Refugee law in the UK

Obtaining and losing refugee status in the UK

by Colin Yeo

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Children at a refugee camp in Sudan depict a Janjaweed attack. Sourced from Wikipedia Commons.
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INTRODUCTION

The 1951 UN Convention on the Status of Refugees is said to be the legal instrument that has saved the most lives in human history. It is a hugely important convention and understanding its terms and how it operates in practice in the refugee status determination process is, inevitably, critically important for any lawyer practicing in refugee and asylum law.

In this ebook I have set out to provide an accessible guide to the meaning of the refugee definition. I have included what I hope is useful material on how the refugee definition operates in practice in the UK. Common arguments, scenarios and examples are deployed to try and give life to the definition.

The last part of the ebook looks fairly briefly at the cessation, exclusion and refoulement clauses of the convention.

I hope the ebook is useful and interesting. If you would like to claim CPD hours for reading this material, head over to www.freemovement.org.uk and sign up as a member. Membership starts at £50 per person for groups of 10 and gives access to a growing suite of immigration training resources.

Do get in touch if you have comments or suggestions.

October 2014
**DEFINITION OF A REFUGEE**

**The Convention definition**

In this ebook reference is made throughout to 'the Refugee Convention' or just 'the Convention'. The full title is the *1951 UN Convention on the Status of Refugees* (read with the 1967 New York Protocol to which most states signed up).

The Convention was passed by a special United Nations conference on 28 July 1951 and entered into force on 22 April 1954. It was initially backward looking and was limited to protecting European refugees from before 1 January 1951. The 1967 Protocol gave the Convention new life, making it a living, forward looking instrument that offered protection on an ongoing basis.

The Convention runs to 46 Articles but there is only one that is addressed in detail in this ebook. This are Article 1, which provides the definition of a refugee and certain cessation and exclusion clauses. Articles 31, 32 and 33 are also relevant to refugee lawyers, providing protection against prosecution for illegal entry and protection against expulsion (technically “refoulement”) with certain exceptions provided for.

The refugee definition is set out at Article 1(A)(2) as a person who:

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.
The definition can be broken into its constituent parts:

- Possession of a well-founded fear
- Of treatment that amounts to being persecuted
- For one of five reasons, referred to as the Convention reasons
- Being outside one's country
- Being unable or unwilling to obtain protection

We examine and explore each of these constituent parts in detail below. While examining the different parts of the definition in turn is a helpful way to explore the Convention, it is also important to bear in mind that the definition operates as a whole and the different parts interrelate with one another. In particular, the Convention reasons are highly relevant to interpreting and understanding the meaning of ‘being persecuted’ and being unable or unwilling to obtain protection.

First of all, though, it is important to consider what sources might help us understand and interpret the refugee definition.

**Sources of interpretation**

The Refugee Convention is international in scope. It has to be understood and interpreted in many counties. Any divergence in understanding or interpretation would lead to different protection regimes in different countries and might lead to what governments sometimes call “forum shopping”,

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where refugees who are able choose to flee to one country over another because it has a more generous approach to granting asylum.

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On top of that, the Convention has existed for over sixty years so it will be no surprise that during that time, courts, institutions and others have grappled with the meaning. On the whole, a common understanding has largely been reached. International comparisons are beyond the scope of this ebook, though, which focuses on the approach to and interpretation of the Convention in the UK.

**UNHCR**

The United Nations High Commission for Refugees is effectively the international guardian of the Refugee Convention. Because UNHCR is truly international and it is specifically tasked by the UN with safeguarding refugees, what UNHCR says about the meaning of the Convention is generally considered to be very important.

UNHCR also gives occasional guidance on refugee law and protection beyond the UNHCR Handbook. These guidance documents are collected in the UNHCR Protection Handbook.

One particularly helpful and informative series is called the Guidelines on International Protection, which covers a range of specific issues:

No. 10: Claims to Refugee Status related to Military Service

No. 9: Sexual Orientation and/or Gender Identity

No. 8: Child Asylum Claims

No. 7: Victims of Trafficking and Persons at Risk of Being Trafficked

No. 6: Religion-Based Refugee Claims

No. 5: Exclusion Clauses: Article 1F

No. 4: Internal Flight or Relocation Alternative

No. 3: Cessation of Refugee Status under Article 1C(5) and (6)

No. 2: Membership of a Particular Social Group

No. 1: Gender-Related Persecution

Another useful UNHCR series for those acting in refugee protection claims is the Eligibility Guidelines series. These documents are country-specific and examine particular issues and risk groups in the country concerned.
In the UK, UNHCR guidance is in theory given considerable weight by the Home Office and the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal (referred to here for convenience collectively as ‘the immigration tribunal’). However, guidance is not accepted uncritically nor its entirety. Instead, it tends to be assimilated into further national guidance documents. For the Home Office these are the country information reports and policy documents and for the tribunal these are the Country Guidance cases of the Upper Tribunal. Ultimately, the UNHCR guidance is only one of the sources of law and/or country information that will be taken into account.

EU law

The European Union has been seeking to harmonise asylum process and law for many years now. One of the biggest steps in this direction was the adoption in 2004 of EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. This is referred to day to day as ‘the Qualification Directive’ as it sets out the definitions of those who qualify for protection. It is now a critical document within the EU for anyone seeking to understand and interpret the meaning of the Refugee Convention.

The Qualification Directive has been transposed into UK law through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) and modifications to the asylum section of the Immigration Rules at Part 11. Because the Directive is directly effective, is referred to in other EU states and judgments of the Court of Justice of the European Union and because the UK transposition was incomplete, most
lawyers and judges refer directly to the Directive itself rather than the UK regulations.

**Case law**

In the UK, judicial decisions from the Immigration and Asylum Chamber of the Upper Tribunal (and its predecessors), the High Court, the Court of Appeal, the House of Lords and Supreme Court, the European Court of Human Rights and the Court of Justice of the European Union provide additional guidance on the interpretation of the Refugee Convention. Because the Convention is international in nature, it is also possible to look further afield, for example to the case law of the highest courts of Canada, America, New Zealand and Australia.

There is a substantial body of this case law and while it has to a significant extent been replaced by the Qualification Directive it can still help illuminate the meaning and interpretation of the Refugee Convention.

**Scholars**

The works of legal scholars have often cast light upon the proper approach to the Convention and have been influential on UNHCR and in case law. Grahl Madsen, Goodwin Gill and Hathaway are considered the three leading international scholars on refugee law and a serious student will want to read their works.

For UK based practitioners, Symes and Jorro’s *Asylum Law and Practice* is a very useful reference book with some invaluable footnotes.
The first of the elements of the refugee definition is the possession of a “well founded fear”. There are two key aspects to this. The first, which is sometimes over emphasised, is truthfulness or credibility: is an asylum claimant telling the truth about what happened to him or her in the past? If the asylum claimant cannot establish they he to she is telling the truth about past events, it is unlikely (but not impossible) that he or she will be able to show a well founded fear. This is sometimes referred to as the ‘subjective’ element to well found fear.

The second aspect is future risk. The asylum claimant might genuinely fear return, but is that fear well founded in the sense of there being a sufficient likelihood of those fears being realised? This is sometimes referred to as the ‘objective’ element of well founded fear.

Relevant to both these aspects of well founded fear is the standard of proof. To what standard does the asylum claimant need to ‘prove’ past events and what level of risk is needed for the risk to be considered ‘well founded’?

**Standard of proof**

An asylum seeker who has fled his or her home and reached another country will face some very serious difficulties in “proving” that his or her account of what happened is true.

Cynicism is rampant amongst case-hardened officials, judges and lawyers. Little or no evidence will have been brought with the refugee on their journey to safety, it will be hard or impossible to obtain evidence from the home country and any evidence that is obtained is often alleged to be capable of being forged. Events in far off lands

“Cynicism is rampant amongst case-hardened officials, judges and lawyers.”
may well seem implausible or incredible to those residing in the luxury of a stable and comfortable environment. The actions of people from a very different country and culture may seem perplexing and even irrational.

At the same time, though, the stakes could not be higher. A wrong decision in a refugee protection claim can be a death sentence.

For both these reasons — the difficulty in establishing past facts and the consequences of making a wrong decision — the standard of proof in asylum claims is a low one.

Method of assessment

In the UK, the standard of proof for both past and future aspects of well-founded fear is that of ‘a reasonable degree of likelihood’, which is lower than and different to the civil standard of the balance of probabilities. It has also been expressed as ‘substantial grounds for believing’ or ‘real risk’. The leading case is *Ravichandran* [1996] Imm AR 97.

The correct approach was expanded upon by the Court of Appeal in an important and often misunderstood case, *Karanakaran* [2000] Imm AR 271. The court found that the whole concept of a legal standard of proof is inappropriate in asylum cases. Instead of probabilities being artificially elevated to certainties once a probability threshold is crossed — the balance of probabilities in civil cases or beyond reasonable doubt in criminal cases — a decision-maker should simply evaluate the risk on the basis of relevant evidence. Sedley LJ described the normal standard of proof approach to fact finding as “a pragmatic legal fiction” and went on to hold that:

*No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it.*
In the same judgment, Brooke LJ endorsed the approach of an earlier tribunal and held that the first three of the following four categories of evidence identified by a decision maker are relevant for this purpose:

(i) evidence they are certain about
(ii) evidence they think is probably true
(iii) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true
(iv) evidence to which they are not willing to attach any credence at all.

He goes on to say:

… when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur.

So, it is often said that there is a low standard of proof in asylum cases. It would be more accurate to say that the conventional standard of proof approach is not the correct one and it is instead a matter of evaluating all the available evidence and only discarding that to which no credence at all may be attached.

Benefit of the doubt

Because of the difficulties inherent in proving a claim to refugee status it is sometimes said that refugees should be given the “benefit of the doubt”. See, for example, paragraph 203 of the UNHCR Handbook:

After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As
explained above (paragraph 196), it is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

UNHCR go on to say that the benefit of the doubt only need be given where the account is generally credible. This is broadly mirrored in the Qualification Directive at Article 4(5)), which can be read as providing a framework for trying to evidence an asylum claim:

Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.
Truthfulness

How does one person judge the truthfulness of another? Witch dunking was once a popular way of ascertaining truth. Modern asylum claim determination sometimes seems directly descended from this trial by ordeal.

The whole exercise of judging truthfulness is particularly problematic where the other person comes from a different culture and country and the events he or she experienced are so beyond the direct experience of the judge that they may be all but unimaginable. To avoid at least the appearance of making judgments on truthfulness based on mere “gut instinct” a number of different rules or measures have developed that are thought by some to provide a more accurate means of assessing credibility in asylum cases.

The most frequently decisive of these are whether there are internal inconsistencies between the different accounts an asylum seeker has given of their experiences, whether the account in some way seems implausible to the decision maker and whether the country information provides other similar instances of persecution.

Example

Julia claims asylum. She relies entirely on her word to make her claim and hopes that the benefit of the doubt will be exercised in her favour.

Hermione claims asylum and attempts to obtain corroborating evidence about what happened to her in her country. She writes to former colleagues but they do not reply, she phones her brother but he is too afraid to speak to her, she tried instructing a lawyer to obtain copies of court documents but he finds that he cannot get access. She explains all this in her witness statement and shows evidence of her attempts (phone records, copies of letters, lawyer's letter). The fact that she has made every effort to try to obtain evidence will cast her in a better light and garner additional sympathy. It should also assist by complying with the expectations of the Qualification Directive.
Unfortunately, it is all too common to see Home Office refusal letters and judge determinations that assert events are implausible without reference to country information and minor inconsistencies being highlighted and used to reject an account.

Making a positive case

It is all too easy to lapse into a preemptive, reactive and ultimately negative mode in preparing and presenting an asylum case. Worry about the potential reasons for refusal may cause omission of the making of a positive case as to why the claimant should be believed and recognised as a refugee.

The logic of some refusal decisions is so transparently nonsensical and absurd that one is left with the impression that the reasons for refusal are in fact excuses for refusal; that the decision maker has decided for other reasons to reject the case -- perhaps because he or she simply does not
believe the applicant -- but has then looked for acceptable and objective-seeming reasons for doing so.

Making a strong positive case for refugee status to be granted may reduce the danger of this topsy turvy approach to status determination.

Narrative inconsistencies

Making a claim for refugee status in the UK involves repeatedly giving an account of past events. Typically, this can occur at an initial screening interview, a witness statement submitted prior to a full asylum interview, at the full asylum interview, in a further witness statement before a tribunal hearing and at a tribunal hearing.

Most lawyers and judges understand in theory that it is difficult or even impossible accurately to recount a narrative account in exactly the same way on multiple occasions, even where one is well educated, is not a victim of trauma, does not have to use different interpreters on different occasions, understands the importance of consistency, is practiced in doing so and is trained in the western narrative tradition. Recalling and recounting is not like replaying a video tape. That understanding is sometimes in short supply when it comes to the refugee status determination process, unfortunately.