



Speech by Maeve Sherlock:

## Closing the door: the UK's erosion of the right to asylum

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"The fact of the matter is that the industrialised states of Western Europe and North America – those states which played a leading role in the establishment and development of the international refugee regime – have in many respects led the effort to challenge the principles on which that regime is based."

*Crisp:2003:7*

### **Introduction**

The right to seek and enjoy asylum is a key human right in both senses of the phrase. As a legal right, the principle first articulated in the Universal Declaration on Human Rights at Article 14: "Everyone has the right to seek and enjoy in other countries, freedom from persecution" and elaborated in the 1951 Refugee Convention is unusual, in that, unlike many similar international commitments, the commitment to provide protection is one that states honour, however partially. As a human right, the right to seek and enjoy asylum defines the nature of our duty to our fellow human beings. Thus, eroding the right to asylum has implications that extend far beyond the operation of the international system for refugee protection, and into the way we see our world and the connections between us.

Today, I would like to look at some examples of the way in which UK, and in some cases, EU law and policy is eroding this right, with particular emphasis on three key areas: how easy it is to get to the UK in order to ask for protection, the quality of the process for determining claims and our commitment to not return or *refoule* people who are at risk of persecution or torture in their countries of origin.

I'd then like to consider whether this represents a new, more politicised approach to the asylum process, and finally whether taking an ethical approach to the human right of asylum offers new ways to advocate for reinforcing the legal rights enshrined in the 1951 Convention.

### **Getting here: the development of 'interception measures'**

Over recent years, the UK government and the European Union have invested heavily in measures designed to strengthen national and international borders. As a consequence, the UK has become one of the most difficult countries in the world to reach, and there is now no lawful way for a refugee to enter the UK for the purposes of claiming asylum<sup>1</sup>.

Since 1991, the number of countries whose citizens require a visa to enter the UK has rocketed from 19 to 108. In many cases a visa is needed even to pass through the UK in transit to another country. The list of 'visa nationals' bears an uncanny resemblance to a list of refugee producing countries; it includes Iran, Eritrea, China, Somalia, Afghanistan, Iraq, Pakistan, Zimbabwe and the Democratic Republic of Congo: the 10 most common countries of origin for refugees reaching the UK this year.

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<sup>1</sup> There is no provision in the UK Immigration Rules for someone to be granted a visa for the purposes of coming to the UK to claim asylum. In theory, the embassy or consulate could refer an entry clearance application to the UK Home Office, if the person was already outside of their country of origin, could demonstrate a *prima facie* case for Convention status, had close ties with the UK and could provide evidence that the UK was the most appropriate country of refuge.

In theory then, an MDC (Movement for Democratic Change) activist who had experienced persecution at the hands of the Mugabe government, would need to ask that government to issue a passport, then approach the British Embassy in Harare to ask for a visa. He will need to lie about his reason for visiting the UK, as any suggestion that he wishes to apply for asylum will lead to the Embassy refusing to issue a visa. Using a false passport, or lying to obtain a visa is likely to seriously prejudice his asylum claim, and may leave him vulnerable to being returned to a third country, such as South Africa<sup>2</sup>.

This is not accidental. The UK government has cited the imposition of visa controls on Zimbabwean nationals as an example of their success in tackling abuse of the asylum system<sup>3</sup>. By adding Zimbabwe to the visa list in November 2002, the UK government achieved a 61% drop in the number of asylum applications: a 'success' in the government's terms, a terrifying prospect in the eyes of human rights advocates.

At the same time, the UK has pushed border controls further and further from its own shores. Since the Nationality, Immigration and Asylum Act 2002, the UK has had the power to enforce full immigration control at any port in the European Economic Area<sup>4</sup>: a key tool for building 'fortress Europe'. In addition to this, the UK has posted airline liaison officers, and immigration liaison officers in international airports which are embarkation points for large numbers of undocumented travellers. We have little information about how these officials operate, though we do know they are based in countries such as Sri Lanka, Bangladesh, Russia and Romania, where human rights abuses are well documented. It is legitimate to ask whether these officials are in practice seeking to prevent refugees from reaching the UK to make their claim for asylum.

Finally, over many years the UK has steadily shifted responsibility for immigration control onto private companies through a system of carrier sanctions. These impose financial penalties on airlines, ferry operators and other carriers for each and every illegal migrant who reaches the UK's shores. Private companies have an overriding interest in maximising shareholder returns, so high-level security processes are a sound investment. In fact, if a carrier operates sufficiently stringent document checks the UK government may grant it 'approved gate check status' meaning that fines will usually be waived.<sup>5</sup> Of course, unlike the UK government, these companies have no obligations at all under the Refugee Convention, so are free to turn away refugees whose lives are at risk.

How real can the right to asylum be if getting here to exercise that right is a question of economic privilege and sheer good luck? How real can the UK government's commitment to providing protection be when it doesn't care about the fate of the refugees it turns away at its borders?

### **Getting a fair hearing: tightening the asylum process**

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<sup>2</sup> Getting a false South African passport in order to flee Zimbabwe is common. At present, a number of Zimbabwean women are on hunger strike in Yarl's Wood: the UK has rejected their claims for asylum, and does not accept they are Zimbabwean nationals. Consequently they are liable for removal to South Africa, where they are at risk of being handed back to the Zimbabwean government.

<sup>3</sup> See Home Office press release reference: 144/2003, 22 May 2003 *Asylum Applications Down By A Third – Home Secretary Welcomes Significant Progress*.

<sup>4</sup> Currently this system is in operation in France and Belgium.

<sup>5</sup> In October 2003 there were 2 sea carriers and 58 air carriers with sufficient checks to have been granted this status.

Those refugees who are lucky enough to make it onto UK territory still face a daunting prospect: navigating their way through a system routinely described as bound by a 'culture of disbelief'. This is a system where claims are prejudged and fast-tracked, refugees are often forced to represent themselves in complex legal proceedings.

A key example of the way in which claims are pre-judged is the use of the so called 'white list' of countries designated as 'safe' by the UK government. This year, India was added to the 'safe list', despite there being continuing evidence of serious human rights abuses, particularly directed at vulnerable groups such as *dalits*<sup>6</sup> and women<sup>7</sup>.

In 2004, shortly before designating India as 'safe' the Home Office published *Women in India*, a report of their fact-finding mission. In the executive summary of the report it states:

"Domestic violence was reported as a common and serious problem across all religious, class and caste boundaries. Societal violence against women was also a serious problem. Although providing or taking a dowry is illegal the practice is still widespread and where there are disputes over the dowry this can lead to the harassment or death of the woman. It was reported that women do not report the majority of rapes, and only 10% of rape cases were adjudicated fully by the courts. It was reported that police typically failed to arrest rapists, thus fostering a climate of impunity. Rape in custody was also reported."

*Women in India: Report of the fact-finding mission (2004)*  
Home Office, para 2.4

Applicants from so called safe countries have their claims 'fast tracked' and are then expected to conduct any appeal from their country of origin. So an Indian woman, fleeing to the UK to escape persecution, would be liable to having her claim fast tracked, and potentially be expected to conduct her appeal from India. This is despite the fact that on return she might face the risk of being seriously harmed by her family, the wider community and even agents of the state for having violated societal norms while in her country of refuge<sup>8</sup>.

Access to publicly funded legal representation has been cut and cut again. Law firms that have developed a high level of expertise are increasingly likely to stop providing advice to asylum seekers as the legal aid regime now makes it difficult, if not impossible to provide the high quality of service that refugee determinations require. This can lead to friends and family incurring substantial debts to pay for legal advice, and to vulnerable clients attempting to represent themselves:

"Six companies contacted on behalf of [the 19 year old Afghan in our case study] asked for sums of money varying from £1000 to £2500 ...another Afghan client's family paid a firm £900. He was in detention, facing deportation. The [representatives] applied for bail, and then withdrew the application, leaving the client, who was very traumatised, to go to Taylor

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<sup>6</sup> People from the lowest social caste.

<sup>7</sup> Designating a country as safe not only implies some level of prejudgement in relationship to the claim for protection under the convention, but crucially in the case of Indian women prejudices the need for humanitarian protection and assumes it is possible to conduct an appeal safely from country of origin.

<sup>8</sup> In *Balvir Kaur v SSHD UKIAT03387* the Tribunal confirmed the decision of the adjudicator that returning such a woman was not safe, but described the case as 'exceptional'.

House on his own. Although the Medical Foundation for Torture Victims indicated willingness to accept a referral, the company failed to refer him.”

*Justice Denied (2005) BID & Asylum Aid p16*

Does it not undermine the right to asylum if an abused woman can be sent back to a country with a horrific record on women’s rights and told to conduct her appeal from there? If a torture-surviving refugee from Afghanistan is left to represent himself before the Asylum and Immigration Tribunal?

### **Human safety: the principle of non-refoulement**

Over recent months, it has become commonplace to hear politicians either hinting, or openly stating that the current climate may require the UK to resile from its commitments under international human rights instruments:

“Let no one be in any doubt that the rules of the game have changed.... Should legal obstacles arise, we will legislate further, including, if necessary amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights.”

*Prime Minister Tony Blair, 5/8/2005*

These comments, coupled with the UK's increasingly aggressive approach to returns and the proliferating legal and policy regime relating to terrorism are combining seriously to undermine the fundamental principle of *non-refoulement*, the commitment that states will not return those who are at risk of persecution and torture.

The government is now using diplomatic assurances and memoranda of understanding to facilitate returns to states with appalling human rights records, including those with a record of using torture. As the UN Special Rapporteur on Torture has noted, the very fact that it is necessary to ask such states agree not to torture returnees should suggest that returns are unsafe, and likely to contravene the principle of *non-refoulement*.

Already, we have signed memoranda of understanding with Jordan and Libya. This is despite the fact that in 2004, the National Human Rights Centre in Jordan received more than 250 allegations of torture in detention, not including those detained by the intelligence service. Human Rights Watch has stated that it believes the UK cannot deport security suspects to Jordan without violating the principle of *non-refoulement* and the Special Rapporteur has requested: “Governments to refrain from seeking diplomatic assurances and the conclusion of memoranda of understanding in order to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill treatment”.

Evidence to date on the efficacy of ‘diplomatic assurances’ is not encouraging – one well known case involves the Swedish government’s expulsion in December 2001 of two Egyptian asylum seekers on the strength of assurances obtained from the Egyptian authorities. The men claimed to have been tortured on their return to Egypt, and yet the Swedish authorities allowed five weeks to pass before making a follow up visit. When asked why there had been such a significant delay between returning the men and ensuring that they remained safe, the Swedish ambassador stated that he

could not have visited them immediately because that would have signalled a lack of trust in the Egyptian authorities.

The UN Committee against Torture's view of this case - *Agiza v. Sweden* – is that, "at the outset... it was known, or should have been known" to the Swedish authorities that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The Committee concluded that the expulsion of the complainant was in breach of Article 3 of the Convention Against Torture, and that "the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."

And the UK is going further still. Not content with the use of memoranda of understanding and diplomatic assurances, the UK government is seeking to undermine the nature of the Article 3 ECHR right to be protected from torture or inhuman and degrading treatment.

Article 3 as applied to refugee law is simple but unequivocal: no one shall be returned to face torture or inhumane or degrading treatment. This was confirmed in 1996 in the case of *Chahal*, where the European Court of Human Rights held that Article 3 is an absolute and non-derogable right, even in the context of national security policy.

The UK government is now intervening in a Netherlands case concerning Article 3 at the European Court of Human Rights (*Ramzy*). They are supported in this by the governments of Italy, Lithuania, Portugal and Slovakia. The substance of the intervention is simple: the UK wishes to modify the *Chahal* decision, so that rather than having an absolute duty not to return people to situations where they are at risk of torture, they would be enabled to balance Article 3 rights with 'national security concerns'.

So we can no longer say with confidence that the right to asylum means the right to get here, have your claim fairly heard, and be protected at the most fundamental level: protected from facing torture.

### **The politics of protection**

Looking at this steady degradation of the protection system, this list of ways in which the UK government seeks to prevent people reaching our shores, to close its ears to their protection claim, to send them back even to countries of origin even where there is a real risk of torture, it is tempting to conclude that the asylum system risks becoming so politicised that it can no longer function to protect human rights.

But this is to over simplify: as Crisp says "we should not imagine that there was ever a global age of asylum" (*Crisp:2003:2*). The system of international protection, the legal right of asylum, has been deeply politicised since its inception.

For evidence of the political nature of the protection system, one need only look to at the recognition rates for different nationalities in different countries of the world. In 2004, 90% of Iraqi refugees in Jordan were given convention status, compared to 52% in the USA and a startling 0.1% in the UK.

From the 1960s to the 1980s the recognition of refugees in the West had a direct connection with the politics of the Cold War. By way of example, during the 1980s the US only accepted 3% of asylum claims from Salvadorians and Guatemalans, but 75% of claims from the Soviet Union. Not only did this political connection lead to high levels of recognition for refugees fleeing communist countries, it affected the way in which the protection system approached durable solutions for refugees. Returning refugees to communist countries of origin would imply some acceptance of those states, and consequently the normative approach to refugees was settlement in country of refuge, rather than return.

The end of this Cold War era of refugee protection is neatly described in this year's Human Security Report:

"In the West the end of the Cold War swept away any remaining ideological motive for accepting refugees, most of whom now came from the poorest countries of the developing world. Opportunistic European politicians began blaming unemployment and rising crime rates on refugees, asylum seekers and illegal migrants."

*Human Security Report 2005 p104*

The post Cold War era brought new forms of conflict and faster large scale refugee movements, at the same time as Western countries lost their political motive for providing protection and developing countries were increasingly economically stretched. These factors contributed to the political environment in the UK today, where the focus of the asylum system is on preventing applications, fast tracking cases and removal at all costs, and the normative approach even to those recognised as refugees is to plan for return to country of origin.

It is clear then, that the erosion of the legal right to asylum we are witnessing is part of an older problem: the politicisation of the protection regime. Like many others, the Refugee Council has fought this erosion, yet despite small successes, the UK's capacity and crucially our willingness to provide protection seems to decline with each passing year.

Today, we have a system where the number of asylum applications is being driven down by states turning refugees away from borders all over the world; a UK asylum system that refuses the vast majority of claims at first instance; a system grounded on a profoundly inadequate legal aid regime; a system that returns refugees to an uncertain and unsafe future.

### **The ethics of protection**

"Often we miss the nature of the duty that we owe to particular refugees, forever seeing refugee admissions as mere acts of charity, rather than acts that might be demanded by the principles of justice."

*(Gibney:2005:1)*

The 1951 Refugee Convention was framed in response to a colossal ethical failure: Jews fleeing Nazi Germany found closed doors wherever they turned. As a consequence, the Convention's framers placed their faith in a system of legal obligations, mindful of the suffering and devastation that sprang from reliance on the humanity of states. Now, the legal rights enshrined in the Convention have been

eroded through a process of legal and political attrition, and the advocacy of refugee and human rights organisations has failed to arrest their decline.

How do we begin the process of reaffirming our commitment to the right of asylum, and providing protection to those who need it?

For those of us committed to the human right of asylum, perhaps the answer lies in a radical affirmation of the ethical basis for the legal rights of the Refugee Convention.

The utilitarian ethicist Peter Singer has argued that globalisation has enormous and as yet unexplored implications for our moral landscape. In a global economy it is no longer possible to close our doors to the vulnerable, and use the boundaries of the nation state to draw the boundaries of the duties we owe each other. In a sense, the legal right to asylum, always global in scope, is coming of age.

In practical terms, this means articulating the so-called asylum 'debate' in the context of the West's role in creating the crises from which refugees flee. It means looking holistically at the connection between poverty, famine, social and political instability and refugee-producing situations. It means being prepared to talk about those who fall outside of the Convention definition, such as those fleeing conflicts, or internally displaced people.

Thinking in this way could be a powerful tool to advocate for the legal right to asylum, for stemming the erosion of our protection system, and rebuilding it. Re-stating the human right to asylum means taking on the challenge of considering our ethical responsibilities to each other in a 'globalised' world: perhaps this is how we can make sure the UK's door is open.

Ends

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