

ASYLUM SEEKERS IN “LIMBO”

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“The refugee claimant cannot make use of his Convention rights unless he can have it determined whether or not he is a refugee...”

per Lord Phillips MR in *Saad* [2001] EWCA Civ 2008 at para 20

1. Although it is natural for lawyers to focus on *decisions*, made by the State, because they affect our clients, we must remind ourselves that sometimes the *absence* of a decision has major consequences too. The theme of this talk is that ‘limbo’ is a place no asylum-seeker should have to be in for too long. An undetermined status means an asylum seeker is technically not ‘here’ at all, has fewer rights than the rest of us, and is liable to serious detriment such as detention. The position is especially stark from the point of view of a person with (in fact) a good claim to asylum, who simply cannot get it determined one way or the other. The individual, as well as experiencing social disadvantages, also suffers from the uncertainty of not knowing whether his attempt to escape persecution is going to succeed or whether he is going to be sent back to face it again. Yet limbo is an endemic problem in our immigration system. The law potentially has much to say about this, but it is uneven and undeveloped. Here are a few examples of immigration limbo, in which the seeds that have already been sown are ripe for development.

(a) limbo caused by waiting for an asylum decision

2. In theory, asylum claims should be determined within a reasonable time: *R (S) v SSHD* [2007] EWCA Civ 546 at #51. See also Council Directive on minimum procedural standards (2005/85/EC) at article 10(1)(d).
3. In practice, however, delays by the SSHD in determining asylum claims have over the past 10 years or so become endemic. Delays of many years before even an *initial* decision is made have started to look commonplace. Such delays would surely not be tolerated as a matter of public law in any other decision-making context. Are they acceptable in the asylum context? If not, what is the consequence?

4. Long delay is inherently bad for a refugee because he should not in principle have to wait in 'limbo' for long periods before his status is recognised. In many cases it will be nothing short of "cruel" for the State to have allowed this to happen: see *S* [2007] EWCA Civ 546 per Carnwath at #59. It is also, clearly, bad for immigration control too.
5. The *Ravichandran* [1996] Imm AR 97 principle – originating from a purposive approach to human rights protection - is often turned against the asylum seeker in this context. During the period of an unreasonable delay conditions in the home state have often moved on: the asylum seeker may thus now have a weaker asylum claim and will be refused leave to enter even though – had the SSHD acted reasonably – he would already have it. Arguments that the asylum seeker had a "legitimate expectation" of having an asylum claim decided within a reasonable time (and therefore should now get leave to enter) are fraught with difficulties: see e.g. *Strbac* [2005] EWCA Civ 848 - but how much of the guidance in that case and in previous cases remain good law in light of *EB (Kosovo)* [2008] UKHL 41 [2008] 3 WLR 178? *EB (Kosovo)* has – I would suggest - changed the landscape on delay (just as *Huang* [2007] AC 11 [2007] 2 AC 167 has changed the landscape on art 8). See e.g. *Bhatti (Pakistan)* (17.2.09, CA).
6. Is there a relevant legal distinction between detriment-delay and other delay? This is likely to (continue to) be controversial.
7. Article 8 ECHR is of central relevance here. Delay affects both sides of the balancing exercise. *EB (Kosovo)* confirms that (1) the longer a person is allowed to stay in the UK but without status-determination, or any attempt to remove, the more likely it is that he will have developed a family life here, and the more intensely his private life will (inevitably) have been developed. Consider also the wide scope of *private* life (e.g. *Niemitz* (1992) 16 EHRR 97) – too often eclipsed in our art 8 jurisprudence by concentration on family life. And (2) the SSHD's reliance upon efficient and effective immigration control, usually regarded by Courts as a compelling factor in favour of removal of any person with no right under the Rules to be here, will, as time passes, come to look weaker and weaker.

8. In summary, the law on unreasonable delay is ripe for further development, via, for example: (1) art 8 appeals: if a delay means that it would now seem disproportionate to remove, where it previously might not have been, then an individual can argue that (a) removal should not now occur and (b) he should get leave to remain; (2) an interim mandatory order, in the context of a judicial review application, compelling SSHD to decide the claim, now; c.f. *FH and others* [2007] EWHC 1571. Obviously great care needs to be taken here (a) as to merits (the Court will be reluctant to tell the SSHD how to allocate resources) and (b) as to the consequences of success. (3) public law aspects e.g. (a) limbo-induced anomaly or discrimination, or (b) an unlawful policy - such as was found to have existed in *R (S) v SSHD* [2007] EWCA Civ 546 (c) development of the common law *Saad* approach, i.e. effective access to status-determination.
9. Are the EU institutions going to contribute further? (1) 2005/85/EC, art 10(d), as mentioned above says that the state must ensure that all applicants for asylum are given "*notice in reasonable time of the decision by the determining authority on their application for asylum*". (2) How is the UK facilitating the "*integration*" of a person who is (in fact) a refugee, in line with the clear purpose of the Qualification Directive (2004/83/EC, art 33)? (3) Note also, on 10.3.09 the European Parliament made a resolution stating inter alia that it "*...welcomes the Commission's intention to amend the Asylum Directive and stresses that the common asylum procedure should provide for clear, uniform and reasonable time limits for the authorities to decide on an asylum application, thus avoiding long and unwarranted waiting periods which could have negative consequences for asylum seekers' health and well-being*".

(b) limbo caused by lengthy detention

10. Detention has become a normal – and for many an inevitable - part of the modern UK asylum procedure, often at facilities like the ones at Oakington and Harmondsworth, where new asylum claims are 'processed'. Legislation gives the SSHD wide powers of detention. See IA 1971, Sch 2, para 16. Temporary detention at Oakington, pending the resolution of a simple asylum claim, was given the green light by the House of Lords in *Saadi* [2002] UKHL 41, [2002] 1 WLR 3131, and the subsequent Grand Chamber ECtHR decision on 29.1.08. The ECtHR said this is

lawful insofar as it seeks to prevent “unauthorised” entry pursuant to ECHR art 5(1)(f). Does the same logic apply where the asylum claim takes longer to process and an asylum seeker with a bona fide claim has been on temporary admission for a substantial period?

11. Note the strong common law background along with art 5 ECHR: no one should be deprived of their liberty without good cause. *Tan Te Lam* [1999] 3 WLR 328, 341F; *Exp Singh* [1984] 1 WLR 704. Two (separate) questions should be asked: (a) is there a *power* to detain at all? (b) If so, has the power been properly *exercised*?
12. How can asylum-seekers seek to avoid detention? Limits imposed by the Courts, recognising (in effect) the force of the limbo point. See *Hardial Singh* [1984] 1 WLR 704 at 706; *Khadir* [2006] 1 AC 207.

(c) limbo by being kept ‘in the dark’

13. The SSHD might decide an individual’s case (or take other action against him) without having (a) published, (b) told him about, or (c) considered her *own* policy. This is a form of limbo (although the individual doesn’t realise it at the time). There is strong case-law on (a) the potential for unfairness in a situation where SSHD is failing to apply a policy to a given state of affairs at the relevant time where that policy should benefit the individual (*Rashid* [2005] EWCA Civ 744) – although the Court’s jurisdiction to intervene and neutralise the injustice appears to be reserved for “extreme” cases of conspicuous unfairness: see *S, H and Q* [2009] EWCA Civ 192 at #45; and (b) the duty of the SSHD to publish and make accessible her own policies (see e.g. *Salih* [2003] EWHC 2273 (support) and *Amirthanathan* [2003] EWCA Civ 1768 [2004] INLR 139 (detention)). Especially in a HRA art 5 or 8 context, where any interference with a protected right must be “prescribed by law” (The ECHR has accessibility and foreseeability standards for this requirement).

(d) limbo after the asylum-determination process

14. The SSHD may of course not agree that an individual is a refugee, and appeals may not succeed. But that is not the end of the story. An individual might yet not leave the UK. There may be a variety of different possible reasons for that. In many cases

the problem is that, whether or not the individual faces *persecution* in his home country, he cannot now *return* there. That might for example be related to a discriminatory or restrictive entry policy on return, to intolerable general conditions in the country of origin, or other practical obstacles to making the journey (e.g. Israeli border police refusing entry to returning Palestinians to Gaza; c.f. the Eritrean problem in *Tekle* [2008] EWHC 3064).

15. Where the impossibility of removal is in doubt, it may become more apparent, the longer the SSHD declines to attempt removal. Consider whether a FOI request, relating to how many successful removals to the relevant country have been carried out within (say) the previous year, might be fruitful.
16. Is this form of limbo something that can be brought to an end by a JR?

consequences of limbo

17. If not detained, asylum seekers in limbo are typically given temporary admission. This is a type of quasi-status given to those who are liable to be detained pending removal. Those who are temporarily admitted are (by virtue of a legal fiction) deemed not to have entered the UK. See IA 1971 s 11. They are almost not really here at all: almost non-persons. They are excluded from the rights given to those who have leave to enter, and, of course, from the rights given to refugees. On the other hand, they *are* lawfully present for certain social security purposes: *Szoma* [2006] 1 AC 564.
18. They have substantial disadvantages which those with status do not have. They can be subjected to intrusive conditions, e.g. restricting them as to where they can live, or disallowing them from being employed. They can be required to 'report' to the police or SSHD regularly. Breach of such conditions is a criminal offence which can result in a fine and imprisonment for 6 months: IA 1971 s24(1)(e).
19. There have been disagreements about the original purpose of temporary admission. But whatever Parliament's precise intention was, it is strongly arguable that it was never envisaged that people could live in the UK for years on end, get married, have

children, etc. and still all the while be on something called temporary admission. *Khadir* [2005] UKHL 37 [2006] 1 AC 207 and *S (sub nom GG)* [2006] EWCA Civ 1157 (the 'Afghan hijackers case') deal to some extent with this: once the point is reached where there is no realistic prospect of removal, then temporary admission should stop, and leave to enter should be granted. Certainly, the TA regime is "harsh" (see *Khadir*, per Lord Brown at #34). But is this all there is to say?

20. In *MS (Ivory Coast)* [2007] EWCA Civ 133, the Court of Appeal referred to "no man's land" – a situation in which a woman had been left by the SSHD's argument, which had succeeded before the AIT, that her art 8 ECHR claim should fail because the state had no present intention of removing her. The Court ruled that the AIT should, instead, have considered whether removal would breach the ECHR *if removal were to take place* - precisely because, if it didn't ask that question, and the Appellant had no ECHR adjudication as a result, she would be left in limbo, without status. (Where a person succeeds under a human rights claim he must be given leave to enter. Temporary admission thereafter is not good enough: see *S* [2006] EWCA Civ 1157). In a way one might suggest that the Appellant's limbo in that case was not as bad as the limbo faced by many asylum seekers – at least she had an undertaking that she was not to be removed. Part of the limbo experience for others waiting for decisions is the continuing fear of persecution but experienced in a context of not (yet) having been accepted as genuine, and also fearing, from day to day, that one might at any moment be sent back to face it.
21. *MS* and *S* (2006) are important – they show that the *Saad* [2001] EWCA Civ 2008, [2002] Imm AR 471 approach applies to *ECHR* claims as well as to *asylum* claims. Non-removability *requires* the grant of status. Further, *Saad* makes clear, in effect, that the State has an adjectival duty to *determine* whether a person has refugee status or not. Otherwise it will be in breach of its international law obligations to treat refugees in the way that it has agreed to do. It's hard to see why the Courts should not be willing to scrutinize the *adequacy* of the determination process put in place, wherever it breaks down or operates unfairly.

22. Drawing the strands together, might one simply propose that there must logically come a point where SSHD has kept a person in limbo for so long that some form of leave (even if temporary) must in fairness now be granted?
23. A topical issue is the right to work – often denied to asylum seekers: but see HC 395, para 360 and 360A, which deal with the possibility of applying for permission to work where there has been delay by the SSHD.
24. Look out – in this regard - for 2 forthcoming appeals in the Court of Appeal: *Tekle* [2008] EWHC 3064, and *Min Min* [2008] EWHC 1604. The two cases are to be heard together, in April. The cases involve the nexus between the right to work and private life under art 8 ECHR, in a particularly interesting and important context. In particular, (1) how can the Court identify if there is a point, after a period of delay attributable to SSHD, at which a policy, limiting access to the labour market so as to discourage economic migration – a policy which many will say the government is entitled to have - might create such intolerable and detrimental limbo for individuals that it becomes a disproportionate interference with ECHR art 8? And (2) what is the scope of Directive EC/2009/9, art 11, which deals with giving access to the labour market to a person who has made an “application for asylum” (which has not been determined after a year) – does that relate only to initial applications, or also to subsequent, fresh claims that are considered by SSHD under para 353 of the Rules?

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