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Using learning to inform challenges to the Nationality and Borders Act 2022

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The Nationality and Borders Act 2022 makes a large number of changes to the asylum system. It poses a host of new and unfamiliar challenges for asylum lawyers. As most provisions of the Act are not yet in force, and litigation is ongoing, there is much we do not yet know.

This paper is not an exhaustive overview of the Act, but simply focuses on a few key issues of particular relevance to those representing asylum-seeking children and young people. As lawyers with experience of working with this highly vulnerable client group, we wanted to share the benefit of our experience, and how we think our past learning might help us tackle the challenges posed by the Act.

Inadmissibility and transfers to Rwanda

One of the biggest challenges for lawyers is the new inadmissibility regime. This denies people access to the asylum system based on their failure to claim asylum in a "safe country" during their journey. This will be dealt with under sections 80B-C of the Nationality, Immigration and Asylum Act 2002 as inserted by the 2022 Act, but these have not yet been brought into force. At present, therefore, inadmissibility is still dealt with under paragraph 345A-D of the Rules:

> *"Inadmissibility of non-EU applications for asylum*
>
> *345A. An asylum application may be treated as inadmissible and not substantively considered if the Secretary of State determines that:*
>
> *(i) the applicant has been recognised as a refugee in a safe third country and they can still avail themselves of that protection; or*
>
> *(ii) the applicant otherwise enjoys sufficient protection in a safe third country, including benefiting from the principle of non-refoulement; or*
>
> *(iii) the applicant could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because:*
>
> *(a) they have already made an application for protection to that country; or*
>
> *(b) 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*
>
> *(c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection.*
>
> *Safe Third Country of Asylum*

345B. A country is a safe third country for a particular applicant, if:

(i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;

(ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;

(iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; and

(iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country."

345C. When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry."

Exceptions for admission of inadmissible claims to UK asylum process

345D. When an application has been treated as inadmissible and either

(i) removal to a safe third country within a reasonable period of time is unlikely; or

(ii) upon consideration of a claimant's particular circumstances the Secretary of State determines that removal to a safe third country is inappropriate

the Secretary of State will admit the applicant for consideration of the claim in the UK."

In general, asylum-seekers who reach the UK by lorry or boat will have passed through one or more "safe third countries". Most do not seek asylum in one of these countries on their journey. Therefore, for the majority of clients the ground of inadmissibility will be paragraph 345A(iii)(b): *"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."* This puts the onus on them to show that there were *"exceptional circumstances"* preventing them from claiming in the safe third country.

When sections 80B-80C come into force, the position will be similar, except that the burden on applicants will be lower: they will only have to show that it would not have been "reasonable" for them to make a claim in the safe third country (see sections 80C(4) and (5)).

Current Home Office policy is that if a person's claim is held to be inadmissible under paragraph 345A(iii)(b), and they are deemed to have made a "dangerous" journey to the UK

after 1 January 2022, they will be considered for transfer to Rwanda.[1] As attendees will be aware, the first planned flight to Rwanda was halted on 14 June 2022 after the European Court of Human Rights (ECHR) made rule 39 indications. Litigation in the domestic courts as regards transfers to Rwanda is still ongoing and the outcome is uncertain.

In the meantime, however, it is essential that asylum-seekers who have recently arrived through irregular means receive early and specialist legal advice. The Home Office policy gives asylum-seekers just 7 days (if detained) or 14 days (if at liberty) to respond to a "Notice of Intent" before their claim is held to be inadmissible. It is essential that asylum-seekers receive legal advice during that period, and that their lawyers respond to the Notice of Intent and request more time to submit proper representations as to why their claim should not be held to be inadmissible.

It is important to remember that under current policy, before the Home Office can transfer to Rwanda, they must first hold the asylum-seeker's claim to be inadmissible. If the asylum-seeker's claim is not inadmissible, then the prospect of transfer to Rwanda falls away. It is, therefore, essential that lawyers take proper instructions on why their client did not claim asylum in a "safe third country" during their journey to the UK, and gather evidence (as far as possible) to support their account.

It is not yet clear how the courts will interpret the concept of "exceptional circumstances" in paragraph 345A(iii)(b). However, having regard to our experience of working with asylum-seekers, it seems to us that relevant considerations might include:

- Their individual vulnerabilities. Many, indeed most, asylum-seekers have experienced highly traumatic events and are suffering from mental health problems such as post-traumatic stress disorder (PTSD) and depression. Some might have other disabilities, such as learning disabilities or developmental disabilities. Mental health vulnerabilities can affect a person's decision-making in a variety of ways,[2] and might well be relevant to the question of why a person did not claim in a safe third country. Obtaining a medico-legal report might therefore be very helpful in the context of the inadmissibility decision.
- Their age at the time of their journey to the UK. Children think differently from adults, and make decisions differently.[3] What would be reasonable for an adult is not necessarily so for a child.
- Whether they were free to claim asylum. Some asylum-seekers have been trafficked across Europe, or have been under the control of agents throughout their journey with no say in their destination.

[1] Home Office, "Inadmissibility: safe third country cases", version 6.0 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073965/Inadmissibility_-_safe_third_country_cases.pdf
[2] For instance, by making it more difficult to trust people in authority: see UNHCR, "Beyond Proof: Credibility Assessment in EU Asylum Systems," May 2013, pp 65-66 https://www.unhcr.org/51a8a08a9.pdf
[3] See UNHCR, "The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union," December 2014, pp 59-60 https://www.refworld.org/pdfid/55014f434.pdf

- Whether they had a subjective fear of further attacks. For example, many Albanian asylum-seekers do not feel safe in Schengen area countries because they are aware that Albanians can access the Schengen area without a visa and that Albanian criminal gangs operate across Europe. Some have already been trafficked to another European country. Even if the fears are not considered to be objectively well-founded, a genuinely held fear might well be relevant to justifying why they did not claim asylum in a safe third country.
- Their living conditions. In some European countries it is common for asylum-seekers to be destitute and street-homeless.

It is essential to make the point that just because a person has passed through a safe third country, that does not in itself make their claim inadmissible. If they can show "exceptional circumstances" that prevented them claiming, their claim is not inadmissible.

A controversial issue, which will be aired in the ongoing litigation and is not yet settled, is whether Article 31 of the Refugee Convention is relevant. That Article prohibits the imposition of penalties on refugees for illegal entry or presence, provided that they have "come directly" from the country of persecution. It is arguable that denial of access to the asylum process constitutes a "penalty" (this is not settled domestically, but the Canadian case of *B010 v Canada* 2015 SCC 58 is persuasive authority). And "coming directly" is a term of art. Under the leading cases of *R v Westminster Magistrates' Court ex parte Adimi* [2001] QB 667 and *R v Asfaw* [2008] UKHL 31, the fact that a refugee had stopped in a third country in transit is not necessarily fatal. Refugees have some choice as to where they might properly claim asylum, and 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 they were seeking to escape. On the basis of this test, many asylum-seekers are protected by Article 31 notwithstanding that they passed through a safe third country. Arguably, the requirement of *"exceptional circumstances"* in paragraph 345A(iii)(b) should be read consistently with this test.

From 28 June 2022, section 37 of the 2022 Act will redefine "coming directly" for the purposes of Article 31. However, even then, section 37 will provide that a refugee is not to be taken to have *"come directly"* 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."* Accordingly, it maintains the need for an assessment of the individual refugee's circumstances: when it enters into force, the touchstone will be whether they could reasonably be expected to have sought asylum in the third country. If they can show that it was reasonable for them not to do so, then they enjoy the protection of Article 31 and are immune from penalties.

There are, therefore, good arguments that lawyers can make about why their individual client's claim is not inadmissible. Lawyers should be prepared to work proactively, to ask the Home Office for more time to respond to the "Notice of Intent", and to take detailed instructions and seek medical evidence at the earliest possible stage.

A further concern, however, is that once Schedule 4 of the 2022 Act is brought into force, it will – on its face – authorise the Home Office to transfer asylum-seekers to Rwanda (or another "safe third country") even if their claim has not been held to be inadmissible. It is unclear whether removal to a safe third country will remain tied to the inadmissibility provisions after Schedule 4 is brought into force.

The "two-tier" refugee system

The 2022 Act, together with Statement of Changes to the Immigration Rules HC 17, will implement a new two-tier refugee system from 28 June 2022. "Group 1 refugees" who succeed in establishing that they are refugees will, as now, be granted 5 years' leave to remain followed by settlement. "Group 2 refugees", however, will only be granted 30 months' leave to remain and will not have a route to settlement, although they will presumably be able to settle under paragraph 276B of the Rules after completing 10 years' continuous lawful residence.

The definition of "Group 1" and "Group 2" is set out in section 12 of the 2022 Act:

> *"(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.*
>
> *(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."*

It can be seen that the language of this section is taken directly from Article 31 of the Convention. This has to be read together with section 37 which, as stated above, redefines "coming directly", so that the touchstone will now be whether the individual could reasonably have been expected to have sought asylum in the third countries through which they passed.

Therefore, the considerations relevant to inadmissibility, as set out above, will also be relevant to whether a person is a "Group 1" or "Group 2" refugee. Lawyers will need to concentrate their efforts on explaining why their clients did not claim asylum in a safe third

country on their journey to the UK, and showing, on their clients' individual facts, that it was not reasonable to expect them to do so.

Disturbingly, people granted humanitarian protection will also now only receive 30 months' leave to remain, irrespective of whether they are in Group 1 or Group 2. This means that the difference between humanitarian protection and refugee status will now become much more important, and lawyers will have to devote more attention to establishing that their clients' fear of persecution is on account of one of the five Convention reasons.

Reinterpretation of refugee law

The 2022 Act also reinterprets the Refugee Convention in various respects, reversing various court decisions that the Home Office did not like. It replaces the retained provisions of the EU Qualification Directive. The relevant provisions of the 2022 Act will come into force on 28 June 2022. I will focus on two changes that are particularly important for the preparation of asylum cases.

Standard of proof and credibility in asylum appeals

Section 32 of the 2022 Act changes the standard of proof in asylum appeals. Previously, the standard of proof for all purposes was "real risk" or "reasonable likelihood". Section 32 implements a two-stage standard of proof. The decision-maker must first determine on the civil standard, the balance of probabilities, 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 whether they do in fact fear such persecution. If they do, then the prospects of future persecution must be assessed on the basis of reasonable likelihood. Effectively, therefore, past facts have to be proved to the civil standard, the balance of probabilities, while the standard of reasonable likelihood continues to apply to the prediction of future events.

This change only applies to asylum claims: it will not apply to claims to be at risk of Article 3 ill-treatment on removal, for which the standard of "real risk" will continue to apply.

This change is obviously detrimental to asylum-seekers. However, it should not make a properly prepared asylum case unwinnable. Most of the time, the Home Office's adverse credibility findings are based on one of three things:

(1) Internal inconsistencies in the asylum-seeker's account;
(2) External inconsistencies between the asylum-seeker's account and background country information;
(3) Findings that the asylum-seeker's account is inherently implausible.

As to (1), every asylum lawyer should know that internal inconsistencies in a person's account are capable of being explained by mental health conditions such as post-traumatic stress disorder (PTSD) and depression. PTSD and depression have a significant impact on memory: in particular, they can cause "overgeneral memory" which makes it more difficult to remember specific events in one's past, not only about traumatic events but about other

events as well.[4] The proposition that mental health vulnerabilities can explain inconsistencies in an account is well supported by the academic literature[5] and UNHCR guidance,[6] and has been recognised by the courts.[7] The effect of childhood trauma is particularly significant. PTSD and depression are **extremely** common among asylum-seekers, so lawyers should start from the assumption that most clients are likely to have one or both of these conditions, and that it is essential to get a high-quality medico-legal report as early as possible. Some clients will also have additional relevant conditions such as learning disabilities or developmental disabilities. Once medico-legal evidence is obtained, it is straightforward to argue at appeal that inconsistencies should not be held against one's client in the assessment of credibility.

Asylum lawyers should also be aware that the academic literature shows that even in people who are mentally healthy, human memory is very poor for information such as dates, durations, sequences of events, proper names and verbatim conversations.[8] It is therefore wrong for judges to draw adverse inferences from vagueness or inconsistency about these kinds of details.

As to (2), Home Office decision letters are usually riddled with poor-quality research, outdated or unreliable sources, and selective quotations from sources.[9] What is said in a decision letter about "what the country information shows" should never be taken at face value. It is essential to check the sources and conduct your own research. In most cases, this exercise shows that the Home Office is wrong.

As to (3), the courts have repeatedly warned about the dangers of relying on "inherent plausibility" in asylum cases.[10] Whether a person's account is plausible should be assessed

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[4] See J Herlihy and S Turner (2013) "What do we know so far about emotion and refugee law?", 64 *Northern Ireland Legal Quarterly* 1, 47–62 http://www.csel.org.uk/assets/images/resources/herlihy-turner-2013-nilq/NILQ-64.1.3-HERLIHY-AND-TURNER.pdf; B Graham, J Herlihy and C Brewin (2014), "Overgeneral memory in asylum seekers and refugees," *Journal of Behavior Therapy and Experimental Psychiatry 45,* 375-380 http://csel.org.uk/assets/images/resources/graham-herlihy-brewin-2014-jbtep/graham-herlihy-brewin-overgeneral-memory.pdf

[5] See generally D Neale and J Blair, "Bridging a Protection Gap: Disability and the Refugee Convention," April 2021, pp 38-43 https://www.helenbamber.org/sites/default/files/2021-04/Bridging%20a%20Protection%20Gap%20-%20Disability%20and%20the%20Refugee%20Convention.pdf

[6] UNHCR, "Beyond Proof: Credibility Assessment in EU Asylum Systems," May 2013, pp 61-65;

[7] *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123 at [21(d)]; *JL (medical reports-credibility) China* [2013] UKUT 145 (IAC) at [26]-[27]; and *R (MN and IXU) v SSHD* [2020] EWCA Civ 1746 at [125]-[128]

[8] See HE Cameron (2010) "Refugee status determinations and the limits of memory'", 22 *International Journal of Refugee Law* 4, 469-511

[9] The Home Office's analysis of country evidence, in general, should never be taken at face value. For examples of the Home Office getting it wholly wrong, see D Neale, "Albanian blood feuds and certification: a critical view," 4 April 2019 https://www.gardencourtchambers.co.uk/news/albanian-blood-feuds-and-certification-a-critical-view and D Neale, "Albanian blood feuds: an update," 16 April 2020 https://www.gardencourtchambers.co.uk/news/albanian-blood-feuds-an-update

[10] As the Court of Appeal held in *HK (Sierra Leone) v SSHD* [2006] EWCA Civ 1037, *"Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases… in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any)."* Likewise, as Lord Bingham said extrajudicially, in a passage quoted in the unreported IAT determination

not on the basis of assumptions, but on the basis of country and/or expert evidence about what actually does occur in the country concerned.[11] Obtaining such evidence often means that the adverse points in the refusal letter fall away. For example, where the Home Office has claimed that it is implausible that a person's traffickers would have acted in a certain way, a country and/or trafficking expert familiar with the *modus operandi* of traffickers in that country may well be able to debunk the Home Office's points.

Once these points are appreciated, it will be seen that a case may look weak, contradictory or implausible on first reading the papers, but may become a very strong case by the time one gets to the appeal hearing.

Redefinition of "particular social group"

Section 33 of the 2022 Act redefines "particular social group" for the purposes of the Refugee Convention, so as to reverse *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC).

DH considered the definition of "particular social group" in the Qualification Directive, which had two limbs: *"members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it"* and *"that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society".* Contrary to some earlier cases, *DH* held that these limbs were alternative, not cumulative, so that only one of them needed to be met. This significantly lowered the threshold for establishing membership of a particular social group.

Section 33 reverses *DH,* so that the *"innate characteristic"* and *"distinct identity"* limbs must both be met. This is particularly disadvantageous to people whose risk of persecution is based on disability or mental illness, as was the case in *DH.* It is easy to show that disability or mental illness is an innate characteristic that a person cannot change, but harder to show that people with a particular disability or illness have a distinct identity in the country concerned. Expert evidence is likely to be required on this point.

Of course, many asylum-seekers who are at risk on return, but not for one of the five Convention reasons, will qualify for humanitarian protection. But as set out above, humanitarian protection will now become a less advantageous status than previously, so it will be important for lawyers to argue that a Convention reason is engaged.

Further changes

in *Kasolo* (13190), *"No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act in the way he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."*

[11] An expert report can offer *"a factual context in which it may be necessary for the fact-finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them," Mibanga v SSHD* [2005] EWCA Civ 367

The 2022 Act makes numerous other far-reaching changes to the asylum process that are not yet in force, including the potential reintroduction of the “Detained Fast Track”, the introduction of “Priority Removal Notices,” and changes to the processes for age assessments and recognition of victims of trafficking. Time does not permit a detailed analysis of these changes in this paper. Such an analysis will have to await further elucidation of Government policy on these issues.

Conclusion

While the 2022 Act certainly makes life more difficult for asylum-seekers and their lawyers, it is not cause for despair. Lawyers will need to act expeditiously in preparing their client’s response to the “Notice of Intent”, asking for more time, taking detailed instructions on their client’s journey to the UK and why they did not claim in a third country, and obtaining medical evidence to document their client’s vulnerabilities and how these might have affected their decision-making at the time. This kind of evidence will be relevant both to the inadmissibility decision, and to the decision whether a client is a “Group 1” or “Group 2” refugee.

If a client succeeds in avoiding the inadmissibility provisions and having their asylum claim substantively considered, the changes to the standard of proof and the meaning of “particular social group” will make asylum appeals more difficult, but will certainly not make them unwinnable. Above all, every asylum lawyer needs to keep constantly in mind that most asylum-seekers have significant mental health vulnerabilities which are relevant to various aspects of their claim, and that it is essential to commission high-quality medico-legal evidence in virtually every case.