
GARDEN COURT
CHAMBERS

The Nationality and Borders Act 2022 and third country removals

5th October 2022

Raza Halim, Garden Court Chambers

New Removal Powers

Schedule 4

A person can be removed to a third State if it is a place:

- Where a person's life and liberty are not threatened for a Refugee Convention reason;
- Where a person will not be removed elsewhere other than in accordance with the Refugee Convention;
- To which a person can be removed without their Article 3 ECHR rights being breached; and
- from which a person will not be sent to another State in contravention of their Convention rights.

The person must not be a national or citizen of the State in question.

Schedule 4 to the NBA 2022 intersects with the existing certification powers in Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AI(TC)A 2004).

New Removal Powers

- Countries listed in Parts 2 and 3 of Schedule 3 to the AI(TC)A 2004 are presumed (apparently irrebuttably) to be places where a person's life and liberty are not threatened for a Refugee Convention reason and where a person will not be removed elsewhere other than in accordance with the Refugee Convention.
- It is also (rebuttably) presumed that they are countries to which a person can be removed without their Article 3 ECHR rights being breached, and from which a person will not be sent to another State in contravention of their Convention rights. The countries listed in Part 2 currently include all EU and EEA countries and Switzerland. Currently, no countries are listed in Part 3.
- Countries listed in Part 4 of Schedule 3 to AI(TC)A 2004 are presumed (again apparently irrebuttably) to be places where a person's life and liberty are not threatened for a Refugee Convention reason and where a person will not be removed elsewhere other than in accordance with the Refugee Convention. There is no presumption with respect to breaches of Convention rights in those countries. Currently, no countries are listed in Part 4.

New Removal Powers

Schedule 4 makes various amendments to schedule 3 to the AI(TC)A 2004.

- In particular, it abolishes the limited out of country appeal rights that previously existed for those certified under that schedule.
- It does not provide for the UK to process a person's asylum claim in a third country. Rather, it simply provides for the summary removal of an asylum-seeker to a third country.
- Once they are removed, their asylum claim will be dealt with under the third country's laws, and the UK will not necessarily play any continuing role.
- Another striking feature of schedule 4 is that it does not require that a person's asylum claim first be declared inadmissible before they can be removed to a third State. In principle, it allows the SSHD to remove any asylum-seeker to any third State that meets the conditions.

New Removal Powers

- At present, the SSHD's policy is to select asylum-seekers for removal to Rwanda only if their asylum claims are inadmissible and they have made a "dangerous journey" to the UK on or after 1 January 2022

    - (Source: Inadmissibility: safe third country cases, 28 June 2022 https://www.gov.uk/government/publications/inadmissibility-third-country-cases/inadmissibility-safe-third-country-cases-accessible 0

- However, schedule 4 does not require her to do so only on this basis: it gives her *carte blanche* to remove any asylum-seeker to any third State that will accept them, with no statutory preconditions.

Inadmissibility

Prior to 28 June 2022, an asylum claim could be held inadmissible under paragraphs 345A-D of the Immigration Rules. The criteria for holding a person's claim inadmissible were:

- They have been recognised as a refugee in a safe third country and can still avail themselves of that protection;
- They otherwise enjoy "sufficient protection" in a safe third country, including benefiting from the principle of non-refoulement;
- They could enjoy "sufficient protection" in a safe third country, including benefiting from the principle of non-refoulement, because
  - They have already made an application for protection to that country;
  - They could have made an application for protection to that country, but did not do so and there were no exceptional circumstances preventing such an application being made; or
  - They have a connection to that country, such that it would be reasonable for them to go there to obtain protection.

Inadmissibility

The NBA establishes a new inadmissibility regime in sections 80B-C of the NIAA 2002 as inserted by section 16 of the NBA 2022.

This came into force on 28 June 2022 and is materially different from the paragraph 345A-D regime. In short, a person's asylum claim is to be treated as inadmissible if one of the following five conditions applies:

- Condition 1. They have been recognised as a refugee in a safe third State and remain able to access protection under the Refugee Convention in that State;
- Condition 2. They have otherwise been granted protection in a safe third State as a result of which they would not be sent from that State to another State otherwise than in accordance with the Refugee Convention, or in contravention of their rights under Article 3 ECHR, and they remain able to access that protection in that State;
- Condition 3. They have made an asylum/protection claim in a safe third State which has not yet been determined or has been refused;
- Condition 4. They were previously present in and eligible to make an asylum/protection claim to a safe third State, it would have been reasonable to expect them to make a claim, and they failed to do so; or
- Condition 5. In their particular circumstances, it would have been reasonable to expect them to have made an asylum/protection claim to a safe third State instead of making it in the UK.

Inadmissibility

A ”safe third State” for the purposes of the section 80B-C regime is defined as a State where:

- the person’s life and liberty are not threatened by reason of a Refugee Convention reason;
- from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention or in contravention of their Article 3 ECHR rights;
- and in which a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention.

Inadmissibility

- If a person's asylum claim is inadmissible, it ordinarily will not be considered.

- A decision to declare a claim inadmissible is not a decision to refuse the claim for the purposes of section 82(1) NIAA 2002, and accordingly no right of appeal arises.

- The SSHD has a discretion to consider the asylum claim if she determines that there are exceptional circumstances in the particular case that mean the claim should be considered, or in such other cases as are provided for in the Rules.

Practical Points

- The current procedure is that the SSHD serves an asylum-seeker with a “Notice of Intent” soon after their screening interview, and they are given 7 days (if detained) or 14 days (if not detained) in which to make representations as to why they should not be removed.
- It is critical that they obtain legal representation during this time, and that their representatives urgently write to the SSHD asking for more time to make representations.

Practical Points

The first priority: ascertain why your client did not claim asylum in a safe third country, so that you can make representations as to why (as the case may be) it was not "reasonable to expect" them to claim asylum there or there were "exceptional circumstances" that prevented them doing so.

Common reasons include:

- They were under the control of agents/traffickers until they reached the UK;
- They were trafficked to the third country and were fearful of their traffickers in that country;
- They were fearful that they could be targeted by agents of persecution in the third country (for instance, many Albanians fleeing criminal gangs are fearful in Schengen Area countries because Albanians have visa-free access to the Schengen Area);
- They were destitute and homeless in the third country;
- They were abused by police/immigration officials/private individuals in the third country;
- They did not speak the language in the third country;
- They did not know how to claim asylum;
- They had family members in the UK;
- They had heard that the UK respected human rights and that other European countries did not.

Practical Points

- Not yet clear how the “reasonable to expect” and/or “exceptional circumstances” tests will be interpreted in practice

- Practitioners should for the time being argue that these tests are subjective, not objective, and depend on the person’s state of knowledge at the time.

- Medico-legal evidence will be required in virtually every case.
  - It is important not only for diagnosis of conditions but also potentially relevant to their decision-making, understanding of the situation, and assessment of risk while they were in the safe third country.

- In every case it will also be essential to prepare a strong argument as to why Rwanda (or any other proposed country of removal) is not a safe third country for the particular asylum-seeker and why their human rights would be breached there. Again, medico-legal evidence about their particular vulnerabilities will be crucial.

Accelerated detained appeals

05 October 2022

Hannah Lynes, Garden Court Chambers

Where are the new provisions found?

Section 27 of the Nationality and Borders Act 2022

Accelerated detained appeals

(1) In this section "accelerated detained appeal" means a relevant appeal (see subsection (6)) brought—
- (a) by a person who—
  - (i) was detained under a relevant detention provision (see subsection (7)) at the time at which they were given notice of the decision which is the subject of the appeal, and
  - (ii) remains in detention under a relevant detention provision, and
- (b) against a decision that—
  - (i) is of a description prescribed by regulations made by the Secretary of State, and
  - (ii) when made, was certified by the Secretary of State under this section.

(2) The Secretary of State may only certify a decision under this section if the Secretary of State considers that any relevant appeal brought in relation to the decision would likely be disposed of expeditiously.

(3) Tribunal Procedure Rules must secure that the following time limits apply in relation to an accelerated detained appeal—
- (a) any notice of appeal must be given to the First-tier Tribunal not later than 5 working days after the date on which the appellant was given notice of the decision against which the appeal is brought;

- (b) the First-tier Tribunal must make a decision on the appeal, and give notice of that decision to the parties, not later than 25 working days after the date on which the appellant gave notice of appeal to the tribunal;

- (c) any application (whether to the First-tier Tribunal or the Upper Tribunal) for permission to appeal to the Upper Tribunal must be determined by the tribunal concerned not later than 20 working days after the date on which the applicant was given notice of the First-tier Tribunal's decision.

Where are the new provisions found?

...cont. Section 27 of the Nationality and Borders Act 2022

(4) A relevant appeal ceases to be an accelerated detained appeal on the appellant being released from detention under any relevant detention provision.

(5) Tribunal Procedure Rules must secure that the First-tier Tribunal or (as the case may be) the Upper Tribunal may, if it is satisfied that it is the only way to secure that justice is done in a particular case, order that a relevant appeal is to cease to be an accelerated detained appeal.

(6)For the purposes of this section, a "relevant appeal" is an appeal to the First-tier Tribunal under any of the following—

(a) section 82(1) of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims);

(b) section 40A of the British Nationality Act 1981 (appeal against deprivation of citizenship);

(c) the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (S.I. 2020/61) (appeal rights in respect of EU citizens' rights immigration decisions etc);

(d) regulation 36 of the Immigration (European Economic Area) Regulations 2016 (S.I. 2016/1052) (appeals against EEA decisions) as it continues to have effect following its revocation.

(7) For the purposes of this section, a "relevant detention provision" is any of the following—

(a) paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal);

(b) paragraph 2(1), (2) or (3) of Schedule 3 to that Act (detention pending deportation);

(c) section 62 of the Nationality, Immigration and Asylum Act 2002 (detention of persons liable to examination or removal);

(d) section 36(1) of the UK Borders Act 2007 (detention pending deportation).

...cont. Section 27 of the Nationality and Borders Act 2022

(8) In this section "working day" means any day except—

(a) a Saturday or Sunday, Christmas Day, Good Friday or 26 to 31 December, and

(b) any day that is a bank holiday under section 1 of the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where the appellant concerned is detained.

(9) Regulations under this section are subject to a negative resolution procedure.

Who does the detained accelerated appeals procedure apply to?

- A person who:
  - is detained under any of the provisions set out at Section 27(7) NBA
  - has made a relevant appeal to the FTT i.e. any appeal listed at Section 27(6) NBA. This includes:
    - Protection/human rights appeals
    - Appeals against deprivation of citizenship
    - Appeal rights in respect of EU citizens' rights immigration decisions
    - Appeals against EEA decisions
  - is appealing a decision of a description prescribed by regulations made by the SSHD (Section 27(1)(b)(i) NBA) and that has been certified by the SSHD (Section 27(1)(b)(ii) NBA)

Time limits

- Section 27(3) provides that:
  - Any notice of appeal must be given to the First-tier Tribunal not later than **5 working days** after the date on which the appellant was given notice of the SSHD's decision
  - The FTT must make and give notice of its decision no later than **25 working days** after the date on which the appellant gave notice of appeal
  - Any application (whether to the First-tier Tribunal or the Upper Tribunal) for permission to appeal to the Upper Tribunal must be determined by the tribunal concerned not later than **20 working days** after the applicant gives notice of its application

Safeguards?

- Section 27(2) NBA "The **Secretary of State may only certify a decision** under this section if the Secretary of State considers that any relevant appeal brought in relation to the decision **would likely be disposed of expeditiously**"

- Section 27(5) NBA "Tribunal Procedure Rules must secure that the First-tier Tribunal or (as the case may be) the Upper Tribunal may, **if it is satisfied that it is the only way to secure that justice is done in a particular case,** order that a relevant appeal is to cease to be an accelerated detained appeal.

Return of the detained fast track procedure?

- Lord Chancellor v Detention Action [2015] WLR 5341
  - Court of Appeal upheld High Court finding that the Fast Track Rules 2014, which governed appeals to the FTT in DFT cases were unlawful
  - Lord Dyson MR: "**the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases**… The system is therefore structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention."

Nationality and Borders Act 2022

5 October 2022

Mark Symes, Garden Court Chambers

New legal provisions

- Nationality and Borders Act 2022 ("NBA 2022") – s87
  - commences validity of pre-commencement nationality deprivation decisions
  - empowers new Rules re visa penalties for countries posing risk to international peace and security etc
- NBA 2022 s87 also provides for 28 June 2022 entry into effect of new Refugee Convention regime, changes re clearly unfounded appeals and visa penalties re uncooperative countries
- The Nationality and Borders Act 2022 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2022 – further provisions entering force on 28 June 2022 (most of the nationality regime, Refugee Convention differential treatment, various new immigration offences)

New Rules

- Part 11 “Asylum” Immigration Rules changes (generally entering force 28 June 2022 as per SoC HC 17 – applications “registered” (Exp Memo) before 28 June to be decided under old Rules)

- New Appendices: Private life and Settlement Family Life

Refugee Convention

Summary of protection claim changes

- Differential treatment (s12)
- Accommodation differences (s13)
- Designated place for asylum claims (s14)
- Inadmissibility rules on statutory footing (ss15-16)
- Support for inadmissible asylum seekers (s17)
- Immunity from penalty regime s30, s37
- Substantive refugee definition changes including the standard of proof s30-s38
- *Note that "evidence notice" and "priority removal notice" procedures and detained fast track appeals are not yet in force*

Summary – Refugee Convention

- New regime
  - General transposition of law from EU retained law to UK law (i.e. Refugee/Protection Regs 2006 repealed)
  - A change to the standard of proof for assessing past facts
  - New clauses domesticating refugee definition

- Commons refuse to place express Refugee Convention compliance on statute book: "*the Commons consider that the provisions of Part 2 are compliant with the Refugee Convention, and that it is therefore not necessary to provide expressly that this is so*"

Transitional arrangements

- As noted new regime bites on post-28 June 2022 claims
- Guidance states that those seeking to claim asylum before commencement but given subsequent dates are treated as pre-28 June claims, so long as they attend the scheduled appt or any rescheduling of that original appt
- Whereas if a scheduled appt is missed, enter modern regime unless they have evidence of circumstances beyond their control and explain things ASAP

Refugees and lawful entry

Simon Brown J in *Adimi* [1999] EWHC Admin 765:

> “The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. As was stated in a 1950 Memorandum from the UN Secretary-General:
>
> > "A refugee whose departure from his country of origin is usually a flight is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.”

The combined effect of visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents. Just when, in these circumstances, will Article 31 protect them? The precise ambit of the impunity lies at the heart of these challenges.”

Article 31 Refugee Convention

Refugees unlawfully in the country of refuge

> "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Article 31: Key components

- No penalty
- Due to illegal entry/presence
- On refugees **coming directly** from territory [of feared persecution]
- Who enter or are present without authority
- Provided present themselves **without delay**
- **Show good cause** for illegal entry/presence

Adimi – "coming directly"

- "**some element of choice** is indeed open to refugees as to where they may properly claim asylum … any **merely short term stopover** en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the **length of stay in the intermediate country**, the **reasons for delaying** there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and **whether or not the refugee sought or found there protection de jure or de facto** from the persecution they were fleeing."

Adimi – "*without delay*" and "*Good Cause*"

"Present themselves without delay"

If Mr Adimi's intention was to **claim asylum within a short time of his arrival** even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached this condition.

"Good Cause"

All counsel agree that this condition has only a limited role in the Article. It will be satisfied by a **genuine refugee showing that he was reasonably travelling on false papers.**

Immigration and Asylum Act 1999: s31

- Post-*Adimi* a statutory defence was created
- Defence against certain forgery, identity, deception and document falsification offences committed prior to asylum claim
- For a person who came directly from territory of feared persecution who presents himself to UK authorities without delay, shows good cause, and makes asylum claim "*as soon as reasonably practicable*"
- Coming directly: must show "*could not reasonably have expected to be given protection under the Refugee Convention in that other country*"
- *Q* [2004] QB 36 §40:

  "...it is also clear that some asylum seekers are so much under the influence of the agents who are shepherding them into the country that they cannot be criticised for accepting implicitly what they are told by them."

Interpretation of s31 IAA 1999

Abdulahi, R. v [2021] EWCA Crim 1629

"the requirement that the claim for asylum must be made as soon as was reasonably practicable does not necessarily mean at the earliest possible moment …

… The main touchstones by which exclusion from protection should be judged are the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape"

Nationality and Borders Act 2022

- Lord Wolfson of Tredegar (Hansard col 1461)

> "Lord Brown … asked me whether we were overturning the judgment in *Adimi* and *Asfaw* and, if so, why? … With the greatest respect, the courts [there] interpreted "come directly" in Article 31(1) more generously than the original intention of Parliament. The Explanatory Note to Section 31 of the Immigration and Asylum Act 1999 says:
>
> > "This defence, which is modelled on Article 31(1) of the Refugee Convention, does not apply if the refugee stopped in a third country outside the United Kingdom unless he can show that he could not reasonably have been expected to be given protection under the Convention in that country."
>
> What we are doing here is consistent with the refugee convention. There is sufficient flexibility in the proposed powers and the overall policy to enable an individual to demonstrate that during the stopover they could not reasonably have been expected to seek protection under the refugee convention or, where appropriate, to show good cause for their illegal entry or presence."

NBA 2022 – A change to Adimi?

- Regime found in s12 and s37 NBA 2022, further worked out in Immigration Rules
- cf Refugee Convention's common autonomous meaning: does NBA 2022 clearly change it?
- Lord Kerr in *SG* [2015] UKSC 16: "Where a legislative provision is ambiguous there is a presumption that Parliament intended to legislate in a manner which does not involve breach of international treaty obligations: *Salomon* [1967] 2 QB 116; *Garland v British Rail Engineering Ltd* [1983] 2 AC 75"

NBA 2022 s12(1)-(2)

(1) For the purposes of this section—

(a) a refugee is a Group 1 refugee if they have complied with both of the requirements set out in subsection (2) and, where applicable, the additional requirement in subsection (3);

(b) otherwise, a refugee is a Group 2 refugee.

(2) The requirements in this subsection are that—

(a) they have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention), and

(b) they have presented themselves without delay to the authorities. Subsections (1) to (3) of section 37 apply in relation to the interpretation of paragraphs (a) and (b) as they apply in relation to the interpretation of those requirements in Article 31(1) of the Refugee Convention.

NBA 2022 s12(3)-(4)

(3) Where a refugee has entered or is present in the United Kingdom unlawfully, the additional requirement is that they can show good cause for their unlawful entry or presence.

(4) For the purposes of subsection (3), a person's entry into or presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.

NBA 2022 s37(1)

Article 31(1): immunity from penalties

> (1) A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they **stopped in another country** outside the United Kingdom, unless they can show that they could **not reasonably be expected** to have sought protection under the Refugee Convention in that country.

NBA 2022 s37(2)

(2) A refugee is not to be taken to have presented themselves without delay to the authorities unless—

(a) in the case of a person who became a refugee while they were outside the United Kingdom, they made a claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom;

(b) in the case of a person who became a refugee while they were in the United Kingdom—

(i) if their presence in the United Kingdom was lawful at that time, they made a claim for asylum before the time when their presence in the United Kingdom became unlawful;

(ii) if their presence in the United Kingdom was unlawful at that time, they made a claim for asylum as soon as reasonably practicable after they became aware of their need for protection under the Refugee Convention.

(3) For the purposes of subsection (2)(b), a person's presence in the United Kingdom is unlawful if they require to leave to enter or remain and do not have it.

Group 1 and Group 2 refugees

- Refugees divided into two groups (s12)
- **Group 1** (if s12(2) and (3) satisfied)
  - those coming to the UK direct and presenting themselves without delay (s12(2))
  - s37(1) defines "without delay": includes time in transit country where could "reasonably be expected" to claim asylum: without delay requires as soon as reasonably practicable from arrival (re sur place claims: from when asylum seeker became aware of protection need)
  - entered/present unlawfully without "good cause" (i.e. requires leave and doesn't have it) (s12(3))
- *"otherwise, a refugee is a **Group 2** refugee"*

Discrimination authorised

- Statute authorises discriminatory treatment of Group 2 refugees (& their family members) may be differently treated as to length of leave, route to ILR, recourse to public funds, and family (non-refugee) reunion: see temporary refugee permission to stay regime r339QA, 352DA, 352DB (to which Humanitarian Protection is equated via THPTS concept)
- s37(4): Not a penalty if relevant act done in course of leaving the UK
- Refugees would "*be expected to leave the UK as soon as they are able to or as soon as they can be returned or removed, once no longer in need of protection*" - see Appendix Settlement Protection

The Rules & Group 1 and Group 2 refugees

- Group 1 refugees get 5 years' RPTS (r339QA(i)) – defined as "*Refugee permission to stay*" 352G(f)
- Group 2 refugees get 30 months' RPTS – unless "*exceptional circumstances*" (undefined) apply (r339QA(ii)) - defined as "*Refugee temporary permission to stay*" 352G(g)
- Extension applications to be made within last 28 days of permission to stay and renewable "*upon application*" (r339QA, r339QB)

NBA 2022 regime v predecessors

- Plainly modelled on the Art 31 regime, though Lord Wolfson said: *"I should be clear that differentiation does not constitute a penalty for the purposes of Article 31"*
- s12(2) - a lawful entrant who came to the UK non-directly can fall into Group 2
- s12(3) - separate criteria to s12(2)(a) & (b): leave/permission could be revoked for dishonesty, e.g. student declared illegal entrant for asylum claim incompatible with their promised short-term presence in UK = a person whose *"presence in the United Kingdom is unlawful"*
- s37 not framed re SSHD's satisfaction of matters therein: is it a precedent fact given found in statute & cross-ref'd by Rules?

Helpful comments in Parliament

- Minister of State for Home Office in HL stated https://hansard.parliament.uk/Lords/2022-02-01/debates/DB8DE906-AF60-4B7D-9334-4362B62CC74F/NationalityAndBordersBill

- Discretion likely to be appropriate where
  - Person unable/unwilling to present timeously due to sexual violence or
  - Not in control of actions in cases of trafficking, minors & those with serious mental or physical health disabilities

Criticisms of NBA 2022 regime

- UNHCR: *"inconsistent with the Refugee Convention and has no basis in international law … [contrary to] right to family life and the principle of family unity and would run counter to decades of international consensus, in which the UK has consistently participated, 'that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee' … family reunion [should] be flexible, swift and effective [ECtHR in Tanda-Muzinga (no. 2260/10)]"*

- Refugee Convention assigns rights re degree of association with country of refuge, not via choice of host country, travel means or claim's timing

- Risks of social exclusion given likelihood of disability, mental health problems, and long-term health conditions amongst genuine refugees, paying for secondary healthcare will represent a barrier to accessing public health services

Accommodation for asylum seekers

- IAA 1999 s97 amended to include different accommodation arrangements for asylum seekers depending on case processing (e.g. if subject to inadmissibility procedures) and compliance with bail and support conditions

- Notes explain this opens up the possibility of “full board accommodation centres” designed to speed along removal

- Welsh government objects given threat to Nation of Sanctuary - indefinite warehousing of asylum seekers in large facilities, away from the wider community prevents development of social support networks, informal language acquisition, and cross-fertilisation of culture, all needed for integration

Refugee Convention – general regime

- Definitions in Refugee/International Protection Regs 2006 now move to ss31-35 NBA 2022
- Regime applies to claims made from 28 June 2022
- No longer retained EU law = domestic law – interpretative consequences, CJEU decisions have presumably weaker precedent value, presumption unclear provisions construed compatibly with international law
- Mostly reshuffling familiar principles defining persecution, Convention reason: e.g. particular social group must be both recognised in society and feature a uniting characteristic
- Particularly serious crimes are now those where 12-month sentence imposed (not 2 years) - s72(2)(b) NIAA 2002

Credibility provisions

- Tribunal must explain how it has taken account of relevant behaviour under s8 AITCA 2004

- Including the new proviso e.g. "*any relevant behaviour … the deciding authority thinks is not in good faith*" in dealings with immigration authorities, and in appeals, civil or judicial review proceedings

Refugee standard of proof

- s32 NBA 2022: when assessing well-founded fear decision maker must determine on balance of probabilities

    - if asylum seeker has a characteristic which could cause them to fear persecution for [Convention reasons]

    - whether the asylum seeker does in fact fear such persecution in their country of nationality [or former habitual residence] … as a result of that characteristic

- Where those questions are both answered positively, then the reasonable likelihood of persecution is to be determined to the "*reasonable likelihood*" standard (including internal relocation)

Determining “fear”

(2) The decision-maker must first determine, on the balance of probabilities—

(a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and

(b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

(See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant’s credibility)).

Determining “risk” etc

- s32(4)-(5)

(4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—

(a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and
(b) they would not be protected as mentioned in section 34.

(5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 35 (internal relocation).

Determining risk and internal relocation

- Dramatic change to determination of historical facts

- Differentiation between standard of proof for assessing past events and future risks

- More precisely balance of probabilities will be the basis for (s32(2))
  - "Fear" (cross-refers to "AITCA 2004" "section 8" factors) (s32(2)(b))
  - Convention reason (s32(2)(a))

Issues

- Is it really about historical facts? Focusses on the (possibly) narrower question of *"fear"* as conceived by s8 AITCA 2004 (i.e. failure to claim asylum in a safe third country, obstructive behaviour)

- Some questions involve fact-finding but are hard to link to "fear" however broadly that might be defined –internal relocation expressly determined on real risk standard, matters such as job opportunities or family support, involves fact-finding before one reaches the assessment of reasonableness

- Why is there no mention of Humanitarian Protection? HP and refugee claims have tended to *"stand and fall"* together since HP was introduced in 2006: but Cl 33 is in the section of the Bill which interprets *Refugee Convention* protection

- HO Guidance *Assessing credibility and refugee status post 28 June 2022*
- Stage 1 - “whether the claimant is who they say they are and fear what they say they fear”
- Post-28 June 2022 Humanitarian Protection Guidance – “you must reconsider all relevant facts to the lower standard”, no need to be “certain” “convinced” or “satisfied”

New Immigration Rules

New family reunion provisions

- General policy to limit refugee family reunion
- New "*exceptional circumstances*" criteria bolted on to refugee family reunion routes for Group 2 refugees: so partners must now show insurmountable obstacles to life abroad *and* ECHR Art 8 breach: r352AB, children r352DA
- Routes for minor and adult children: r352D(ii)(a), (ii)(b), under latter "*exceptional circumstances*" required
- r352DB: "*exceptional circumstances*" for adult children: emotional & financial dependency, parent must be in the UK or travelling with them, & not leading an independent life, no other relatives to support them, no support or employment in the country of origin so would "*likely become destitute*"
- Same scheme for HP: 352FA(vii), 352FG(ii) & 352FGA

Guidance

- "Vast majority" of family reunion applications would be disproportionate to refuse

- Where a third country is in play, bear in mind admission including family reunion rights there having regard to the Sponsor's immigration status, financial obstacles, health, safety and security, and children's best interests

- Family reunion is not a backdoor to asylum – which cannot be claimed from outside the UK

- Evidence of family relationships should be realistically assessed bearing in mind problems with approaching authorities, functioning administrative systems, duress during departure, un-documentable relationships, life in refugee camps

Children of refugee relatives

- Similar notion where accommodation or maintenance criteria not met applies to children of refugee relatives: r319X, and r319XAA defines as relevant to "*exceptional circumstances*" existence of immediate adult family member, no family other than in the UK who could reasonably be expected to support them, an existing, genuine family relationship and dependency

- Children of refugee relatives now receive leave in line with Sponsor rather than for 5 years on arrival: r319XAA

Asylum applications and validity

- Asylum claims now have a validity regime r327, r327AC & must (still) be determined "as soon as possible" r333A though not within *"a reasonable time"* (old r333) – where 6 months target not met, nor any revised timeframe, on specific request a non-obligatory timeframe should be advised r333A

- Must be made (r327AB)
  - at designated place (defined s14 NBA 2022: asylum intake units, removal centres, ports, elsewhere as per Regs)
  - in person & not by a British citizen
  - "particularised" if over 18
  - not further representations until accepted as a "fresh claim"

Asylum procedures

- If refugee status is granted to a person holding ILR they will retain ILR r335
- Usually refugee status or Humanitarian Protection revocation brings procedural protection via right to make representations/interview, not if they have acquired British citizenship or "*unequivocally renounced*" status: r339BB
- Revocation of refugee status for misrepresentation only occurs where there is no other basis for refugee status r339AB
- Maybe more scope for not interviewing children r352 as the r339NA exceptions now expressly referenced

Refugee leave & Refugee permission to stay

- "*Refugee leave*" to be replaced by "*Refugee permission to stay*" ("*RPTS*") (interpretation clauses), and grant of asylum is the gateway to permission to stay both for refugee route and HP (r339QA, r339QB)
- Distinction between "*Refugee permission to stay*" and "*Temporary refugee permission to stay*"
- Humanitarian Protection claim is deemed to be an asylum claim and will be assessed first under Refugee Convention regime r327EC, r327(ii)

Dependants

- Dependants "*may*" be granted PTS and is renewable on application if extension granted to principal (r339QC)

- Will receive PTS "*in line*" with principal (r339QC, for both dependants of those granted refugee status or HP – i.e. 30 months/5 years)

- Revocation/refusal/curtailment *"may"* follow in line with principal's PTS's revocation or where dependant no longer meets Rules' requirements (r339QE)

Humanitarian Protection

- Beneficiaries now get 30 months' Temporary Humanitarian Permission to Stay (HPTS) *"as soon as possible"* post-HP-grant (r339QB) – (no exceptional circumstances proviso) - extension applications should be made within 28 days of expiry - *"Temporary Humanitarian Protection permission to stay"* 352G(h)
- Same validity criteria as for refugee route 327EB & inadmissible in line with asylum applications 327F
- References to *"country of return"* replaced by *"country of origin"* e.g. 339C(iii): i.e. no HP claim viable re a third country (from 11 May 2022: rushed in as part of Rwanda measures, see Exp Memo 3.5)
- Internal relocation test in Rules r339O(ii) whereas Refugee Convention test is in statute s35 NBA 2022

Appendix Settlement Protection

- Those granted refugee status/HP before 28 June 2022 can apply
- From 28 June 2022: only eligible if granted
  - refugee status and
  - refugee permission to stay
- So not eligible for ILR if granted temporary HPTS or temporary RPTS from 28 June 2022
- See Intro to Appendix Settlement Protection, STP1.3
- Unless child born in UK STP6.3

Appendix Settlement Family Life – Eligibility

- New route for ILR for those present under Appendix FM on 10-year settlement route
- Sponsor must be living in UK & a British citizen, or holding/applying for ILR (SETF7.1)
- Must have at least 1 year's permission with a current partner (SETF7.3) - relationship requirements now found in *Appendix Relationship with Partner*
- Modern Rules' regime applies: Appendix Continuous Residence, B1 via Appendix English language, Appendix KOL UK): if ILR criteria are not met may be granted PTS if pay IHS (SETF9.2-3)
- Combinable with other leave (SETF.3.1): Appendix FM or ECHR Art 8 partner/parent/child, "family permission", old and new private life routes – and with any other leave in ILR route so long as not illegal entrant (unless have PLPTS as child/young adult) so long as 1 years' Appendix FM PTS (SETF.3.2)

Appendix Settlement Family Life

- r39E regime applies
- Sentences>12 months: no ILR
- Sentences<12 months, sham marriages, false documents, unpaid litigation costs & NHS charges: no ILR until 10 years lawful residence in route including 5 years post-sentence or mishap coming to light (SETF2.4)
- No ILR for 10 years if illegal entrant unless child/young adult with PLPTS (SETF2.5)
- 10-year period combinable with other leave (SETF2.6): Appendix FM or ECHR Art 8 partner/parent/child, "family permission", old and new private life routes

Thank you

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