

Asylum : Can the Judiciary Maintain its Independence?

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Although judicial structures and cultures take as many different forms as there are states in the world, the two things they either have or ought to have in common are independence and impartiality. No international human rights instrument, and no written constitution I know of, settles for less. The two things are of course linked: a judiciary which is not independent is not likely to be impartial, at least vis-à-vis the state. But impartiality is a state of mind. Independence is a state of being, and in that sense is prior even to impartiality. It is independence which is the primary focus of this paper; but any such focus has logically to include in the ways in which pressures on the structural independence of judges are capable of affecting the impartiality of their decision-making.

Asylum law ought not in principle to be any different from the law of tenancy or insolvency or anything else. Such bodies of law affect hundreds of thousands of people in any average-sized country every year; yet it is the asylum law decisions which reach the news and become subjects of political debate – or, worse than debate, abuse. Everybody knows what the issue is: the perception of tidal flows of individuals seeking a safer or a better life in states which either have undertaken international obligations of protection or simply happen to be the nearest place of comparative safety. The reason why it is this issue, rather than, say, the effects of widespread homelessness or bankruptcy, which allows public passions to be so readily ignited has probably less to do with social economics than with atavistic fear of the outsider – once the stranger within the gates to whom all settled societies gave hospitality, now the feared “other” of postmodern discourse.

But that is not to say for a moment that the issue is unreal. The moment you begin to unpack my casual description of the tidal flow, you start to see the problems. The nearest place of relative safety should be, in practice and in law, where all asylum-seekers go; but many make prolonged and circuitous journeys to reach a haven of choice, and by doing so attract the suspicion that they are in search not simply of a safer life but of a better one. Who can blame them? Yet between a safer life and a better one the twentieth century has brought down a steel curtain. The signatories of the refugee conventions have had of necessity to reserve emergency protection to those in well-founded fear of their lives or personal safety. Economic migrants have inevitably to stand in a different, a long and slow-moving, queue of which they may never reach the head. We do not, because we believe we cannot, allow the search for a safer life to become the search for a better one.

Judges know as well as politicians do that the consequence has become a worldwide industry of transporting or smuggling people, often at the cost of their own and their entire families’ assets, and equipping them with invented stories to exploit the asylum laws of sought-after host states. I say deliberately that judges are as aware of it as politicians are because a significant part of the pressure on

judges comes from people – politicians, journalists and through them large tranches of the public – who from time to time find it convenient to blame the bleeding hearts of refugee law judges for the perceived influx of undeserving aliens. But while this is the most direct and crude form of pressure on judges, I am going to suggest that it is probably not the most potent or the most important.

First, nevertheless, one needs to look at these direct political pressures. They may be insidious – as in those countries, including the United States, where asylum judges are part of the executive and are therefore dependent in some measure on the approval of their political superiors; or overt – as in the United Kingdom and Australia, where in recent years ministers and editors have not hesitated to denounce not only decisions of which they disapprove but the judges who have made them.

It is chastening to realise that as recently as 1996 the Special Rapporteur of the UN Commission on Human Rights noted “with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary.” The illustrations which the report went on to give omitted some of the abusive prose directed in the mid-1990s at individual judges by government-prompted journalists. The report concluded: “That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe.”¹ But it is a fact. A former permanent secretary at the Lord Chancellor’s Department had written not long before: “One of the most dramatic changes that has taken place over the past thirty years or so has been the increasing freedom felt by newspapers, in particular, to attack judges with a vigour (and one could use a much stronger expression) that was formerly quite unknown.”

To be sure, no-one wants a return to the 1930s, when a Lord Chief Justice of England and Wales could solemnly tell the guests at the Lord Mayor’s Dinner that His Majesty’s judges were content with the almost universal esteem in which they were held; and without doubt the greater readiness of judges in recent years to speak in public on issues of legal policy makes it impossible for them to object if their views are criticised. But every judge at every level is limited to defending his or her decisions by the single set of reasons publicly pronounced for them. If the reasons do not speak for themselves, the judge cannot thereafter do it for them; and they are of course in the public domain and as open as everything else in that domain to criticism. Lord Cockburn in the 1880s got himself into deep water by trying publicly to defend his judgment in the still celebrated case of *R v Bedingfield*². Even so, it continues to be dispiriting when a decision is attacked (usually by a dictate of editorial policy) by a journalist who has evidently either not read the judgment or, if he has read it, has not understood it.

Political attacks recycled and amplified by the press in turn provoke a phenomenon which is peculiarly nasty: hate-mail. I will not use anecdote, but those judges who have been on the receiving end of a hate-mail campaign will know how unnerving it can be, and how difficult to hold steady from day to day in

¹ Cited in T. Bingham, *The Business of Judging*, (2000), p.55.

² (1879) 14 Cox CC 341.

the face of it. The potential effect of such attacks is not – for it cannot be – to alter the decision which has already been taken; it is on the next decision and the one after that. The near-certainty that doing what you believe to be the right thing is going to bring another storm of public abuse on your head can be a potent incentive to kick for touch, to fudge the issue, to find a less contentious solution. It is the ability not to let it happen which marks out judicial quality.

Asylum law, however, has an aspect which I think makes it unique: the need for it to deal in outcomes which are publicly perceived as having a direct and often unwelcome effect on the lives of the settled population. Asylum judges consequently handle facts and topics which, unlike those addressed by any other branch of the law except crime, are a matter of often vitriolic daily public debate. You can attend fifty social gatherings, you can drink in a hundred bars, where the conversation never comes remotely near the problems of eviction or bankruptcy; but it's unusual to be in any gathering where immigration does not sooner or later come up, and with it the view that asylum is a tolerated gateway for illegal economic migrants.

Now the assault in these dialogues may well not generally be on the judges who adjudicate in contentious cases. In the United Kingdom, for example, journalists know relatively little about the Immigration Appellate Authority. They know a great deal more about the inefficiencies of executive government, largely because executive government is a rich source of leaked information, but also because the government's own figures show a very slow initial turnaround of asylum applications and a large-scale failure to remove asylum-seekers whose claims have been rejected. It is known that individuals, especially those with the help of determined and sometimes unscrupulous advisers, can spend many years unsuccessfully claiming refugee status; and if by the time of the final refusal they have found a partner and started a family, removal may become impossible for reasons arising not any longer from the Refugee Convention but (in the UK's case) from the European Convention on Human Rights. I would be surprised if this situation were not replicated in a good many other countries.

What affects judges in such a situation is not a targeted critique of their own role but an ambient pressure to put a finger in the dyke, to stem the tide, to stop the rot; to reject the stories they hear from asylum-seekers so that they can be sent home. At times this becomes nationality- or ethnicity-specific. We have been going through it in the United Kingdom in relation to east European Roma. Here the range of pressures is very marked: there is both the overt press hostility to gypsies who are awaiting decisions and who can be seen begging in the streets with children in their arms, and the unspoken awareness of judicial decision-makers that a decision in favour of one may be a decision in favour of hundreds of thousands of Roma in the identical situation. Not to sweat under such atmospheric pressure is a near-impossibility. It does not mean that adjudicators will all lurch in the same direction. There is just as much risk that conscientious judges will over-compensate for the pressures they sense around them. But the hothouse itself is, I think, peculiar to asylum law adjudication. Probably the nearest we come to it in other fields is in criminal law, where from time to time the societal pressure to secure a conviction can distort the process of justice; but there it is at least episodic, not a constant daily phenomenon.

Yet this is still not the high point of the problem. I have not reached the critical function of first-instance asylum judges in the majority of the world's developed jurisdictions: the function of fact-finding. It is in the atmosphere I have been describing that many, perhaps most, decisions have to be arrived at as to whether an asylum-seeker is telling the truth and, if not, what the truth is. I have described this function elsewhere 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."³

The procedures by which asylum law judges of first instance undertake this complicated task are as numerous as the states to which asylum-seekers come. But they all, I believe, have one thing in common: the critical issues are only rarely capable of determination by an adversarial contest as to where the truth lies. Such issues do of course arise – for example as to whether an arrest warrant is a genuine document or whether scars are the product of torture; but even they are likely to be only a part of a bigger picture, and the bigger picture, although its background may come from common funds of information, is something to which only the applicant can give definition and content. In the result asylum law judges, whatever the legal tradition or culture they inhabit and whatever the procedures governing their work, are all to one degree or another inquisitors rather than umpires. Those of you to whom cricket is simply an incomprehensible way of wasting of a sunny afternoon will have to overlook the remark that in a common law criminal trial the court's only function is to answer the question "Howzat?"; whereas the asylum law judge, starting from a bare claim to his or her country's protection, has typically to examine a mass of particular and general testimony, much of it inadmissible in a court of law, and to decide what it adds up to.

But all tribunals, the adversarial and the inquisitorial, the administrative and the penal, face the same core question in case after case: how do we know whether we are being told the truth? This is not the place for a disquisition on lie-detectors, nor for a much-needed debunking of the fiction that a few years of legal or judicial experience are all that it takes to look a witness in the eye and see an honest person or a liar. Any illusions of that kind which I might have harboured were dispelled in my early days as a judge by a highly regarded judicial veteran who said to me: "The longer I sat on the bench, the less certain I became that I could tell truth from falsehood." Doing one's honest best to discern the truth without objective aids in a jurisdiction on which people's lives and safety may depend is a grim and exhausting business; and it is not helped by the pressure of time under which the work is mostly done. The availability of a single unassailable piece of evidence – a plainly authentic document, perhaps, or agreed medical evidence – acquires in such circumstances the disproportionate value of a plank in a shipwreck.

For the rest, we know on the one hand that there are junk sciences in the field of truth-evaluation, many of them flying the flag of behavioural psychology. We know

³ Approved on appeal in *Shah and Islam v Homes Secretary* [1999] 2 AC 629.

on the other hand that there are true culturally determined behavioural differences, for instance about the politeness or unacceptability of looking an interlocutor directly in the eye, which asylum law judges need to be alive to. Impartiality here does not mean assessing everybody by the same criteria: on the contrary, as discrimination law has painfully established over recent decades, it may well mean assessing people by different criteria in order to be able to judge them on an equal footing. Judicial training can do much in such respects to enhance the quality and reliability of adjudication.

But beyond these reaches lies a much darker hinterland, in which judges still have to do their unaided best to decide whether an account is credible or not. The common resort is to consistency or inconsistency, either intrinsic to the applicant's account or extrinsic by relation to in-country reports and the like. Even this is something of a counsel of despair, for we know from an infinity of human experience that it is the competent liar who tells the most internally consistent and externally convincing story, and that honest people may be so traumatised or fearful that nothing they say makes sense. We know too that in-country reports can do only so much to focus the general on to the particular.

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 proof 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 the parties as knowing oneself – perhaps the hardest form of knowledge for anyone to acquire.

I have no simple solutions to offer. Asylum judges are going to have to go on doing the best they can in a jurisdiction which has neither the falsifiability of a science nor the completeness of an art. My single conclusion is to return to what I began by discussing: the kinds of articulated and inarticulate pressures, most of them indirect and impersonal but all of them potent, which in the societies to which most asylum-seekers come are part of the air which asylum judges breathe. They are capable of exercising a considerable influence, all the greater for operating unconsciously, on the conclusions which judges arrive at upon materials which are themselves inconclusive. These are pressures which are not ordinarily identifiable,

except in the long perspective, and so are rarely appealable. But they are in my view the most troubling aspect of adjudication in an open society in which justice no longer pretends to be a cloistered virtue.

We are probably not going to be able to do much better in the twenty-first century than Sir Matthew Hale, a great chief justice of England and Wales, did in the mid-seventeenth. In a memorandum to himself he insisted: "That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions."

The judicial oath in the United Kingdom, replicated – I am certain – in one form or another throughout the world, is to do justice without fear or favour, affection or ill-will. Every one of those nouns is set in high relief by the asylum judge's functions. The fear of public abuse or political displeasure, even if neither can result in dismissal; the risk of unwittingly favouring individuals who fit stereotypes with which the judge feels an affinity; the risk that affection – sympathy - will skew judgment; the risk that ill-will – prejudice - may do the same: the judicial oath calls out by name these demons which lurk in every system of asylum adjudication.

I have not suggested and do not suggest that there is any nostrum against them, though being aware that they exist is an important start. But I believe that the overt and covert pressures on judges which are present in any modern open society are probably heavier and more damaging in the area of asylum adjudication than anywhere else, because asylum judges tend, in the nature of their jurisdiction, to have comparably fewer anchorages in hard fact or rigorous procedure to hold them steady against the tides of public opinion and the winds of hostile comment. Their independence is correspondingly fragile, and politicians and journalists who set out to undermine it may be doing their own societies greater damage than they realise.