

# Asylum seekers and State of first arrival

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a House of Lords judgment relevant to New Zealand legislation

In May the House of Lords released a unanimous judgment in *Secretary of State v Nasser* [2009] UKHL 23 refusing to declare the Secretary of State's decision to return the appellant asylum seeker to Greece, as the country of first arrival, incompatible with obligations under the European Convention on the Protection of Human Rights and Fundamental Freedoms. This note reflects on those aspects of the decision that relate to the right to refuse asylum to individuals arriving via a third State, rather than from the country of origin.

The discussion seeks to determine the extent to which States have a right under international law to refuse entry to asylum seekers, before contrasting the rule as it is expressed in the EU context, as was the case in relation to the *Nasser* judgment, and New Zealand. Having established what the scope of the rule is, this note will examine the rationale that underlies it. This analysis draws on the discussion in the *Nasser* judgment to consider firstly, whether the right to return asylum seekers allows States to escape their obligations in relation to international protection and secondly, whether any right to send asylum seekers back to the country of first arrival has the potential to undermine the prohibition on refoulement that underpins the framework of international protection.

## RETURNING ASYLUM SEEKERS

States are under no legal obligation to determine an application for asylum, unless the failure to do so would undermine the prohibition on refouling an asylum seeker to their State of origin, where there is a reasonable risk that the individual will face persecution. The prohibition is expressed in art 33 of the Geneva Refugee Convention 1951, is a principle of customary international law and forms the basis of the framework of international protection that binds all States. All other rules applying to the protection of asylum seekers and the rights and duties of States relating to the protection of asylum seekers are secondary in status.

If the prohibition on refoulement is the foundation on which the framework of international protection is built then the principle of burden sharing between States for this purpose can be said to give the framework its stability. In order that the protection of asylum seekers is effective, States are required to co-operate. Burden sharing is prescribed under both formal agreements, such as the Dublin II Regulation (Council Regulation (EC) No 343/2003) in the EU context, and informal arrangements, for example in times of mass exodus and in response to calls by the UN High Commissioner for Refugees (UNHCR) for States to grant asylum seekers temporary entry.

The right to return asylum seekers to the country of first arrival illustrates the tension that arises between these two pillars of international refugee law. On the one hand the right to return facilitates the procedural and resource burden in processing asylum applications and the integration of successful applicants into society. On the other hand there is the risk that States will seek to avoid their responsibilities without ensuring that the individual asylum seeker will be safe, if returned. In order to strike a balance between these potentially competing considerations several guiding principles have emerged.

First, an individual may only be returned to the country of first arrival if the State is satisfied that the asylum seeker will not be refouled to the originating State and that the applicant's human rights will be protected (UNHCR Executive Committee Conclusion No 58 (1989)). In particular, the returning State would have to determine "if the risk of persecution, refoulement or torture was non-existent; if there was no actual risk to the person's life; if a genuinely accessible and durable solution was in prospect ... and if specific protection needs were recognized and respected" (UNHCR "Note on International Protection" (1998)).

Second, the State must undertake a practical and holistic examination of the circumstances relating both to the asylum seeker and the country of first arrival in order to determine whether the individual faces any risk if returned (UNHCR "Global Consultations" (2001)). For example, it is insufficient simply to rely on the fact that the country of first arrival has adopted human rights instruments if the State also has a record of human rights abuses or non-compliance. Any analysis must be pragmatic and the UNHCR has noted that even the presence of a UNHCR Office within the country is not enough to ensure effective protection (UNHCR "Submissions on the New Zealand Immigration Bill 2007" para 22). Furthermore, regard must be had to the conditions that the asylum seeker can expect to face on return, for example they must have access to some means of subsistence. Effective protection would therefore take into account socio-economic considerations including education and special assistance needs where required (Lisbon Expert Roundtable "Summary Conclusions on the Concept of Effective Protection in the Context of Secondary Movements" (2009)).

Third, the returning State must seek assurance from the country of first arrival that the asylum seeker would have access to a fair and impartial process for determination of asylum status. In particular, the country of first arrival must be a party to the 1951 Refugee Convention and Additional 1967 Protocol (Goodwin-Gill and McAdam *The Refugee in*

*International Law* (2007)). This last point is especially important to pre-empt the asylum seeker being immediately refouled to the State of origin without any substantive consideration of their application for asylum.

#### **RATIONALE IN RETURNING ASYLUM SEEKERS**

The development of the above guidelines seeks a balance between ensuring international protection is effective and sharing the burden of providing international protection between States. In striking this balance, the guidelines aim to ensure the right to return is not subject to abuse by States and that the protection framework is not exploited by individuals to the detriment of genuine asylum seekers.

In favour of allowing States to return asylum seekers to a country of first arrival is the argument that if individuals were truly in need of protection from persecution then it would be irrelevant which State provides that protection. This would stop asylum seekers from engaging in forum shopping in order to obtain the most attractive place of residence.

However, this fails to take into account that individuals may seek asylum in a particular country for valid reasons including family unity. It also fails to acknowledge that an individual may have a valid reason for not wishing to stay in the country of first arrival, such as a risk of persecution when the individual is in a minority (Goodwin-Gill, pp 392–393). At a practical level, if there was a strict requirement that only the country of first arrival could handle an asylum claim then certain countries would be required to shoulder a disproportionate burden given their geographic proximity to regions that generate large numbers of asylum claims. Notably, New Zealand's isolation means that a majority of asylum seekers will transit in a third State before arrival.

In contrast, the argument in favour of construing the right to return strictly is that without restriction, States could implement a returns policy in a manner that undermines the objective of burden sharing and maintenance of an effective international protection framework. On this basis, the rationale for a right to return is arguably stronger in areas of regional cooperation and less convincing where the State is not proportionally placed under a significant weight in terms of providing international protection, which arguably includes New Zealand.

By illustration, data from the UNHCR shows that in New Zealand in 2007 there were 2740 individuals seeking asylum. This is compared to 22,164 asylum seekers in Australia; 299,718 in the UK; 281,291 in the USA and 1,585,546 in Europe (Statistical Data (2007)). Reference to these statistics does not begin to illustrate the nuances associated with their interpretation but it does provide a snapshot of the extent of the burden of international protection being borne by some States as opposed to others. A second statistic is a comparison between the inflows of asylum seekers in a given year into OECD countries. New Zealand had 23 asylum seekers in one year while Luxembourg, which is of a similar size, had 129. This can be explained on the basis of geographic location.

It is apparent that the right to return is a mechanism that seeks to facilitate rather than frustrate international protection for asylum seekers but that without careful monitoring there is the potential for abuse. With that comment in mind this note will turn to consider whether the decision in House of Lords can be described in terms of facilitation or frustration.

#### **THE HOUSE OF LORDS**

Before considering the decision of the House of Lords, a couple of introductory points must be made about the system for receipt of asylum seekers within the European Union. Pursuant to art 10 of the Dublin II Regulation, the Member State in which an asylum seeker arrives will be responsible for processing the individual's claim for asylum. To manage this arrangement the EURODAC system of fingerprinting was introduced to prevent individuals from entering into the EU through certain soft spots in the walls of fortress Europe and then moving across borders prior to making an official application for asylum.

One of the consequences of the arguably successful implementation of Dublin II and EURODAC has meant that certain States on the EU rim have received a disproportionately large number of asylum seekers. States that come within this category, such as Greece, have responded by adopting policies in relation to managing asylum applications that are then criticised as being contrary to international protection standards under the 1951 Convention and in accordance with UNHCR standards (*Nasseri* judgment).

Mr Nasseri was an Afghan national who arrived in Greece and, having lodged an application for asylum, fled to the UK where a further asylum claim was made. In accordance with the provisions of Dublin II and the UK Asylum and Immigration (Treatment of Claimants) Act 2004 that deems Greece a safe country for the purposes of return, the Secretary of State ordered that the appellant be sent back to Greece. The appellant challenged the validity of this decision by citing art 3 of the European Convention claiming that he faced a risk of inhuman and degrading treatment if sent back to Greece, due to the likelihood of being subsequently refouled to Afghanistan (*Nasseri*, para [4]).

An appeal was brought on the grounds that art 3 would be breached where there was no inquiry into the risk of refoulement, due to the prior designation of Greece as a safe country. The appellant cited the European Court of Human Rights when it held that Dublin II did not in fact absolve the State of its responsibility to ensure that the asylum seeker would not be exposed to a breach of art 3 on return. On this basis the appellant argued that the decision of the Secretary of State could not be upheld (*TI v UK* [2000] INLR 211).

The House found that in order for the UK to satisfy its obligations under art 3 it was only required to establish that the individual's rights under art 3 would not be infringed if returned to Greece (para [22]). It dismissed the appeal but not before making findings as to the potential risks faced by the appellant in being returned.

As noted above, Greece is one of several EU Members that has been criticised for its asylum processing policies that included dismissing an application of any individual whose claim was suspended for longer than three months, usually because they had sought asylum in another country. Concerns were voiced by Member States and human rights organisations and in 2008 Greece was threatened with infringement proceedings by the European Commission (para [32]). On this basis, and referring to the guidelines noted above that relate to implementation of the right to return, it could be said that the decision of the House to dismiss the appeal was unsustainable and viewed more as frustrating rather than facilitating international protection.

However, both Lord Hoffmann, and in a separate comment, Lord Scott, gave reasons as to why the House considered that the appellant did not face a real risk of a breach of art 3 and why return of the individual would facilitate the objective of burden sharing that characterises the framework of asylum protection in the EU (para [32]). Following the threat of infraction proceedings, Greece had amended its legislation to ensure compliance with the several directives and regulations binding Member States and relating to asylum protection. In addition, the very Member status of Greece is conditional on adoption of the Convention. As if specifically citing the guidelines given above, Lord Hoffmann noted that mere adoption of the Convention was insufficient without effective implementation but considered that in the absence of any evidence to the contrary the House was entitled to find that Greece would uphold its obligations accordingly. Finally, it was noted that Greece had never previously refouled an individual to Afghanistan (para [34]) and “accordingly there appeared to be no real risk that Mr Nasserri would be returned to Afghanistan contrary to his Convention rights under art 3”.

#### RELEVANCE FOR NEW ZEALAND

The House of Lords considered that the appellant was not at risk from persecution in being returned to the country of first arrival in view of the protection of international agreements to which both the UK and Greece are party, including Dublin II and the Convention. It is the opinion of the UNHCR that “such arrangements can work within a multilateral, legal framework, such as that of the European Union, where clear reciprocal obligations are imposed on States” (UNHCR “Submissions on the New Zealand Immigration Bill 2007” para 19). Where there are no such arrangements however, the UNHCR has expressed strong concerns about whether States should adopt a policy of return.

Submissions were made by the UNHCR and Amnesty International following the introduction of the 2007 Immigration Bill in New Zealand. This was because cl 125 permitted the return of asylum seekers to a country of first arrival on the basis that the individual was entitled to seek

asylum in that country. The UNHCR noted that “most asylum-seekers come to the region through countries which are neither signatory to the 1951 Refugee Convention and do not have even the most basic capacity to provide protection and durable solutions to refugees” (UNHCR para 20). This could lead to the individual being refouled to face the risk of persecution and created the potential that New Zealand could escape its obligations in relation to international protection on purely procedural grounds.

Two points, however, suggest that the concerns raised by the UNHCR are not borne out and that the potential that a right to return will be used to undermine the framework for international protection appears to be managed, at least in the context of New Zealand.

First, New Zealand is one of only ten countries that annually assume a full quota of UNHCR refugees. This confirms that the State actively seeks to share the burden of international protection, rather than avoiding its obligations which would give rise to the suspicion that cl 125 could be used as a means to escape the State’s responsibilities.

Second, cl 125 of the Immigration Bill was amended in response to the criticism by the UNHCR so that the question facing decision-makers was not whether the State had “a reason to decline to consider a claim” but “whether a claimant had the protection of another country” which meant the State was not obliged to consider the claim (“Commentary” Immigration Bill 2007, p 17). Specifically, there would be “protection” where New Zealand was in an arrangement of some sort with another State, under which both were party to the Refugee Convention, the Convention Against Torture and the International Covenant on Civil and Political Rights and the other State had a satisfactory process for the processing of asylum applications.

Currently New Zealand is not party to any such arrangements resembling those listed under cl 125. However, given the provision made under cl 125, the model set by the EU with UNHCR approval and the precedent and guidance provided by the House of Lords in the *Nasserri* judgment it is argued here that the right to return can be implemented in New Zealand in a manner that facilitates rather than frustrates the framework for international protection. □

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achieved by the use of “disembodied” execution pages that potentially leave open the possibility of a signatory later arguing that the document to which their signature was later affixed was not the document to which they agreed.

Notwithstanding its cautionary value, it remains to be seen whether the controversial reasoning in *Mercury* would be adopted by a New Zealand court. The statements in *Mercury* about execution of documents were obiter and in light of their inconsistency with a long-standing precedent from a higher court (which remains the leading English authority on the subject), it is doubtful that a New Zealand judge would be persuaded to take a similar approach should a dispute with similar facts come up in New Zealand.

In addition, s 11 of the Property Law Act 2007 abolished the historical legal rule that rendered a deed invalid if it is materially altered after its execution. This legislative provision sheds further doubt on whether a hard-line approach to execution of deeds would be taken by a New Zealand court.

Given the recent publicly reported cases involving the alleged falsification of documents in connection with the Blue Chip investment scheme, it may be that this issue is raised before New Zealand courts sooner rather than later. Cynics would claim that it is possible (however unlikely) that the approach Underhill J took in *Mercury* could appear attractive to a New Zealand judge faced with a sympathetic plaintiff seeking to recover their retirement savings by invalidating a document altered after execution by someone involved in the scheme.

What is certain is that *Mercury* directly impacts the execution of deeds and other contracts governed by English law. New Zealand lawyers arranging for the execution of English-law governed documents in New Zealand will need to ensure that they have taken the appropriate measures with respect to execution. In addition, New Zealand firms which engage UK-based local counsel should keep the case in mind in determining how completion should occur, particularly if an unqualified legal opinion as to due execution is required from the English firm. □