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JUDICIAL OR ADMINISTRATIVE PROTECTION OF ASYLUM-SEEKERS - CONTENT OR FORM?

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Introduction

[1] It is sometimes said that administrative and judicial systems are different. Whether that is true or not is most often debated at a rather abstract level and possibly coloured by subjective experiences. Common law lawyers in particular seem unusually vulnerable to presuming an innate superiority of the common law model which emphasises ***judicial*** protection, even while administrative adjudication continues to proliferate in most common law jurisdictions and while civil disputes move ever more into alternative, non-judicial forms of conflict resolution.

[2] This paper does not enter the debate as to the supposed divide between administrative rather than judicial protection. The position taken is that in the refugee context these are largely false opposites. The real question is whether the particular legal system delivers effective protection under the Refugee Convention. This transcends a more myopic view which falsely assumes that administrative protection is necessarily inferior to judicial protection. An administrative system may in some countries be as effective, if not more so, in delivering meaningful protection than a judicial system and vice-versa. In other countries only a mix of the two systems working together produces the desired result. As of 31 March 2005 there were 145 States parties to either the 1951 Convention or the 1967 Protocol or both of these instruments. The legal systems of these countries are so diverse that it would be artificial to construct a supposed polarity between administrative and judicial protection.

[3] A more pragmatic, and hopefully more useful approach, is proposed namely to pose the question "Does the domestic legal system ensure the good faith observance by the State party of its obligations under the Refugee Convention?"

[4] The core purpose of the Refugee Convention is to protect those at real risk of being persecuted for a Convention reason from being returned to their country of origin. The question to be addressed is how well that obligation is implemented at domestic level. It is the effective discharge of the protection obligation which is important, not the particular delivery system. All legal systems, whether based primarily on an administrative system or a judicial system, must be measured against this single overarching criterion.

[5] What this paper does is to identify and briefly discuss an admittedly limited set of factors which may impact on the level of protection delivered by a particular system.

[6] First it is important to note the nature of the fundamental duty of any State party which enters into treaty obligations. It is the duty of good faith observance of the Treaty.

The duty of good faith

[7] The obligations assumed by a State party under the Refugee Convention are mandatory and of immediate binding effect. Each of Articles 3 to 34 employs the mandatory "shall". They are duties of result. See particularly the all important Articles 16 and 33:

Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Article 16. -- Droit d'ester en justice

1. Tout réfugié aura, sur le territoire des États contractants, libre et facile accès devant les tribunaux.

2. Dans l'État contractant où il a sa résidence habituelle, tout réfugié jouira du même traitement qu'un ressortissant en ce qui concerne l'accès aux tribunaux, y compris l'assistance judiciaire et l'exemption de la caution *judicatum solvi*.

3. Dans les États contractants autres que celui où il a sa résidence habituelle, et en ce qui concerne les questions visées au paragraphe 2, tout réfugié jouira du même traitement qu'un national du pays dans lequel il a sa résidence habituelle.

Article 33. - Prohibition of expulsion or return ("refoulement")

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.

Article 33. -- Défense d'expulsion et de refoulement

1. Aucun des États contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

[8] The Convention, however, is of course silent as to how these mandatory obligations of a

State party are to be implemented at domestic level. Few legal systems are the same and the assumption is that each State party will observe the principle *pacta sunt servanda.* Domestic law cannot justify failure to perform a treaty. Principles of customary international law codified in the Vienna Convention on the Law of Treaties, 1969 are clear[2]:

> **Article 26**
>
> **Pacta sunt servanda**
>
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
>
> **Article 27**
>
> **Internal law and observance of treaties**
>
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

[9] Article 18 of the Vienna Convention on the Law of Treaties further obliges a State to refrain from acts which would defeat the object and purpose of a treaty by which it is bound.

[10] Similarly the Refugee Convention, while providing a comprehensive definition of the term "refugee", does not prescribe any particular form of procedure for determining refugee status. It is implicit in the good faith obligation and in the guarantee of the right of access to courts that the procedures will maximise the opportunity for a refugee claimant to establish that he or she is a refugee which in turn maximises State observance of the non-refoulement obligation. Fairness is an indispensable aspect of such procedures[3], as is the need for the procedures to be both prescribed by law and subject to the scrutiny of the courts of law on the territory of the State party.[4]

[11] Above all, however, are the points made by Professor James C Hathaway in the Canadian context[5]:

(a) There must be a recognition that refugee claimants are not opponents or threats, but rather persons seeking to invoke a right derived from international law.

(b) The refugee criteria must be applied dispassionately, recognising that refugee determination is among the most difficult forms of adjudication, involving as it does

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[2] *Libya v Chad* ICJ Reports (1994) 4 at [41]; *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 171 ALR 483 (FC:FC) at [14] & [90] - [91] per Drummond & Katz JJ; *Refugee Appeal No. 74665/03* [2005] NZAR 60 at [45] (NZRSAA).

[3] See, for example, the recent analysis of the EU proposals by Sylvie Da Lomba in *The Right to Seek Refugee Status in the European Union* (Intersentia, 2004) Chapter V and the earlier discussion by Guy Goodwin-Gill, "The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam" and by Johannes van der Klaauw, "Towards a Common Asylum Procedure" in Elspeth Guild & Carol Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart, 2001) 141, 155, 165, 172.

[4] Thomas Spijkerboer, "Higher Judicial Remedies for Asylum Seekers - An International Legal Perspective" in IARLJ, *Asylum Law: First International Judicial Conference* (1995) 217 at 219-224 commenting on the Article 13 ECHR obligation to provide an effective remedy and the Article 16 Refugee Convention obligation to provide free access to courts of law.

[5] James C Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993) 7.

fact-finding in regard to foreign conditions, cross cultural and interpreted examination of witnesses, ever present evidentiary voids and a duty to prognosticate potential risks rather than simply declare the more plausible account of past events.[6]

(c) These evidentiary and contextual concerns make departure from traditional modes of adjudication imperative.

Rather than "technocratic justice", cases demand what Professor James C Hathaway has described as "expert, engaged, activist decision-makers who will pursue substantive fairness".[7]

[12] While the prescription may be clear, implementation of the Refugee Convention at the domestic level can be less than straightforward. Because the Convention prescribes no particular procedure for determining refugee status, it is not "self-executing" for those states which take the monist approach to treaty incorporation. In this respect the Refugee Convention is not capable of being applied at domestic law without new legislation.[8]

[13] States which subscribe to the dualist approach would require legislation in any event[9].

Domestic incorporation - manner and form

[14] ***How much*** of the Refugee Convention is incorporated domestically is just as important a question as ***how*** incorporation itself is achieved. There is a marked reluctance to incorporate the entire Convention. The failure by Australia, for example, to adopt this simple expedient has led to Byzantine complexities.[10] There is a decided preference to adopt only the definition in Article 1A(2) (or a modified version of it). Canada has not incorporated Article 1D.[11] The Dutch definition apparently does not include the cessation and exclusion clauses of Articles 1C, D, E and F.[12] There is also a tendancy to paraphrase the Convention "well-founded fear ***of being persecuted***" into "well-founded fear ***of persecution***", as in the case of Canada, Australia and the USA.[13] This can lead to dangerous distortions as in the

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[6] Ibid 6. See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* para 47.

[7] James C Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993) 7 cited in *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 (SC:Can) at [41] per Bastarache J .

[8] For a brief description of the monist approach and examples (France, Germany, The Netherlands, Poland, Russia, Switzerland) and an explanation of the dualist approach (UK) and a discussion of the way treaties are dealt with under the Constitution of the USA, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, 2000) at 143-161.

[9] See for example *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005) (HCA) at [17] & [35].

[10] See for example *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005) (HCA) addressing *inter alia* "The phrase 'protection obligations under the Refugees Convention' in s 36 of the Migration Act 1958 (Cth).

[11] This was the position under the Immigration Act 1985 and remains the position under the Immigration and Refugee Protection Act 2001.

[12] Dirk Vanheule, "The Netherlands" in Jean-Yves Carlier, Dirk Vanheule et al (eds), *Who is a Refugee? A Comparative Case Law Study* (Kluwer, 1997) at 479, 481.

[13] Immigration and Refugee Protection Act 2001, s 96 (Can). The Migration Act 1958 (Cth) ss 91R, 91S, 91T & 91U legislatively stipulate the meaning of "persecution", "membership of a particular social group", "non-political crime" and "particularly serious crime" for the purposes of Australian Federal Law; for the USA see the definition of "refugee" in the Immigration and Nationality Act para 101(a)(42)(A); 8 USCA para 1101(a)(42)(A).

nexus or causation requirement.

[15] The Refugee Convention employs the passive voice "well-founded fear ***of being*** persecuted". These words emphasise that the refugee definition has as its focus the ***predicament*** of the refugee. The Convention defines refugee status not on the basis of a risk of "persecution" but rather a risk of "being persecuted". The language draws attention to the fact of exposure to the harm rather than to the act of inflicting harm. In the result:

(d) The focus is on the reasons for the predicament of the refugee claimant rather than on the mindset of the persecutor. The holding of the US Supreme Court in *Immigration and Naturalisation Service v Elias-Zacarias*[14] to the contrary that the mindset or intention of the persecutor ***is*** essential must be seen in the light of the fact that the Immigration and Nationality Act s 208(a) (codified at 8 USC para 1108(a)(42)) is differently worded (*a well-founded fear of persecution on account of*) to Article 1A(2) (*well-founded fear of being persecuted for reasons of*).[15] Contrast the decision of the High Court of Australia in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[16] and that of the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No. 72635/01*[17].

(e) The better view, based on the text of the Refugee Convention itself and not on a modified or paraphrased version thereof, is that it is sufficient for the refugee claimant to establish that the Convention ground is a ***contributing cause to the risk of "being persecuted"***. It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established.[18]

[16] As Joan Fitzpatrick has pointed out, *Elias-Zacarias* illustrates the dangers of a domestic asylum system disconnected from an international framework.[19] The same observation could be made of the provision in the Australian Migration Act 1958 (Cth), s 91R(1)(a) which requires decision-makers to recognise ***only*** the "*essential and significant reasons for the persecution*".

[17] The point of these examples drawn from the USA and Australia is that the reach of the

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[14] *Immigration and Naturalisation Service v Elias-Zacarias* 502 US 478 (1992)

[15] See further Shayna S Cook, "Repairing the Legacy of *INS v Elias-Zacarias*" (2002) 23 Mich J Int'l L 223.

[16] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [33] (HCA).

[17] *Refugee Appeal No. 72635/01* [2003] INLR 629 at [168] (NZRSAA).

[18] *Michigan Guidelines on Nexus to a Convention Ground* (2002) 23 Mich. J. Int'l L. 210 and see *Refugee Appeal No. 72635/01* [2003] INLR 629 at [167] to [178] (NZRSAA). This approach has been adopted by the UNHCR in recently issued Guidelines, specifically the UNHCR, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 7 May 2002) at para 20. See also the discussion by Karen Musalo, "Claims for Protection Based on Religion or Belief" 16 IJRL (2004) 165, 205-212.

[19] Joan Fitzpatrick, "The International Dimension of US Refugee Law" 15 Berkeley J Int'l Law (1997) 1, 21. There have been bitter divisions in the Supreme Court of the United States on the relevance of international human rights norms. See particularly *Lawrence v Texas* (2003) 156 L Ed 2d 508, particularly the dissenting decision of Justice Scalia at 539. Note the apparently contradictory position taken by Justice Scalia and Justice Sandra Day O'Connor in *Olympic Airways v Husain* 124 S Ct 1221 (2004) noted in "Supreme Court's Use of Court Decisions of Treaty Partners" (2004) 98 American Journal of International Law 579.

protection afforded by the Refugee Convention can be impeded to a dangerous degree by the manner and form of domestic incorporation. Particularly where the domestic legislation not only departs from the text of the Convention, but also seeks to impose a particular "vision" of what the definition ***ought to be***[20]. In the EU context this vision has been described as "tunnel vision".[21]

[18] In these circumstances there is little opportunity for the system to self-correct, unless there is a Constitution or other fundamental law which allows tribunals or courts to substitute the actual (and binding) terms of the Refugee Convention for the non-conforming language employed in the domestic legislation. As a general rule judicial protection would, in these circumstances, afford a higher level of protection to the sometimes hierarchically inferior administrative processes.

Domestic incorporation - interpretation of the Refugee Convention

[19] Whether perfectly or imperfectly incorporated into domestic law the Refugee Convention will potentially raise a number of difficult interpretation issues, particularly in relation to the Inclusion and Exclusion clauses. The degree to which a particular system facilitates a full and informed debate of these interpretation issues is a significant measure of the integrity of that system.

[20] Experience shows that it is unlikely (though not impossible) for a first or even second instance tribunal or court to chance on the "true" interpretation of the Refugee Convention the first time a particular issue arises. There are considerable advantages in the opportunity for further argumentation and consideration at higher administrative or judicial levels, provided the relevant body is independent and possessed of the expertise necessary to interpret and apply an international human rights instrument. The advantages of higher consideration are substantial. The process as a whole has greater legitimacy and the ruling (hopefully "correct") in the individual case will provide a precedent by which other refugee claims will be determined. There is opportunity for the development of a principled interpretation of the Refugee Convention in accordance with accepted principles of treaty interpretation. This too is a substantial component of the duty to be fair. But unfortunately error-free jurisprudence cannot be guaranteed. Mistakes will occur, as in the case of the "well-founded fear" standard which the common law world unjustifiably interprets as mandating both objective and subjective components. This is an unsupportable interpretation and not one which prevails in civil jurisdictions.[22] A degree of humility is required for false jurisprudence to be abandoned.

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[20] See generally Alice Edwards, "Tampering with Refugee Protection: The Case of Australia" 15 IJRL (2003) 192, 202-204; Roz Germov & Francesco Motta, *Refugee Law in Australia* (Oxford, 2003) 189-192; Shayna S Cook, "Repairing the Legacy of *INS v Elias-Zacarias*" (2002) 23 Mich J Int'l L 223, 243.

[21] Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, "Understanding Refugee Law in an Enlarged European Union" (2004) 15 EJIL 355, 371.

[22] See most recently the *Michigan Guidelines on Well-Founded Fear* (disponible aussi en français *Les Recommandations de Michigan sur la crainte avec raison*) <http://www.refugeecaselaw.org/fear.asp>. It is intended that a background study to these *Guidelines* will be published shortly in the Mich. J. Int'l L.

The question of natural justice and fairness - impartiality and independence

[21] There is a direct connection between the good faith discharge of the obligations (of result) under the Refugee Convention and procedural due process. Giving a refugee claimant a fair hearing is a necessary precondition to the accurate determination of whether the non-refoulement obligation of the State is engaged in relation to that specific individual. In this context procedural rights perform an ***instrumental*** role in the sense of helping to attain an accurate decision on the substance of the case.[23] Formal justice and the rule of law are enhanced in the sense that the principles of natural justice or fairness help to guarantee objectivity and impartiality.[24]

[22] In a paper of limited scope it is not possible to do more than mention the centrality of fair procedures to the good faith observance of the obligations under the Refugee Convention. There can be much debate as to the minimum content of those procedures, as is currently occurring within the European Union in the context of Article 6 of the ECHR generally[25] and in the asylum and human rights context specifically. See most recently the Qualifications Directive adopted by the Council of the European Union on 29 April 2004 (implementation date 10 October 2006) and the Procedures Directive (draft).[26] It is necessary, however, to touch on the issue of impartial decision-making and independence.

[23] At the 5th IARLJ Conference held at Wellington, New Zealand in October 2002 Sir Stephen Sedley memorably articulated the overt and covert pressures on asylum judges which are capable of affecting the impartiality of their decision-making and which render their independence fragile.[27] As he rightly points out, the critical function of first-instance asylum judges in the majority of the world's developed jurisdictions is the function of fact-finding. Many, perhaps most, decisions have to be arrived at only after determining whether the refugee claimant is telling the truth and, if not, what the truth is.[28] He has judicially described this function as:

> "... not a Conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."[29]

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[23] PP Craig, *Administrative Law* 5th ed (Sweet & Maxwell, 2003) 408.

[24] Ibid, 408.

[25] Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia, 2004) 173; Paul Craig, "The Human Rights Act, Article 6 and Procedural Rights [2003] PL 753; Jurgen Schwarz, "Enlargement, the European Constitution and Administrative Law" (2004) 53 ICLQ 969 and *Wade & Forsyth, Administrative Law* 9th ed (Oxford, 2004) 445-449.

[26] Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia, 2004) 173; Robert Thomas, "The Proposed Procedures Directive - its likely impact on national decision-making and its compatibility with European Union law and the European Convention on Human Rights" (paper delivered at the IARLJ Conference, Edinburgh, November 2004).

[27] Sir Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence?", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (2002) 319.

[28] Ibid 323.

[29] *R v Immigration Appeal Tribunal; Ex parte Syeda Khatoom Shah* [1997] Imm AR 145, 153 approved on appeal in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL).

[24] Addressing the difficulties of credibility evaluation he referred in his paper to what he calls the "darker hinterland in which judges ... have to do their unaided best to decide whether an account is credible or not"[30]:

> It is in such a situation, where there is frequently so little firm or objective help to be gained from materials before the judge and where so much depends on personal impression and visceral reaction, that the demands of independence and impartiality become acute. I suspect that a truly impartial outcome in a high proportion of asylum cases would be a draw. But that is the one luxury denied to judges. Setting the standard for a successful claim well below truth beyond reasonable doubt and even below a preponderance of probability, and limiting it to the establishment of a real risk, may help the asylum-seeker but does not ultimately help the asylum judge. A possible life-and-death decision extracted from shreds of evidence and subjective impressions still has to be made.
>
> Not only for these substantive reasons but for procedural reasons too, asylum adjudication calls up a very particular version of impartiality. In ordinary civil and criminal contests, impartiality implies no more than not taking sides, at least until one has heard the evidence and the argument. In asylum law, except to the extent that the state takes on itself the role of the asylum-seeker's adversary, there are no such sides. In an exercise which is typically one of testing assertions, not of choosing between two stories, the form which impartiality most typically takes for the judge is abstention from pre-ordained or conditioned reactions to what one is being told. It means not so much knowing others as knowing oneself - perhaps the hardest form of knowledge for anyone to acquire.

[25] These insights highlight the necessity to afford the refugee claimant a fair hearing. The rule of law requires nothing less. It enforces minimum standards of fairness, both substantive and procedural.[31] It maximises the opportunity for the "voice" of the claimant to be heard above the decision-maker's own prejudices, conditioned reactions, doubts and the subconscious influence of public opinion and hostile comment. Above all it ensures that the decision-maker's mind is concentrated on the single composite issue posed by Articles 1A(2) and 33 of the Refugee Convention: Is ***this*** individual at real risk of being persecuted for a Convention reason if returned to the country of origin?

[26] This is not a prescription for over-sophistication and complexity in refugee determination. A balance must be struck between over-judicialisation at the primary level and over-pragmatism at the higher levels. Refugee protection includes a requirement that the

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[30] Sir Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence?", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (2002) 319, 324-325. See also Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" in IARLJ, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (October 1998) 134, 139-140.

[31] In the common law context see *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 591 (HL) (Lord Steyn); Wade & Forsyth, *Administrative Law* 9th ed (Oxford, 2004) 20-25 and see the recent statement by Collins J in *R (on the Application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] Imm AR 142 at [12] that the court will act where the process is unfair, even where a particular individual cannot be shown to have suffered.

principles of refugee law be articulated with clarity and simplicity to facilitate consistent application. A refugee determination process must also be "nimble on its feet", responding rapidly to new refugee situations and new understandings of the Convention which is, after all, a "living instrument".[32] This is especially important in the context of claims based on gender, age, disability and sexual orientation.

The question of appeal and judicial review

[27] Because so much of the practical implementation and application of the Refugee Convention is done by government or executive action or policy and because so much of the process and conditions for applying for refugee status can be controlled and influenced by the executive, there must be a means of effective challenge to a higher authority with power to review on both the merits and the law.[33]

[28] Given the interests involved, both of the individual and of the State, most systems allow for an appeal and/or judicial review in one form or another. The tendency, however, is to restrict rather than expand such appeal or judicial review rights. Where restriction occurs, the perception is that the system is over-generous to declined asylum-seekers or that the system is being abused. These are legitimate concerns, but can be managed in different ways. A standard of excellence at the primary decision-making level is a much under-appreciated means of increasing the overall speed of the decision-making process, reducing appeals or review, reducing costs and engendering confidence in the refugee determination system.

[29] The overarching requirement, however, at all levels of a refugee determination system is that irrespective of whether the system is characterised as "administrative" or "judicial", all decision-makers must be both independent and impartial.[34]

CONCLUDING OBSERVATIONS

[30] Neither judicial nor administrative systems have innate superiority in refugee determination. They are false opposites. The more relevant inquiry is how well a particular asylum process accurately and fairly identifies individuals who satisfy the definition of "refugee" in the Refugee Convention. The challenge is to identify the factors which have the potential to either impede or to facilitate the protection of asylum-seekers and refugees in the refugee determination process, irrespective of the legal "tradition" of the particular State party and irrespective of the particular domestic system employed for refugee determination. Content must prevail over form.

[31] This paper has suggested that often-overlooked factors have a greater influence on the outcome of refugee determination than generally recognised. These factors include the way

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[32] *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304 (HL) at para [6] per Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) approving Sedley J in *R v Immigration Appeal Tribunal; Ex parte Shah* [1997] Imm AR 145, 152; *Refugee Appeal No. 74665/03* [2005] NZAR 60 at [70] & [71] (NZRSAA).

[33] Colin Harvey, "Refugees, Asylum-Seekers, the Rule of Law and Human Rights" in David Dyzenhaus (ed), *The Unity of Public Law* (Hart, 2004) 201, 202-203, 205-206.

[34] For a comment on this issue in the context of the Nordic countries, see Robin Lööf & Brian Gorlick, "Implementing international human rights law on behalf of asylum-seekers and refugees: The record of the Nordic countries" (UNHCR, New Issues in Refugee Research, Working Paper No. 110) (November 2004) at 8.

in which and the degree to which the Convention itself is incorporated into domestic law, the degree to which the particular domestic system will allow and facilitate a purposeful and dynamic interpretation of the Convention in accordance with its language, context, object and purpose and the degree to which fairness is allowed to intrude into the determination process. Independence and impartiality are the essential foundation stones of any credible process, as is the existence of a right of appeal or review to an independent judicial or administrative body.