

REFUGEES, ASYLUM SEEKERS AND THE HUMAN RIGHTS ACT

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“The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships - except that they were still human. The world found nothing sacred in the abstract nakedness of being human.”

Hannah Arendt, *Origins of Totalitarianism* (1951)²

INTRODUCTION

It is well established that some of the most vulnerable people in the world are refugees, asylum seekers and stateless peoples. In losing national protection, they have lost everything apart from their humanity; they have no rights but human rights. How we treat those without states is how we treat humanity. Following the Holocaust, the Universal Declaration of Human Rights 1948 was enshrined alongside the Convention relating to the Status of Refugees 1951 (Refugee Convention).

Rather than dwell on the philosophy behind refugee rights, this report concerns the law enforcing them. In the context of the possible repeal of the Human Rights Act 1998 (HRA), which codified the European Convention on Human Rights (ECHR) into UK law, I consider how the HRA has protected the rights of refugees.³ This report is in three parts. First, it defines refugees in the UK; second, it looks at the HRA and what its repeal might mean; finally it examines how the HRA has protected refugees and asylum seekers.

¹ With thanks to the British Institute of Human Rights and RightsInfo.

² Arendt H. *The Origins Of Totalitarianism*. New York: Harvest; [1951] 1973:299.

³ Leftly M. A British Bill of Rights is going to be fast-tracked into law. *The Independent*. 2015. Available at: <http://www.independent.co.uk/news/uk/politics/british-bill-of-rights-to-be-fast-tracked-into-law-by-next-summer-a6698261.html> [Accessed 23 January 2016].

I. Refugees in the UK

Article 1 in the Refugee Convention defines a refugee as someone 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”*⁴

An asylum seeker is someone who has applied to the Government for refugee status. As of the end of 2014 there were just under 120,000 refugees living in the UK and just under 40,000 pending asylum cases.⁵ This will increase significantly over the next five years as the UK absorbs the promised 20,000 Syrian refugees.⁶ Even with this increase, refugees still make up a tiny part of the UK’s population, but they are amongst the most vulnerable to human rights abuses.

II. The Human Rights Act

The HRA came into force in 2000, and incorporates the rights contained in the ECHR into UK law. It does this in three ways:

- i. The judiciary must take into account decisions by the European Court of Human Rights (ECtHR) in Strasbourg, and interpret legislation in a way that is compatible with the ECHR.
- ii. If an Act of Parliament cannot be interpreted to be compatible with ECHR rights, British courts can issue a declaration of incompatibility. The law remains valid (so Parliamentary sovereignty is maintained) but this declaration allows the Government – if they choose – to fast track an amendment of the Act.

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189: 152, Available at: <http://www.refworld.org/docid/3be01b964.html> [Accessed 23 January 2016].

⁵ UNHCR. The Facts: Asylum in the UK. [unhcr.org.uk](http://www.unhcr.org.uk). 2016. Available at: <http://www.unhcr.org.uk/about-us/the-uk-and-asylum.html> [Accessed 28 January 2016].

⁶ Wintour P. UK to take up to 20,000 Syrian refugees over five years, David Cameron confirms. *The Guardian*. 2015. Available at: <http://www.theguardian.com/world/2015/sep/07/uk-will-accept-up-to-20000-syrian-refugees-david-cameron-confirms> [Accessed 23 January 2016].

iii. Public authorities must act compatibly with the ECHR.⁷

The HRA is misunderstood, and proposals to replace it are currently vague.⁸ One thing that does look to be clear is that the rights of non-citizens are at risk. The very name “British Bill of Rights” is unambiguously a citizen’s bill, threatening the rights of non-citizens.

More specifically, the Government is keen to give a narrower interpretation to what it calls “excessively broad meaning by the ECtHR in some rulings”.⁹ It seems refugees are in their cross hairs. In their 2014 proposal for repealing the HRA, *Protecting Human Rights in the UK*, they refer to *Sufi & Elmi v UK [2011]*,¹⁰ where Article 3 of the ECHR prevented the removal of a Somali war criminal on the grounds that there was a real risk of ill treatment if he returned to Mogadishu. It is apparent that the Government is keen to reevaluate the rights of non-British nationals.

Even more worrying is Martin Howe QC’s *A UK Bill of Rights*, produced as part of the Commission on a Bill of Rights, where, in Article 26(3) he writes in the explanatory notes: “The core and central rights in the Bill should be enjoyed by citizens and non-citizens alike; but it may be desirable carefully to consider whether some of the rights which are more civic in nature ought to extend to non-citizens”.¹¹ This categorising of humanity by nationality poses a direct threat to those without citizenship. It is clear that any potential repeal puts refugees and asylum seekers in the firing line.

Although the Government has refused to rule out leaving the European Convention on Human Rights,¹² the current proposal for a Bill of Rights involves

⁷ Liberty. How the Human Rights Act works. *Liberty*. 2016. Available at: <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/how-human-rights-act-works> [Accessed 23 January 2016].

⁸ Elliott M. My analysis of the Conservative Party’s proposals for a British Bill of Rights. *Public Law for Everyone*. 2014. Available at: <http://publiclawforeveryone.com/2014/10/03/my-analysis-of-the-conservative-partys-proposals-for-a-british-bill-of-rights/> [Accessed 23 January 2016].

⁹ Conservatives. *Protecting Human Rights In The UK*. Conservatives; 2014:6. Available at: https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf [Accessed 28 January 2016].

¹⁰ *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011.

¹¹ Commission on a Bill of Rights. *A UK Bill Of Rights? The Choice Before Us, Volume 1*. Ministry of Justice; 2012:214.

¹² Watt N. Cameron refuses to rule out leaving European convention on human rights. *The Guardian*. 2015. Available at: <http://www.theguardian.com/law/2015/jun/03/cameron-refuses-to-rule-out-leaving-european-convention-on-human-rights> [Accessed 26 January 2016].

repealing the HRA but remaining party to the ECHR.¹³ If the HRA was repealed but we remained a party to the ECHR, the rights would still exist, but they could only be accessed in the ECtHR. It is clear from experience prior to the enactment of the HRA that taking a case to Strasbourg is a lengthy and costly process, so justice would be much harder to access for the poorest groups in society, of which refugees are one.

III. The Human Rights Act and Refugees

These changes would together serve to restrict rights in the UK, and make it more difficult to claim rights in Strasbourg. Therefore, to understand their impact on refugees and asylum seekers we must look at judgements here and in the ECtHR.

Since the HRA came into force, three Convention rights have proved critical for the rights of refugees: Articles 3, 8 and 14.

i. Article 3

*“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*¹⁴

After the horrors of World War II, Article 33 of the Refugee Convention 1951 enshrined in international law the principle of non-refoulement, that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁵

Article 3 of the ECHR has acted to extend this principle. While the Refugee Convention requires the danger to be on account of a group that the person belongs to (race, nationality etc.), Article 3 also prevents removal on the grounds of generalised violence in the destination country. In NA. v. The

¹³ HC Deb 26 Jan 2016, vol 605, c141.

¹⁴ *Human Rights Act 1998*, Chapter 42. Available at: <http://www.legislation.gov.uk/ukpga/1998/42> [Accessed 28 January 2016].

¹⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189: 30, Available at: <http://www.refworld.org/docid/3be01b964.html> [Accessed 23 January 2016].

United Kingdom [2008],¹⁶ the Government was prevented from removing a Tamil Sri Lankan on the grounds of generalised violence in Sri Lanka. Although the judges in Strasbourg set a high threshold - “extreme cases of general violence” (paragraph 115) – if this threshold is met, removal is prohibited *irrespective of the reasons behind the danger*.

Second, Article 3 has prevented states from removing people if their life or freedom might be in danger, *irrespective of the facts of the case*. In S.H. v. United Kingdom [2010],¹⁷ although refused leave to remain, Strasbourg prevented the UK Government from removing the applicant on the grounds that his life would be at risk if sent back to Bhutan. The Court held this on a number of grounds, including the general discrimination against ethnic Nepalese, the difficulty of ascertaining the human rights situation in Bhutan, and the fact that he would be an involuntary returnee. As his asylum claim was rejected, he depended solely on his Article 3 rights.

Article 3 has played a significant role in guaranteeing the *mental health of refugees and asylum seekers*. If there is a risk that the applicant will suffer serious mental health issues upon return without adequate support, Article 3 can be invoked to prevent removal. In Y and Z (Sri Lanka) v. Secretary of State for the Home Department [2009],¹⁸ the applicants had been tortured and raped by security personnel. The Court of Appeal held that returning them to Sri Lanka would be so traumatic that they would be unable to seek the psychological support they required, and so would bring a high likelihood of suicide. Such inhuman treatment would clearly breach their Article 3 rights.

In these three respects, Article 3 has served to extend the rights in the Refugee Convention.

It is not just other states that abuse Article 3 rights; it also *protects refugees while they are the UK*. In MK and AH v. The Secretary of State for the Home Department [2012],¹⁹ the High Court ruled that the systematic failure of the Home Office to provide support for asylum seekers while they waited for a

¹⁶ *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008.

¹⁷ *S.H. v. United Kingdom*, Application no. 19956/06, Council of Europe: European Court of Human Rights, 15 June 2010.

¹⁸ *Y (Sri Lanka) v. Secretary of State for the Home department; Z (Sri Lanka) v. Secretary of State for the Home Department*, [2009] EWCA Civ 362, United Kingdom: Court of Appeal (England and Wales), 29 April 2009.

¹⁹ *MK (1) and AH (2) v. The Secretary of State for the Home Department*, [2012] EWHC 1896 (Admin), United Kingdom: High Court (England and Wales), 10 July 2012.

decision on a further claim for asylum – a delay of at least 15 days – was causing homelessness and destitution. The policy of delaying consideration for support was declared unlawful, as it produced a risk of an Article 3 breach.

Article 3 has proved critical in both extending the rights in the Refugee Convention with regards to removal, and protecting refugees in the UK.

ii. Article 8

*"Everyone has the right to respect for his private and family life, his home and his correspondence."*²⁰

Much has been made of Article 8. Politicians and press alike have misrepresented the article; many associate it with the UK being prevented from deporting terrorists on overly generous legal grounds. Who can forget Theresa May's widely-discredited claim at Conservative Party conference in 2011:

*"We all know the stories...about the illegal immigrant who cannot be deported because, and I am not making this up, he had a pet cat."*²¹

Contrary to claims like this, Article 8 is *not an absolute right*. The right can be derogated if there are greater concerns, such as public safety, the rights of others, or control on immigration. It is not a 'blank cheque' for keeping foreign criminals in the UK.

Article 8 has proven particularly effective at *protecting the rights of children*, in the remit of family life.²² The case of ZH (Tanzania) v SSHD [2011]²³ concerned the removal of a failed asylum seeker with a terrible asylum history (including two claims with a false name), who was the mother of two British children (the father had HIV so was unable to look after them). The Supreme Court ruled that the primary consideration must be the rights of the children,

²⁰ Human Rights Act 1998, Chapter 42. Available at: <http://www.legislation.gov.uk/ukpga/1998/42> [Accessed 28 January 2016].

²¹ Casciani D. The case of the cat deportation tale - BBC News. BBC News. 2011. Available at: <http://www.bbc.co.uk/news/uk-politics-15171980> [Accessed 23 January 2016].

²² 1 Crown Office Row. Article 8, Right to private and family life. *UK Human Rights Blog*. 2016. Available at: <http://ukhumanrightsblog.com/incorporated-rights/articles-index/article-8-of-the-echr/> [Accessed 23 January 2016].

²³ *ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 4, United Kingdom: Supreme Court, 1 February 2011.

and, particularly as British citizens, removing them would clearly be against their best interests. Article 8 is not absolute, and so the interests of children will not always prevail over all other considerations, but, said Lord Kerr, they “must rank higher than any other” (paragraph 46). In *CL (Vietnam) v. Secretary of State for the Home Department [2008]*²⁴ the issue was whether the reception facilities for children in Vietnam were so bad that a removal would have breached the appellant’s right to a private life. The Supreme Court made the important judgment that this was something for judges to decide, not the Home Office.

The importance of Article 8 for children’s rights was proved again at the start of this year, when British judges ruled that three youths and a dependent adult should be immediately brought from ‘The Jungle’ camp in Calais to their relatives in the UK.²⁵ They had initially been rejected on the grounds that the Dublin Regulation required them to first apply for asylum in France, followed by a request from Paris to join their relatives in the UK. This process, noted the tribunal, can take almost a year. It ruled that, considering the vulnerability of the applicants and the conditions in the camp, “the Secretary of State’s refusal to permit the swift admission to the United Kingdom of the first four Applicants would interfere disproportionately with the right to respect to family life under Article 8 ECHR”.²⁶

Like Article 3, Article 8 has also proved important for *protecting the mental health of refugees and asylum seekers*. In *R v. Secretary of State for the Home Department, ex parte Razgar [2004]*²⁷ the appellant claimed that return to Germany would have caused him serious psychological trauma, although there was no risk of an Article 3 violation. The House of Lords ruled that he should not be removed; mental stability is fundamental for the enjoyment of private life.

In *Protecting Human Rights in the UK*, the Conservative Party declared that it wants to “[l]imit the use of human rights laws to the most serious cases...There will be a threshold below which Convention rights will not be engaged,

²⁴ *CL (Vietnam) v. Secretary of State for the Home Department*, [2008] EWCA Civ 1551, United Kingdom: Court of Appeal (England and Wales), 10 December 2008.

²⁵ Bowcott O. Allowing four Syrian refugees into UK 'may set limited precedent'. *The Guardian*. 2016. Available at: <http://www.theguardian.com/uk-news/2016/jan/29/allowing-four-syrian-refugees-into-uk-may-set-limited-precedent>. [Accessed 7 February 2016].

²⁶ *R (on the application of ZAT and Others) v Secretary of State for the Home Department*, IJR [2016] UKUT 61 (IAC), 22 January 2016.

²⁷ *R v. Secretary of State for the Home Department, ex parte Razgar*, [2004] UKHL 27, United Kingdom: House of Lords (Judicial Committee), 17 June 2004.

ensuring UK courts strike out trivial cases".²⁸ In November 2015 a leaked document further reinforced this message; only cases fulfilling "a certain level of seriousness" would go to court.²⁹ Reading the Theresa May quote above, alongside tabloid criticisms of the HRA, it is apparent that 'qualified' rights such as Article 8 could be under threat. Human rights do not exist just to keep us alive and physically safe, they should allow the conditions for a good, fulfilling life. By characterising some rights as 'trivial', that prospect of leading a life with dignity – whether it alongside your parents or with mental stability – will be diminished for refugees, asylum seekers and many others.

iii. Article 14

*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*³⁰

Rights should be applied to refugees as if they were anyone else. While this might seem self-evident, too often the rights of the most vulnerable are treated as privileges, making them easier to take away. *Hode and Abdi v. the United Kingdom [2013]*³¹ illustrates this principle. Having been granted five years 'Leave to Remain' in 2006, Hode married Abdi in Djibouti in 2007. She then applied to join him in the UK, but her application was rejected on two grounds: (i) Having only been granted temporary 'Leave to Remain' Hode was not considered "present and settled in the United Kingdom" (ii) Spouse reunion did not apply because they were not married when Hode fled his country of origin, Somalia.

The couple argued that they had been treated differently, without reasonable justification, from

²⁸ Conservatives. *Protecting Human Rights In The UK*. Conservatives; 2014:7. Available at: https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf [Accessed 28 January 2016].

²⁹ Shipman T. Human rights law to be axed. *The Sunday Times*. 2015. Available at: <http://www.thesundaytimes.co.uk/sto/news/Politics/article1630327.ece> [Accessed 23 January 2016].

³⁰ *Human Rights Act 1998*, Chapter 42. Available at: <http://www.legislation.gov.uk/ukpga/1998/42> [Accessed 28 January 2016].

³¹ *Hode and Abdi v. the United Kingdom*, Application No. 22341/09, Council of Europe: European Court of Human Rights, 6 February 2013.

- (i) Other groups with temporary 'Leave to Remain', such as students and workers, who were allowed to be joined by spouses irrespective of marriage date;
- (ii) Refugees who had been married before they fled.

Strasbourg upheld their appeal and so also upheld an important legal and moral principle underlying human rights: though it may be easy to treat more desperate people less generously, rights must be applied equally, for we are all equally human.

IV. Conclusion

Refugee rights have always been precarious, and the state of politics in Europe and Britain make them look more vulnerable than ever. Britain's increasingly inward-looking political landscape endangers the rights of non-citizens, and now millions of innocent refugees are being associated with horrific acts of terrorism.³²

As I discussed in Section II, it is impossible to know what impact the repeal of the HRA will have until it is repealed, and it may well be difficult even then.³³ For now, it is enough to conclude that, alongside other protections, the HRA has acted as a vital source of support for refugees and asylum seekers. It has reinforced the sacrosanct idea that the Refugee Convention 1951 aimed to preserve: that there is an "inherent dignity" to humanity.³⁴ While any potential move to a British Bill of Rights will be complex, and it may take a long time before we understand the full impact on refugees and asylum seekers, it will certainly be a step away from this ideal.

³² Hewitt G. Paris attacks: Impact on border and refugee policy - BBC News. *BBC News*. 2015. Available at: <http://www.bbc.co.uk/news/world-europe-34826438> [Accessed 23 January 2016].

³³ Rozenberg J. Human rights legislation in the UK: a cut-out-and-keep guide. *The Guardian*. 2014. Available at: <http://www.theguardian.com/law/2014/sep/01/human-rights-legislation-uk-council-european-convention> [Accessed 23 January 2016].

³⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [Accessed 26 January 2016].