

Fordham International Law Journal

Volume 28, Issue 5

2004

Article 5

The Judiciary, the State, and the Refugee: The Evolution of Judicial Protection in Asylum – A U.K. Perspective

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Abstract

I will look at how the United Kingdom has attempted to handle its own obligations under the Refugee Convention of 1951 - and the European Convention on Human Rights - under the pressures of the increased numbers of those arriving in the country and claiming protection. I propose to survey the development of the system over the years, and in what seems to be a crisis management manner, the role played by the judiciary, and the overall effect on the refugee and how he or she establishes the claim. I will draw attention to some of the cases, particularly in the higher courts, which have sought (not always with lasting effect) to limit the increasing restrictions on welfare provisions while the claimant's application is being processed, and to confine the extent of detention without trial of terrorist suspects, and address the ever-tightening approach toward the remedies available against an adverse status determination. This Article coincides with the entry into force of the latest Act in this progressively restrictive legislation, the Prevention of Terrorism Act. It is too early to be dogmatic about its ultimate effect, but I will conclude by posing some questions on the issue of impact/effect and proffering some tentative answers.

THE JUDICIARY, THE STATE, AND THE REFUGEE: THE EVOLUTION OF JUDICIAL PROTECTION IN ASYLUM— A U.K. PERSPECTIVE

*Geoffrey Care**

I. BACKGROUND

In 1983, Arthur Helton wrote an article examining comprehensively one of the most vexed areas of refugee law — particular social groups.¹ He traced the different interpretations of this ground within the Refugee Convention from the Conference of Plenipotentiaries² through decisions in U.S. courts. In the United Kingdom, it was not until a case reached the House of Lords in 1999 that this area of jurisprudence was fully addressed.³

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1. See Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983).

2. See, e.g., Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The comments of two delegates are interesting. The U.S. delegate commented, "[P]eople sometimes left their country for social or economic reasons." *Id.* The French delegate responded "[I]n practice I feel sure that [they] would be recognised as refugees!" *Id.* But subsequent events have proved that they are not. On the contrary, it is their marginalization under such sobriquets as "bogus" or "economic migrants" that has led to the increasingly restrictive and draconian legislation. See Muhammed A.S.Al-Mass'ari, Case HX/75955/94 (unreported) (1996) (holding that the asylum petition of a Saudi dissident could be rejected by the United Kingdom, on the grounds that the island of Dominica was willing to grant him asylum).

3. See *Regina v. Immigration App. Tribunal Ex parte Shah, Islam v. Sec'y of State for the Home Dep't*, 2 A.C. 629 (H.L. 1999) (appeal taken from Eng. C.A.) (holding that women could be considered a "particular social group" for asylum purposes when their home country discriminated against them on the basis of sex); see also *Immigra-*

Arthur Helton's contribution in the field of protection of refugees is well known and exceptional — and he gave his life to this cause. This Article is dedicated to him, acknowledging his personal support in the establishment of the International Association of Refugee Law Judges (“IARLJ”) formed to advance the effective role of the courts globally in relation to refugees and refugee law.

I will look at how the United Kingdom has attempted to handle its own obligations under the Refugee Convention of 1951⁴ — and the European Convention on Human Rights⁵ — under the pressures of the increased numbers of those arriving in the country and claiming protection.⁶ I propose to survey the development of the system over the years, and in what seems to be a crisis management manner, the role played by the judiciary, and the overall effect on the refugee and how he or she establishes the claim.

I will draw attention to some of the cases, particularly in the higher courts, which have sought (not always with lasting effect) to limit the increasing restrictions on welfare provisions while the claimant's application is being processed, and to confine the extent of detention without trial of terrorist suspects, and address the ever-tightening approach toward the remedies available against an adverse status determination.

This Article coincides with the entry into force of the latest Act in this progressively restrictive legislation, the Prevention of Terrorism Act.⁷ It is too early to be dogmatic about its ultimate effect, but I will conclude by posing some questions on the issue of impact/effect and proffering some tentative answers.

Presenting our perceptions of “the [refugee] problem” in historical context, I quote from the Preamble to an Act passed in

tion and Nationality Directorate of the Home Office, Appendix 1 to Law and Policy, Feb. 26, 2003, at http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/immigration_rules/appendix_1.html (outlining visa requirements and exemptions for entry into the United Kingdom by country/territorial entity).

4. See Refugee Convention, *supra* note 2; see also Int'l Ass'n of Refugee Law Judges, *infra* note 28 and accompanying text (discussing the United Kingdom's approach to refugees).

5. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter *European Convention*].

6. See generally *Immigration: Rolling Up the Welcome Mat*, *ECONOMIST*, Feb. 12, 2005 (describing the recent sharp increase in asylum-seekers in Britain).

7. See Prevention of Terrorism Act, 2005, c. 2 (Eng.).

1793 in the reign of King George III, at the time of the French Revolution: “Whereas a great and unusual number of persons, not being natural-born subjects of his Majesty . . . have lately resorted to this kingdom: and whereas, under the present circumstances, much danger may arise to the public tranquillity from the resort and residence of aliens, unless due provisions be made in respect thereof.”⁸ Views on refugees did relax in the 19th Century, however — a sort of lull before the storm.

Professor Colin Harvey recently wrote that “in an era when numbers have influenced national legislation away from protection and towards control what has the judiciary done to stand in the gap?”⁹ Strictly, the “gap” is the distance between what is and what can be, which adds force to what a Canadian judge said not so long ago:

My vague general impression is that governments with a geographic base are weakening in the face of global commerce and domestic political leaders are drawing strength from the lack of a combined judicial voice with the result being an increasing tendency in “the civilised world” for the manipulation of judicial decisions being attempted.¹⁰

Although perhaps not a lot has changed since George III, I hope that we have moved forward since Lord Denning’s statement regarding Mr. Thakrar’s potential claim under the Refugee Convention in 1973: “[H]e can choose to go away if he pleases”!¹¹

8. See Dallah Stevens, *The Case of UK Asylum Law and Policy: Lessons from History?*, in *CURRENT ISSUES OF UK ASYLUM LAW AND POLICY* 9, 11 (Frances Nicholson & Patrick Twomey eds., 1998) (quoting Regulators of Aliens Act, 1793, 33 Geo. III, c. 4, pmbl. (Eng.)).

9. See COLIN HARVEY, *SEEKING ASYLUM IN THE UK: PROBLEMS AND PROSPECTS* 306 (2000).

10. See Geoffrey Care, *Presidents’ Report to the 5th Conference IARLJ in New Zealand, in STEMMING THE TIDE OR KEEPING THE BALANCE: THE ROLE OF THE JUDICIARY* 401, 404 (N.Z. Ass’n for Comp. Law and the Revue Juridique Polynésienne, in assoc’n with N.Z. Ctr. for Pub. Law of the Victoria Univ. of Wellington eds., 2003).

11. See *Regina v. Sec’y of State for the Home Dep’t Ex parte Thakrar*, 2 All E.R. 261 (C.A. 1974) (Eng. C.A.). Lord Denning agreed with Lord Widgery CJ who had rejected the writ of habeas corpus in an earlier case on the ground that the applicant’s freedom was not denied. See *Regina v. Sec’y of State for the Home Dep’t Ex parte Mughal*, 1 W.L.R. 1133, 1136 (Q.B. 1973). Lord Widgery explained that the applicant had chosen to remain in custody while his appeal was pending, but he could have returned to his own country after an immigration officer had refused him entry to the United Kingdom. It appears that at that time some judges at least wholly failed to comprehend the situation of a refugee.

II. REFUGEE CONVENTION AND HUMAN RIGHTS

The degree of cooperation between Nations, which is encouraged in the Preamble to the Refugee Convention, has become only more urgent with the strong influence of a purely regional harmonization in Europe. Indeed, as early as 1974 at the Paris Summit, harmonization "in stages of legislation on foreigners" has been advocated.¹² The uneven distribution of refugees will become even more burdensome on those countries least able to cope. The rewards for the trafficker will only increase, and the crisis management of the entire system will lead to further demands to unravel the Convention.¹³

We must, however, be realistic about how far the courts can, or should, go to maintain the right balance between the conflicting interests of the individual and the State itself. This is especially important given that most States today see refugee flows as a challenge to vital national interests.¹⁴ At no point in recent times has this conflict been more acute than it is today.¹⁵ The Human Rights Act 1998¹⁶ and the decisions of the European

12. See Council Resolution of 16 July 1985 on guidelines for a Community policy on migration, O.J. C 186/3 (1985) (stating that the 1974 Paris Summit advocated the creation of a harmonized legislation on foreigners applicable to the Member States of the European Community).

13. See, e.g., *Selmouni v. France*, [2000] 29 E.H.R.R. 403. The applicant alleged that the French police tortured him while he was in custody in violation of the European Convention on Human Rights. See *id.* at 424. Finding for the applicant, the court stated that Article 3, a prohibition of torture, is applicable even in the event of public emergency or terrorism threat. See *id.* at 406-07. The *Selmouni* court referred to the degree of diplomatic complexity and sensitivity involved in evaluation of another country. But insofar as domestic courts are concerned, where no question of a "friendly settlement" arises, their obligation is to ensure that their own country is not in breach of the European Convention. No margin of appreciation is relevant; they are concerned with the case before them and should surely act on what they see to be the law.

14. See generally *The Longest Journey*, *ECONOMIST*, Nov. 2, 2002, at 3 (discussing States' attitudes towards the status of refugee claimants).

15. In the United Kingdom it is an ongoing saga, dating from what Lord Ackner, a former member of the House of Lords Judicial Committee, recalls as "the turf wars during Howard's era." See Frances Gibb, *Blunkett v. the Bench: The Battle Has Begun*, *TIMES* (U.K.), Mar. 4, 2003, at 3. One recent example of the Home Secretary (Mr. Blunkett) undermining the independence of the judiciary and coming close to threatening the Court of Appeal can be seen in his attack on Mr. Justice Collins in March 2003. The judge was dealing with regulations that purported to remove an asylum-seeker's welfare rights if he did not apply for asylum on arrival. A comment made by an internationally respected South African Constitutional Court Judge, Albie Sachs, was that he was dispirited, and he remarked, "If it happened in Africa, people would say: 'Where is the rule of law?'" *Id.*

16. See Human Rights Act, 1998, ch. 42 (Eng.).

Court of Human Rights (“ECtHR”) have cleared the way for the House of Lords to strike down a decision by the Secretary of State for the Home Department (“SSHD”) for the indefinite detention without trial of those (non-British) subjects believed to be involved in terrorist activities.¹⁷ This action was discriminatory because it only applied to non-nationals, despite the argument that international law recognized the right of any country to control non-nationals.¹⁸ Lord Bingham stated in his judgment:

I would allow the appeals. There will be a quashing order in respect of the Human Rights Act 1998 (Designated Derogation) Order 2001. There will also be a declaration under [s]ection 4 of the Human Rights Act 1998 that [s]ection 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with [A]rticles 5 and 14 of the European Convention in so far as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status.¹⁹

17. *See A & Others v. Sec’y of State for the Home Dep’t, X & Another v. Sec’y of State for the Home Dep’t*, 2 W.L.R. 87 (H.L. 2005). This case started off before the Special Immigration Appeals Commission presided over by the President at the time, Mr. Justice Collins. *See id.* at 92. A compromise was ultimately reached in Parliament whereby the Home Secretary was empowered to make control orders but subject to the supervision of the court. *See* Prevention of Terrorism Act, *supra* note 7, at § 1(2). There was a further attack by the Home Secretary and the Prime Minister on the House of Lords following this decision. *See* Frances Gibb & Helen Rumbelow, “*I Will Put Safety of Britain Before Liberties*,” *TIMES* (U.K.), Dec. 21, 2004, at 22 (discussing criticism, by the Prime Minister and the Home Secretary, of the House of Lords’ ruling that indefinite detention of suspected terrorists without trial was unlawful.).

18. *See A & others*, 2 W.L.R. at 127-30. The foreign nationality of the appellants does not preclude them from claiming the protection of their European Convention rights. By Article 1 of the Convention (which has not been expressly incorporated), the contracting States undertook to secure the listed Convention rights “to everyone within their jurisdiction.” *See also* European Convention, *supra* note 5, art. 1. That Article applies to the appellants. The European Court has recognised the Convention rights of non-nationals. *See, e.g.*, *Conka v. Belgium*, [2002] 34 Eur. H.R. Rep. 54 (Feb. 5, 2002) (extending Convention rights to Slovakian Romany families seeking asylum in Belgium). This accords with domestic authority:

Habeas corpus protection is often expressed as limited to “British subjects.” Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic ‘no’ to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others.

Khara v. Sec’y of State for the Home Dep’t, Khawaja v. Sec’y of State for the Home Dep’t, 1 A.C. 74, 111 (H.L. 1984).

19. *See A & others*, 2 W.L.R. at 130; *see also* Arthur Chaskalson, *Human Dignity as a Foundational Value of Our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193, 201 (1998)

Lord Steyn, a member of the House of Lords and an earlier member of the EctHR, said:

Courts will sometimes have to balance the protection of the fundamental rights of individuals against the general interests of the community. Individuali[z]ed justice and the stability needed in any democratic society may be in contention. . . . Often courts will have to choose between competing values and make sophisticated judgments as to their relative weights.²⁰

Legislation to curb terrorism has not only raised the issue of discrimination, it has led to detention without trial,²¹ other types of control on the basis of an assessment of “risk,” which inevitably does not require the application of standards of proof,²² and to the suspension of parts of the Human Rights Act.²³ In a democracy, this is a problem for and of constitutionalism, and is experienced wherever constitutional government is in force.²⁴ Where there is no democracy, the courts will always be overruled in any such conflict.²⁵

In the realm of the Refugee Convention, the obligation that the States have assumed is not a solitary one; it serves as surrogate protection to be afforded only when the claimant cannot, at the time and for reasons within the Convention, seek protection within his own country.²⁶ It is supposed to be a burden shared by all signatories jointly. At least in a regional group, such as the

(quoting Lord Steyn, *The Constitutionalism of Public Law* 11 (May 1999) (unpublished paper)). See generally *Regina (Daly) v. Sec’y of State for the Home Dep’t*, 3 All E.R. 433 (H.L. 2001) (extending European Convention rights to prisoners).

20. *Id.* at 201-02.

21. See *A & others*, 2 W.L.R. at 107 (stating that the Anti-Terrorism, Crime and Security Act permitted detention of foreign nationals who were not suspected of posing any threat to the security of the United Kingdom).

22. See 670 Parl. Deb., H.L. 51 (6th ser.) (Mar. 10, 2005), at col. 872 (rejecting a burden of proof test in assessing “risk”).

23. See Prevention of Terrorism Act, *supra* note 7, § 4 (allowing for the derogation from Article 5 of the Human Rights Act in certain circumstances).

24. See Michael J. Perry, *Protecting Human Rights in a Democracy*, 38 WAKE FOREST L. REV. 635, 655-56 (2003) (explaining that countries with constitutional human rights protection protect the disadvantaged segment of their populations by providing a judicial forum to seek redress where a political process is not necessarily able to help).

25. See Aharon Barak, *The Judicial Power: The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 126-27 (2003) (arguing that the court’s power to protect human rights is an integral part of democracy).

26. See Refugee Convention, *supra* note 2, art. 1(A)(2). Article 1 defines “refugee” as a person who “is outside the country of his nationality and is unable, or owing to [fear of being persecuted for reasons of race, religion, nationality, membership of a

European Union ("EU"), this type of cooperation should surely be the norm, but, unfortunately, it has not always been so.

III. *THE COURT'S ROLE*

The courts have a challenge, and an opportunity, to protect the refugee as well as the legitimate²⁷ interests of the State, thereby keeping the spirit of hospitality alive by which countries are ultimately judged. An isolationist, non-distributive approach by the judiciary will not do. This area has been made such a quagmire by xenophobic societal elements and the panic reactions of media and politicians alike that the courts may be the only institution that can help. They can minimize the lottery involved for the refugee of where and when he has his application determined. The judges can, internationally,²⁸ move toward a harmonization²⁹ of approach by different countries. They can also, by their explanation of the democratic processes, calm the more extreme elements in society over what is not one issue, but a concatenation of many issues, which arouse passionate, and often uninformed, reactions.³⁰

IV. *THE U.K. SYSTEM*

In order to understand what the refugee encounters in the United Kingdom, it is necessary to give the reader some idea of how the U.K. system operates. The legislative framework is mainly composed of primary legislation embodied in the Acts of Parliament of 1969, 1971, 1988, 1993, 1996, 1998, 1999, 2002,

particular social group or political opinion], is unwilling to avail himself of the protection of that country" *Id.*

27. Was a "valuable contract" a legitimate interest? See Asylum and Immigration Act, 1996, c. 49 (Eng.), sched. 3, ¶ 1.

28. Harmonization was one of the main aims in the formation of the International Association of Refugee Law Judges in Warsaw in 1997. See Int'l Ass'n of Refugee Law Judges, Introduction, at <http://www.iarlj.nl/content/association/introduction.htm> (last visited Sept. 6, 2005).

29. The European Union ("EU") has made much progress in directives aimed at just such a result. See DALLAL STEVENS, *UK ASYLUM AND POLICY: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 419 (2004).

30. Julius Nyerere said: "The international community will be spending less money eventually if they help these countries to develop than if they wait to watch those horrible pictures on their television screens. It is part of any democratic process to explain what needs to be done." See Int'l Ass'n of Refugee Law Judges, *Refugee Law in the International Context and the Role of the IARLJ*, at <http://www.refugee.org.nz/Reference/IARLJ3-00Care.html> (last visited Apr. 19, 2005).

and 2004.³¹ There is also subsidiary legislation, which is comprised of statutory instruments — procedural rules and so on. Peculiar to this jurisdiction are the Immigration Rules, which bind the judiciary but not the Minister.³²

The principles of protection for those fleeing persecution as spelled out in the Refugee Convention of 1951³³ is observed, in some degree at least, in nearly every country in the world. One hundred and forty countries have acceded to it, although not every country that has done so has passed domestic legislation that rigidly adheres to the Convention's wording.³⁴ It would seem self-evident, therefore, that it is a desirable goal to make every effort to interpret the provisions of the Convention in the same way is desirable — the courts have expressed this view.³⁵ It is an equally desirable aim that effective *access* to protection should likewise universally be at best practice levels, as opposed to just a minimum standard.

Neither aim has been achieved. Difficult though it may be globally, it is no reason for not trying. If the governments of individual countries cannot, or will not do so, the courts have the opportunity to try to do so. This, of course, requires an understanding as well as the desire on the part of the courts just as much as willingness by governments to respect decisions of their courts, even where they run contrary to their own wishes.

It is beyond the scope of this Article to do more than touch on the part supranational tribunals (the European Court of Human Rights and the European Court of Justice in the case of Europe) play in this area.

31. See Immigration Appeals Act, 1969, c. 21 (Eng.); see also Immigration Act, 1971, c. 77 (Eng.); Immigration Act, 1988, c.14 (Eng.); Asylum and Immigration Act, 1993, c. 23 (Eng.); Asylum and Immigration Act, 1996, *supra* note 27; Human Rights Act, 1998, *supra* note 16; Immigration and Asylum Act, 1999, c. 33 (Eng.); Nationality, Immigration and Asylum Act, 2002, c. 41 (Eng.); Asylum and Immigration Act (Treatment of Claimants, etc.), 2004, c. 19 (Eng.).

32. See, e.g., Immigration Rules, 1994, 251, H.C. (Eng.).

33. See Refugee Convention, *supra* note 2, arts. 1(A)(2), 33.

34. See UNHCR, The 1951 Refugee Convention, at <http://www.unhcr.ch/1951convention/at50.html> (last visited Apr. 23, 2005) (discussing the state of the 1951 Refugee Convention, 50 years after its passage).

35. See *Horvath v. Sec'y of State for the Home Dep't*, [2000 C.A.] Imm. A.R. 205. ("It is obviously desirable that the approach to the interpretation of the Convention should, so far as possible, be the same in all countries which are signatories . . .").

A. Before 1993

In order to understand the evolution of protection in the United Kingdom it is necessary to bear in mind that until 1993 it was believed that there was no specific system which conformed to the Convention by which a refugee, who had been refused recognition in the country, could effectively challenge the decision by the State,³⁶ either in fact or in law.³⁷ When it was made possible, the scheme adopted was quite simply to protect the State against any accusation that it was not abiding by the Convention.³⁸ As will be explained in more detail later, the remedy of judicial review before the courts was available and of limited rights to challenge the decision before a tribunal.³⁹ It is the form of, and background to, that tribunal which it is now necessary to explain briefly.

Before 1905, there had been intermittent primary and secondary legislation to control immigrants coming for all reasons.⁴⁰ For at least seventy years, however, it does not seem that any control was maintained on aliens entering the United Kingdom, other than to require them to register their presence on arrival.⁴¹ From 1905 until the outbreak of World War I, a review by a tribunal of a ministerial decision refusing entry was possible for all aliens.⁴² Between the outbreak of war in 1914 and 1969, there was no such remedy.⁴³ In 1969, an Act established a right

36. The Secretary of State for Home Affairs ("SSHD") makes the decisions. See Immigration Act, 1971, *supra* note 31, pt. I § 1(4) (Eng.).

37. See *id.*

38. See generally U.N. Convention Relating to the Status of Refugees, *supra* note 2 ("Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.").

39. See, e.g., Immigration Act, 1971, *supra* note 31, sched. 5 (II), ¶ 11.

40. See, e.g., Registration of Aliens Act, 1836, 60 Will. IV, c. 11 (Eng.).

41. See, e.g., Peter Tompkins, *Immigration: Governments and Lawyers on a Collision Course*, 17 LOY. L.A. INT'L & COMP. L. REV. 891, 892-93 (1995) (discussing the history of immigration legislation in the United Kingdom).

42. See Aliens Act, 1905, c. 13 (Eng.).

43. See Aliens Restriction Act, 1914, c. 12 (Eng.). The power to deport rested in the Royal Prerogative and was confined to aliens. The Aliens Order 1953, Article 20(2)(b) gave power to deport on the grounds that it was conducive to the public good. See also Aliens Order Act, 1953, art. 20(2)(b) (Eng.). This power has been later extended in the 1971 Immigration Act and in such cases as *Chahal*. See Immigration Act, 1971, *supra* note 31, § 3(5)(b); see also *Chahal v. United Kingdom*, [1997] 23 Eur. H.R. Rep. 413; *Regina v. Sec'y of State for the Home Dep't Ex parte Sivakumaran*, 1 All E.R. 193 (H.L. 1988). For an early example showing the court's attitude toward protection

of appeal in respect of all persons who needed permission to enter or remain in the country to a separate tribunal called the Immigration Appellate Authority (“IAA”).⁴⁴ The appeal structure comprised two tiers. The first tier was presided over by a single, usually but not always, legally qualified person called an “adjudicator” sitting at four centers in the United Kingdom.⁴⁵ The second tier, called the Immigration Appeals Tribunal (“IAT”), sat in London.⁴⁶ The IAT hearings were generally before a legally qualified chairman and two experienced lay members.⁴⁷ Permission was required in order to appeal to the IAT.⁴⁸ At the time, there was no further direct appeal to the courts, although the remedy of judicial review was available.⁴⁹

The Immigration Act of 1969, which first established the IAA, was replaced by the Immigration Act of 1971. The 1971 Act put in place a more comprehensive structure for immigrants generally, but the appeal system remained the same.⁵⁰ An exception to the right of appeal is where the Secretary of State for Home Affairs certified exclusion or deportation on the grounds that exclusion is conducive to the public good.⁵¹ This was replaced by a statutory panel, the Special Immigration Appeals Commission, which is a Superior Court of Record in 2001 because of the events of September 11, 2001.⁵²

An appellant who was lawfully in the country would be able to attend and call evidence at the hearing.⁵³ If the appeal was

of the liberty of the subject, see IAN A. MACDONALD, *IMMIGRATION LAW AND PRACTICE* 480 (1995).

44. See Immigration Appeals Act, 1969, *supra* note 31.

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See Immigration Act of 1971, *supra* note 31.

51. See *id.* §§ 3(5)(b), 13(5), 15(4). He could have a hearing before a panel called the “three wise men,” whose decision was not binding on the minister. See *Chahal*, [1997] 23 Eur. H.R. Rep., ¶ 75 (noting that a deportation order was made on the grounds that the applicant’s presence was unconducive to the public good); see also *Regina v. Sec’y of State for the Home Dep’t Ex parte Sivakumaran*, 1 All E.R. 193 (H.L. 1988).

52. See Anti-Terrorism, Crime and Security Act, 2001, c.24, §35 (Eng.). The Commission hears appeals in respect of those detained as suspected international terrorists, the definition of which, in section 21(1) is a belief that the person’s presence is a risk to national security.

53. See *id.*

from the refusal of a visa, he could still call evidence at an oral hearing, but very rarely be able to be present.⁵⁴ An appellant who was in the country without permission (an illegal immigrant was someone who needed leave to enter and did not have it or had been guilty of some deception) could only exercise his right of appeal from outside the country.⁵⁵ It was this limitation that most affected the refugee, because the obligation is to consider the claim when it arises, which is the moment he arrives in the country and claims to be a refugee, and then, if he is, not to *refouler* him. If, as is usual, he does not have the right to enter, he is an illegal entrant and may forthwith be removed. As will appear later, it was this lack of an assured right to appeal to an (independent) competent authority that led to the enactment of the Asylum and Immigration Act of 1993.⁵⁶

The vast majority of appeals to the IAA, until the very early 1990s, concerned such matters as visitors, students, family reunions, businessmen and people of independent means, all coming for various periods from short term to permanent settlement.⁵⁷ In 1973, there were 6,262 appeals in all of which very few indeed involved refugee issues.⁵⁸ By 1997, there were 34,000 asylum appeals alone.⁵⁹ The numbers had risen sharply from the end of the 1980s to 1993 (when the 1993 Act was brought into force).⁶⁰ There was little increase by the year 2000, but by 2002, the numbers stood at 84,148, rising to 107,174 by 2004.⁶¹

In 1973, the Immigration Rules (Rule 58) recognized the right to make a claim under the Refugee Convention:

A passenger who does not otherwise qualify for admission should not be refused leave to enter if the only country to which he can be removed is one to which he is unwilling to go owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁶²

54. *See id.*

55. *See id.*

56. *See* Asylum and Immigration Act, 1993, *supra* note 31.

57. *See generally* UNHCR Statistics, at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics> (last visited Sept. 5, 2005) (providing overview of refugee statistics for 1994 through 2004).

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See* Immigration Act, 1971, *supra* note 31, Rule 58, § 3(2).

Originally, it was expected that most claims would be made on entry, not later — even though, if they did so, it was generally considered that they did not have a right of appeal as long as they remained in the country, even if port immigration officers strictly observed Rule 58 of the Immigration Rules.⁶³

Rule 58 was repeated in the Immigration Rules (HC 66 1990), and paragraph 134 added the words: “Any such claim is to be carefully considered in the light of all the relevant circumstances.”⁶⁴ However, even as early as June 7, 1972, the IAT heard an appeal by a young man from Sierra Leone who had gone to ground; when he was arrested, he claimed that he may be persecuted should he have to go back to Sierra Leone.⁶⁵ The Tribunal referred the matter to the U.N. Refugee Agency (“UNHCR”) (who declined to participate) and in its determination said, “[W]e accept that he might . . . on returning to his own country be subjected to some prejudice or discrimination but [he has] not . . . established a well-founded fear of persecution.”⁶⁶

If he had established a well-founded fear of persecution, it is conceivable — if the appeal was against a decision to make a deportation order — that the Tribunal could have exercised its discretion and found that deportation was not the right course on the merits. However, if the appeal had been on any other ground — other than a decision to deport — it is difficult to see what the Tribunal could have done at that time. The Convention was not directly enforceable in the United Kingdom, despite the United Kingdom’s accession to the Refugee Convention.⁶⁷

63. *See id.*

64. *Id.*

65. This was the first recorded decision of the Immigration Appeals Tribunal (“IAT”) and was decided under section 8(1) of the Immigration Appeals Act 1969.

66. *Id.*

67. The same situation arose in the case of the European Convention on Human Rights until the Human Rights Act 1998. In Australia the signing by the country of a Convention was held to amount to a representation and created a legitimate expectation that its provisions would be respected. *See Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 C.L.R. 273, 287 (“Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument.”). It may seem a little unsatisfactory that there have been cases in the United Kingdom where it was held that legitimate expectation gives rise to rights. *See Regina v. Sec’y of State for the Home Dep’t Ex parte Asif Mahmoud Khan*, 1 All E.R. 40 (C.A. 1985) (noting that a legitimate expectation gave rise to a right to challenge a decision of the Secretary of State).

The Tribunal, being a creature of statute, could only perform the tasks that its enabling Act allowed it to do.

An early example of an appeal against a decision to deport arose in *Secretary of State for the Home Department v. Yuksel and another*.⁶⁸ The adjudicator, who later became the Chief adjudicator, declared that, due to the unsettled situation in Cyprus at the time the case was current, the policy would be to not deport Turkish Cypriots to Cyprus, if their homes were in the Greek region.⁶⁹ He allowed the appeal on the grounds that it was not the right course on the merits.⁷⁰ That decision was reversed on appeal to the Tribunal.⁷¹ Until one looks at the adjudicator's determination, this result is very hard to understand. The outcome may, however, have been due in part to the way in which the adjudicator worded his findings, but the reason the Tribunal gave for its decision was that the SSHD had said that they would remove him at some future time.

What was before the Tribunal was not what may happen in the future, but what the intention was at the time;⁷² neither the declared policy nor Rule 58 was mentioned. As noted above, though, it had by then been brought into force under the 1971 Immigration Act.⁷³ Perhaps the facts did not go so far as to raise a Convention ground, and the SSHD had in fact made a "group" decision on humanitarian grounds.

In much later cases in the 1970s and 1980s, appeals on the grounds of (generally political) asylum were brought, and a number of them succeeded under the then current legislation.⁷⁴ Two examples were in June and July of 1988, by which time the IAA was receiving up to twenty such appeals a month! One of

68. [1976] Imm. A.R. 91, 94.

69. *See* Sec'y of State for the Home Dep't v. Yuksel and another, [1976] Imm. A.R. 91, 94.

70. *See id.*

71. *See id.*

72. *See* Nationality, Immigration and Asylum Act, 2002, *supra* note 31, §§ 77-78. Where an appeal was on the merits against removal and there is no present intention to remove, it is difficult to see how he could succeed, as he could not demonstrate that he will be required to go anywhere, let alone back to the country where he claims he may be persecuted. However under sections 77 and 78 of the 2002 Act a pending appeal does not preclude an order for removal or decisions of an intention to make a deportation order.

73. *See* Immigration Act, 1971, *supra* note 43.

74. *See id.* Immigration Rules are made under section 3(2) — that is the 1972 Immigration Rules, and the later rules HC 66, of January 1, 1983.

these appeals from Ethiopia failed because the appellant's story was not believed. The other appeal, from Somalia, succeeded.⁷⁵ But in both these cases, the claim to asylum had been made whilst the appellant was already legally in the country.⁷⁶ If the claim to asylum was made at the port of entry, the claimant would have been regarded, and possibly, treated as an illegal entrant without an in-country right of appeal; he would have been therefore refused entry.⁷⁷ He did still have a right to appeal, but only after he had already left!

It was for this last reason that the only remedy for anyone in that position was to make a swift application to the courts for judicial review. In such cases, the court would not retry the facts and would only overturn a decision the Minister could not reasonably have made on the facts before him; or if he failed to take something into account, which he should have done, or took something into account, which he ought not to have done.

In 1988, the House of Lords gave their judgment in *Regina v. Secretary of the Home Department ex parte Sivakumaran* ("*Sivakumran*").⁷⁸ This was the first important appeal to reach the House of Lords, which came about as the result of a decision to refuse asylum to six Sri Lankan Tamils. The House of Lords upheld the Minister's decision and in due course they were deported,⁷⁹ not, it may be said, without protest at the airport where the victims stripped off their clothing!

Sivakumaran and his five compatriots did, however, have a right to appeal once they got back to Sri Lanka. Their solicitors in the United Kingdom found four of the group and took up their cases making out of country appeals in respect of three. These appeals succeeded before the adjudicator, on the facts, and the Divisional Court ultimately dismissed a further appeal from this decision. The direction that the successful appellants

75. See *Amdemichael Gebremichael v. SSHD*, TH/22084/86 (5978); see also *Abdulfatah Said Ahmed v. SSHD*, TH/22755/86 (5967).

76. See *id.*

77. See generally *Regina v. Sec'y of State for the Home Dep't Ex parte Khawaja*, 1 All E.R. 765 (H.L. 1983) ("Summary removal powers are limited to those persons failing to come through immigration control at a designated port of entry and those entering in breach of a deportation order made against them.").

78. See *Regina v. Sec'y of State for the Home Dep't Ex parte Sivakumaran*, 1 All E.R. 193 (H.L. 1988).

79. See *id.*

be returned—at the Minister’s expense—to the United Kingdom therefore took effect, and they were duly returned.

The House of Lords held in *Sivakumaran* that the expression “well founded” calls for inquiry into whether the subjective fear of the claimant is objectively justified. Lord Keith, said:

[T]he general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country and does not extend to the allaying of fears not subjectively justified, however reasonable these fears may appear from the point of view of the individual in question.⁸⁰

The decision to be made was, basically, an objective one and was to be reached on an assessment of all the available evidence.⁸¹ The standard laid down was that of a reasonable likelihood.⁸²

Professor James Hathaway re-echoes that the term “fear” reflects a prospective risk, and although a subjective state of mind may be relevant, it is generally “trumped” by the objective assessment.⁸³ Notwithstanding what would seem to be obvious, the decision-makers in the United Kingdom continued, and to some extent still continue, to refer to the subjective state of mind in their determinations.⁸⁴

It was out of this series of events that *Vilvarajah v. United Kingdom* arose before the European Court of Human Rights.⁸⁵ The importance of the case in this context, decided by a majority, was that judicial review was an adequate remedy that satisfied the provisions of Article 32(2) of the Convention and the criteria set out in UNHCR Handbook paragraph 192(vi).⁸⁶

80. *Sivakumaran*, [1998] 1 All E.R. at 992.

81. See UNCHR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 195-205 (1992) [hereinafter UNCHR HANDBOOK] (setting forth procedural and evidentiary standards for determining refugee status).

82. See *Sivakumaran*, [1998] 1 All E.R. at 994.

83. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 65 (1991).

84. For a decision in the United States referred to by the House of Lords in *Sivakumaran*, see *I.N.S. v. Luz Maria Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that an alien seeking asylum does not have to prove it more likely than not that he or she will be persecuted in his or her home country); and in Canada, where the test was “a reasonable chance,” see *Adjei v. Minister for Employment and Immigration*, [1989] 57 D.L.R. (4th) 153 (holding that the test is whether there is a reasonable chance, or substantial grounds, for thinking persecution may take place).

85. See *Vilvarajah v. U.K.*, [1991] 14 Eur. H.R. Rep. (ser. A) 248.

86. See *Handbook on Procedures and Criteria for Determining Refugee Status under the*

Hitherto, it had been generally considered that neither the then current legislation and rules, nor judicial review, amounted to effective remedies sufficient to comply with Article 32(2) of the Convention to protect the United Kingdom from a potential breach of its obligations thereunder.⁸⁷ The decision in *Vilvarajah* that judicial review was a sufficient remedy therefore came as a surprise to the U.K. Government. Not expecting that outcome, the government had already prepared legislation giving specific and extensive rights of appeal from its decisions. The first bill, which failed because Parliament was prorogued, was later replaced by the 1993 Act, which came into force on July 1, 1993.⁸⁸

B. After 1993

The manner in which the 1993 Act introduced this right of appeal for refugees was by grafting onto the existing immigration appeal system — the IAA — and by providing that no-one should be removed from the United Kingdom if to do so may put the country in breach of its obligations under the Convention.⁸⁹ The Act then defined a *claim to asylum* and, in Section 2 noted: “Primacy of Convention: Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.”⁹⁰ The 1993 Act, therefore, did not give any right to claim “asylum” as such but simply provided that no one should be removed from the United Kingdom if doing so was likely to breach the Convention.⁹¹

Conditions for the treatment of refugees, fingerprinting,

1951 Convention and the 1967 Protocol relating to the Status of Refugees, Refugees Comm., U.N. Doc. HCR/IP/4/Eng./REV.1 (1979), revised Geneva, 1992, art. VI.

87. See *Vilvarajah*, 14 Eur. H.R. Rep. (ser. A), ¶¶ 123-27 (holding that judicial review was an adequate remedy under Article 32); see also Beate Rudolf, *Chalal v. United Kingdom*, 92 AM. J. INT’L L. 70, 73 (1998) (discussing a case which distinguished *Vilvarajah*, holding judicial review an insufficient remedy).

88. See Asylum and Immigration Appeals Act, 1993, *supra* note 31.

89. See *id.* § 2. This contrasts with Germany, where, in addition to the claim to recognition as a refugee under the Refugee Convention under all five grounds of Article 1A(2), there is a constitutional right also to claim *asylum* where the basis for the claim is persecution for reason of political opinion. See Grundgesetz [GG] [Constitution] art. 16(a) (F.R.G.) (establishing that persons persecuted on political grounds have the right of asylum). Compare Refugee Convention, *supra* note 2, Art. 1A(2).

90. See Asylum and Immigration Appeals Act, 1993, *supra* note 31, § 2.

91. See *id.* § 6, sched. 2, ¶¶ 8-9.

and housing were contained in the same Act, which also made it clear that the rights of appeal given in the Act would be suspensive,⁹² which judicial review was not. The hearing before the adjudicator re-examines the facts as well as the law from the start. The SSHD is entitled representation; in recent times, however, the SSHD has said that it is not represented in as many as seventy-two percent of appeals before adjudicators.⁹³ The appellant himself is able to appeal, give evidence, and be represented.⁹⁴ There are also quite generous facilities for legal assistance;⁹⁵ unfortunately, good representation is not always available in time to be of any real help.

As the number of appeals grew, not only did representation by the SSHD become less frequent, but the quality of the original decision deteriorated.⁹⁶ But it was a combination of tight time limits in the procedural rules, adjudicators being pressured into refusing adjournments,⁹⁷ and poor first decisions, which had posed the greatest threat to the value of the right to appeal. I will look at other aspects of this restrictive approach below.

At the same time both the primary legislation and the procedural rules became more and more complex and restrictive — and general welfare rights severely reduced. There was special

92. *See id.* As noted, technically at least judicial review is not suspensive in the United Kingdom; however, the 2002 Act covers the High Court's power to review. *See* Nationality, Immigration and Asylum Act, 2002, *supra* note 31, §§ 78, 104. But it was in the tight time limits imposed on the refugee and on the IAA, coupled with the poor first decisions, which have posed the greatest threat to the value of the right to appeal. I will look at other aspects of this restrictive approach below.

93. *See* Asylum and Immigration Appeals Act, 1993, *supra* note 31, § 8.

94. *See id.*

95. *See id.*

96. It is difficult to demonstrate this by specific citations. It was my own observation as a sitting immigration judge, but indirect support can be had from the numbers of appeals from adjudicators, which had to be returned for a rehearing — remittals — or were outright successful. In the twelve months leading up to November 2002 there were around 4000 remittals — IAA statistics. However, whilst supporting the view regarding quality, Robert Thomas is doubtful that the rate of successful appeals is any guide. The same doubt may apply to the decisions of adjudicators. *See generally* Robert Thomas, *Asylum Appeals: the Challenge of Asylum to the British Legal System in THE CHALLENGE OF ASYLUM TO LEGAL SYSTEMS* (Prakash Shah ed., 2005).

97. *See, e.g.*, Adjudicator Guidance Note 4, Feb. 2003, Delayed Promulgations (requesting that adjudicators do everything in their power to ensure that cases close on the hearing date). This was aimed at discouraging adjournments and delayed notification of decision to allow submission of further documentary evidence. One must assume that if the adjudicator did so delay he must have felt in the exercise of his judicial duties that it was necessary to do so.

legislation for asylum seekers put in place later.⁹⁸

It is unlikely that an adversarial type of appeal procedure is best able to correct any poor first decision;⁹⁹ this has been recognized at long last by a very recent IAT decision chaired by the President Sir Duncan Ouseley.¹⁰⁰ So the inadequacy of appeal is more greatly reflected when only one party is represented, and the other, possibly only poorly so. Added to this, there is little time and often a minimal chance to prepare properly, and the reliability of the country background data is of questionable accuracy.¹⁰¹ When the establishment of an appeal system was first examined, it was supposed that there would have been a careful initial decision and by the time it reached the IAT, another full hearing afresh before the adjudicator.¹⁰²

However, there was, as has been noted, the check on the first tier of appeal—albeit only with permission. The IAT was originally intended to give authoritative guidance to adjudicators.¹⁰³ The grounds for granting leave to appeal, apart from where political asylum or a matter of law was concerned, were envisaged to be “if it appears . . . that there is a principle of importance involved in the case, or there are other special circumstances.”¹⁰⁴ Otherwise, it was to be left to the Tribunal to decide on what basis an appeal would be entertained.¹⁰⁵ As noted, such an approach was premised on the basis that by the

98. See, e.g., *Immigration and Asylum*, 1999, *supra* note 31, at part VI, scheds. 8, 10; *Nationality, Immigration and Asylum Act*, 2002, *supra* note 31, § 55 (stating the powers of restriction under The Act did establish a special support system and a body to hear appeals called the Asylum Support Adjudicators).

99. The guidelines issued by the IAT that the adjudicator may only ask questions by way of clarification in the absence of a Home Office representative may be well intentioned but it is suggested that it would be far better to recognise that the system is not truly adversarial and retrain the judges in the IAT to conduct the hearings appropriately where no representative appears. See *Surendran v. Sec’y of State for the Home Dep’t* (21679) (HX/70901/98); see also Sir Stephen Sedley, *Asylum: Can the Judiciary Maintain its Independence?* (Working Paper, Int’l Ass’n Refugee L. Judges, World Conf. Apr. 21, 2005)

100. See *WN (Surendran, Credibility, New Evidence)*, [2004] UKIAT 00213, Dem. Rep. Congo (Immigration Appeal Trib.). It seems that the President disapproves of *Surendran v. Sec’y of State for the Home Dep’t* on the degree of intervention by an adjudicator especially where there is no representative from the SSHD—and very rightly so.

101. See *id.*

102. See Report of the Committee on Immigration Appeals, 1967 Cmmd. 3387, ¶ 114 [hereinafter the Wilson Report].

103. See *id.*

104. *Id.* ¶ 115.

105. See *id.*

time it had reached the Tribunal, the case would have been “fully and carefully considered twice.”¹⁰⁶

The grounds for an appeal to the IAT therefore were not specifically restricted at first, but generally it came to be accepted that any fundamental error, whether on the adjudicator’s approach to the facts or on an issue of law itself, would be enough.¹⁰⁷ Gradually, the IAT moved toward the approach of not granting leave to appeal (where no issue of law *per se* was present), even where there was an error, unless that error went to the root of the decision.¹⁰⁸

A specific restriction limiting an appeal to a point of law was introduced by the 2002 Act,¹⁰⁹ and this has compelled the IAT to look at a very much-restricted approach to the grant of leave to appeal.¹¹⁰ The effect of these restrictions finally has been to remove the right to judicial review of any refusal by the IAT to grant leave to appeal from the adjudicator.¹¹¹ Henceforth, judicial review is replaced with statutory review, first to the IAT and then, if refused the appellant may apply to a High Court Judge who will decide the application on papers.¹¹² It is a little early to know just what effect this change has made.

As of April 2, 2005, the two-tier system of appeals has been abolished and replaced with a single tier called the Asylum and Immigration Tribunal with Immigration Judges (“IJs”) (formerly the adjudicators), and Senior Immigration Judges (“SIJs”) (formerly Vice Presidents and legal members of the IAT).¹¹³ Although the IAT has been abolished and there is no longer an appeal from the IJ, so to speak, there is still the initial internal review by an SIJ.¹¹⁴ If that fails, the High Court judge (or a judge of the Court of Session in Scotland) looks at the applica-

106. *Id.* ¶ 114.

107. *See* Wordie Property Co. Ltd. v. Sec’y of State for Scotland, 1984 S.L.T. 345 (citing with approval the decision of the IAT in *Ahmed*, 0018 (Oct. 1997)).

108. *See* Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 GEO. IMMIGR. L.J. 1, 39 (1996).

109. *See* Nationality, Immigration and Asylum Act, 2002, *supra* note 31, § 101(1).

110. *See id.* § 101(05).

111. *See id.* § 101(3).

112. *See id.* § 101(2).

113. *See* Asylum and Immigration Tribunal-Procedure Rules, and Judicial Titles Order, at www.dca.gov.uk/consult/asylum/main-cp27-04.pdf (last visited Apr. 23, 2005) (setting forth rules of procedure for the Asylum and Immigration Tribunal).

114. *See* Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004, *supra* note 31, § 61(4), sched. 4 (Eng.).

tion again.¹¹⁵ An attempt by Parliament to remove the right of judicial review altogether met with such opposition from, among others, the higher judiciary in the House of Lords that it had to drop the proposal.¹¹⁶ If leave is granted, there will be a hearing before the SIJs.¹¹⁷

The main purpose behind the 2005 Act was to shorten the appellate procedure. This new legislation was introduced against a backlog of applications and appeals, which has, it seems, built up once again.¹¹⁸ The time lag between the original decision and the right to remove an unsuccessful claimant was considered too long.¹¹⁹ The perceived method was to remove one of the tiers of appeal — conflating both levels into one.¹²⁰ However, SIJs will have to sit in panels and “go on circuit” and, even though the system is designed to remove the remitted case, there is a real risk that as the pressures remain, cases will be over-listed before IJs.¹²¹ This, with the already severe restriction on adjournments (both in the legislation and psychologically on the IJ), and the need to reach the decision within ten days would not seem best calculated to produce sound decisions.

Refugees have been accused of “asylum-hopping.” It is not surprising considering hardly any two countries are alike in the systems that they employ to decide whether an individual falls within the Convention. The variations can be anything from detention and welfare benefits to tight time limits and no interpreters.¹²² These variations can lead to vast differentials in outcomes; and, this is not to speak of the inevitable disparities in the decision-makers themselves or the view taken of the safety of a country of origin or transit.

The variations in the interpretation of the Convention itself can also be wide, leading to applicants being rejected in one

115. *See id.* § 26.

116. *See* 419 *PARL. DEB.*, H.C. 124 (5th ser.) (2004).

117. *See, e.g.*, The United Kingdom Parliament, Evidence Submitted by Immigration Advisory Service, at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/276/276we07.htm> (last visited Apr. 23, 2005) (discussing the appeals process).

118. *See, e.g.*, 419 *PARL. DEB.*, H.C. 124 (5th ser.) (2004). Unofficially, I understand that there are up to 130,000 applications in the pipeline.

119. *See* 415 *PARL. DEB.*, H.C. (5th ser.) (2003), at 1659.

120. *See* Asylum and Immigration Tribunal-Procedure Rules, and Judicial Titles Order, *supra* note 113.

121. *See id.* at 8.

122. *See id.* at 9.

country, but not in another.¹²³ The individual aspects of this area have received attention from many writers, but what I focus on in this Article is how they have been dealt with in the United Kingdom and within a regional group, the EU.

The EU has increasingly sought to harmonize Directives and Resolutions.¹²⁴ The latest Directives and Resolutions deal with both minimum standards for qualification as refugee and procedures for granting and withdrawing refugee status.¹²⁵ It has from its inception been the aim of the IARLJ to encourage the judges themselves to harmonize the jurisprudence and employ consistent fair practices.¹²⁶ The IARLJ seeks to limit the range of the acceptable differences in both procedures and interpretation of the Convention.¹²⁷ It has set out to achieve these objectives by promoting a worldwide understanding of refugee law principles; encouraging reliance at all times on the rule of law by training, seminars, regional and global conferences, and, particularly, by advocating ongoing Working Parties.¹²⁸

The number of applications and appeals, and their accompanying backlogs, continued to rise at the Home Office and in the IAA.¹²⁹ To combat this, successive governments have introduced measures that make it difficult for people to leave their country. The first measure is visa regimes — not only for the country where the applicant seeks to stay, but also for the countries through which he will transit.¹³⁰ This regime has been ex-

123. See Explanatory Notes to Asylum And Immigration (Treatment Of Claimants, Etc.) Act, at <http://www.legislation.hmso.gov.uk/acts/en2004/2004en19.htm> (last visited Apr. 24, 2005) (explaining background and purposes of the Act, including the streamlining of the appeals process).

124. See Resolution of European Immigration Policy No. 30/11, [1992] O.J. C 313; see also Resolution of European Immigration Policy No. 21/12, [1992] O.J. C 337; Resolution of European Immigration Policy No. 2 3/1995, [1992] O.J. C 262; Joint Position No. 96/196/JHA, [1996] O.J. L 63.

125. See Council Directive No. 17/52, O.J. L 17/52 (2004) (concerning temporary or subsidiary protection).

126. See Int'l Ass'n of Refugee Law Judges, at <http://www.iarlj.nl/index.html> (last visited Apr. 23, 2005) (stating the purposes of the IARLJ).

127. See *id.*

128. See *id.*

129. See Asylum Statistics United Kingdom 2003, Nov. 2004, at <http://www.homeoffice.gov.uk/rds/pdfs04/hosb1104.pdf> (last visited Sept. 5, 2005) (documenting the increase in asylum applications in the United Kingdom).

130. See Immigration and Nationality Directorate of the Home Office, Appendix 1 to Law and Policy, 26/02/03, at http://www.ind.homeoffice.gov.uk/ind/en/home/laws__policy/immigration_rules/appendix_1.html? (last visited Sept. 5, 2005) (setting forth visa requirements for the United Kingdom).

tended to most countries outside the EU.¹³¹ Secondly, increased carriers' liability penalties force those who would seek to escape their country — whether for a sound Convention reason or not — to resort to lies, deceit, and forgery,¹³² and finally to pre-entry clearance immigration schemes in certain countries.¹³³ This year, six Czech Roma challenged this scheme in a case of refusal of entry clearance to come to the United Kingdom.¹³⁴ At the time, there had been an influx of Roma claiming asylum on arrival, and this scheme was clearly devised as another part of the visa and carriers' liability schemes to choke off the flow at the source.¹³⁵ The House of Lords held that such a regime was not contrary to the practice of Nations, but that U.K. immigration officers had implemented it at Prague Airport in a discriminatory manner, contrary to the Race Relations Act of 1976.¹³⁶ None of these steps stemmed the flow, nor have the measures taken once they arrive.

Since 1988, those measures have reduced the opportunities for an in-country appeal, limited access to welfare benefits in all forms except hospital treatment, and extended detention of asylum seekers in one form or another — the list is not exhaustive.¹³⁷ Not all outcomes may have been explicitly aimed at refugees, such as the limitation on the right of appeal from a decision to make a deportation order in 1988.¹³⁸

131. See, e.g., Joseph L. Scarpaci, *Globalization and Work: Economy, Remittances, and Joint Ventures in Post-Soviet Cuba*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 499, 508 (2004) (describing visa procedures in Cuba).

132. See Nationality, Immigration and Asylum Act, 2002, *supra* note 31, § 125.

133. See Guy S. Goodwin-Gill, *Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From the South Pacific*, 12 *PAC. RIM L. & POL'Y J.* 23, 29 (2003) (discussing the United Kingdom's pre-entry clearance practices in foreign airports); see also Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 *ADMIN. L. REV.* 253, 291 (2000) (criticizing current pre-entry control practices).

134. See Nikki Tait, *Screening of Roma in Prague Ruled Unlawful*, *FIN. TIMES*, Dec. 10, 2004 (discussing the House of Lords ruling that screening arrangements designed to stop Roma immigrants were unlawful).

135. See *id.*

136. See *id.*

137. See Frances Nicholson, *The Human Rights and Welfare Implications of the Asylum and Immigration Act and Related Measures*, at www.nottingham.ac.uk/law/hrlic/hrnews/oct96/asylum.htm (last visited May 16, 2005).

138. See Immigration Act, 1988, *supra* note 31, § 5. The principal act did not exempt asylum seekers from the restriction because at that time there was no express right of appeal. The exemption was added under the Immigration (Restricted Right of

In 1993, as already noted,¹³⁹ in addition to giving the asylum seeker a right to appeal, the Act also removed any obligation on local authorities to house him if he already had accommodation — however temporary — that was reasonable for him to occupy.¹⁴⁰ The Act also presented the potential asylum seeker, who was already lawfully in the country, with a dilemma: if he claimed asylum, his leave to remain, which may have been as a student, a visitor, or for medical treatment, could be curtailed.¹⁴¹ He needed to be sure of his ground to give up a right to be in the country for the chance of an asylum appeal. In practice, however, these appeals were taking so long to process and go through the appellate system that many took their chances. It did encourage them, however, to wait until the last minute, but this in turn reduced the likelihood that their stories would be believed. These powers were to be extended to family members in 1996.¹⁴²

A form of ministerial fiat brought about the practice of further restricting the rights of appeal, at least while in the country. The Minister could certify that the appeal lacked foundation, because in his opinion it did not raise a Convention issue, or was otherwise frivolous or vexatious.¹⁴³ The IAA had jurisdiction to decide whether the Certificate was justified and, if not, to send it back to be decided substantively.¹⁴⁴

The next turn of the screw came with the 1996 Act.¹⁴⁵ The

Appeal against Deportation) (Exemption) Order 1993 No. 1656 and extended by SI 2145/1996.

139. See HARVEY, *supra* note 9.

140. See Immigration Act, 1988, *supra* note 31, §§ 4-5.

141. See *id.* § 7(1). There was no appeal against curtailment and if a decision to deport had been taken he could be detained — despite his claim to asylum. Not many were detained at that time.

142. See Asylum and Immigration Act, 1996, *supra* note 31, sched. 3, ¶ 1.

143. See *Regina v. Sec'y of State for the Home Dep't Ex parte Mehari* [1994] Q.B. 474 (Eng. C.A.). Justice Laws held that the certificate could only be made in the case of alleged safe third countries.

144. The practical problem of this provision was due to very tight time limits imposed by the Procedure Rules. Courts had to be kept free for such cases but the Secretary of State for the Home Department estimates were rarely accurate, and other appeals had to be put back. Thus began the pernicious slide into a backlog from which the IAA has never recovered and which seems to have offered an added justification for further curtailments of appeals and tightened timetables.

145. See Asylum and Immigration Act, 1996, *supra* note 31. The United Kingdom was not alone. See, e.g., Resolutions produced under Title 6 Justice and Home Affairs Treaty of European Union (Feb. 1995); Draft Resolution on Minimum Guarantees

special restrictions that started in 1993 were extended. This time around, the Minister's Certificate could be on a number of additional grounds such as the appellant was to be returned to a "safe" country.¹⁴⁶ And because the decisions of the IAA made it virtually impossible to return anyone to Europe, the provisions were tightened yet further. If the adjudicator upheld the Minister's decision, there could be no further appeal.¹⁴⁷ There was also no in-country appeal if the applicant had come from, and would be returned to another Member State of the EU or some other countries, such as Canada.¹⁴⁸ The only in-country appeal was to test whether the preconditions to the certificate existed, nothing more.¹⁴⁹

Penalties for tangential criminal activities continued with, for example, the increase of penalties on carriers,¹⁵⁰ to powers of arrest without warrant, and thence to further restrictions on employment and powers to make orders further restricting an asylum seeker's rights to housing and other welfare benefits.¹⁵¹ Before passing on to subsequent primary legislation, the Minister made regulations concerning further restrictions on benefits and housing.¹⁵² These gave rise to robust judicial intervention. In a number of cases, the High Court and the Court of Appeal "step[ped] into the gap" in the mid-1990s, possibly, as Colin Harvey opines,¹⁵³ in an attempt to give effective access to the deter-

(Mar. 1995). There were also earlier Council of Ministers Resolutions on Manifestly Unfounded Applications in London on 30 November and 1 December 1992.

146. See *Asylum Order (Designated Countries of Destination and Designated Safe Third Countries)*, 1996, SI 2671 (Eng.) (citing the following as countries where there is in general no serious risk of persecution: Bulgaria, Cyprus, Ghana, India, Pakistan, Poland, and Romania).

147. See *Nationality, Immigration and Asylum Act, 2002*, *supra* note 31.

148. See *Asylum Order (Designated Countries of Destination and Designated Safe Third Countries)*, 1996, *supra* note 146 (citing countries where a "person who has been, or is to be, sent to such a country not entitled to bring or pursue an appeal so long as he is in the United Kingdom:" Canada, Norway, Switzerland, and United States).

149. See *Asylum and Immigration Act, 1999*, *supra* note 31, at § 2(2) (making further provisions as to the giving, refusing or varying of leave to remain).

150. See *Immigration (Carriers Liability) Act, 1987*, c. 24 (Eng.); see also *Asylum and Immigration Appeal Act, 1993*, *supra* note 31. It is said that neither could be described as having any effect on arrivals. If so then subterfuge must have been effective. Such measures anyway led to the vastly lucrative trade of people trafficking.

151. See *Immigration (Carriers Liability) Act*, *supra* note 150, §§ 6-11.

152. See generally *Anti-Terrorism, Crime and Security Act, 2001*, *supra* note 52 (using housing, housing benefit, homelessness, child benefit legislation and the attempted voucher system instead of cash).

153. See HARVEY, *supra* note 9, at 151.

mination process. Two decisions illustrate the court's intervention.¹⁵⁴

It should be noted that at the time decisions on whether to grant recognition as a refugee or not were then taking up to three years and more. As to the role of the judiciary, Colin Harvey's statement is also the question: What have the courts done?

C. Major Judicial Input

We have already seen how intervention by Judge Collins brought the wrath of the Home Secretary down on the judiciary.¹⁵⁵ Two cases in particular illustrate what happened when the courts intervened. First, in a case¹⁵⁶ arising out of the restrictions on housing benefit imposed by regulation Simon Brown LJ — as he then was, he is now Lord Simon Brown in the House of Lords — said the legislation was “so uncompromisingly draconian [that] Parliament could not have intended a significant number of genuine asylum-seekers to be impaled on the horns of so intolerable a dilemma . . .” either to their claims or to carry on in utter destitution.¹⁵⁷ Having struck down the subordinate legislation, Parliament promptly restored it in primary legislation.¹⁵⁸ It remains questionable whether this would stand up today after the Human Rights Act of 1998.

In *Regina v. Borough of Kensington ex parte Kehara & Westminster City Council ex parte A*, the court held that regulations purporting to remove the right of homeless refugees to be housed did not operate retrospectively to affect acquired rights.¹⁵⁹ The regulations denied housing to an impoverished group that did not have the means to improve its condition — homeless refugees were not legally allowed to work, and so they became part

154. See, e.g., *Regina v. Sec'y of State for the Home Dep't Ex Parte Thakrar*, 2 All E.R. 261 (C.A. 1974); *Regina v. Sec'y of State for Social Security Ex parte Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275.

155. See generally *Regina v. Sec'y of State for the Home Dep't ex parte Thakrar*, 2 All E.R. 261 (C.A. 1974).

156. *Regina v. Sec'y of State for Social Security ex parte Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275.

157. *Id.*

158. See *Asylum and Immigration Act, 1993*, *supra* note 31, § 11.

159. See *Regina v. Westminster City Council ex parte M,P,A and X*, 1 CCLR 85 (1997); see also *Lismane v. Hammersmith & Fulham LBC*, [1999] 31 HLR 427. The court in *Westminster City Council* held that the National Assistance Act could not be interpreted as depriving those in need without any remedy.

of what was eventually known as the “black economy.”¹⁶⁰

Two cases affecting the root of *any* determination further illustrate the judiciary’s role. Logically, *Karanakaran v. Secretary of State for the Home Department* (“*Karanakaran*”),¹⁶¹ was the worthy successor to *Regina v. Secretary of State for the Home Department ex parte Sandralingam & Ravichandran* (“*Ravichandran*”).¹⁶² *Ravichandran* decided two important issues. The first was that in asylum cases the facts are to be those applicable at the time of that hearing. The second was that the appellate structure, i.e. the IAA, is to be regarded as an extension of the decision-making process. Simon Brown LJ based his view on Section 8 of the 1993 Act, which was the foundation of appeals in asylum cases.¹⁶³

A rather different form of clash between court and State occurred in 1995. In *Muhammed A.S. Al-Mass’ari*,¹⁶⁴ the appellant was wanted in his home country, Saudi Arabia.¹⁶⁵ The United Kingdom proposed returning him to Yemen, and British-Yemeni treaties made it likely that Yemen would ultimately return him to Saudi Arabia.¹⁶⁶ Observers claimed that very lucrative contracts between the United Kingdom and Saudi Arabia hung on the outcome of the case.¹⁶⁷ Al-Mass’ari was recognized as a refugee. The United Kingdom then sought to remove him to a Caribbean island where it claimed he would be safe.¹⁶⁸ Chief Adjudicator Judge David Pearl refused to approve the transfer, and this further attempt at removal failed.¹⁶⁹

In *Karanakaran*, the Court was considering whether a Tamil who had fled persecution at the hands of the Tamil Tigers was safe anywhere in Sri Lanka.¹⁷⁰ Medley LJ said “[t]he civil stan-

160. See Robin Oakley, *Europe’s Tangle Over Immigration*, at <http://edition.cnn.com/SPECIALS/2001/immigration/stories/overview/> (last visited May 15, 2005) (discussing the ways criminals have taken advantage of the grim situation faced by many immigrants).

161. *Karanakaran v. Sec’y of State for the Home Dep’t*, 3 All E.R. 449 (C.A. 2000).

162. *Regina v. Sec’y of State for the Home Dep’t ex parte Sandralingam & Ravichandran*, [1996 Q.B.] Imm A.R. 97.

163. See *id.*

164. *Muhammed A.S. Al-Mass’ari*, Case HX/75955/94 (unreported).

165. See *id.*

166. See *id.*

167. See *id.*

168. See *id.*

169. See *id.*

170. See *Karanakaran v. Sec’y of State for the Home Dep’t*, 3 All E.R. 449, ¶ 3 (C.A. 2000).

dard of proof, which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones."¹⁷¹

In asylum appeals the evaluation is not one of hard facts. It requires knowledge of the claimant's own tale or what is accepted of it, and a whole range of other matters. The inquiry is essentially administrative. This follows the thinking of the UNHCR Handbook Part 2, which states that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared."¹⁷²

Australia's decision in *Minister for Immigration and Multicultural Affairs v. Rajalingam* ("*Rajalingam*") follows this line.¹⁷³ The hard truth for adjudicators or IJs, particularly in the United Kingdom, is that they are set in an adversarial system; they often receive inadequate help, or no help at all, from the parties or their representatives, and they are pressed from all sides for a fast decision based on what little information they have been given. Frequently, the original decision is inadequate as a result.

In *Abdi & another v. Secretary of State for the Home Department & another*, the House of Lords decided that the State was not obliged to make full disclosure of the information on which they based their decision.¹⁷⁴ At the time, the Rules seemed to be very specific about what the SSHD was obliged to serve upon the appellant, and the only substantive papers included in that list were the notice of decision, any documents referred to therein and the notes to any interview taken.¹⁷⁵ *Abdi* was one of the very rare (and probably unique) cases in which the IAA joined as a party to the appeal in order to argue that the adjudicators must be supplied with all relevant information in order to reach decisions of the sort that the UNHCR Handbook (and probably

171. *Id.* ¶ 16.

172. See UNHCR HANDBOOK, *supra* note 81, ¶ 196.

173. See *Minister for Immigration and Multicultural Affairs v. Rajalingam*, 93 F.C.R. 220, 253-63 (C.A. 1999).

174. See *Abdi & another v. Sec'y of State for the Home Dep't & another*, 1 All E.R. 641 (H.L. 1996).

175. See generally *Asylum and Immigration Appeals Act, 1993*, *supra* note 31; see also *Immigration and Asylum Appeals (Procedure) Rules, 2003*, SI 652 R.9 (Eng.).

Karanakaran) envisaged.¹⁷⁶ It was finally accepted that the definition of persecution is based on the internationally recognised framework of human rights and the objects of the Convention can best be found in its Preamble.¹⁷⁷

Islam Appellant v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal and another ex parte Shah both tackled head-on the knotty problems of a particular social group.¹⁷⁸ In those cases, Judge Sedley (as he was at the time) decided that two women from Pakistan who had fled their husbands and escaped to the United Kingdom would not be protected in Pakistan.¹⁷⁹ His decision was overturned in the Court of Appeal but restored in the House of Lords.¹⁸⁰ In restoring Sedley's decision, the House of Lords reviewed *Sanchez-Trujillo v. I.N.S.*¹⁸¹ and other cases from Australia and elsewhere.¹⁸² Lords Hoffman and Steyn held that women in Pakistan were a particular social group.¹⁸³ By virtue of the fact that they were female, their husbands suspected them of adultery and the State would not protect them.

In another landmark decision, *Regina v. Sec'y of State for the Home Dep't ex parte Adan*,¹⁸⁴ the combined issues of whether the Convention applied to a civil war situation where there was no

176. See *Abdi & another v. Sec'y of State for the Home Dep't & another*, 1 All E.R. 641, 644-51 (H.L. 1996).

177. See *Gashi v. Sec'y of State for the Home Dep't*, [1997 Imm. A.] I.N.L.R. 96. Arthur Helton was clear on this in 1983. His division of the U.N. perception was illuminating as a useful guide. He said that the United Nations had demonstrated its commitment to protecting many groups from persecution. This commitment takes two distinct forms. First, there are Conventions and resolutions condemning certain governmental activities, e.g., Genocide and second, there are provisions for the protection of those individuals, e.g., Refugee Convention. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948; see also Refugee Convention, *supra* note 2. Helton went on to note that there are many particular groups against which it outlawed persecution and by doing so presumably it would also wish that they be afforded sanctuary.

178. See *Islam Appellant v. Sec'y of State for the Home Dep't; Regina v. Immigration Appeal Tribunal and another Ex parte Shah*, 2 A.C. 629 (H.L. 1999).

179. See *id.*

180. See *id.*

181. See *Sanchez-Trujillo v. Immigration and Naturalization Service*, 801 F.2d 1571 (9th Cir. 1986).

182. See, e.g., *Applicant A. v. Minister for Immigration and Ethnic Affairs*, [1997] 71 A.L.J.R. 381; *Attorney-General of Canada v. Ward*, [1993] 2 R.C.S. 689.

183. See *Shah*, [1999] 2 A.C. at 652.

184. *Regina v. Sec'y of State for the Home Dep't Ex parte Adan*, 2 All E.R. 723 (C.A. 1997).

central government (in this case Somalia) and whether a return to Germany would likely result in the appellant's return to Somalia both arose. The case's appeal addressed matters which went to the root of Article 1(A)2 of the Refugee Convention.¹⁸⁵ Ultimately, the Court of Appeal held that there was a distinction between the "interpretation" of the Convention and its "application," and that *Regina* required the former.¹⁸⁶ The House of Lords concluded that it was impossible for the SSHD to certify that it was safe to return the appellant to Germany (or France, as there was a conjoined appeal relating to that country), because neither country interpreted the Convention in a manner that afforded protection where there was no central State.¹⁸⁷

The United Kingdom was a signatory to the European Convention for the Protection of Human Rights (1950), the European Convention for the Prevention of Torture and Inhuman or Degrading or Punishment or Treatment (1987), and to many other conventions thereafter.¹⁸⁸ It was not until 1968, however, that U.K. courts were empowered to enforce the Human Rights Convention directly by the Human Rights Act of 1998.¹⁸⁹ This Act enabled the Convention to be applied directly.¹⁹⁰ It was probably the Courts' focus on the human rights content of asylum appeals, as much as any other pressure, which led to this Act.

Not every country in the world has signed the 1951 Refugee Convention and its Protocol.¹⁹¹ Some retain their own ways of tackling these issues. Those with written constitutions often rely on domestic constitutional provisions to deal not only with Con-

185. *See id.* at 726.

186. *See id.* at 748 (Thorpe, L.J., dissenting).

187. *See id.* at 736. According to France and Germany, persecution sufficient to warrant protection had to be by the State or its agent.

188. *See, e.g.*, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Eur. T.S. No. 155; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Established Thereby, Feb. 1, 1989, Eur. T.S. No. 126.

189. *See* Human Rights Act, 1998, *supra* note 16; *see also* *Regina v Sec'y of State for the Home Dep't Ex parte Mehari*, 2 All E.R. 494 (Q.B. 1994). Prior to 1968, Conventions were not believed to be self-executing. *See* Helton, *supra* note 1, at 558-59 (looking at the position regarding the Protocol in the United States).

190. *See* Human Rights Act, 1998, *supra* note 16.

191. *See* States Parties to the 1951 Convention, at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63> (last visited Sept. 5, 2005).

vention issues but human rights as a whole.¹⁹² India is a good example of a country using this kind of “one stop” situation to prevent *refoulement* of those fearing persecution.¹⁹³ It could be that India is in fact developing its own brand of jurisprudence in this area with little or no interaction with the rest of the world.

Following hard on the heels of this Act was yet another legislative attempt to get the asylum system right — the Immigration and Asylum Act of 1999.¹⁹⁴ The major changes brought in by this Act were the regulation of human rights appeals and, in particular, establishing a “one stop” system so that entire matters could be dealt with in one single proceeding. These changes ensured that here would be no opportunity to trickle feed claims and thereby spin out the appeal process.¹⁹⁵

The Act of 2004 introduced the first fundamental change to the appeal system since 1969.¹⁹⁶ The need for two bites at the apple, judicial review and an appeal to the Court of Appeal and the House of Lords, has long been a matter of considerable debate.¹⁹⁷ It will be recalled why the Wilson Report¹⁹⁸ proposed a two-tier system in the first place. The Report assumed sound first decisions by the Home Office followed by a swift look from an independent adjudicator — probably at the port of entry — with limited rights of appeal to keep a tight rein on justice and the law.¹⁹⁹ None of those assumptions apply today.

But will rolling both levels into one and still retaining a review of the lower echelon decision make any real difference? It

192. See H. Knox Thames, *India's Failure to Adequately Protect Refugees*, 7(1) HUM. RTS. BRIEF 20 (2004).

193. See INDIA CONST. arts. 20-21; see also *National Human Rights Commission v. State of Arunachal Pradesh*, All IR 1235 (S.C. 1996). In 1998, the Indian government's reason for not acceding to the Refugee Convention was that India's record in dealing with refugees was good and that no Convention would make it better. The Human Rights groups and Commissions to whom I spoke did not agree that it was unnecessary to sign the Convention or at least draw up specific legislation.

194. See Immigration and Asylum Act, 1999, *supra* note 31.

195. See *id.* §§ 69, 74-77 (noting the combined effect of the safe countries and countries with whom special arrangements for return existed where there was also a human rights claim).

196. See Immigration and Asylum Act (Treatment of Claimants, etc.) (2004), *supra* note 31.

197. See Migration Watch UK, Asylum and Immigration Act 2004 Summary, ¶¶ 5-9, available at http://www.migrationwatchuk.org/pdfs/legal_8_8_Summary_of_Act04.pdf (last visited Apr. 19, 2005) (discussing the appeal process).

198. See *Wilson Report*, *supra* note 102.

199. See *id.*

will cut out remittals as such, but if the original decision is inadequate and the first line of appeal is flawed, then the original decision still needs to be put right. Leave to appeal has in the past run as high as fifty-eight percent or more.²⁰⁰ The danger is that it will not be. It is too soon to say just how effective this new round of legislation will be. The last IAT President took the view that “there is some force, having regard to numbers of claims devoid of merit, in cutting down opportunities for challenge.”²⁰¹

No one disputes that the majority of those claiming protection fall out of the narrow confines of both the Refugee and the Human Rights Conventions.²⁰² Often, they cannot be recognized as refugees, as the French delegate over-optimistically predicted in 1950, but many are given some form of alternative humanitarian protection.²⁰³ This allows the applicant to stay, but without rights of travel or immediate family reunion.

Immigration poses two main challenges to this country, and indeed to any country that is seen to offer a better standard of living than the one from which the immigrant comes. The first is management, and the second is integration. In addition, new factors like a combination of vast populations on the move due to violence, natural disasters and general population mobility must also be considered. On its own, the management of large numbers in itself presents little problem as a matter of immigration control, but the reality is that this management is also mixed up with refugees. How to disentangle the two in a transparent and morally defensible manner is what all this legislation is about. And still the question remains: Will the new legislation be any more effective in achieving its objective than its (failed) predecessors?

D. *Policies and the Refugee*

Let us return to Colin Harvey’s question, and to the Cana-

200. See Joint Council for Welfare of Immigrants, Briefing for the Second Reading on 17 Dec. 2003, at <http://www.apby64.pipex.com/pipex/bill2004/JCWIBriefing2004.doc>.

201. See Tribunal Appeal Receipts and Disposals, at <http://www.iaa.gov.uk/information/statistics.htm> (last visited Apr. 19, 2005).

202. See The Asylum and Immigration Tribunal, About Us, at <http://www.ait.gov.uk/aboutus/aboutus.htm> (last visited May 5, 2005) (discussing the main types of appeals heard by the Tribunal).

203. See Council Directive on the Obligation of Carriers to Communicate Passenger Data, O.J. L 261/24 (2004) (recognizing this specifically); see also *Wordie Property Co. Ltd. v. Sec’y of State for Scotland*, 1984 S.L.T. 345 (1983).

dian judge's observations. Firstly, how are the confrontational and party political natures of successive governments tackling this whole area? The question and its possible answers are more within the expertise of the political scientist. The question is only posed here because perhaps, by proceeding as they have done, successive governments have disabled themselves from adopting policies and laws with a reasonable chance of achieving more balanced results in immigration and asylum that do not include racial overtones and come at less cost.

Finally, this Article turns to the refugee himself. This is who Arthur Helton lived, and died, for. It is the refugee and his plight that this is all about. Why *do* refugees still come? Man has been on the move since he was first on earth. What has changed is the emergence of the nation-state, with its boundaries and, in many regions, something to guard.²⁰⁴ When the pressure is on, these states will look for more effective policing of their borders. Two other changes have come about: the day of mass fast travel has arrived, and so has the media.²⁰⁵ Neither natural disasters nor tyrannies are new, but news of them gets to us more quickly now, as do the victims — often in sudden and large numbers. As Nyerere remarked, we can “watch [the] horrible pictures on [the] television screen.”²⁰⁶

Visas police borders, but they also lock in those who manage to pass through and do not want to leave. “Draconian” (to use Lord Simon Brown’s word) measures may encourage people to seek out more hospitable countries, but judging from the continuing high level of immigrants and the public and political concern over the issue, it does not seem that either visa or carrier’s liability make a real difference in those countries with something they wish to guard. One might suspect that such measures would most affect those who are targets of the ruling regime in their own country. This reasoning would tend to support the

204. See, e.g., Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 *VAND. J. TRANSNAT’L L.* 693, 729 (2000) (noting that some of the means of dealing with the perceived threat of immigration strict prohibition of federal services to illegal immigrants, stronger policing of borders, and expeditious deportation of illegal immigrants).

205. See, e.g., Louise Nouratpournhs, *Doctors Condemn Government*, *MORNING STAR* (London), June 5, 2004, at 5 (publicizing a group of doctors’ disapproval of British immigration policy).

206. See Int’l Ass’n of Refugee Law Judges, *supra* note 30.

view that those who do manage to pass through such barriers are less likely to be those who fall within the parameters of either Convention.

It is not apparent that the system has prevented the entry of many suspected international terrorists, especially given the anxiety to pass further legislation that would detain such suspects without trial, and the former Metropolitan Police Commissioner's claim that up to 200 such suspects are already in the United Kingdom.²⁰⁷

CONCLUSION

Over the past twelve years, there have been six major legislative attempts to deal with what successive governments see as the "refugee problem." The Conservatives have made immigration a major issue in their election speeches so far — so if they form the next government we can expect yet further legislation, unless of course the present system succeeds to the satisfaction of all parties. The bad apple in the basket is, and always has been, the ability to remove. If there were no problems on that score the rest would be relatively easy. The new legislation is no doubt expected to help remove this problem by reaching faster decisions, but with a current backlog of over 130,000 at the original decision stage alone, optimism is at a premium.

Have the judiciary stepped into the gap? Have they narrowed the distance between the marginalization of the refugee and his right to have his case fairly heard? If they have, have they had any lasting influence?

The answers will vary depending on the window through which you are looking. My own answers come from a quarter-century of sitting on the immigration bench and having been concerned with the growth of the refugee appeal system since it took off in the mid 1980s. If the answers seem somewhat pragmatic, that is how I see where we are today.

We have seen that the higher judiciary have frequently been willing to step in to protect the interests of the asylum-seeker — detention, welfare benefits, housing and widening the scope of the Convention are all significant examples of this intervention.

207. See Sir John Stevens, *Forget Human Rights . . . Kick Out the Fanatics*, NEWS OF THE WORLD, Mar. 6, 2005 (claiming that there are probably 200 al-Qaeda terrorists in Britain).

In all but housing and welfare benefits, the decisions have been enduring.

When it comes to the conduct of the claim itself — the procedural aspects — I think that we can see the limits to which the courts will travel. On the one hand, the courts, recognizing the difficulties facing the claimant in proving his case, have made the burden lighter,²⁰⁸ have made sure that adjudicators give reasons for their decisions and have provided helpful guidelines in the approach to decision making.²⁰⁹ But they balked at imposing a burden of full disclosure on the SSHD.²¹⁰

Turning to the dedicated tribunal itself — the tribunal on which I sat — I am less sanguine. There are many factors involved. There is caseload, the lack of preparation time, time limits, both on the appellant to have his case ready and on the adjudicator to make his decision.²¹¹ These are also coupled with strict criteria for the grant of adjournments, both in the Rules and in Practice Directions made by the Chief adjudicator.²¹² Time can be too short to obtain reliable representation²¹³ or ready access to evidence. The IAT's novel step of making some decisions on fact binding, in all but name, on all immigration judges can certainly be helpful and is understandable, but as the Court of Appeal said, it "is foreign to the Common Law"²¹⁴ and must be subject to careful limitations. The unreliability of much

208. See *Regina v. Sec'y of State for the Home Dep't ex parte Sivakumaran*, 1 All E.R. 193 (H.L. 1988); see also *supra* notes 77-79 and accompanying text.

209. See *Regina v. Sec'y of State for the Home Dep't Ex parte Sandralingam & Ravichandran*, [1996 Q.B.] Imm A.R. 97; see also *Karanakaran v. Sec'y of State for the Home Dep't*, 3 All ER 449 (C.A. 2000); *supra* notes 155-156 and accompanying text.

210. See *Sec'y of State for the Home Dep't A Special Adjudicator v. Khalif Mohamed Abdi & another* [1994 C.A.] Imm. A.R. 402; see also *supra* note 161 and accompanying text.

211. See *Asylum and Immigration Tribunal Information*, at <http://www.ait.gov.uk/aboutus/faqs.htm> (last visited Apr. 19, 2005) (noting that an appellant must have his case ready within 10 days).

212. See, e.g., *Immigration and Asylum Appeals (Procedure) Rules, 2000*, SI 2333, R.31 (Eng.); *Immigration and Asylum Appeals (Procedure) Rules*, *supra* note 175, at R.13(1). These limit the powers to adjourn yet further through closure dates.

213. See, e.g., Laurence Saffer, *The Possible Impact of Legal Aid Changes*, 2 IAA (2004) (the Newsletter of the IAA Judiciary) (on file with author). He opines that there is likely to be a reduction in the already sparse representation and more clients representing themselves. In this often complex field where a person's life may be at stake this is a gloomy prospect. Furthermore, less and less of the more experienced practitioners are willing to act.

214. See *Shirazi v. Sec'y of State for the Home Dep't*, 2 All E.R. 602, ¶ 30 (C.A. 2004) (Sedley, L.J.).

country background material and the unseen pressures on the immigration judges are also further cause for concern.

A large number of asylum claims stand or fall on the reliability of the background material and the claimant's own story. There is little or no training of which I am aware for refugee claims decision makers at any level on how to approach fact-finding generally or specifically on how to evaluate country of origin and transit material. Likewise there is little guidance that I know of, on the approach to an assessment of credibility. Even if there was more as Sedley LJ said in a case in 2004:

173. Whether a person has acted dishonestly . . . is axiomatically a question of fact. Axiomatically, too, an appellate court will require to be satisfied that the fact-finding tribunal must have erred before interfering . . . this is so even . . . where the higher court has grave doubts The reticence is predicated on the assumption that the opportunity to observe a witness . . . gives . . . an advantage which cannot be replicated on appeal.

174. But an assumption is all it is. For most of us, experience relentlessly and depressingly undermines the lawyer's self-congratulatory belief that forensic practice sharpens to near infallibility the eye for prevarication . . . with luck, some objective piece of evidence will verify or falsify a witness's account . . . the very proximity of the tribunal to the witness can as readily mislead as reveal²¹⁵

Country background material is only as good as the observers and rarely catches the local practices and nuances, which can be all important. It is not, and probably never will be, exhaustive. Refugee status decisions are not in general essentially legal issues where hard empirical evidence is available—yet the decision can be the difference between life and death. The decision maker needs to have some capacity to be able to detect the gaps.

The dangers of lack of guidance and of the practice or near-binding Country Guidance Cases operated in an adversarial system such as prevails in the UK has come sharply into focus with the Australian decision in *NABD*.²¹⁶

The country issue raised in this case was whether Christian

215. *Niru Battery Manufacturing Co v. Milestone Trading Ltd*, [2004] QB 985, at 1006.

216. *Applicant NABD of 2002 v. Minister for Immigration and Cultural Affairs and Refugee Review Tribunal*, [2005] HCA 29 (Austl.).

converts were at risk on return to Iran. It was accepted that the appellant had converted to Christianity after leaving Iran, that he had “distributed pamphlets” and “had spoken to others privately.” A Government Report distinguished between “converts to Christianity who go about their devotions quietly and maintain a low profile are generally not disturbed” as opposed, presumably, to those it categorised as being involved in “aggressive outreach through proselytising by adherents of some more fundamental faiths.” The Refugee Review Tribunal did not accept he would fall into the latter category and therefore was not at risk.

A very strong minority (Judge McHugh and Judge Kirby) viewed this as a false process of reasoning, saying “[T]he Tribunal diverted itself from the critical issue in the case[, which] was whether the appellant had a well founded fear of persecution by reason of his religious beliefs.”

The unseen pressures are difficult to identify, much less prove,²¹⁷ but a serious example of the thinking was the attempt to widen the scope for dismissal of an immigration, not limited to misconduct, but potentially at least for non-compliance with practice directions.²¹⁸

217. Judge Stephen Reinhardt and Sir Stephen Sedley (with a commentary by Justice David Baragwanath NZ) examined the freedom from influence of judge (as well as other judiciary) in two most illuminating papers delivered at Conference of the IARLJ in Wellington New Zealand in October 2002. See generally Sedley, *supra* note 99. The U.S. immigration judge and Board Member is the more overtly vulnerable because he holds office at the pleasure of the Attorney General. But in the case of the fulltime UK immigration judge, although appointed for life is beset by overt and covert pressures and their independence is “correspondingly fragile.”

218. See ILPA Briefing, Asylum and Immigration (Treatment of Claimants, etc.) Bill: House of Lords – Committee Stage – Briefing on the Government Amendments to Clause 14, at <http://www.ilpa.org.uk/briefings/ILPAHLCCgovamendtscl14.htm> (last visited Apr. 23, 2005). The Asylum and Immigration Bill (Treatment of Claimants, etc.) Schedule 1(3)(1)(c) provided that a member of the new single tier Tribunal to be created under the Bill “shall hold and vacate office in accordance with the terms of his appointment (which may include provision for dismissal).” In the debate on the second reading in the House of Lords on March 15, 2004, the Lord Chief Justice roundly condemned this, saying:

I am unaware of such a proposal for ‘dismissal’ ever previously being included in a judicial officer’s terms of appointment [There was] concern[?] that this provision could be used as a justification for members of the new tribunal being dismissed because of dissatisfaction with their decisions [or even adjournment rate?] . . . because of the novel proposal that it should be a term of their engagement that they have to comply with practice directions.

Id. The provision was dropped!