THE COURTS AND DETENTION – THE UNITED KINGDOM EXPERIENCE

Justice Collins*

The Refugee Convention contains no provision which governs the methods whereby a State is to determine whether a person seeking asylum is a refugee. In particular, there is no indication of the circumstances in which detention can be justified. The closest that it comes to guidance is Article 31 this requires that any restrictions on the movement of refugees must be 'necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country' (Article 31.2). Article 31.1 prohibits the imposition of penalties on refugees "on account of their illegal entry or presence … provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

Although the Article refers to refugees, it must include presumptive refugees: otherwise, Article 31.2 makes no sense. Such a construction has been applied by a court in the United Kingdom.[1] Thus, provided the asylum seeker has complied with the requirements of Article 31.1, he should not be penalised for any unlawful entry. In *Adimi's* case the court considered that the requirement that he should have come directly from the territory where his life or freedom was threatened could not be considered literally because to do so "would contravene the clear purpose of the Article". Accordingly, it accepted that an asylum seeker who had passed through intermediate countries on his way to the State in which he claimed asylum would be entitled to the protection of Article 31. An asylum seeker was entitled, it was said, to an element of choice and, provided that his stay in an intermediate country was not such as showed that he would and should have

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1 See *R v Uxbridge JJ ex p Adimi* [2000] 3 WLR 434.

claimed asylum there, he would not lose the protection. As a result of *Adimi* (which was not appealed by the government), the practice of prosecuting asylum seekers who entered the United Kingdom by means, for example, of false documents and sending them to prison on conviction has ceased.

The United Kingdom is facing an increasing number of people from various parts of the world who are seeking to enter the country. Many, perhaps most, are economic migrants. Many enter illegally with the help of people smugglers and will stop at nothing to get into the country. The United Kingdom is not unique in facing this problem, but it has meant that the government has introduced measures to try to stem the tide. In order to discourage would be entrants, steps have been taken to reduce as far as possible benefits available to asylum seekers. It has, in my view correctly, been recognised that quick decision-making is very important and steps are being taken to try to speed up the process, not only by the administrators but also by the appellate bodies. In the United Kingdom, as many of you will be aware, there is a two stage appeal. An adverse decision can be appealed to an independent judge known as an adjudicator, who normally hears evidence, finds facts and reaches his conclusion. Either party may appeal the decision to the Immigration Appeal Tribunal, of which I am President, but only if the Tribunal gives leave to appeal. When I tell you that the tribunal is receiving about 600 applications for leave to appeal each week and that the numbers are increasing you will have some idea of the extent of the problem.

One of the ways to discourage is to detain. International law has always recognised that a State may refuse to permit an alien to enter and may impose such conditions as it pleases upon an alien if he is permitted to enter. Aliens may be deported and their reception is a matter of discretion.[2] Most (probably all) States have specific laws which control the entry of aliens and most of those will include a power to detain.

So it is in the United Kingdom. The Immigration Act 1971 gives to an immigration officer, where an individual is seeking to enter or has entered unlawfully, the power to authorise detention. This power is exercisable pending a decision to give or refuse leave to enter or whether or not to direct removal of an illegal entrant. It can be exercised whether or not there is any perceived risk that the person in question is likely to abscond, although it had been the practice until March 2000 only to detain in accordance with a policy set out in a document of

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2 See *Oppenheim's International Law* (1955) 675-676.

1998 entitled *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* in these terms:[3]

> The Government has decided that, whilst there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances:
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> - Where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release:
> - Initially, to clarify a person's identity and the basis of their claim; or
> - Where removal is imminent. In particular where there is a systematic attempt to breach the immigration control, detention is justified whenever one or more of those criteria is satisfied."

Thus detention was regarded as a last resort. For a genuine asylum seeker who has been persecuted or who fears persecution which may include imprisonment, detention will be a dreadful thing, even if the conditions are as pleasant as possible. But, whatever the conditions, detention involves loss of liberty, itself a fundamental human right, and so must in my view be justified. English law recognises one fetter on the power to detain. It must only be for such time as is reasonable to reach the decision in question or to remove.[4]

I regard this limitation as most important. Keeping people in custody for weeks on end while their applications are being considered cannot in my view be justified. That is particularly so if the conditions of detention are harsh, as sometimes they may perforce be. Deliberate imposition of harsh conditions seems to me equally to be unjustified but I suspect it would be difficult for an applicant to persuade a court to intervene on that ground alone unless the conditions are so harsh as to amount to "cruel, degrading, or disproportionately severe treatment", to quote section 9 of the New Zealand Bill of Rights which, in slightly varying terms, is to be found in the constitution or laws of most civilised countries.

It is also worth quoting from *A v Australia*[5] which concerned detention of boat people. The UN Human Rights Committee considered that detention was

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3 Cm 4018, Paragraph 12.3.

4 See *R v Governor of Durham Prison ex p. Singh* [1984] 1 WLR 704.

5 (1997) 4 BHRC, 229.

arbitrary within the terms of Article 5(4) of the Optional Protocol of the International Covenant on Civil and Political Rights if it was not necessary in all the circumstances of the case to detain. It said:

> … the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

The issue of detention of asylum seekers is before the courts in the United Kingdom at present. It arose because of a new policy in March 2000 to detain at a centre called Oakington in order to achieve speedy decisions in particular cases. The detention was to be for no more than 7 – 10 days and was for those from particular countries whose claims were considered to be likely to be straightforward and so to be dealt with quickly. Not only was a danger of absconding not a ground for such a regime, it was a positive indication against it since such persons were likely to be disruptive. Four of those subjected to the regime challenged its lawfulness and their claims came before me in June last year. One claimant had arrived at London Airport and immediately claimed asylum. There was then no room at Oakington and so he was given temporary admission for two days and then detained for a week while his claim was considered. It was refused, whereupon he was granted temporary admission until he could be removed.

I decided the regime was unlawful because it was disproportionate, and so arbitrary and contravened Article 5 of the European Convention on Human Rights.

Unfortunately, the Court of Appeal disagreed. Both my and the Court of Appeal's judgments are reported as *R(Saadi) v Home Secretary.*[6] The Court of Appeal thought that the decision of the European Court of Human Rights in *Amuur v France*[7] recognised that there was a distinction drawn between 'the restriction on liberty' which did not and 'deprivation of liberty' which did come within Article 5. Thus it was able to say that the ECtHR seemed to recognise that to confine aliens in a detention centre was lawful provided that it was accompanied by suitable safeguards (ie the conditions were not too unpleasant) and was only for a reasonable time to enable the application for admission to be

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6 [2002] 1 WLR 356.

7 (1996) 22 EHRR 533.

considered. Thus the question whether such detention is proportionate only arises in relation to its duration.

The House of Lords has heard an appeal in the case. I had hoped that it would have reached its decision[8] by the time I came to write this, but it has not and its decision will not be given until October at the earliest. Perhaps I shall know by the time this paper is delivered. However, I am, unsurprisingly, wholly unpersuaded that there exists the distinction between detention and restriction on liberty where the individual is locked up in a particular place and unable to leave it. However pleasant the conditions may be said to be, to lock someone up is to deprive him of his liberty. A requirement that a person remains in a particular place which is reinforced by locked doors preventing him from leaving is detention and in my opinion is clearly covered by Article 5. But the Court of Appeal recognises that to keep someone for an unreasonable time or in unpleasant conditions is not permissible.

Another problem has become more acute since the events of 11 September 2001. Article 1F of the Refugee Convention provides that the Convention is not to apply to 'any person with respect to whom there are serious reasons for considering that' he has committed various serious crimes or acts 'contrary to the purposes and principles of the United Nations'. Those reasonably suspected of having committed acts of terrorism would be likely to come within Article 1F. Conspiracy to commit such an act would normally be included. It would normally be lawful to detain such a person pending his removal.

However, English domestic law (*Ex p Singh)* and the ECtHR in *Chahal v United Kingdom*[9] have made it clear that such detention can only be for a reasonable time pending removal. The Refugee Convention quite clearly recognises that such persons may be returned to the country of their nationality notwithstanding that they may be persecuted there. There is no similar provision in the European Convention on Human Rights. Thus the Court at Strasbourg has decided that to return a person when there is a real risk that he may suffer torture or inhuman or degrading treatment or punishment would be to breach Article 3 (and the same principle would apply to the other articles of the European Convention on Human Rights). Thus those who are within Article 1F of the

8 *R v Home Secretary, Ex p Saadi* (31 October 2002) [2002] UKHL 41.

9 (1996) 23 EHRR 413.

Refugee Convention cannot be returned if they would suffer in a way which breached their human rights, and that will often be the case.

It seems to me to be apparent that those who originally drew up the European Convention on Human Rights did not contemplate that it would apply to aliens who were to be removed from the country but only to those who were within and entitled to the protection of the State. But, as the European Convention on Human Rights has said, the Convention is a living instrument and the jurisprudence that extends it to removal is too well established to be changed.

The United Kingdom government's solution was to derogate from the European Convention on Human Rights and to pass an Act enabling detention of such supposedly irremovable aliens on reasonable suspicion that they were involved in international terrorism. Derogation under Article 15 of the European Convention on Human Rights is only permissible if there exists a state of war, or a public emergency threatening the life of the nation. The decision to derogate has been declared to be incompatible with the European Convention on Human Rights by a court (which was chaired by me), not because there was not a relevant public emergency but because the Act was discriminatory in that it targeted only aliens and not British citizens although the evidence showed that there were British citizens who were just as likely to be dangerous as the aliens. That is going to the Court of Appeal.

I am satisfied that the power to detain either on entry while a claim is being investigated or with a view to removal should not be used as a general deterrent to try to discourage entrants. And it should be for no longer than is reasonably necessary to examine the claim and reach a decision. There is no reason why someone who is not likely to abscond or otherwise misbehave should be detained for longer than is absolutely necessary. Further, since asylum seekers may have a genuine claim, it is wrong to keep them in deliberately harsh conditions.