Thwarting the Refugee Convention:
Government Restrictions & Practitioners' Responses

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> ***[H]uman rights have their definitions and their boundaries…[and] it may well be legitimate to devise legislative and other schemes that take maximum advantage of those boundaries. But there comes a point when the legislative devices being used or proposed are so disrespectful of fundamental principles that questions have to be asked about their legitimacy in a country committed to the protection of human rights. Legislative and judicial decisions relevant to this issue must be keenly scrutinised.*** **(Ashworth (2004) 120 LQR 263, 265)**
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> *The restrictive trends and pressures on asylum procedures in Western countries tend to lead to practices which turn a blind eye to elementary human rights and undermine the concept of asylum. States are well positioned to devise more ingenious methods which curtail access to international protection…* **(Andrysek (1997) 9 IJRL 392, 410)**

1. **Introduction.** The Refugee Convention provides basic refugee rights, in particular: (1) the right not to be removed to face persecution (Art 32-33); (2) the right not to be penalised for unlawful entry/presence (Art 31); and (3) rights to beneficial treatment within the community (e.g. in relation to employment (Art 17), welfare (Arts 20-24) and administrative measures (Arts 25 et seq)). Refugees are persons who fulfil the Convention criteria, even if they are asylum-claimants whose status has not yet been formally determined as such by the state: see UNHCR Handbook §28. How does or might a State seek to avoid taking straightforward responsibility for those who would be entitled to exercise their

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refugee rights? How do or might refugee-protection lawyers respond? Here are some examples.

2. **Impeding refugee travel.** A State might prevent refugees from securing their rights by (1) impeding their arrival in the country of refuge; or even (2) impeding their escape from the country of persecution. Measures include (a) visa regimes, (b) carrier penalties and (c) pre-clearance arrangements: see *ERRC* [2004] UKHL 55. Protections need to be found, whether in: (i) extra-territorial effect of Art 33; (ii) international - *Padfield* [1968] AC 997; or (iii) ECHR Art 3 (cf. *Al-Skeini* [2007] UKHL 26).

3. **Harsh interim treatment.** A State might discourage refugees by harsh interim treatment including (1) administrative detention (*Saadi v UK* 29.1.08 Appl. 13229/03); (2) minimal welfare support; and (3) refusal of permission to work. The harshness of (2) and (3) are exacerbated by delayed status determination (§5 below). Protections need to be found, whether in: (i) ECHR Art 3 (*Limbuela* [2005] UKHL 66), Art 5 (cf. *Saadi*) and Art 8 (*Tekle* [2008] EWHC 3064, [2009] EWCA Civ awaited); (ii) the EU Directives (e.g. Reception Directive Art 11; *Omar* [2008] EWHC 1604, [2009] EWCA Civ awaited); or (iii) common law (e.g. *JCWI* [1997] 1 WLR 275).

4. **Collateral penalisation.** A State might seek to penalise a refugee for an offence which is not directly, but only indirectly, related to unlawful entry/presence: see Immigration and Asylum Act 1999 s.31; *Makuwa* [2006] EWCA Crim 175. Protection needs to be found, whether in: (i) compatible statutory construction; or (ii) abuse of process. See *Asfaw* [2008] UKHL 31.

5. **Delayed status determination.** A State might implement decision-making practices involving prolonged administrative delays in status-determination, in chilling combination with harsh interim treatment (§3 above). There might be: (1) substitute protection (ELR) as an alternative to status-determination; (2)

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administrative mishandling; and (3) backlogs. Protection against such 'limbo' scenarios needs to be found, whether as to: (i) statutory interpretation (*Saad* [2001] EWCA Civ 2008); (ii) safeguards against unlawful delay (cf. *FH* [2007] EWHC 1571); or (iii) protection as to interim rights (§3 above).

6. **Procedural curtailment.** A State might adopt reduced standards of procedural fairness in the context of asylum-related appeal and review, whether: (1) out of country appeals; (2) manifestly-unfounded/safe third country certification; (3) fresh claim screening; (4) fast-track decision-making (*RLC* [2004] EWCA Civ 1481); (5) restricted legal aid; (6) paper-only statutory review. Protection needs to be found, whether in: (i) EU Directives; (2) ECHR Art 6 (cf. *Maaouia v France* 5.10.00 Appl. 39652/98; *RB (Algeria)* [2008] UKHL 10); (3) ECHR Art 14 (cf. *A* [2004] UKHL 56); or (4) judicial review, including procedural (*Thirukumar* [1989] Imm AR 402, 414) and substantive "anxious scrutiny" being (see *Q* [2003] EWCA Civ 364 at §115):

> *apt…to apply to the right to seek asylum, which is not only the subject of a separate international convention but is expressly recognised by article 14 of the Universal Declaration of Human Rights (1948)…*

As to judicial review, see the shadow cast by *G* [2004] EWCA Civ 1731 and *F (Mongolia)* [2007] EWCA Civ 769.

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