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'The Role of Lawyers, Judges, Country Experts and officials in British Asylum and Immigration Law'[1]

In this paper I examine two key issues. First, using a diverse range of legal cases I examine the work of lawyers, judges and 'country experts' involved in asylum and migration litigation in the United Kingdom. Secondly, following Galanter (1974: 95-96), I step back from specific cases to ascertain 'under what conditions can litigation be redistributive, taking litigation in the broadest sense of the presentation of claims to be decided by courts (or court-like agencies) and the whole penumbra of threats, feints, and so forth'.

The background to this paper arises from the fact that the British government has consistently categorized 'foreigners' as ethnically and racially different from the host population and has used this rhetoric to justify its exclusion of members of the British Commonwealth, migrants and asylum-seekers and others from entering the UK (Geddes 2003; Bosworth, Parmar & Vázquez 2018). This paper will show, however, that the supposedly 'bright line' set out in the law to differentiate between the rights of citizens and non-nationals (Dauvergne 2004: 590-591) has become increasingly blurred due to changes in legislation and the discretionary decisions of officials which have created numerous ambiguities and contradictions regarding the legal status of 'foreigners'. It is litigation against some of these ambiguities which is explored below.

The first section of this paper discusses the research on which this article is based. Section (ii) argues that asylum and immigration law and practice constitute a 'semi-autonomous social field' within which is situated a number of diverse institutions,

[1] I gratefully acknowledge comments from two anonymous reviewers which have greatly improved the paper.

organizations and actors that shape policy and determine the outcome of legal appeals/ litigation. To illustrate how the asylum field works, section (iii) examines four different types of legal claims which have been litigated in the courts between the mid-1990s and 2019. As the cases show, there is a strong continuity in the way that institutions and actors perform their distinctive, interlinked roles in the 'asylum field' which is dominated by the British Home Office (HO) and, to a lesser extent, the judiciary. While politicians legislate and officials implement policies, immigration barristers challenge policy and/or how policies are implemented, country experts provide evidence for specific appeals against the government, and the judiciary tends to suture over potential fractures in the law by interpreting 'facts' and relying on precedent to ensure legal and political stability (Latour 2010). In this way the asylum field functions over time to uphold the legitimacy of state policy to exclude 'foreigners', while simultaneously granting a small number of asylum applicants protection and some foreign nationals the right to legally enter and reside in the UK.

FIELDWORK IN THE UNITED KINGDOM

This paper draws on two years of in-depth ethnographic fieldwork (between 2007-2009), a considerable amount of subsequent research, and twenty-five years of my work as a 'country expert' (between 1994-2019) writing 'expert reports' for asylum seekers and migrants and providing oral testimony in legal appeals (cf. Good 2004). With some exceptions (see work cited below), most research on asylum has been prescriptive – i.e. it focuses on specific laws, reforms or cases – and has failed to set out a wide picture of how the asylum system is organized and operated. For the most part research has not sought to understand the role and interplay of key institutions in the system.

While considerable research has focused on litigation in specific appeals, it has tended to criticize how cases were decided and has failed to examine the inter-connected roles of

‘country experts’, lawyers, judges and government officials involved in litigation. In short, most research at the time and, to a certain extent even now, tends to focus on narrowly defined issues and fails to appreciate how the British asylum system constrains the possibilities of legal challenge and reform. To overcome such a limited understanding, I have relied on the work of Moore (1973/74) which has enabled me to see the asylum system as a legal arena or ‘semi-autonomous social field’.

Accordingly, I have followed asylum-related litigation in the First Tier Tribunal (FTT, Immigration and Asylum), the Upper Tribunal (UT, Immigration and Asylum Chamber) and in the English Court of Appeal (CoA). I have followed asylum and migration claims as they moved between the Home Office, law offices and the court and I have collected and analysed information on a large number of different kinds of appeals. Fieldwork has allowed me to understand how legal claims are taken (by Home Office officials and refugee lawyers), interpreted, translated into the law, argued in court by barristers and decided by Judges (Campbell 2017).

Fieldwork was also conducted in immigration law firms and barristers’ chambers as well as in two departments of the United Kingdom’s Visas & Immigration Department, the Government Legal Department and in eight national refugee organizations, forty NGOs and eleven refugee community organizations. Fieldwork involved participant observation in many different settings including courts and law offices; I took verbatim notes of appeals, accessed case files, analysed documents and interviewed asylum applicants, lawyers, barristers and officials.

A focus on litigation has allowed me to identify and understand the work of all the institutions whose activities are focused on determining the outcome of individual legal claims and, directly and indirectly, influencing asylum and immigration policy. In this sense,

litigation has provided me with a means of understanding how specific actors located in different institutions in this social field perform their tasks, and the manner in which legal cases are constructed and argued by the parties involved in the claim. However, my ethnographic research looks beyond individual claims and situates and analyses them as part of the broader political processes at work in the asylum field.

Research was vetted and approved by my institution, funded by the UK's Economic and Social Research Council and was overseen by an Advisory Board. The purpose of the research was explained to everyone – sometimes by myself, my research officer or by research assistants/interpreters – and informants were asked to sign consent forms authorising me to use the information they provided.

With respect to as 'every day ethics' or 'micro-ethics' (Tomkinson 2015) which arose during fieldwork, we sometimes found it necessary to advise and/or assist asylum seekers[2] and sometimes what was required was to listen to their stories and empathize with their situation. However, because we were not undertaking a longitudinal study of asylum-seekers we did not experience intensive and complex relationships with informants which might have required a more complex 'multi-layered' approach to their needs (Vervliet, Rousseau & Derluyn 2015). In contrast, my work as a country expert was commissioned directly by an asylum-applicants solicitor; I had no contact with individual applicants unless I attended court to provide oral testimony in their appeals.

THE FIELD OF ASYLUM AND IMMIGRATION LAW

[2] We paid destitute asylum-seekers a small cash honorarium for allowing us to interview them.

Fieldwork revealed that there are a number of institutions which directly shape the asylum field, but which are normally seen as operating outside the asylum field. For instance, in Parliament elected politicians review, debate and pass legislation that fundamentally shapes asylum and immigration law and the way the entire field functions. At one remove from Parliament is the Home Office (HO) which is the central institution in the asylum system. This Department, overseen by the Secretary of State for the Home Office (SSHD), is part of the executive branch of the state. The Secretary of State, an elected politician, is responsible for immigration and asylum policy as well as the administration of the HO and its operational wings the United Kingdom Visas & Immigration Department, the Border Force and Immigration Enforcement. In addition to implementing legislation, the SSHD creates law and policy by introducing new and secondary legislation (Clayton and Firth 2018, Sec. 1).

Cabinet decisions and decisions taken by the SSHD are communicated to staff in the HO via discussions with senior officials in the 'Policy Development Group' before being transmitted downwards to a plethora of officials who are expected to implement them. Crucially policy making in the HO is an intensely insulated process which results in policies and decisions that are frequently in tension with domestic and international law including the 1951 Refugee Convention (Duvell & Jordan 2003; Consterdine 2013; Campbell 2016).

Each institution – including law firms, barrister chambers, NGOs, the Chief Inspector of the Borders, UNHCR, the courts and so – and the individuals who work in them, pursue a range of projects/agendas focused on asylum and migration law. The situation can be understood in two complementary ways. For instance, Conley & O'Barr (1998: 89) have observed that 'the entity we call the law manifests itself in the behaviour of legal officials …Because these are real people, their orientations and reactions are not uniform, but rather vary in interesting ways' as they seek to influence the outcome of a case. At the same time, Bourdieu's (1987: 817) conception of the 'juridical field' aptly describes litigation. He

argues that the 'juridical field' 'is the site of competition for monopoly of the right to determine the law'. Whereas Bourdieu focuses on 'the socially recognized capacity to interpret a corpus of texts', I envisage legal contests as playing out in a much wider political field, though I share his view that the actors involved, most of whom see themselves as 'lawyers' (whether or not they actually practice law), exhibit a clearly identifiable *habitus* reflecting a set of ingrained habits, skills, and dispositions which they pursue via 'a single minded pursuit of their client's interests' (Rostain 2004: 153).

Fieldwork examined the work of Home Office case workers who process and decide initial claims/applications. Their work is directly affected by HO policies and instructions and by bureaucratic processes, e.g. the imposition of management targets requiring quick decisions, the quality of their training and so on which result in decisions which are challenged by judicial review (see case three and four, below). Legal challenges against official decisions occur at all stages of the asylum process.[3]

Litigation, which for the purpose of this paper includes asylum appeals and Judicial Reviews (JR's) against official decisions, provides information about the issues raised in a claim and it allows me to analyse the work of institutional and individual actors. The work of institutions is revealed in the legal and policy issues raised in a claim, including behind-the-scenes work to influence how a claim is decided. Furthermore, an examination of cases reveals how the government litigates to secure compliance with its objectives (even though litigation often fails to achieve a specific objective; Campbell 2017, Chap. 6).

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[3] Typically, ninety percent of initial asylum applications are refused by Home Office caseworkers, though between one-quarter and one-third of their decisions are overturned on appeal.

Private immigration caseworkers/solicitors work in tandem with 'interpreters' in a law firm to prepare an application for asylum and the legal appeal against the HO's refusal to grant protection. Due to the complexity of asylum and migration law, applicants have little chance of securing status without legal assistance. In effect lawyers and interpreters (in the UK interpreters are barred from offering legal advice) function as 'gatekeepers' who can facilitate or stymie a legal claim (James & Killick 2012).

Furthermore, given the asymmetrical nature of all interviews, especially those conducted by the Home Office, limited access to a lawyer, and difficulties in bridging cultural and linguistic differences between applicants and British actors, the 'translation' of an asylum applicant's account and its 'entextualization' into documents written in English which are submitted to the court can easily damage the credibility of applicants and undermine their claim (Crawley 2010; Blommaert 2001; Gibb & Good 2014; Jacquemet 2009).

Lawyers, judges, Home Office officials and interpreters 'manipulate the discourse' of law to shape, redefine, redirect and argue a dispute.[4] Indeed, Mather and Yngvesson argue that disputing should 'be viewed as a bargaining process in which the object of the dispute, and the normative framework to be applied, are negotiated as the dispute proceeds' (1980/81: 818). They note that is common for lawyers to narrow the focus, restrict or exclude participation in the dispute beyond the immediate parties, and adopt a highly specialized form

[4] Good (2004: 131) notes: 'The key point seems to be that lawyers take matters which have been established to the appropriate standard of proof to be true facts, in an absolute sense, and judges see their task as deciding how the law should properly be applied to those facts, whereas for anthropologists 'facts' are always products of a particularly theoretical approach, and truth is at best provisional and contested.'

of discourse which prevents disputants from participating in the case. This aptly describes the nature of asylum/immigration litigation in the UK.

'Country Experts' provide 'evidence'[5] addressing key elements of an individual's asylum claim to the judiciary, a process that enhances the legitimacy of the legal process. In asylum and immigration law these 'expert witnesses' are identified and instructed by legal counsel for individual appellants and can be selected from the fields of medicine[6], law, anthropology, history, linguistics or journalism. The key issue in choosing an expert to is whether s/he possesses sufficient 'cultural expertise' in the form of an in-depth knowledge of the appellant's country of origin, his/her language or culture, their medical condition or foreign law, and whether the expert can provide a persuasive view of the issues raised by the case (Jones 1994; Goodwin 1994).

Following Holden (2019) it is important to note that experts can play very different roles – and sometimes no role at all – in common law and civil law traditions and in different legal jurisdictions (e.g. asylum, family and criminal law, native land claims etc.). Indeed, in British asylum law country experts provide cultural and/or legal evidence (see case one, below) or assume an interstitial role[7] between different legal jurisdictions to interpret foreign law and practice (see case two, below).

Most experts find that judges sceptically view their evidence/testimony and often reject, reinterpret or instrumentalize their findings. This problem arises because, regardless of

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[5] Anthropologists tend to define the nature of their 'evidence' as 'cultural' (Engelke 2008; Good 2008).

[6] Good (2007) has described the limited role of medical experts/expertise in British asylum.

[7] The *Concise Oxford Dictionary* (1999) defines interstitial as an adjective, 'of, forming or occupying interstices.'

their training or area of claimed expertise, an expert's standing in asylum law is limited to providing hearsay or opinion evidence.[8] In addition, Judge's use the court's Procedural Rules and Directions to decide how much weight, if any, to attach to an expert's 'evidence' (Campbell 2017, Chap. 5). In this sense, the power of judges to control/regulate experts is a reflection of their 'professional vision', i.e. their *habitus* or situated perspective which emerges from professional socialisation, training and court room practice. This 'vision' reinforces their power to accept, reject or modify the evidence before them and reflects their view of the case and relevant law (Jones 1994; Goodwin 1994).[9]

Anthropologists who are country experts are normally asked to assess an applicant's claims about political conditions in their country of origin, including the possibility that they may be at risk of persecution for a Convention reason if s/he is 'returned' to their country of origin. Anthropologists have typically responded to their perceived subordination to judges in one of three ways.[10] First, in response to accusations that experts are biased/lack objectivity, some argue that the legal process forces them 'to submit to the hegemony of the judiciary' and that anthropologists are trained 'to think differently' than lawyers (Good 2004: 129). Other anthropologists argue that lawyers operate with different epistemological premises to

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[8] Rules regulating opinion evidence are intended to limit permissible evidence in order to limit bias and to allow judges the freedom to arrive at a 'reasoned' decision.

[9] As Rosen (1979: 111-112) has noted of expert evidence, 'in a court of law their concepts may take on significance far beyond the limits of their intention or their initial inquiry, and the implications of their testimony may go far beyond anything they had seen'. In this sense, an expert's evidence will have been 'given an entirely different valence; they are instrumentalized' (Riles 2006: 62).

[10] Only a small number of anthropologist's act as experts in legal proceedings.

anthropology which can create serious ethical dilemmas, and which requires them to position themselves strategically in relation to the court (Hoehne 2016). Yet other anthropologists argue that anthropologists should 'collaborate' with courts and lawyers (Vetters & Foblets 2016) despite clear evidence that lawyers and judges 'instrumentalize' anthropological methods by appropriating their research and knowledge (Riles 2006). While arguments about supposed differences in disciplinary training are no doubt correct, they completely miss the point: the legal system provides judges with the power to conduct a hearing and decide the value of all the evidence submitted to the court. In short, while experts, lawyers and judges may differ in terms of their methods, ethics and knowledge practices, in court these differences are of little consequence due to the adversarial nature of legal argument and the power wielded by judges.

Finally, judges are important because they are authorised to manage and decide legal appeals.[11] Tribunal/Court Procedural Rules and Practice Directions provide Judge's – many of whom have limited training in asylum and immigration law – with considerable power to speedily decide appeals. Efficiency is sought by regulating legal counsel and experts and is

[11] Judges in different jurisdictions adopt very different approaches regarding the standard and burden of proof which should be applied in asylum hearings. Where as in the UK the standard is 'a reasonable degree of likelihood' that the applicant's account is true, and their fear of persecution is well founded (*Sivakummaran v SSHD [1998] Imm AR 147*), in France the process hinges upon whether or not the judge develops an 'inner belief' regarding the 'truth' of an applicant's account based on a feeling of empathy and compassion (Kobelinsky 2019).

accomplished by a judge's use Procedural Rules and Practice Directions[12] to define whose speech and what forms of speech are legally salient, and what weight to attach to written and oral evidence. 'Good' Immigration Judge's (IJs) draw out a full record of the evidence and consider all the material 'in the round' including reports of country conditions and the relevant law; 'skeptical' IJs use the Procedural Rules and Practice Directions to truncate oral evidence enabling them to speedily refuse an appeal. Many IJs are not particularly good, a fact that is indicated by their overwhelming tendency to refuse large numbers of appeals on the basis that a claim lacks credibility (Campbell 2020; Byrne 2007; Sorgoni 2019). Nevertheless, if appellants have access to a good legal representative, IJ decisions are frequently overturned on appeal in the Upper Tribunal.

In short, fieldwork revealed 'a semi-autonomous social field' that is composed of a diverse range of institutions and actors engaged in shaping and challenging immigration law and policy: this field generates its own 'rules and customs and symbols internally, but … it is also vulnerable to the rules and decisions and other forces emanating from the larger world by which it is surrounded' (Falk Moore 1972/73: 720). The asylum and immigration field in the UK is defined by its processual character. It is an empirically observable field which is clearly linked to other fields in complex ways and it is reinforced by the state and the judiciary which gives it an aura of legitimacy. A further characteristic of this social field is that these actors are imbued with variable professional attitudes/orientations: they are variously aggressive and defensive, act professionally and unprofessionally, are well- and ill-prepared to perform their tasks and they possess quite different attitudes about asylum

[12] For instance, 'Practice Direction 35' sets out the directions which guide the way that experts are expected to provide evidence to the courts. For the entire list of 'Directions' See: https://www.justice.gov.uk/courts/procedure-rules/civil/rules

seekers and migrants. In the following sections I examine how officials, lawyers, experts and judges perform their roles by examining four different types of legal claim.

LITIGATION, RIGHTS AND 'TRUTH'

Case 1. The contribution of expert evidence in asylum appeals

Asylum applicants have left their country of origin and applied for political asylum in the United Kingdom. Asylum applicants are foreign nationals about whom many negative stereotypes exist, notable among them that they are 'bogus' and seek to enter the UK to access benefits, education and work. Asylum appeals are made against the Home Office's initial decision to refuse an applicant protection. The Home Office refuses approximately ninety percent of all applications[13] which triggers a right of appeal for most applicants. While they await a decision on their appeal they are dispersed across the UK and allocated poor quality housing and given food coupons.

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[13] The initial decision is taken by a case worker and takes the form of a 'Refusal Letter'; at the appeal the Home Office is represented by a junior civil servant, a Home Office Presenting Officer, with limited legal training. In this case the decisions taken by both officials were poor and contributed to the success of GA's appeal.

‘GA’ was born in Ethiopia in 1998[14] and managed to reach the UK in 2015 when he applied for asylum. His case worker identified me as a recognized country expert and instructed me to write an Expert Report[15] for his client’s 2017 appeal.

GA claimed that he was born in Ethiopia in 1998 to a father who was Eritrean and a mother who was Ethiopian, and that both of his parents were deceased. Without support he and his sister had lived rough on the streets and, because of their Eritrean ethnicity, they were discriminated against. In 2012 a stranger trafficked them to Sudan where they were compelled to do unpaid work; GA escaped and travelled to Libya and, via a boat, arrived in the UK via Italy where he claimed asylum aged seventeen.

Home Office officials refused to grant him Discretionary Leave to Remain and they refused his asylum claim because they did not accept that he was an Eritrean national; instead they argued that he was Ethiopian and that he could claim Ethiopian nationality through his

[14] I was given his entire case file which contained his Home Office Statement of Evidence form, his initial Asylum Screening Interview, the Home Office Refusal Letter, a psychiatric report and other associated material. A copy of the FTT’s decision was sent to me after the hearing (appeal PA/05762/2017).

[15] His case worker instructed me to address the following issues: country-background information on the mistreatment of ethnic Eritreans in Ethiopia; country background on the situation of street-children in Ethiopia as a source country of trafficking; the plausibility of the his account; whether he was entitled to Ethiopian nationality (and how he might reasonably be expected to secure it); any risk of re-trafficking if he were to be returned to Ethiopia; and any other information which I felt was relevant to his claim. My curriculum vitae, containing evidence of research, publications and work as an expert in asylum proceedings was attached to the report as evidence that I was a recognized country expert.

mother. The Home Office also argued that if he were returned to Ethiopia, he could 'avail himself of the protection' of the authorities and would not be at risk of being re-trafficked.[16] Officials argued that since he attended school in Ethiopia, albeit for one year, he must be an Ethiopian national. Furthermore, he was interviewed in Amharic, an 'Ethiopian language', and provided no evidence that he could speak Tigrinya, the language spoken by his father. Finally, it was asserted that because he had not made 'a bona fide' application to the Ethiopian embassy to secure a travel document to Ethiopia, his claim should be refused.

During the hearing legal argument by GAs barrister and evidence from my Expert Report were relied upon to counter arguments by the Home Office. On the issue of nationality, my report showed that Ethiopian law did not support the argument that GA was entitled to Ethiopian nationality or indeed that he could access it if he were returned to Ethiopia. The Judge stated: 'I must have regard to the opinions of experts when interpreting foreign law. I have not been referred to any contrary authority to that of Dr Campbell as to the appellant's ability to acquire Ethiopian nationality…' (¶33; my emphasis).

My report made it clear that: (a) both parents of an individual seeking nationality must be Ethiopian 'by descent' and that being born in Ethiopia does not entitle an individual to Ethiopian nationality; (b) the appellant could not avail himself of Ethiopian laws promulgated in 2003 and 2004 to regularize the status of resident Eritreans because the registration period had ended; (c) viewed against relevant background evidence, the appellant's claim that he is an Eritrean national was consistent and plausible; (d) seen against relevant British case law, the appellant had made a 'bona fide' application to the Ethiopian embassy which had been refused because he could not provide the required documentation; (e) if he were forcibly

[16] This argument was effectively countered by his barrister who noted that trafficking constituted a form of persecution.

returned to Ethiopia the authorities would not recognize him as a national and he would be imprisoned or placed in a refugee camp; finally (f) I concluded that if he were returned to Ethiopia, as a young adult who had no familial or social support he was vulnerable and might, once again, be trafficked.

My expert report also addressed two 'cultural' issues. First, I argued that GA had 'clearly distinguished between his ability to speak Amharic, a language spoken in Ethiopia, and his ethnicity, which was Tigrinya and that there is no direct relation between language and ethnicity. Second, I concluded that GA's account of being a street child was 'plausible.'

The Judge accepted my evidence and decided that GA was an Eritrean national who could not be returned to Ethiopia; he recognized him as a refugee. The judge discounted the entire Home Office case against the appellant. Two points are worth making. First, with regard to the legal evidence provided to the court, the Home Office Presenting Officer failed to provide a 'contrary authority', i.e. rebuttal evidence, that could contest or undermine my evidence. This point is critical: judicial decisions depend upon weighing arguments against counterarguments in a process which leaves it to the judge to decide whose evidence to accept. It is important to recognize that the adversarial process is NOT a zero-sum game in which judges automatically exercise their hegemony to control experts. Second, the provision of evidence – legal and cultural – requires experts to carefully document their reports and demonstrate how they arrived at their conclusions.

Case 2. The role of experts in 'foreign' adoption proceedings

This case looks at the pivotal role of expert evidence in the adoption of foreign children in the UK. Adoption is one of a myriad of legal statuses defined and regulated by the United

Kingdom’s growing list of Immigration Rules which are designed to regulate the entry of foreign nationals into the UK.[17] Specifically, Immigration Rule 309A states:

> ‘For the purposes of adoption under paragraphs 310-316C a de facto adoption shall be regarded as having taken place if:
>
> (a) at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the first period mentioned in sub-paragraph (b)(i) and must have cared for the child for at least a period of time equal to the second period material in that sub-paragraph; and
>
> (b) during their time abroad, the adoptive parent or parents have: (i) lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and (ii) have assumed the role of the child’s parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility.
>
> 309B. Inter-country adoptions may be subject to section 83 of the *Adoption and Children Act 2002*[18] or the equivalent legislation in Scotland or Northern Ireland if the adopter’s habitual residence is there. Where this is the case, a letter obtained from the Department for Education (England and Wales habitual residents) or the equivalent from the relevant central authority (Scotland or Northern Ireland habitual residents) confirming the issue of a Certificate of Eligibility must be provided with any entry clearance adoption application under paragraphs 310-316C.’ [my emphasis]

British courts and Home Office Entry Clearance Officers who decide applications for inter-country adoption require clear evidence about foreign adoption procedures, which in turn requires a report from a ‘country expert’ who, *per force*, is required to adopt an interstitial position between different legal jurisdictions. This is necessary when the state

[17] For a list of the relevant immigration rules, see: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-8-family-members#pt8children

[18] See: http://www.legislation.gov.uk/ssi/2013/310/pdfs/ssi_20130310_en.pdf

from which a child is adopted is not a signatory to *The Hague Convention (1980)*[19], i.e. where a recognized system of international adoption does not exist.

'Mekdes' was adopted in Ethiopia by a British couple living in Abu Dhabi who sought to bring her to Scotland where the relevant legislation is the *Adoption Recognition of Overseas Adoption (Scotland) Regulations 2013/310.* This legislation was modified by *Cobb J in G (Children) [2014] EWHC 2605* which sets out the common law test that requires three questions to be answered in order to recognize a foreign adoption: "(i) Was the adoption obtained wholly lawfully in the foreign country? (ii) If so, did the concept of adoption in that jurisdiction substantially conform with the English concept? (iii) If so, was there any public policy consideration that should mitigate against recognition?'

In 2014, following an unsuccessful approach to the Ethiopian embassy for assistance, a British lawyer instructed me to identify relevant foreign law and procedures in Ethiopia where the child was adopted from and to assess whether the child's adoption met the conditions set out by the Immigration Rules/*Cobb 2014*. This task required me to identify and interpret relevant Ethiopian and British law and procedure and to writing a report for the Scottish Court of Sessions to confirm whether the process used by the adoptive couple followed the correct procedure for adoption in Ethiopia. I was also required to assess whether the documents which the couple submitted to the court were 'genuine and authentic.'

The couple's lawyer sent me the case bundle which contained documents identifying the adoptive parents and the child they wished to adopt, the death certificate of the adopted

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[19] See: https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

child's father[20], translations and original copies of the Ethiopian adoption contract, a document issued by the Federal First Instance Court, a request to the Federal First Instance Court to issue a decision on the adoption, and the decision of the Federal First Instance Court. I identified the *Revised Family Code of Ethiopia (1992)* as the legislation regulating adoption.

What was missing, however, was a statement from the adopted parents regarding the specific steps they had taken to secure adoption in Ethiopia. Their lawyer took further witness statements from both parents and sent them to me. My report addressed Scottish and Ethiopian law and established that the documents provided by the adoptive family clearly indicated that they had followed the procedures set out in Arts. 190, 193 and 194 of the *Ethiopian Family Code*, that they were eligible to adopt[21], that the child was under the age of eighteen when adoption occurred, that relevant Ethiopian identity documents had been issued to the child in Ethiopia, and that the Browns had provided long-term support for the child prior to bringing her to the UK. My report concluded that Ethiopian law and policy conformed with Scottish law.

The report was submitted to the Scottish Court of Session for a decision along with an application for a grant and relevant affidavits from the parents. In 2015 Lord Brailsford sitting in the Court of Session considered the evidence before him, including my expert report, and recognized the common law adoption of the child. This was the first 'foreign

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[20] The child's deceased father had married an Ethiopian woman; following his death the child's mother married Mr. Brown, a British national and the couple were seeking to formally adopt her child.

[21] Unlike the situation which prevails in the UK, Ethiopian law forbids gay/homosexual couples and single adults from adopting children.

adoption' recognized in Scottish Law[22] and set the standard for the provision of expert evidence in subsequent inter-country adoption procedures.

Case 3: When is a refugee not a refugee?

The case of 'ST'[23] provides a window into the way that lawyers and judges construct a case and view evidence; it illustrates how a legal case was transformed from an argument about the facts of the case – did the Tribunal/FTT grant 'ST' refugee status or not – to an arcane point of law, namely an analysis of Art. 32 of the 1951 *Refugee Convention*[24] that took lawyers and judges fourteen years to 'decide' during which time the asylum applicant led a physically, economically and legally precarious existence.

The applicant was an Ethiopian-born ethnic Eritrean who fled Ethiopia at a time when that country was arresting and deporting ethnic Eritreans during a bitter war with Eritrea (Campbell 2014). She arrived in the UK in 1998 and claimed asylum as an Eritrean national;

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[22] See: https://www.scotcourts.gov.uk/search-judgments/judgment?id=28b7daa6-8980-69d2-b500-ff0000d74aa7.

[23] I attended and took notes of the JR proceedings in the High Court and interviewed her barrister. Subsequent legal proceedings were published online.

[24] 'Article 32, expulsion 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.'

however, the Home Office failed to assess her claim until 2004[25] when they refused it. She appealed against that decision to the FTT which, in March 2005, upheld the Home Office decision refusing her protection. In an appeal to the Upper Tribunal in February 2005, the UT decided that her case should be reconsidered due to a serious error of law made by the IJ who had decided to return her to Ethiopia. In January 2006 the FTT reconsidered her case and found that she was a refugee and granted her protection.

Surprisingly, in May 2006, and well after the five days allowed the SSHD to appeal against a decision by the FTT, the Home Office issued a new refusal letter overturning the Tribunal's decision. In July 2006 STs legal team filed a judicial review (JR) asking the High Court to overturn the Home Office decision on the basis that it was 'unreasonable'.[26] The JR, which substantially narrowed the grounds of appeal, was granted by the High Court in December 2008 which decided that the FTT had 'made a finding' that the applicant 'was entitled to the protection of the 1951 Convention'.[27]

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25 This was period when the Home Office was in considerable turmoil and there was a massive backlog of cases which it failed to deal with; see: *[2008] EWHC 3064 (Admin).*

26 'It is settled principle today, however, that judicial review for unreasonableness is not restricted to situations in which a public authority purports to make a decision which is not in accordance with the terms of the powers conferred on it and that, even if a decision on the face of it fails within the letter of these powers, it can still be successfully impugned if it is shown to be unreasonable, in the relevant sense. The essence of this broader criterion of unreasonableness is …that "there may be something so absurd that no sensible person could ever dream that it lay within the powers of the author' (Peiris 1987: 54-55).

27 See: https://www.refworld.org/cases,GBR_HC_QB,496478cd2.html

However, counsel for the Home Office appealed against the High Court decision to the Court of Appeal which, in June 2010, reversed the decision against ST.[28] In February 2012 that CoA decision was appealed to the Supreme Court which refused the appeal against the Home Office on the basis that Art. 32[29] of the Refugee Convention could not be given 'extended and autonomous meaning' because 'ST' was not 'lawfully present' in the UK as a refugee.[30] The Supreme Court decided that 'ST' had been granted 'temporary admission' into the UK until such a time as her case was finally decided (cf. Sawyer & Turpin 2005).

During the fourteen years this case wound its way through the courts the central issue moved away from objective evidence about whether ST would be persecuted in Eritrea or Ethiopia, to whether the Home Office had unreasonably delayed assessing her case and taken an unreasonable, and therefore illegal decision to overturn a Tribunal decision, to an arcane

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28 See: https://www.refworld.org/cases,GBR_CA_CIV,4c1f856d2.html

29 Art. 32 concerns 'expulsion' and states: '1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.'

30 See: https://www.supremecourt.uk/cases/uksc-2010-0149.html

question of law: was ‘ST’ ‘lawfully present’ in the UK.[31] The case provides an excellent illustration of Bourdieu’s concept of the ‘judicial field’ in which lawyers contend with each other in lengthy litigation which ultimately went to the Supreme Court to decide the issue (in a process that failed to address the protection needs of ‘ST’).

Indeed, the situation facing asylum seekers deteriorated rapidly during this period because the government eliminated their right work, their right to access social security and their ability to resist removal. This was a period when legal aid budgets were slashed, and more experienced lawyers stopped practicing asylum and immigration law which left asylum applicants with fewer options to challenge Home Office decisions.

Case 4. The limitations of litigation and the ‘Windrush Scandal’

This case concerns who has the right to reside in the UK, a right which is set out in the Immigration Rules[32] but which is very complex and varies in relation to the legal status of an individual. The key issue I address here concerns the extent to which litigation, in this case numerous successful Judicial Reviews against the Home Office, failed to force the Government to change its policy. Indeed, it was belated Parliamentary pressure, together with media reports which finally made clear how inequitable Home Office policies were, which put pressure on the Government to change its policies.

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[31] Many years later her barrister remarked: ‘I very much doubt she was ever returned. To memory she had a husband who was either a British citizen or a refugee, and two kids. The case took so long that I imagine she was ultimately given DLR [leave to remain] on a broad Art. 8 ECHR basis’.

[32] See: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-1-leave-to-enter-or-stay-in-the-uk

The ‘Windrush’ scandal emerged in relation to new Immigration Rules created in 2010[33] and the way that Home Office officials implemented these rules which were part of a strategy to reduce UK immigration to the levels promised by Government in the 2010 Conservative Party Election Manifesto[34] (which was given a statutory basis in the *Immigration Act 2014)*. It is now widely agreed that the Governments’ ‘implacable opposition to immigrants’ and human rights, combined with a wilful disregard of evidence and of those who urged caution …’ caused untold suffering for ‘the Windrush generation, and all other immigrants and ethnic minorities placed in a comparable position’ (JWCI 2018: 3).

In 2010, following its victory in national elections, the Conservative Party (in conjunction with the Liberal Democrats) put into place new and more complex immigration rules aimed at preventing entry into the UK by asylum seekers and migrants[35] and creating greater ‘post-entry control’ over ‘migrants’ already in the UK (White 2019). In 2013 the Government was told that its ‘hostile climate’ against ‘illegal migrants’ was causing distress to hundreds of Caribbean migrants who were being told to leave the UK and that the

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33 The government introduced eight changes to the Immigration Rules in 2010, see: https://www.gov.uk/government/collections/immigration-rules-statement-of-changes#statement-of-changes-to-the-immigration-rules:-2010

34 The pledge to cut immigration was a major plank in the party manifesto, see p. 21-f of the Manifesto.

35 A migrant is a person who moves from one country to another and who is required to apply to the proposed host country for permission to enter and reside there. Migrants may be joining family already resident in the country; they may be applying to work or to study or for some other legally recognized reason.

implementation of the immigration rules was giving rise to serious legal problems. However, the Government carried on in the face of a growing numbers of judicial reviews. Official statistics on the number of Judicial Reviews filed against asylum and immigration decisions indicate a sharp rise to ten thousand in 2010, the year the 'hostile policy environment' came into force, rising to over fifteen thousand five hundred per year by 2013 followed by a decline to about four thousand claims per annum in subsequent years.[36]

At least one-third of these JRs were successful (this includes cases in which the government 'settled' without going to trial; cf. Bondy & Sunkin 2009).[37] In one JR proceeding in 2016 Lord Turnbull [*2016] CSOH 73*] in the Scottish House of Sessions found that the SSHD's order that an applicant should leave the UK was based on an incorrect assessment of his right of Indefinite Leave to Remain (he entered the UK in 1959, and in 1973 his Pakistani passport was endorsed by the Home Office granting him Indefinite Leave to Remain). The Home Office sought to remove him when he applied to have a new passport endorsed by the HO indicating his right to remain in the UK; it refused to endorse the passport and stated that he had lost this 'right' even though officials provided no evidence for their decision. The JR against the Home Office was granted.

In a JR filed against NHS regulations that were introduced in 2017 which forced people who cannot prove UK residency to pay for their treatment in advance, 'Albert Thompson', who had legally resided in the UK for forty years, failed in his attempt to quash

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36 Source: Table 2.1 in 'Civil Justice and Judicial Review Data zip file' at: https://data.gov.uk/dataset/163c7366-0988-44f8-9803-6d3124311716/civil-justice-statistics

37 See: 'The true statistics behind judicial reviews 's success rates' at: https://ukhumanrightsblog.com/2015/03/23/the-true-statistics-behind-judicial-reviews-success-rates/

the regulations and was refused access to cancer treatment.[38] The case hinged on his inability to provide documentation of his right to remain (though it is now clear that the Home Office had shredded/disposed of official documents, including the landing cards issued to Windrush migrants who entered the UK between 1959 and 1973). It was only when MP's raised his case in Parliament that Prime Minister May was forced to announce that 'he would get the treatment he needs'.[39]

However, it was not until 2018 that MPs began to raise questions in Parliament about the immigration status of their constituents – some had been deported, some were threatened with deportation, some had their access to housing and health benefits removed etc. – and had begun to demand information from the Home Office about the human cost of its 'hostile environment' policies that the Government began to backtrack on its position. What appears to have sparked a growing public controversy was not litigation or growing media attention but demands by MPs for an investigation into the situation and their demand that Home Office officials should be held accountable for wrongful decisions.

The scale and complexity of problems which confronted the 'Windrush Generation' who number at least six hundred thousand persons[40] arose from a blanket denial of their civil

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38 See: 'Windrush man charged for cancer treatment loses legal challenge against 'hostile environment' regulations' (*The Independent*, 10 December 2018).

39 See: 'Albert Thompson finally given a date to receive cancer treatment' (*The Independent*, 25 April 2018).

40 The NAO (2018: 15) observed that: 'The Immigration Act 1971, which came into force in 1973, introduced changes to end large-scale immigration from the Commonwealth. The Act preserved the indefinite leave to remain of Commonwealth citizens already living in the UK but from that point on people arriving from Commonwealth countries were granted

and human rights as a direct result of policies devised by the former Home Secretary, Teresa May, which were implemented by UK Visas and Immigration, Immigration Enforcement, the Border Force, the Department for Work and Pensions, the Driver and Vehicle Registration Agency and the National Health Service not to mention private organizations and individuals who were required to check on the right of individuals to rent accommodation.

In 2018 The Joint Council for the Welfare of Immigrants (JWCI, 5-6) outlined its understanding of the situation in the following terms:

1. 'Windrush migrants, other Commonwealth nationals, and other groups were turned into undocumented migrants or undocumented citizens by the creation of a system of immigration control, which was not accompanied by the creation of universal identity documents …
2. The later introduction and, post-2012, massive expansion of outsourced immigration enforcement under what became known as the 'hostile environment' created most of the problems faced by Windrush nationals. The Hostile Environment requires businesses, public services and ordinary citizens to target those without documents, and its structure encourages the targeting of ethnic minorities and those who look or sound 'foreign'.
3. It requires those people to be denied access to housing, healthcare, employment, benefits, or assistance and encourages reporting them to the authorities if they attempt to access assistance such as police protection as victims of crime. The idea is to force those without documents into destitution

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temporary residence. The Department did not keep a record of those with …indefinite leave to remain, which was not time-limited, and it did not issue paperwork to people to confirm this. There was also no requirement for individuals to obtain proof of their status'.

and homelessness, outside of the normal protections of police, housing law, employment rights [so] that they 'voluntarily' leave the country without the Home Office having to spend money on enforcing their removal: hence 'Hostile'. Given that most people in the UK without documents have a right to be here, it inevitably causes huge amounts of harm to people who cannot and should not be termed 'illegal'.

4. This was combined with a focus from the highest levels of politics on denying visa applications and reducing net-migration at all costs which combined with a desire to make short term costs savings in Government, led to the following issues:

    (i) Extremely poor decision making by Home Office staff who are underpaid, undertrained and under cultural and formal pressure to refuse applications;

    (ii) The removal of appeal rights from most immigration cases at a time when high numbers of appeals were successful;

    (iii) The introduction of out of country appeals after removal or deportation greatly reduced the chance of a successful appeal;

    (iv) The removal of legal aid from immigration cases;

    (v) The extraordinary rise in immigration application fees and citizenship fees;

    (vi) The continued rise in complexity of immigration rules and particularly the deliberate overcomplication of assessments made under Article 8 of the European Convention on Human Rights…' [my emphasis]

The NAO's (2018: 17) review of how the Home Office handled 'the Windrush situation' revealed that policy enforcement resulted in the seizure/revocation of driving

licences, the closure of bank accounts, stopping benefit payments, individuals lost access to their homes, landlords refused to rent accommodation to individuals who did not have immigration papers, employers refused to hire individuals, and individuals were refused access to health care (which meant that they had to meet the full costs of health care). The NAOs anodyne conclusion was that: 'The Department had a duty of care to ensure that people's rights and entitlements were recognised, and this has been re-emphasised by the Prime Minister. We do not consider that the Department adequately considered that duty in the way that it introduced immigration policy' (p. 11).

It was the documentation of extensive discrimination against individuals who had the right to remain in the UK that undermined public confidence in Home Office policies, forced the Home Secretary to resign, and led to a commission of inquiry into the Home Office and the establishment of a compensation scheme for those affected by the hostile policy environment. Litigation, in the form of thousands of Judicial Reviews against officials implementing the 'hostile' policies played a limited role in changing government policy. Indeed, litigation can at best only address injustices experienced by individuals because, as White (2019: 13) has noted, the problem facing the Windrush 'generation' 'is exacerbated by … the extraordinarily complicated changes in nationality and immigration law … rigorous Home Office enforcement of the policy; enforcement by private citizens … and reliance upon documentation created for an entirely different system.'

In short, the supposed 'bright line' which is assumed to clearly differentiate between the rights of citizens and non-nationals was, in this case, substantially blurred if not obliterated by a raft of legislation beginning with the *Commonwealth Immigrant Act 1962* which, step by step and year by year, stripped away the rights of residence of Commonwealth Citizens. The process ended with the *Immigration Act 2014* that imposed post-entry controls

on individuals who were legally resident in the UK, but who did not have the required documentation to prove their right, in an attempt to force them out of the UK.

CONCLUSION

While asylum and migration law and policy is supposed to draw 'a bright line' differentiating between the rights of citizens and non-nationals, in fact legislation and the discretionary decisions of Home Office officials have over the year blurred the line which, in turn, has led considerable political-legal contestation.

Asylum and migration litigation provides a window into how this social field operates. The outcome of litigation shows that Home Office policy can sometimes be successfully contested and that official decisions can be overturned through the work of lawyers who, acting as gatekeepers into this field, interview clients, prepare cases and instruct experts to provide evidence and barristers to litigate a case. Lawyers – this includes officials, private caseworkers/solicitors and barristers – define the focus of litigation, adopt a highly specialized legal discourse and engage in a highly adversarial system of bargaining/argument with each party attempting to undermine the arguments of its rival to influence the outcome of the case.

The four cases examined in this paper illustrate the interconnectedness of the institutions in the field which are engaged, directly and indirectly, in litigation as well as the different roles played by key actors. Case 1 showed that expert witnesses provide pertinent legal and cultural evidence to the courts, and that the key issue which determines whether their evidence is accepted or rejected is whether the other party in the adversarial process provides judges with 'a contrary authority' capable of undermining an expert's evidence. Judges use court procedural rules and directions to assess the evidence and to decide what weight, if any, they should give to an expert's opinions and the submissions of both parties.

Case 2 illustrated a somewhat different role played by country experts who are required to identify and 'interpret' relevant foreign law for a British court, in this case the issue concerned foreign laws of adoption. Via a process of 'simultaneous interpretation' an expert situates him/herself 'interstitially' between two different legal jurisdictions to provide evidence that can satisfy a judge that the legal requirements of British law have been met.

Case 3 provides a good example of Bourdieu's concept of the 'juridical field' in which lawyers argue with each other in lengthy litigation over the right to interpret the law. However, in the fourteen-year battle over STs claim, protection issues were side lined while lawyers litigated an arcane point of law.

Case 4 illustrates a different issue. In the face of a massive scandal created by iniquitous Home Office policies which were harshly implemented by officials, thousands of persons legally resident in the UK were discriminated against and had their lives turned upside down. It is clear that successful litigation – in this case judicial review which can provide a remedy to individuals against unreasonable official decisions – had no impact on official policy. Indeed, regardless of the furore over the 'hostile policy environment' pursued by the governing Conservative party, the government has still not retracted its policies, nor has it held officials accountable for their decisions. The Home Secretary of the day resigned, an inquiry was established, and limited compensation is being offered to 'victim's'. Even so, the 'hostile' policies have not been amended or dropped.

There are two principle lessons to be learned from these case studies. First, we can clearly appreciate the varied roles played by officials, lawyers, country experts and judges in the social field constituted by asylum and migration law and practice. The field is dynamic, and the outcome of litigation is often unpredictable. Litigation on behalf of individual applicants can successfully contest and overturn government decisions on asylum and

migration claims. However, the cases also confirm an oft-ignored element of Falk-Moore's (1972/3) argument, namely that the asylum and immigration social field is 'vulnerable to the rules and decisions and other forces emanating from the large world from which it is surrounded.' In this case the 'large world' is the Home Office, an executive department of government which exercises an inordinate amount of power in this area of law by blocking, preventing or stymying litigation by individuals (Nader 2001/2). The Home Office policy agenda has been set by all the political parties that have governed the United Kingdom over the past several decades and has created a conservative political agenda with legislation aimed at preventing asylum seekers from entering the UK and criminalizing migrants who seek to enter the country or who are 'illegally' resident in the country.

In deciding asylum and migration claims the judiciary has not adopted an 'activist' position aimed at overturning law or 'rewriting' asylum and immigration policy. In their analysis of cases Judges are primarily concerned with ensuring the flow of cases through the legal system via an intertextual analysis of case law which loses sight of the core issues in each case (Latour 2010). In this process, a Judge's default position, unless challenged by legal counsel, is to defer to the Home Office and to arrive at decisions which maintain political stability and the status quo. In this sense the legal solutions available to individuals fail to provide an effective remedy against the state by non-nationals who 'have no rights' in British law. Indeed, even for individuals who are legally resident in the country, litigation might compel the Government to recognize an individual's rights, but it cannot overturn inequitable policies.

When Galanter (1974: 95) argued many years ago that 'the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systemically equalizing) change', he had in mind the role of lawyers, in particular 'repeat players'. However, litigation in asylum and immigration law faces a greater

uphill struggle than is the case in civil and criminal law in large part because the Home Office, with its access to immense resources and legal expertise, is the largest repeat player. In this field, the Home Office –which has secured legislation to reduce legal aid and restrict the right of appeal against its decisions – constrains the effectiveness of litigation as well as access to justice at its most basic level. Individuals deported under the 'hostile policy environment' cannot make an in-country appeal against that decision, indeed many members of the Windrush generation could not afford to instruct a lawyer to fight their case. In this sense then, the injustices suffered by individuals – many of whom possessed what should have been inviolable legal rights as British residents – reveals considerable injustice in the form of barriers to access justice, the limitations of litigation and the fact that the law upholds the status quo, it does not provide justice to the 'have nots'.

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