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The Prosecution of Asylum Seekers:

The asylum process in the UK and the impact of criminal convictions and sentences on asylum claims

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Introduction

- This presentation will:
  - Give an overview of asylum processes in the United Kingdom
  - Address the impact of criminal convictions/sentences on asylum claims
  - Consider anticipated changes to the system in the United Kingdom

Asylum in the United Kingdom

What is asylum?

- Article 14 of the Universal Declaration of Human Rights provides:

  "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

- Asylum is granted pursuant to the Refugee Convention (the 1951 Convention on the Status of Refugees and the 1967 protocol, usually by reference to Article 1A(2), and a refugee is any person who:

  "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of 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, is unwilling to return to it.[1]"

Elements of an asylum claim

- A refugee will have:
  - A fear of return to their home country
  - That fear will be of persecution
  - That fear of persecution will be well-founded
  - That well-founded fear of persecution will be for a specific Convention reason
  - That well-founded fear of persecution for a Convention reason will be the reason they cannot return

- Burden of proof is on the applicant

- The standard of proof is "*reasonable degree of likelihood*"

What are the stages of an asylum claim?

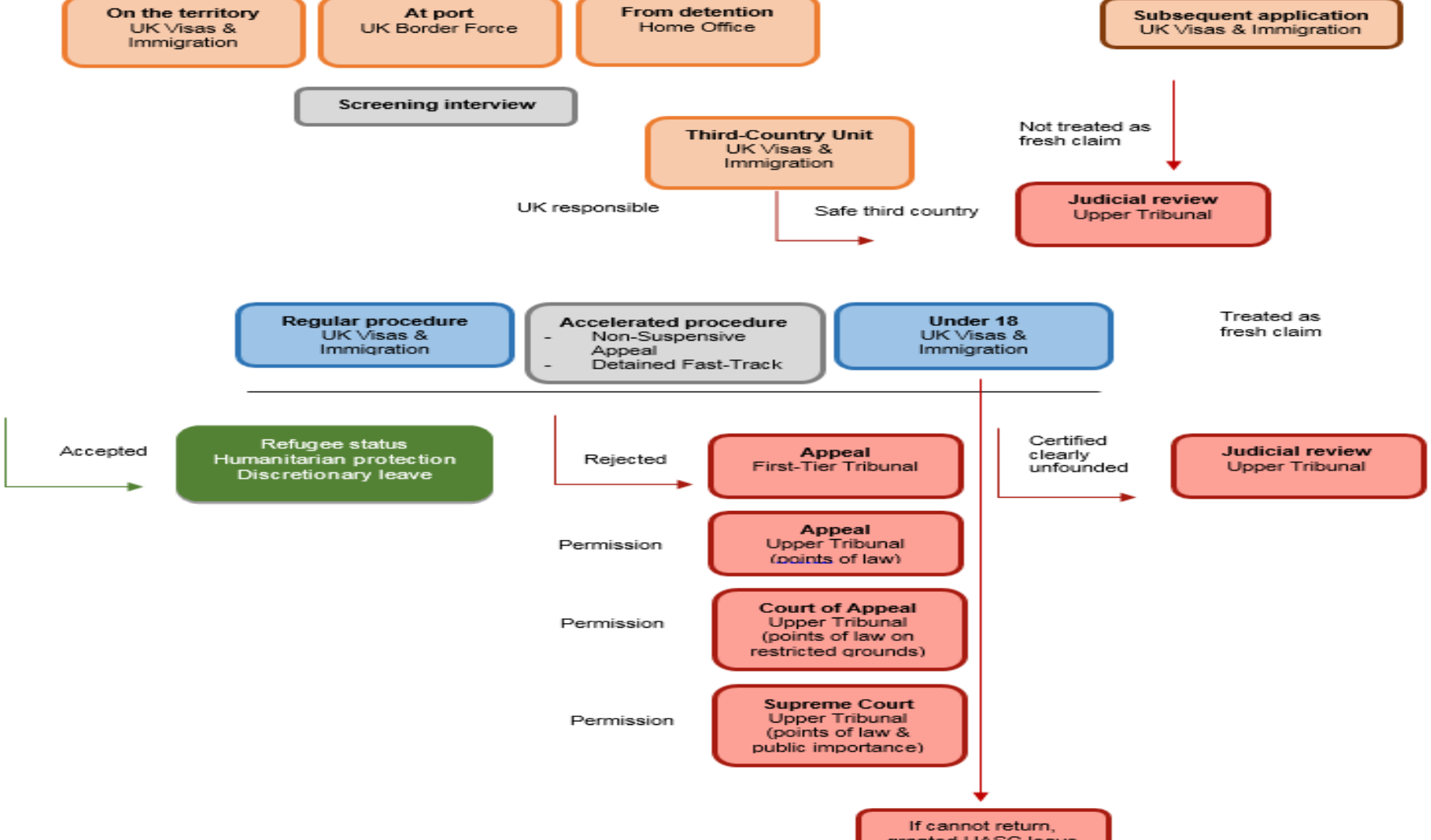
- Stage 1: Escape
  - May be sent away by family (especially young boys in e.g. Afghanistan/Albania)
  - May flee with family
  - May flee alone
  - May have already left when circumstances change
  - Will probably use an agent

- Stage 2: Travel to country of destination
  - May be close by
  - May be in Europe
  - May go to where they speak the language
  - May go to where they have family members (very common with younger asylum seekers)
  - May not have chosen the country (frequently agent's decision)

- Stage 3: Make claim

Claiming asylum in the UK

- There is currently no legal way to claim asylum in the United Kingdom without entering first
- The policy permitting people to transfer refugee status from another country has been withdrawn
- You can claim asylum at the airport (virtually impossible without either a false passport or lying about reasons for entry), but more common to claim asylum at a police station a few days after entry or to be seen leaving the back of a lorry
- Once you have claimed asylum you will be given an appointment to come and register a protection claim
- Failure to claim asylum at the first opportunity will be considered to damage your credibility when your claim is assessed (by virtue of s8 of the Asylum and Immigration (treatment of claimants etc) Act 2004)


On the territory
UK Visas & Immigration
At port
UK Border Force
From detention
Home Office
Subsequent application
UK Visas & Immigration
Screening interview
Third-Country Unit
UK Visas & Immigration
Not treated as fresh claim
UK responsible
Safe third country
Judicial review
Upper Tribunal
Regular procedure
UK Visas & Immigration
Accelerated procedure
- Non-Suspensive Appeal
- Detained Fast-Track
Under 18
UK Visas & Immigration
Treated as fresh claim
Accepted
Refugee status
Humanitarian protection
Discretionary leave
Rejected
Appeal
First-Tier Tribunal
Certified clearly unfounded
Judicial review
Upper Tribunal
Permission
Appeal
Upper Tribunal
(points of law)
Permission
Court of Appeal
Upper Tribunal
(points of law on restricted grounds)
Permission
Supreme Court
Upper Tribunal
(points of law & public importance)
If cannot return,

“Section 8” credibility issues

- S8 of the Asylum and Immigration (treatment of claimants etc) Act 2004 provides:

  “(1)In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant’s credibility, of any behaviour to which this section applies…

  (4)This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.

  (5)This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.

  (6)This section also applies to failure by the claimant to make an asylum claim or human rights claim before being arrested under an immigration provision, unless—

  (a)he had no reasonable opportunity to make the claim before the arrest, or

  (b)the claim relies wholly on matters arising after the arrest.”

Asylum Process – stages of a typical claim

- Claim asylum at port/airport/police station/in detention
- Screening interview (setting out basics of claim)
- Asylum interview (detailed questioning on the basis of claim)
- Asylum refusal letter
- Appeal to the First-tier Tribunal
- Determination allowing appeal
- Grant of leave to remain and Refugee Status

Impact of conviction and sentence

Impact of criminal convictions on an asylum claim

- The main ways in which a criminal conviction/sentence will impact on an asylum claim are these:
  - Credibility likely to be seen as diminished
  - May face deportation
  - May face exclusion from the Refugee Convention/Humanitarian Protection
  - Likely to be detained

Deportation: What is deportation and what is removal?

- Deportation is a sanction for wrongdoing and results in a deportation order being made, which prevents re-entry, usually for a minimum of 10 years. A deportation order invalidates any leave to remain.

- Deportation may be:
  - Following criminal conviction (s3(6) of the Immigration Act 1971; s32 of the UK Borders Act 2007)
  - On the basis that a person's presence is "not conducive to the public good" (s3(5)(a) of the Immigration Act 1971)

- Administrative removal is a distinct process, not a criminal penalty, by which a person without leave to remain is removed from the United Kingdom.

Deportation: What is a foreign criminal?

- For the purposes of the Nationality, Immigration and Asylum Act 2002 a "foreign criminal" is a person:
  - (a) who is not a British citizen,
  - (b) who has been convicted in the United Kingdom of an offence, and
  - (c) who—
    - (i) has been sentenced to a period of imprisonment of at least 12 months,
    - (ii) has been convicted of an offence that has caused serious harm, or
    - (iii) is a persistent offender

- The deportation of a Foreign Criminal is deemed to be in the public interest for the purposes of Article 8 ECHR (s117C(1) of the Nationality, Immigration and Asylum Act 2002). There is a very high threshold to avoid deportation where a sentence is 4 years or more (s117C(6)).

- The threshold for automatic deportation in s32 of the UK borders Act 2007 is also a 12 month sentence.

Deportation: What happens to a foreign criminal?

- A foreign criminal (or someone who cannot prove their nationality/right to reside fast enough) upon completion of their criminal sentence will be:
  - detained
  - considered for deportation always

- Detention will in practice be in prison, at least initially

- Detention may be for a very lengthy period (sometimes far in excess of the period of formal imprisonment)

- In practice, the asylum claim will be considered with the deportation claim and any appeal will be heard together

Exclusion: Exclusion from the protection of the Refugee Convention

- Article 1F of the Convention provides:

  "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
  (a) He has committed a crime against peace, a war crime, or a crime against humanity…;
  (b) He has committed ***a serious non-political crime outside the country of refuge*** *prior to his admission to that country as a refugee;*
  (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

- Article 33 of the Convention provides:

  "1. No 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.

  2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, ***having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country****."*

Exclusion: Exclusion from the protection of the Refugee Convention

- Article 1F operates to prevent those who have committed serious criminal offences or war crimes from the protection of the Refugee Convention.

- Article 33(2) operates to permit the removal of those recognised as Refugees who commit a serious crime and constitute a danger to the United Kingdom.

- In applying Article 33(2), s72 of the Nationality, Immigration and Asylum Act 2002 provides:

  "(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

  (a) convicted in the United Kingdom of an offence, and

  (b) sentenced to a period of imprisonment ***<u>of at least two years</u>****."*

Exclusion: Exclusion from Humanitarian protection

- There are equivalent provisions for those seeking humanitarian protection (Article 3 ECHR or Article 15(b) or (c) of the Qualification Directive):

  "Exclusion from humanitarian protection

  339D. A person is excluded from a grant of humanitarian protection for the purposes of paragraph 339C (iv) where the Secretary of State is satisfied that:

  (i) there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;

  (ii) there are serious reasons for considering that they have guilty of acts contrary to the purposes and principles of the United Nations or have committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;

  (iii) there are serious reasons for ***<u>considering that they constitute a danger to the community</u>*** *or to the security of the United Kingdom; or*

  (iv) there are serious reasons for considering that they have ***<u>committed a serious crime</u>****; or*

  (v) prior to their admission to the United Kingdom the person committed a crime outside the scope of (i) and (iv) that would be punishable by imprisonment were it committed in the United Kingdom and the person left their country of origin solely in order to avoid sanctions resulting from the crime."

Exclusion: Practicalities

- A "*serious crime*" for the purposes of Article 1F(b) will involve "*especially grave*" offending (*AH (Algeria) v Secretary of State for the Home Department [2012] EWCA Civ 395*)

- *IH (s.72; 'Particularly Serious Crime') Eritrea* [2009] UKAIT 00012:

  "Art 33(2) can only be applied in a fact-sensitive way taking account of all the circumstances of the offence including its nature, gravity and consequences and of the offender including any aggravating or mitigating factors."

- Where Article 33(2) or Article 1F applies to a person they:
  - **Will evertheless not be removed if they face a risk of a breach of Article 3 ECHR (or Article 15(b) or (c) of the Qualification Directive) – serious harm**
  - Will not be granted Refugee Status (and so not be entitled to e.g. family reunion)
  - Will only be granted Restricted Leave – leave to remain of 6 months that has to be constantly renewed (plus restricted access to employment, benefits etc)

Exclusion: Practicalities

- From the criminal lawyer's point of view:
  - Conviction of something that can be characterised as a serious crime is of major importance
  - Vital to be aware of the impact of different lengths of sentences:
    - 12 months – automatic deportation
    - 24 months – SSHD presumption of exclusion from the Refugee Convention
    - 48 months – Article 8 ECHR appeal cannot be won absent "*very compelling circumstances*" that are "*over and above*" e.g. being lawfully settled since childhood and having a family
  - Vital to be aware of the potential defences

The “New Plan” for Immigration

What's on the horizon?

- Priti Patel has a "*New Plan for Immigration*" :/
- Draft bill has yet to be released despite being described as "*imminent*" for months
- According to the policy document and numerous press leaks:
  - Asylum claims may be processed offshore
  - Appeal rights will be "streamlined"
  - Those who passed through safe third countries may not have their claims considered for six months
  - Asylum seekers arriving "irregularly" will receive a punitive lesser form of protection
  - Lawyers will be penalised for challenging decisions "unmeritoriously"

Thank you

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