



ACCESS TO HEALTH

What are the Political Realities related to the Human Rights of Asylum Seekers?

How does the conduct of government through legislation, case law and process impact the life of an asylum seeker?

Peter Simm



2 THE ASYLUM PROCESS

- ❖ a/ claim and screening interview
- ❖ b/ full interview - **why did you leave/ why can't you go back?**
- ❖ c/ investigation – (i) **CREDIBILITY** - is the claim **plausible? internally consistent? externally consistent?** and **supported by any evidence? DOES IT CREATE A RISK ON RETURN?**
- ❖ d/ Home Office Grant or refusal? Credibility?
- ❖ e/ Rebuttal statement and evidence
- ❖ f/ Independent Tribunal grant or refusal? Credibility? Onward appeal?

3 SOME NEGATIVE RESPONSES

- ❖ They said I did not claim straight away in the UK - not the actions of a genuine asylum seeker.
- ❖ **They said I left with my passport - the authorities would have no interest in me.**
- ❖ They said that because I was injured in detention I could not have escaped
- ❖ **They said I did not mention that I was raped in my interview but only later in my statement.**
- ❖ **They said that whilst they accepted that the priest believed I was a genuine Christian/ the LGBT group I attend believed I was a lesbian they only had my word for their belief**

4 LEGISLATION IS AGAINST ME!

- ❖ Section 8 of Asylum and *Immigration* (Treatment of Claimants, etc.) Act 2004 provides: *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.*
- ❖ **trying to** conceal information, or mislead or obstruct or delay the handling/resolution of the claim
- ❖ Examples may include
- ❖ failing to claim in a safe third country passed through,
- ❖ Failing to answer questions in what is interpreted as a misleading way
- ❖ failing to produce documents or a passport without reasonable explanation.

5 IS THERE A CULTURE OF DISBELIEF? PROCESS

- ❖ **An adversarial system.** Example: rudeness and aggression in interviews (common practice is for Immigration officer to give warnings that you are answering questions in a misleading way – see s8 2004 Act above).
- ❖ **Eurocentric viewpoints.**
- ❖ escaping a detention facility in UK is not the same as escaping such a facility in Eritrea but some Home office personnel/Judges don't seem to grasp that.
- ❖ Why is a Judge/Home Office representative in any better position to disbelieve a claimed lesbian than a co-ordinator of an LGBT group who has regular contact with attendees?
- ❖ *Why is there a failure to comprehend – with or without medical evidence – that a person raped might be reticent to reveal this in interview with figures of authority?*

6 THE IMPORTANCE OF HEALTH EXPERTS IN THE PROCESS

- ❖ A is injured during arrest and such injuries are disputed as having occurred during arrest. Expert medical evidence compliant with the Istanbul protocol might support the claim
- ❖ **A child at risk of FGM if returned to Gambia yet the Home office dispute such likelihood. An expert report showing that mother of the child had FGM in the past might indicate a reasonable likelihood of the child suffering FGM in the future.**
- ❖ An asylum seeker account of events might be disputed because of inconsistencies. A psychiatric report evidencing PTSD might help explain

7 'MEDICAL CASES'. WHAT ARE THEY?

- ❖ I cannot return to my country because my health would deteriorate and there would be no adequate health care there.
- ❖ **D v UK**. The case involved the proposed removal of a convicted alien drug courier dying of **AIDS** to his country of origin, **St Kitts**, where he had no access to proper medical treatment, nor accommodation, family, moral or financial support. The Court found that his deportation would amount to a breach of **Art. 3** obligations (inhuman and degrading treatment) by the **UK** and that it was an exceptional case.

8 'MEDICAL CASES' - EXCEPTIONALITY

- ❖ **N v UK.** Ms N was seriously ill and was diagnosed as HIV positive. In August 1998, she developed Kaposi's sarcoma (rare type of cancer affecting skin mouth and organs). A physician prepared an expert report which expressed that without regular antiretroviral treatment and monitoring, N's life expectancy would be less than one year. The medication she needed would be available in Uganda, but only at considerable expense and in limited supply in the applicant's home town. The court held that neither the inferiority of treatment in Uganda nor the significant reduction in life expectancy constituted '**exceptional circumstances**'.

9 MEDICAL CASES – THE POLITICAL REALITY

- ❖ Lord Hope: ‘aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional’ and
- ❖ ‘It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country’.
- ❖ Lady Hale: ‘But if it is indeed the case that this class of case is limited to those where the applicant is in the advanced stages of a life-threatening illness, it would appear inhuman to send him home to die unless the conditions there will be such that he can do so with dignity’.

10 MEDICAL CASES' –MENTAL HEALTH

- ❖ In KH Afghanistan the Court of Appeal held that the N threshold (**exceptionality**) is also to be applied in cases of mental illness considered under Article 3 ECHR.
- ❖ Lord Justice Longmore: *The truth is that the presence of mental illness among failed asylum-seekers cannot really be regarded as exceptional. Sadly even asylum-seekers with mental illness who have no families can hardly be regarded as “very exceptional”. In order for a case to be “very exceptional” it would have to be exceptional inside the class of person with mental illness without family support. Perhaps a very old or very young person would qualify but hardly an ordinary adult.*

II MEDICAL CASES – ARTICLE 8 – SOME LIGHT?

- ❖ - **Akhalu** (woman arrived in UK legally to study then later diagnosed with end stage kidney failure) – found breach of Article 8 as she would die soon after returning to Nigeria and unable to afford treatment in Nigeria. **It appears the court adopted a holistic assessment drawing on particularly exceptional links with her community.**
- ❖ **SQ Pakistan** – Health cases involving children where Article 8 is raised should be carefully balanced.

12 MEDICAL CASES – THE CURRENT POSITION

- ❖ In **AM Zimbabwe** the court considered Paposhvili (ECHR case which seemed to apply a lower standard) and N v UK and other cases and concluded that the difference in approach is still one of **exceptionality** and the protection of Article 3 will apply against removal if the following apply:
- ❖ **There is a risk of death or intense suffering in the receiving state**
- ❖ **That risk must be of imminent death or a 'likely' rapid experience of intense suffering and**
- ❖ **The risk must arise owing to the non-availability of treatment in the receiving state that is available here**

13 CONCLUSIONS – QUESTIONS?

- ❖ Is the legislation fair?
- ❖ Is the system fair?
- ❖ Is the case law interpreting the executive's will fair?

14 CONCLUSION – RE-TRAUMA

- ❖ *X's claim was that she could not return to her home country because she was at risk of persecution there on account of being the daughter of a political activist and had been raped by soldiers in the past in consequence. The court accepted that she had been raped but it was not in consequence of her actual or imputed political profile – this latter rejection being on account of certain inconsistencies and implausibility with her evidence. X suffered PTSD in consequence of the rape (as later attested by psychiatric evidence) but her only avenue of seeking to stay and avoid deportation was to make further asylum claims with further evidence. The consequence of this was that her mental health deteriorated as she told 'new' lawyers and 'new' medical experts and 'new' home office officials of her case and each time she was being re-traumatised and she could not face her therapy and she tried to commit suicide more than once. The attempted suicides raised further potential claims but that needed further expert evidence and further reports and further traumatising.*

15 AND FINALLY

❖ Theresa May: May 2012:

❖ **“The aim is to create here in Britain a really hostile environment for illegal migration”** “What we don’t want is a situation where people think that they can come here and overstay because they’re able to access everything they need,”