Churches' Refugee Network

An informal network of

Notes of the
Churches Refugee Network Seminar
2 February 2006
Jerusalem Chamber, Westminster Abbey

Present

David Bradwell	Secretary, Churches Refugee Network
Chris Brice	Social Justice Advisor, Diocese of London
Shari Brown	RESTORE Project Co-ordinator, Birmingham Churches
Stephen Castles	Director, Refugee Studies Centre (Oxford)
Bernadette Farrell	Founding Organiser, South London Citizens
Maria-Teresa Gil-Bazo	Research Fellow, Refugee Studies Centre (Oxford)
Anthony Harvey	Chair, Churches Refugee Network
Allan Mackey	Senior Immigration Judge, Asylum and Immigration Tribunal
Nicholas Sagovsky	Canon Theologian, Westminster Abbey

Introduction

Nicholas Sagovsky welcomed all to Westminster Abbey for the discussion on UK asylum and refugee issues. Anthony Harvey then took the chair and asked those present to introduce themselves

Procedures: adversarial vs inquisitorial

Allan Mackey opened the discussion. Three themes were debated:

1. International human rights treaty obligations that may be in conflict with domestic laws and rules. The 1951 Refugee Convention, the European Convention on Human Rights and other important conventions are part of British law. Within these are obligations of non-return, which stem from internationally agreed rights against persecution and torture.

2. Rules for admission of immigrants. The business of states is to legislate in the interests of its subjects, and to remove those who break the law. There are issues of sovereignty involved here: who decides who should be removed when asylum law is broken? Should the concepts be determined by the same people (e.g. a government department / the courts)? When should a 'protection visa' be granted? If a person is not a refugee then domestic law comes into effect, and then they are subject to the domestic legal process.

3. Determination of refugee status. To be a refugee is 'declaratory' – if a person claims to have a well-founded fear of persecution and moves abroad that

person becomes an asylum seeker (and 'putative' refugee). (See James Hathaway's new book The Rights of Refugees Under International Law.) The task of the receiving state is to check the asylum seeker's claim under these rights. This is very different from the case of a migrant, who must apply to join the state, and falls under domestic law. In this case there is no international yard-stick.

Adversarial and inquisitorial systems each have their advantages and disadvantages for making a fair judgement in different circumstances.

In every system, to determine initial status, there is a form of enquiry (this can be done by Government officers, or UNHCR officials). This is an inquisitorial approach: the officials ask questions. The applicants can sometimes be supported or assisted. The questioners could be border guards, police or civil servants (in the UK: IND Officials).

At the appeals stage, standards of fairness and assessment are often variable. In the UK it is structured on the primary decision of status determination by the officer as to whether or not the applicant is an illegal immigrant. The applicant becomes a defendant : "I am a refugee and therefore should not be removed." In other countries the system is protective. It is designed to determine refugee status first. It is not the decision of an immigration-driven officer (as in the UK), but of a protection-tasked officer. The 'two-hats' worn by UK officials makes their approach difficult.

The adversarial system has developed over at least 800 years in England. It is designed to test the veracity go facts before an independent judge / jury. The judge does not intervene.

In an inquisitorial court, the appellant may have support. A standing judge carries out factual and legal scrutiny of the appellant's claim. The judge then presents the findings to a judicial panel that make the final decision. The French system seems to work like this for asylum cases, as do European courts in Strasbourg and Luxembourg.

Asylum appeals for many EU countries have judges who are both sitting and standing. The appellant is represented in court. The judge controls the hearing and asks questions. The questions must be seen to be fair. The judge then applies the law. The appellant (or his/her representative) can ask questions and make representations. The judge makes a verdict based on the evidence that has been presented.

The inquisitorial model (as operated in New Zealand) is less at risk of getting the facts wrong. In the adversarial system there is a higher chance that wrong facts will lead to wrong decisions.

The EU qualifications directives comes into force on 10 October 2006 will set up a new system. It incorporates the UN Refugee Convention and the European Convention on Human Rights. These are designed to provide consistency on the primary decision across the EU. Other new procedures adopted in 2005 will come into force in 2008. They will establish a much more inquisitorial system than currently exists. It will be interesting to see how the UK will move forward.

Questions

It was confirmed that the EU directive on returns would be part of UK law. It was pointed out that the UK Government could interpret the directive as covering migration and not accept it, but it is likely that they will be bound by it.

The inquisitorial system is generally more likely to produce accurate judgements. In the adversarial system no specialist knowledge of that area of law is needed – judges must rely entirely on the evidence presented to them, and they cannot intervene. This means there is a higher risk of factual inaccuracies going unchallenged, and the wrong decisions being made.

In the adversarial system judges are constrained from intervention, except to clarify a point. It is a very different system in Common Law or Commonwealth countries. In the UK there is often a propensity towards a case failing due to lack of credibility. The whole legal approach is wrong.

A Mackenzie friend is permissible in asylum courts. It is better to have some support rather than none at all. Judges will listen to evidence, even if it is not strictly relevant to the case.

It might be possible to use a stronger interpretation of international human rights law, to guarantee a state's obligations to take all necessary action to protect refugees. The European and UN Conventions could be used to challenge the whole basis of the British system as being unfair and incompatible with British law. This would be a major task. It was underlined that the adversarial system does not work because the courts are confused about determining refugee status or applying domestic law. Asylum courts should be focussed on determining status rather than on immigration application. It would be good to 'clear the decks' and adopt a system that goes back to basics.

An example of Kosovo Albanian refugees was cited. They arrived in the UK in 1999 as putative refugees, but were granted temporary leave to remain. Their claim for refugee status is now being considered years later, after they have settled in this country.

Concern was expressed that often IND officials keep files for a particular case secret, or at least they do not make it easy for the appellant or their representative to fully prepare for the hearing. It was suggested that Freedom of Information legislation should be enough to overcome obfuscating officials. In New Zealand matters such as this can be referred to the Ombudsman, who can instruct the officials that they must provide such information. A central administrative structure sends it out.

For a refugee-determining process, other countries have models that are a considerable improvement on the UK system, such as New Zealand, Australia, Canada and most EU countries. An inquisitorial process is preferable to an adversarial one. On the question of immigration law, that is a matter for domestic policy, and the state needs to determine it. In this case there is an advantage in an adversarial system.

New Zealand has different systems. There are separate Refugee, Residence and Removals Appeals Authorities, and there is a 42-day deadline that applies to all non-nationals.

The problem of many initial decisions being of poor quality was raised. IND officials only receive 3 days training on actual refugee issues.

It was thought that the Government could do more to show moral leadership on refugee issues. The current system is muddled, and there is public demand for the Government to be seen to be tough on asylum seekers, rather than about making fair or ethical decisions. An asylum seeker has to show fear of persecution. Some people claim asylum as an abuse of the immigration system, whereas others may have an unfounded fear of persecution. Either way, the Government should want them to be living and working here legally and paying taxes.

Open Borders

Stephen Castles opened the discussion.

Professor Castles has looked into open borders, and refugee push and pull factors. He brought the groups attention to an executive summary of a report on the economic impact of migration that can be found on the web. This was the first analysis of its kind since the 1970s. Professor Castles also contributed to a debate at the LSE on open borders.

Many people argue for open borders, and that all immigration control should be abolished. Professor Castles disagrees, as although it may be appealing in human rights terms, it could actually damage the rights of asylum seekers.

Human rights advocates, neo-classical economists and employers all want open borders. A free exchange of capital and resources is good for labour, income and living standards. Employers see their wage bills fall. The problem with this is that highly skilled migrants are already very welcome, and there is a good degree of free movement of specialist people. This is damaging to poor countries.

Asylum could become a surrogate for low-skilled migration. The volume of surplus labour in developing countries is large, so this is unlikely to have a major economic impact on poor countries. In developed countries an influx of low skilled labour would put pressure on pre-existing low skilled labour force, which could see a rise in racism.

Under open borders the right to asylum would no longer exist. Governments would therefore not be obliged to provide assistance. Once an asylum seeker arrives in a developed country they would get no support and there would be no good work available to them.

Is the growth in the informal economy because if increasing migration, or did an increase in the number of migrants stimulate the informal economy? It is much easier to casually employ people illegally, in catering, cleaning, building and sub-contracting work.

The introduction of a points system has shown to have advantages for Australia and Canada. Legal migration only involves highly-skilled people. The UK is currently enjoying unskilled labour from EU accession states, but this is only a temporary benefit which will last until restrictions are lifted in Germany and other states. In the future Britain could face a low-skilled labour shortage.

The Government wishes to be in control, but they need legal migration for economic strength. Low-skilled migrants should be better protected with proper wages and working conditions.

The large volume of movement within the EU is likely to be more temporary – people will move for a few years to earn money then return to their country of origin.

Some asylum seekers want to work, but they cannot or do not do it legally. The Government argue that if they were allowed to work this would create a big pull factor.

A recent All-Party Parliamentary Group have said that managed migration would be a good thing. A House of Commons Select Committee report is interesting reading as well. Research shows that most asylum seekers come from states with conflict situations, showing that most claims are not frivolous or manipulative.

In New Zealand asylum seekers can work, although there are hardly any of them. Most of them are Pacific Islanders and it is a good way of getting cheap labour.

In the UK it is easy for asylum seekers to become depressed, as they cannot work and they are accused of being spongers.

New moral and legal avenues are being considered:

- Legal obligations to regularise status determination and end violations of Article III of the European Convention on Human Rights
- Charter of Fundamental Rights includes reference to dignity. The charter is not legally binding, but is based on members' existing rights.

New provisions will broaden the category that people might be considered under.

Conclusion

Anthony Harvey said that the seminar had been successful and very valuable and was hoping that people could begin to see ways forward. He thanked all for attending.

It was raised that Church leaders might like to be informed of today's discussions, and that they could take a moral lead on this issue.

Stephen Castles said that the moral aspects of refugee issues had often been underplayed. He offered anything he or the RSC could do to make people more aware of this. He would be happy to know more about grass roots movements that are calling for new thinking on asylum issues. He said he would be happy to remain involved in future conversations.

The prospect of a similar meeting in the future was warmly welcomed. Allan Mackey may be able to suggest other suitable speakers who might be willing to contribute. A date in May or early June might be the most convenient time.

David Bradwell
21 February 2006