <http://www.ilpa.org.uk/data/resources/13019/10.09.512.pdf>; *ILPA Comments on the Revised Commission Proposal of 1 June 2011 on common procedures for granting and withdrawing international protection status (Recast)* COM(2011) 319 final available at <http://www.ilpa.org.uk/data/resources/13965/11.12.05-ILPAProceduresDirective.pdf>

5 December 2011

¹⁹ 2000/C 364/01.

²⁰ See *Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom* (Protocol No. 30 to the Charter of Fundamental Rights of the European Union).

²¹ Reform of Legal Aid in England and Wales, the Government response, Ministry of Justice, June 2011 <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf>

hopes of those planning transformation, little is known or disclosed at the earliest stage apart from a person's nationality. Where there is triage it will almost inevitably be on the basis of nationality. This disadvantages the person whose situation within his/her country may be atypical of the majority of refugees: women whose cause of persecution lies within the private sphere, those facing persecution because of their sexual orientation and children are three groups that spring to mind.²²

The UK's system for returning persons seeking asylum to another country, especially another EU country, that can determine their claim, is a system that attempted to designate certain third countries, most notably those of the European Union, as safe. As mentioned above, this project goes so far as claims on the face of statute that the safety of these third countries could not be called into question in any court.²³

- 3 (1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed—*
- (a) from the United Kingdom, and*
 - (b) to a State of which he is not a national or citizen.*
- 3(2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in subparagraph (1), as a place—*
- (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,*
 - (b) from which a person will not be sent to another State in contravention of his Convention rights, and*
 - (c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.*

In *MSS v Belgium and Greece* (Application 30696/09) the European Court of Human Rights held that MSS would be at risk of inhuman or degrading treatment as a person seeking asylum in Greece because of the way in which persons seeking asylum are treated in Greece, as well as because of a risk of onward *refoulement*. In the case of *NS v UK* (C-411/10, December 2011) before the Court of Justice of the European Union, which concerned a return to Greece, the court held:

“...if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.” (paragraph 86)

These cases have served as a reminder of the dangers of designating any States. The Humpty Dumpty approach to designation: “Safe means what I say it means,” whatever

²² For a more detailed consideration of the shortcomings of UK systems based on triage, see ILPA's *UK Border Agency Consultation on draft Detained Fast-Track (DFT) & Detained Non-Suspensive Appeals (DNSA) - Intake Selection (Asylum Intake Unit (AIU) instruction)*, ILPA comments of 29 February 2008 <http://www.ilpa.org.uk/resources.php/13101/uk-border-agency-consultation-on-draft-detained-fast-track-dft-amp-detained-non-suspensive-appeals-d> and *UK Border Agency, Detained Fast-Track & Detained Non-Suspensive Appeals - Intake Selection (AIU Instruction)*, ILPA comments on 12 September 2008 available at <http://www.ilpa.org.uk/resources.php/13084/uk-border-agency-detained-fast-track-amp-detained-non-suspensive-appeals-intake-selection-aiu-instru>

²³ Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

the evidence, has no place with a system of refugee protection or a system governed by the rule of law.

Designation is used not only for third country cases but for cases where a person faces return to the State fled. There is the power to certify any claim as “clearly unfounded” and thereby deny a suspensive right of appeal under s 94 of the Nationality Immigration and Asylum Act 2002. There is the power to do so on the basis that a person is from a named state²⁴ as well as a more general power.²⁵ A right of appeal remains, but can only be exercised subsequent to return to the country where the person claims to face persecution. A challenge is thus by way of a request for judicial review of the certificate.

The UK law on this point is drafted on the basis of woolly thinking. It trades in presumptions but presumptions are only operative insofar as they shift the burden of proof. The Nationality, Immigration and Asylum Act 2002 is drafted so that the presumption is supposed to operate within the head of one decision-maker:

94(2) A person may not bring an appeal to which this section applies (in reliance of section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

94 (3) If the Secretary of State is satisfied that an asylum or human rights claimant is entitled to reside in a state listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.

While any case can be certified as clearly unfounded there is thus this woolly presumption that cases from certain countries will be designated. The list of designated states can be augmented or reduced by order. Section 94(5) sets out that to add a State or part to the list in subsection (4), the Secretary of State must be satisfied that:

(a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
(b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom’s obligations under the Human Rights Convention.

Section 94(5D) requires the Secretary of State to have regard to:

(a) all the circumstances of the State or part (including its laws and how they are applied), and
(b) information from any appropriate source (including other member States and international organisations).

States or parts of States may also be removed from the list.²⁶

Ten States were listed in subsection (4) on the face of the 2002 Act when it was passed:

- the Republic of Cyprus
- the Czech Republic
- the Republic of Estonia
- the Republic of Hungary

²⁴ Nationality, Immigration and Asylum Act 2002, s 94.

²⁵ *Ibid.*

²⁶ Nationality, Immigration and Asylum Act 2002, s 94(6).

- the Republic of Latvia
- the Republic of Lithuania
- the Republic of Malta
- the Republic of Poland
- the Slovak Republic
- the Republic of Slovenia

These States were removed from the list on 1 October 2004 when s 27(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was commenced, because of the accession of those States to the European Union.

Twenty four States are currently listed in subsection. Five were added by the Asylum (Designated States) Order 2003 (SI 2003/970):

- the Republic of Albania
- Jamaica
- Macedonia
- the Republic of Moldova.

A further five were added by the Asylum (Designated States) (No.2) Order 2003 (SI 2003/1919):

- Bolivia
- Brazil
- Ecuador
- South Africa
- Ukraine.

The Asylum (Designated States) Order 2005 (SI 2005/330) added India.

The Asylum (Designated States) (No 2) Order 2005 (SI 2005/3306) added:

- Mongolia
- Ghana (in respect of men)
- Nigeria (in respect of men).

This was thus the first instrument to differentiate between different groups in a State.

Ten States were added by the Asylum (Designated States) Order 2007 (SI 2007/2221):

- Bosnia Herzegovina
- Gambia (in respect of men)
- Kenya (in respect of men)
- Liberia (in respect of men)
- Malawi (in respect of men)
- Mali (in respect of men)
- Mauritius
- Montenegro
- Peru
- Sierra Leone (in respect of men).

The Asylum (Designated States) Order 2010 added Kosovo and the Republic of Korea with effect from 3 March 2010.

Bangladesh and Sri Lanka were added to the list by the Asylum (Designated States) (No.2) Order 2003 (SI 2003/1919) and then removed by the Asylum (Designated States) (Amendment) Order 2005 (SI 2005/1016) and the Asylum (Designated States) (Amendment) (No.2) Order 2006 (SI 2006/3275) respectively.

Bulgaria and Romania, which had been added to the list by the Asylum (Designated States) Order 2003 (SI 2003/970), were removed by the Asylum (Designated States) (Amendment) Order 2006 (SI 2006/3215) with effect from 1 January 2007 following those States' accession to the European Union.

You may feel profound surprise that a country such as Sri Lanka could ever make it onto a “clearly unfounded” or “white” list at all. States remain on the list whose inclusion is equally controversial. For example, Jamaica, given the very well-founded claims for asylum from gay men from that country. This is no oversight; it has repeatedly been brought to the attention of Ministers in debates in parliament and in correspondence.²⁷

The power in section 94(5) to add a part of a State is attempt to make the list more nuanced or, more cynically, to ensure that more countries can be placed on the list.

The practice of designation encourages lazy thinking, disbelief and assumption about countries. There is a risk that political pressure will lead to a country's inclusion on the list. Assumptions are reinforced as people are put into processes within which they will struggle to articulate and evidence a claim.

In a functioning asylum system a weak case simply will not take up the time that would be taken up with a borderline or less clear cut case. If a country is safe for most people it will often be easy to get information about the country. If it is hard to get information about a certain group, such as women subject to domestic violence or gay men, alarm bells should start to ring. If there is a clear source of protection within the State, or an internal flight alternative, this is likely to be the answer to the case.

Other short cuts: accelerated procedures and “credibility”

Designation is ultimately an attempt to find a short cut and short cuts always run the risk that one is not determining each claim on its merits, as the UNHCR *Handbook*, not to mention the courts, make clear one is supposed to do in refugee status determination.²⁸ This is fatal to some claims for asylum. Attempts are made to route a case at the earliest possible stage but the accelerated procedures into which a case is routed in the UK are determinative of the result. The UK Border Agency is unable to decide whether its “detained fast track” procedure is for cases that can be determined quickly²⁹ or refused quickly but so fast is the process, so enormous the burden that anyone within it is supposed to discharge, with only a couple days to state their case and gather the evidence in support, that refusal rates in the detained fast track have reached as high as 97%. If

²⁷ See e.g. HL Report, 24 November 2005, col 1812; HL Report, 14 December 2006, col 1670; HL Report, 7 March 2011, col 1358.

²⁸ *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011.

²⁹ See for example the UK Border Agency Enforcement Guidance and Instructions Chapter 55.4

your client is in the detained fast track, pretty much their only hope is if you can get them out.³⁰

On my reading the Canadian proposals for accelerated procedures place the emphasis on the refugee having less time to do things and on time being especially limited when a person did not claim at port, so that, for example, they will have to give in their basis of claim in at the interview. This looks like punitive measures for those who do not claim at port. Since 1996 the UK has repeatedly tried to build on the notion that those who claim in country have weaker cases than those who claim at port but without success, because the evidence of the UK's own determinations simply does not support this hypothesis. The UK has long seen "fresh claims," where a person's case failed but they were not removed for years and the situation for them in their country of origin changed, giving rise to a fresh claim for protection that needed consideration. Now we have the tragic, but also ridiculous, spectacle of persons making fresh claims within weeks of the final decision on the original claim because the procedures were so accelerated and so inadequate that they had no opportunity fully to articulate the basis of claim and no opportunity to marshal the evidence needed to support the claim. It may only be a matter of weeks before such evidence is obtained, the process was either unable to identify that it might be relevant, or to wait for it.

As to handing in the basis of claim at interview, my prediction based on experience in the UK is that the basis of claim will not survive. The UK got rid of written "Statement of Evidence" forms for some nationalities, then most, until they remain only for separated children. Everyone else enters their interview cold. The interviewing officer is thus in no position to prepare for the interview by examining country or other evidence pertinent to the basis of claim or to know, unless specifically alerted by the legal representative or another person, that there are matters of particular sensitivity to be covered. The UK Border Agency has now taken power in guidance to deny the heretofore usual five day window post interview for submitting further representations, including on the quality of the interview record.

Triage, on which the UK Border Agency intends to pin its latest hopes, is often touted as protecting those with strong cases or whose suffering within the asylum system may be reaching a special intensity: the tortured, the trafficked.³¹ Not so. These characteristics are supposed to protect you from the worst excesses of the system because exceptions are made for you. But because membership of a particular group brings advantages, admission to that group is policed. Suddenly your having been tortured or trafficked is doubted. And how at an early stage does one acquire the evidence to be able to triage on the basis of such characteristics? Survivors of torture and trafficked persons do not all throw themselves into the arms of the first immigration officer that they see and describe having been trafficked or tortured. Everyone knows that, so why pretend otherwise? That persons are children is already doubted within the UK system³².

³⁰ See ILPA's *The Detained Fast-Track process, a best practice guide*, April 2010 available at http://www.ilpa.org.uk/data/resources/13264/ilpa_bpg_detained_fasttrack.pdf

³¹ For more detailed consideration of how trafficked persons are treated with the detained fast-track system see ILPA's *Submission to the Home Affairs Committee enquiry into human trafficking* of 7 February 2008 and, jointly with the Anti-Trafficking Legal Project, *Further submission to the Home Affairs Committee enquiry into trafficking* of 5 March 2009 available at <http://www.ilpa.org.uk/data/resources/13071/09.03.564.pdf>

³² See ILPA's *When is a child not a child? Asylum, age disputes and the process of age assessment* May 2007.

All this is a diversion from the fundamental questions: is this person a refugee, or not? Does this person need our protection, or not? What happened and what will happen on return? Systems of triage, systems of designating States, eat up energy and resources that would be better directed to deciding cases.

Appeals

Canada is introducing paper based appeals and thereby going further than the UK system, where we retain a right to a hearing where there is any right to an appeal at all. The notion that there will be oral appeals only in “exceptional cases” echoes the UK Border Agency’s use of “exceptional” get out clauses that can be used to try to reassure opponents that measures will not be as draconian as they appear on their face. The predecessor to the UK Supreme Court, the House of Lords, rejected the test of exceptionality in European Convention on Human Rights Article 8, right to private and family life, cases in *Huang and Kashmiri v SSHD* [2007] UKHL 11. Exceptionality as part of a legal test, the UK Courts have emphasised, is a qualitative, descriptive term rather than functioning to say that cases will be rare.

I was struck by the statements about the denial of appeal rights. The denial of appeal rights is stated to apply to “those with a manifestly unfounded claim” as determined by the Immigration and Refugee Board but also to those with “claims with no credible basis,” designated state and safe third country cases, extradition cases and cases where there has been a decision on a Pre-removal risk assessment.

The more the decision maker does not think there is anything in your case, or does not believe you, the less right that there is to challenge that decision maker. That is a very dangerous route to go down.

So, as in the UK, the battle ground will shift to the higher courts, in the Canadian case, the Federal court. This will cost more and take longer. But that is not the main complaint against it. The main worry is that only some of those who are denied a right of appeal will have the quality of legal representation, and the strength or perhaps, if the UK is anything to go by, the opportunity, to bring such a challenge. Where the initial decision is wrong and there is no appeal to put it right, people risk return to persecution.

Another effect of not everyone who ought to be accessing the Federal court is that those making the decisions will not be subject to the same degree of scrutiny and this, experience from the UK teaches, leads to a downward spiral in the quality of decisions absent separate measures to address this. Do not underestimate either the effects of making the job of determining refugee claims at first instance lower paid and lower status.

As to placing limits on accessing a pre-removal risk assessment and on submitting an application for humanitarian and compassionate consideration, it appears that Canada is following the UK in increasing bureaucracy and multiplying challenges at every stage. If there can be no pre removal risk assessment if there has been one in the previous 12 month period, for example none for a year following a final negative decision on a refugee claim from the Immigration and Refugee Board then it will be necessary to go to the Federal Court where something has changed. I understand that the ban is extended to three years for those from a designated country. All the more reason to go to the Federal Court to fight the effects of designation. I understand that in the event of a

sudden change in country conditions, the Minister of Citizenship, Immigration and Multiculturalism may exempt certain nationals from the bar on accessing a pre removal risk assessment and regulations have been developed to specify criteria which must be considered when determining whether or not an exemption should be granted. Might it not be easier to carry out the assessment and then, if there is no risk, to say so?

The limits on pre removal risk assessment have no direct parallels in UK law. The general disgruntlement at second bites at the cherry appears to resemble attitudes in the UK, see, for example, section 96 of the Nationality, Immigration and Asylum Act 2002.

Similarly, the notion that a humanitarian and compassionate claim cannot be submitted while a refugee claim is pending so that a person must withdraw their refugee claim first. This will simply lead to delays and to suffering for those who need to know that they are safe and will not face return. And again, the work will fall to the Federal court.

I read that Canada intends to increase the number of resettled refugees. The UK resettlement programme is tiny and attempts to off-set harsh measures toward spontaneous arrivals with tiny increases in the resettlement programme have to date failed to impress. One should be wary of the attempt in any event. Canada's resettlement programme takes persons with the potential to become self-sufficient within a relatively narrow span of years. Education, the presence of a support network, work experience, language skills, the ability to pass a health examination and other personal characteristics will feature in the decision. The pool from which the resettled are drawn is the pool of persons in need of protection, but the criteria by which persons are selected for resettlement bear a far closer resemblance to migration criteria.

UK and Canada, a footnote.

Based on UK experiences, the Canadian changes are not going to enhance refugee protection in Canada. In the UK, faced with accelerated procedures and the loss of appeal rights, lawyers have fought back and fought on, in the higher courts and all the way to the European Court of Human Rights in appropriate cases. The role of the Federal Court will be crucial. Canada cannot look to the American Convention on Human Rights and lawyers will instead need to engage with rights of individual petition under for example, the International Covenant on Civil and Political Right

A UK "transformation" based on triage is not only business as usual, it is not going to have a beneficial effect. It is not going to reveal who needs protection and who does not. The judgments of the courts and in particular the determination of the protections arising from the Charter of Fundamental Rights of the European Union are far more likely to be of significance.

The case of *RT (Zimbabwe) v SSHD* [2012] UKSC 38 takes a radical human rights-based approach to protection under the Refugee Convention, It builds on the case of *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, whose effects have been felt around the world. In *HJ*, it was held that a gay man was entitled to live freely and openly in accordance with his sexual identity under the Refugee Convention and that it was no answer to the claim for asylum that he would conceal his sexual identity to avoid the persecution that would follow if he did not do so. *RT (Zimbabwe)*, held that the same principle applies to applicants who claim asylum on the grounds of a fear of persecution on the grounds of lack of political belief, regardless of how important

their lack of belief is to them. That is far more transformative than anything coming out of the UK Border Agency at the moment.

Reflections following the seminar

In the UK an applicant for asylum will have a substantive interview with a civil servant of the UK Border Agency and then receive a written decision, which, if it is a refusal, will set out reasons for the refusal. Unless a certificate has been issued on the case, for example on the basis of a safe country of origin, or that the case is clearly unfounded, there will be a suspensive right of appeal to the First tier Tribunal.

In Canada, the initial application is made in writing, a stage the UK has lost. The official at first instance makes a “referral” to a “hearing”. Under the changes described at the seminar, those hearing the cases will be “public servants” the equivalent of the UK’s civil servants.

Is a “hearing” a similar process to the UK process, given a different name, or is it a different beast? Are hearings public (save when the person seeking asylum requests otherwise and the interests of justice are that the request be acceded to)? Are hearings reported (subject to conditions of anonymity where the person seeking asylum requests otherwise and the interests of justice are that this request be acceded to)? And if so, in practice how often does the public attend a hearing, or read reported determinations?

How does the independence of the decision-maker sit alongside the accountability of the public servant?

It is extremely difficult for those who are the subjects of an asylum system to hold that system to account. If they lose, they may be removed from the jurisdiction and vanish without trace. Among the unrepresented, even where persons succeed in putting their own case they may have very little understanding of how the process is supposed to operate or, unless someone is interpreting and explaining the whole of the proceedings, how it is operating, with the result that they have limited ability to identify shortcomings. A hearing may offer opportunities that a closed interview does not but in practice they may be all too similar.

The Refugee Convention 1951 is an international instrument expounded upon by the UNHCR and glossed by the determinations of many courts. Similarly with human rights standards. There is substantial caselaw in national jurisdictions around matters such as fairness, evidence and procedural safeguards. Judgments such as *RT (Zimbabwe) v SSHD* [2012] UKSC 38 are unlikely to be the product of a decision at the level of the UK’s First tier Tribunal because the immigration judges therein are bound by decisions of the higher courts.

An unrepresented appellant is as unlikely to take the arguments higher as s/he is to identify them in the first place. If the changes to the Canadian system limit the role that legal representatives can play in the process they are likely to make the system less fair and the final outcomes of cases less reliable. However good the English or French language skills of an appellant may be, however intelligent and educated they may be, are they in a position to draw on the range of precedent and all the authorities that can be brought to bear on a decision, to marshal the evidence and weigh it in the time available to them?

Some considerations for the Canadian lawyers and others that occur to me based on the UK experience are:

- To see how the new system is working it will be vital to observe hearings and read decisions. It will be important to keep the system under independent scrutiny and insofar as hearings have a public, on the record, character, strive to maintain this;
- Consideration could usefully be given to whether the Ministry of Citizenship and Immigration is the appropriate sponsoring department for the Board, rather than the Department of Justice. This question may acquire new urgency now that appointees to the Board are to be public servants. Consideration should be given to who makes rules for the Board. In the UK they used to be made by the Home Office but have been wrenched from the grasp of a protesting Home Office and are now made by a Tribunal Procedure Committee;³³
- If well-founded challenges to designations of particular States are not brought, then designation of States may rapidly become the norm;
- Be vigilant as to attempts to reduce the role of the Basis of Claim in some or all cases;
- Keep statistics on how many port applicants as opposed to in-country applicants succeed;
- Consideration should be given to using the international human rights mechanisms for instruments to which Canada is a party. There may be scope to bring challenges on the basis of whether the Canadian system can indeed be negotiated, or negotiated by a particular individual, without legal assistance;
- It is helpful to monitor any correlation between the number of fresh claims for asylum and how soon this are brought after an initial application and subsequent appeals have failed and the use of accelerated procedures.;
- It would be useful to monitor the average tenure of public servant appointees to the Board.

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³³ See <http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee>