
Immigration and Asylum in the United Kingdom

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This piece offers an account of the law relating to immigration and asylum, especially as it affects ministers of religion and those who give religious reasons for seeking asylum. Beside Nicholas Coulton's passionate advocacy,¹ this paper must seem bloodless and even unfeeling. It is a revised version of part of a paper for the European Consortium on Church and State Research, an essentially 'black-letter' account of one country's national law constructed to a template that enabled comparisons to be drawn. It began with the observation that United Kingdom immigration law is of daunting complexity; only some limited aspects can be addressed here.

FACILITATION OR LIMITING IMMIGRATION

A necessary part of the background to asylum claims is the law and practice governing 'regular' immigration. The main instrument governing such immigration is 'the Immigration Rules'.² The Rules are made by the Home Secretary under a broad power in section 3(2) of the Immigration Act 1971. Unusually, the approval of the two Houses of Parliament is *not* required: if a statement of changes to the Rules is disapproved by a resolution of either House, the Act merely requires the Home Secretary to 'make such changes or further changes in the rules as appear to him to be required in the circumstances'. The Rules do not limit the right to enter the United Kingdom of British citizens and of certain citizens of Commonwealth countries (those with the right of abode) and they do not apply to migrants from the European Economic Area or Switzerland (though there are some transitional restrictions on nationals of Bulgaria and Romania).

The points-based system

The Rules were much amended in 2008 by Statements of Changes, the later made in November 2008 and coming fully into effect on 31 March 2009; it was heavily criticised in the House of Lords but survived a motion for

- 1 See N Coulton, 'Asylum Justice Matters' (2010) 12 Ecc LJ 162–79, which immediately follows this article.
- 2 Formally cited as HC (for House of Commons Paper) 395 (1994) as (much) amended; a consolidated version is maintained on the website of the UK Borders Agency.

disapproval. The changes develop further the point-based system of immigration control first announced in 2006, based on the system used for many years in Australia. The changes were described by the UK Border Agency as 'the biggest shake-up of the immigration system for 45 years'.

Intending migrants need to pass a points-based assessment before they are given permission to enter or remain in the United Kingdom. The system consists of five tiers, each with its own points requirements:³

- tier 1: highly skilled workers, for example scientists;
- tier 2: skilled workers with a job offer, for example teachers and nurses;
- tier 3: low-skilled workers filling specific temporary labour shortages, for example construction workers for a particular project [but this tier is currently suspended];
- tier 4: students;
- tier 5: youth mobility⁴ and temporary workers, for example musicians coming to play in a concert.

Except for cases in tier 1 and youth mobility cases in tier 5, a migrant must be sponsored by a UK-based employer or educational institution; the sponsor must hold a sponsor licence. Obtaining a licence is a complex task: the application form runs to 35 pages and the guidance notes to 130. There are further processes before a certificate of sponsorship is issued for a particular entrant.⁵

An example may make the nature of the 'points-based system' clearer. The rules applying to tier 2 migrants (other than those transferring within one company, to whom special rules apply) require an applicant for entry to score 50 points.⁶ The points available are as follows:

if the prospective employment is in a 'shortage occupation': ⁷	50
if the job offer passes the Resident Labour Market Test: ⁸	30
if the applicant has an appropriate sub-degree level qualification:	5
if the applicant has a Bachelors or Masters degree:	10
if the applicant has a PhD: ⁹	15
if the applicant's prospective earnings are from £17,000–20,000 ¹⁰ a year:	5

3 Immigration Rules, r 245ff.

4 The youth mobility scheme is limited to Australia, Canada, Japan and New Zealand (Immigration Rules, App G) and replaced a much wider working holiday scheme much used by young people and having no such geographical limitation.

5 The rules governing sponsorship are not set out in the Immigration Rules but are set administratively by the UK Borders Agency.

6 Immigration Rules, r 245ZB and App A, paras 59–84.

7 The list changes from time to time, but in 2009 included certain engineering and healthcare posts, veterinary surgeons, teachers and social workers.

8 Essentially this means that the job must be advertised to persons already settled in the UK and it be shown that no suitable person was found.

9 No provision seems to be made for other forms of doctorate.

10 £20,000 equalled €22,750 at the time of writing.

if the applicant's prospective earnings are from £20,000–22,000 a year:	10
if the applicant's prospective earnings are from £22,000–24,000 a year:	15
if the applicant's prospective earnings are above £24,000 a year:	20

A student seeking entry under tier 4 to attend a course of study in central London must produce a sponsorship letter from the educational institution¹¹ and show that he or she has (and has had for the past 28 days) money to cover the fees for the course and £7,200¹² for living costs.¹³ A lower amount suffices where the student is to live elsewhere in the country. There has been much concern at the existence of bogus colleges set up solely for immigration purposes, providing no or minimal tuition but providing certificates of success in return for a large fee.

The intended effect of the new Rules is to reduce the overall level of immigration. It seems likely that this will indeed be the result but statistics are not yet available to demonstrate the full effect.

Ministers of religion

Surprisingly, there are special additional requirements for entry prescribed for ministers of religion.¹⁴ The cynical might see this as part of a wider conspiracy to marginalise religion; the merely suspicious may feel that the authorities have in mind the 'radical Islamic cleric' and feel they must apply the same special test to all who claim to be ministers of religion

The requirements are:

- i. That the applicant has been working for at least one year as a minister of religion in any of the prior 5 years or, where ordination is prescribed by a religious faith as the sole means of entering the ministry, has been ordained as a minister of religion following at least one year's full time or two years' part time training for the ministry; or
- ii. If seeking leave to enter as a missionary has been trained as a missionary or has worked as a missionary and is being sent to the UK by an overseas organisation; or
- iii. If seeking leave to enter as a member of a religious order is coming to live in a community maintained by the religious order of which he is a member and, if intending to teach, does not intend to do so save at an establishment maintained by his order;

and intends to work full time as a minister of religion, missionary or for the religious order of which he is a member, does not intend to take any other

¹¹ Immigration Rules, App A, para 113ff.

¹² €8,200.

¹³ Immigration Rules, App C, paras 1–13.

¹⁴ Immigration Rules, App A, paras 85–92.

employment, can maintain and accommodate himself and any dependants adequately without recourse to public funds, and can produce an International English Language Testing System certificate issued to him to certify that he has achieved level 6 competence in spoken and written English.

These rules have attracted much criticism. In the debate on the changes to the Immigration Rules in the House of Lords in November 2008,¹⁵ Lord Avebury spoke as patron of the Buddhist Prison Chaplaincy Organisation, whose spiritual director, the Venerable Ajahn Khemadhammo, is also chair of the Theravada Buddhist Sangha UK and abbot of a monastery in Warwickshire which from time to time hosts visiting monks from Thailand. He said,

There has never been any problem with monks coming to Theravada monasteries here, but now abbots are having to plough through reams of paperwork to become sponsors, a severe distraction from their lives of meditation and teaching the Dharma. . . . It looks as though monks can enter, either as ministers of religion under tier 2, or as temporary religious workers for up to 24 months under tier 5. Tier 2 requires fluent English, and that is not usually spoken by monks when they first arrive from south Asian countries. But under tier 5, they are barred from engaging in many of the normal activities of monks, such as chanting at funerals, or any pastoral duties, including counselling. It may be very hard for monks to qualify at all if these restrictions are interpreted rigidly. . . . The fees will hit small monasteries very hard. It costs £400 for the licence for tiers 2 and 5 and £175 for each certificate of sponsorship, plus the cost of the visa.

This was followed a few weeks later by a letter to the Home Secretary from the Archbishops' Council of the Church of England. It queried the requirement that ministers of religion admitted under tier 2 would be expected to have a higher standard of English¹⁶ than anyone else in that category. Why did the conduct of worship require greater language competence than work as a hospital doctor? Why did the rules apply to contemplative orders and to those who were to conduct services and pastoral work in languages other than English?

ASYLUM

Asylum applications

Asylum applications peaked in the years 1999–2002, where they averaged 75,000 a year.¹⁷ They then fell sharply: 50,000 in 2003, 34,000 in 2004, and

¹⁵ *Parliamentary Debates (Lords)* 25 November 2008, cols 1418ff.

¹⁶ ie equivalent to the Council of Europe level B2 as opposed to the usual Level C1.

¹⁷ *Asylum Statistics* 2008 (Home Office Statistical Bulletin 11/08).

25,000 in 2005. In 2007, 23,430 applications were made. The great majority were unsuccessful (73%); 3,800 were granted asylum and 2,335 HP or DL.¹⁸ There were 14,055 appeals to the Asylum and Immigration Tribunal, 23% of which were successful. 12,705 former applicants were deported or left voluntarily during the year.

The law

The UK applies the 1951 United Nations Convention relating to the Status of Refugees, as extended by the 1967 Protocol, in deciding whether to grant asylum. Persons who are found not to be refugees within the terms of the Convention may nonetheless be granted Humanitarian Protection (HP)¹⁹ or Discretionary Leave (DL) for five years, after which they can apply for indefinite leave to remain.²⁰

Most asylum decisions are taken by tribunals and not reported as fully as court decisions, but many are published. Some decisions, especially of the Asylum and Immigration Appeal Tribunal, are immensely careful and detailed, and are recognised as providing country-specific guidance to those making asylum decisions.

*FS and others (Iran – Christian Converts) Iran CG*²¹ provides an example. The Appeal Tribunal examined 87 pieces of documentary evidence, including eight substantial UNHCR, European and government reports. The Tribunal drew careful distinctions between ethnic Christians, members of ethnic minority Churches (who were not persecuted, at least as a general rule, but nonetheless suffered from societal discrimination and a second class status in the eyes of the state and its institutions) and other Christians, often converts, who were members of Protestant or evangelical Churches. They were subject to a legal regime in which their conversion was at least theoretically punishable with death, and the theocratic nature of the state enabled conversion to be seen as both a religious crime against God and a political crime against the very foundations of the state. There was no evidence, however, that converts were unable to survive socially, for they had the support of their Christian community. They are able to practise their religion, ‘up to a point’.

But the Tribunal drew another distinction between those converts who would simply attend Church, associate with Christians and study the Bible, and those who would become leaders, lay or ordained, or pastors, or who would actively and openly proselytise or who would wear in public outward manifestations of their faith such as a visible crucifix, including those who would be so overt

¹⁸ In the first quarter of 2009, the refusal rate was only 59%. It is not clear if this represents a trend to a more generous approach.

¹⁹ Immigration Rules, r339C.

²⁰ See Immigration Rules, r 327ff.

²¹ [2004] UKIAT 00303.

in their discussions of their faith with Muslims that they would be likely to be seen as proselytisers by the various forms of authorities in Iran. For the ordinary convert, who is neither a leader, lay or ordained, nor a pastor, nor a proselytiser or evangelist, the Tribunal would regard them as not at a real risk of persecution or treatment breaching Article 3. It would regard the more active convert, pastor, church leader, proselytiser or evangelist as being at a real risk. Where an ordinary individual convert had additional risk factors, they too might well be at a real risk. In the case of a single woman, lacking such economic or social protection which a husband or other immediate family or friends might provide, the difficulties she faces as a convert were significantly compounded.

The approach in that case was confirmed four years later in *SZ and JM (Christians – FS confirmed) Iran CG*²² after an even more extensive review of documentary and other evidence.

Some cases do reach the higher courts. A decision of the Scottish courts, *Quin Shue Lin (correctly known as Chen Ri Lin) Ptr*,²³ illustrates the application of the principles governing the grant of refugee status. The petitioner, a national of China, sought asylum. In 1993 he was baptised a member of the True Church of Jesus, a Protestant church with places of worship in several parts of China. The petitioner's wife and her parents had also been baptised in that church. He was an active member of the church in Jiujiang with responsibility for the maintenance and decoration of the local place of worship. He was twice arrested and detained, once while attending a prayer meeting in the church and again at a prayer meeting in his own home. After his escape from detention on the second occasion, an arrest warrant and a circular depicting the petitioner and indicating that he was wanted by the Chinese police in connection with his escape from detention were issued by the Chinese authorities. He went into hiding in Guangzhou; his wife moved to Fu Quin city in Fujian province, where she continues to be a member of the True Church of Jesus. The petitioner's claim for asylum was refused and after two unsuccessful appeals he sought judicial review in the Court of Session. He failed. The initial decision recognised that the petitioner had a well-founded fear of persecution on the ground of religion, but noted that the petitioner's wife had gone to another part of China, where the church was not persecuted, and that, therefore, the petitioner had the option of internal flight. For the petitioner it was argued that the internal flight option was not available in cases where the State is the agent of persecution, but this argument was rejected.

The relevance of the European Convention on Human Rights and especially article 9 on freedom of religion was considered in detail by the House of Lords

22 [2008] UKAIT 00082.

23 [2004] SCLR 608. See also an earlier Scottish decision, *Archer v Secretary of State for the Home Department*, 2001 Scot (D) 15/11 (Christian persecuted in Northern Nigeria; asylum refused on ground of possible internal flight to Southern Nigeria).

in *Regina (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal*.²⁴ There were two distinct cases, heard together. Mr Ullah was a citizen of Pakistan and an active member of the Ahmadiya faith. Members of his faith suffer from a degree of religious persecution from Muslim extremists, and Mr Ullah claimed that he was subjected to a variety of restrictions of religious freedom and social discrimination and had suffered harassment and attacks on himself and his family since he began preaching his faith in December 1998. Miss Do, a citizen of Vietnam, claimed asylum on the ground of her fear of persecution as the result of her religious beliefs as a Roman Catholic. There was evidence to support Miss Do's claim that her freedom to practise her religion was circumscribed in a number of respects; although she could return to Vietnam and practise her religion there, she would have to do so in reduced circumstances.

The Court of Appeal held, in effect, that only article 3 of the Convention could be relied upon in this context. The House of Lords disagreed. After a full analysis of the European case-law, it held that issues might exceptionally be raised where the anticipated ill-treatment would infringe other articles of the Convention, in particular, articles 2, 5, 6, and 8, and did not rule out such a possibility in respect of article 9;²⁵ but also held that reliance on such articles required presentation of an exceptionally strong case such that the actual or threatened treatment would amount to a flagrant denial or gross violation of the relevant right, facts not present in the two cases before the House.

Most asylum decisions necessarily turn on questions of fact, often difficult to assess. The published country-specific guidance examine the background to the most common types of asylum claim from particular countries. For example that on Pakistan, revised February 2009, examines claims by Ahmadis, examining the 'internal flight' option, and by women, and summarises relevant tribunal decisions. The guidance on Vietnam contains four pages assessing the position of minority religious groups, with reference both to the formal legal position and the realities in each part of the country.

The process

Applications for asylum are considered by a 'case owner' within the UK Borders Agency. About a week after an initial explanatory meeting, the asylum interview is held at which the applicant is asked to explain his or her reasons for seeking asylum. An interpreter is provided if needed; legal representatives may attend to assist the applicant. An asylum-seeker may be provided with financial support

²⁴ [2004] UKHL 26, [2004] 2 AC 323.

²⁵ The House noted *Razaghi v Sweden* (Application No 64599/01) (unreported) 11 March 2003, which suggested that article 9 was irrelevant in this context but held that the judgment was not clear on the point.

and accommodation in certain cases, has access to free health care from the National Health Service, and is entitled to free legal assistance subject to means tests.²⁶

That sounds very satisfactory but church groups concerned about the treatment of asylum-seekers present a very different picture. Complaints about the often very unsatisfactory nature of the interview process are well illustrated in Nicholas Coulton's article. The initial decision will not necessarily be fully informed by the extensive and subtle guidance in the case-law just noted. Critics also draw attention in particular to the fact that asylum-seekers are prohibited from obtaining employment and have no access to welfare benefits. The presence, according to official estimates by the National Audit Office, of at least 283,500 persons in the UK who have been refused asylum but who have not been removed points to the scale of the problem.

In 2008 the (Church of England) Children's Society published a report²⁷ on child destitution amongst asylum-seeker families. It found that the mother was often forced to resort to prostitution. The report concluded that the main cause of destitution was lack of legal representation: legal aid for asylum-seekers was severely restricted, and did not allow time to deal with the UK's complex immigration system. The detention of children in Immigration Removal Centres has been of great concern, notably in Scotland where the Church of Scotland has taken up the issue of the conditions in such centres. In the previous year, the Archbishops' Council joined the Still Human Still Here campaign, a coalition of church, refugee and asylum-seeker organisations concerned about the welfare of asylum-seekers after their initial application to stay has been refused. The campaign called on the Government to continue financial support and accommodation, and to provide access to education and healthcare for refused asylum-seekers. It also wanted the Government to grant permission for them to work until they leave the country or are permitted to remain.

A recent study²⁸ of 56 destitute asylum-seekers, many of them Christians, from 20 countries, found that none were 'economic migrants', and they included a surgeon, a lawyer, a civil engineer, a poet and a painter. Most were living on less than £5 a week. Two-thirds of them had been tortured before they arrived in the UK. Although many asylum-seekers sleep on the streets, in parks, on church floors, and on buses, they are not included in the Government's homelessness statistics. Most are not eligible for housing or benefits, and they are not allowed to work. Many have suffered physical and sexual attacks. The majority of those interviewed in the report said that if they were to return to their country of origin, they would be

26 Asylum Support Regulations 2000, SI 2000/704 as most recently amended by the Asylum Support (Amendment) Regulations 2008, SI 2008/760.

27 The Children's Society, *Living on the Edge of Despair* (London, 2008).

28 D Taylor/Positive Action for Refugees and Asylum Seekers, *Underground Lives* (Leeds, 2009).

killed or tortured. One woman, from the Democratic Republic of the Congo, who was forcibly removed from the UK, was tortured when she arrived in Kinshasa. She escaped again to the UK and lodged a new claim for asylum, using her torture scars as evidence. The report says that the UK Borders Agency makes little effort to find out what happens to those whom it repatriates. Rejected asylum-seekers, it says, are:

forced to live underground, enduring severe poverty, extreme hunger, mental and physical ill-health and multiple forms of abuse, as well as constant fear of being rounded up and deported. They walk down the same streets as UK citizens, but inhabit a terrifying, parallel universe.

The General Synod of the Church of England at its February 2009 group of sessions passed by 242 to 1, with 1 recorded abstention, a motion in these terms:

That this Synod, continuing to affirm scriptural teaching about care for vulnerable people, welcome for strangers and foreigners, and the Church's calling to reach out to the marginalised and persecuted, call upon HM Government:

- (a) to ensure that the treatment of asylum-seekers is just and compassionate, and to that end to:
 - (i) confer a right to work on all asylum-seekers,
 - (ii) declare an amnesty for so called 'legacy cases' that predate the Government's New Asylum Model, and
 - (iii) bring to an end the practice of detaining children and families in Immigration Removal Centres;
- (b) to find a practical and humane remedy to the intolerable situation of destitute 'refused' asylum-seekers who are unable to return to their country of origin because of personal safety, health or family reasons;
- (c) to investigate and report publicly on the quality of the legal services provided to asylum-seekers.

There have been many instances of local churches providing shelter to asylum-seekers facing deportation, although it is recognised that there is no 'right of sanctuary' in a church and the most that can be done is to provide support, publicity and win time for legal steps to be taken. In a well-publicised case in 2001, a church in Cleethorpes gave shelter to a family from Kosovo. When they moved back to their home to await the outcome of an appeal, they were arrested at dawn and deported. In the following year 12 police, two in riot gear, broke into a mosque in the Midlands to arrest and deport two asylum-seekers.

A PERSONAL POSTSCRIPT

The operation of the common licence system, to which Nicholas Coulton²⁹ refers, attracts the involvement in many dioceses of the chancellor. In that role I have seen dozens of sets of papers and many concern asylum-seekers, many of whom are in the appeal process. By way of proof of residence, they often supply bank statements or invoices and that gives some inkling of the dire economic plight in which many live. I have found almost no evidence of ‘sham’ marriages. Yes, some couples seem to have little by way of a common language, but the careful reports I receive from clergy who know them tell of a genuine relationship, one built very much ‘against the odds’. They are all asked what would happen if the asylum appeal failed. ‘We would stay together somehow’ is the usual response. I let them have their licence and ask myself time and again what our Christian country is doing to these people.

29 See N Coulton, ‘Asylum Justice Matters’, note 1 above, at pages 176–177.