REFUGEES AND THE LAW: Talk for St Anne's Kew Social Justice Forum, March 2017

I am here today as a member of the St Anne's congregation who happens to be a lawyer working as a judge, much of whose work has been in the asylum appeal field. I emphasise that this does not make me some kind of authority. This talk should be regarded as explanatory of the asylum appeal system.

If you have ever served on a jury, you probably know that judges have to be careful when talking about their work. As a serving judge, I cannot publicly express any personal opinions about government policy in this area or any views about hypothetical situations. I cannot comment on any appeals I have heard. Obviously I can't talk about individual cases. Please stop me if it appears I am about to stray. I am only trying to provide a broad overview of the law this evening, the actual detail can be complex and even counter intuitive at times.

I am aware that Our Lord had little to say in the Gospels in praise of lawyers or judges, although I take some comfort from the fact that it was a lawyer's search for truth and genuine love of debate which prompted the parable of the Good Samaritan. The subtleties of that parable are enormously rich. There can be few more powerful illustrations of when law must be tempered by love and mercy. Our Lord also summarised the 10 Commandments, into the 2 greatest Commandments, the second of which is thou shalt love thy neighbour as thyself, as we are reminded in the prayer book communion service. This has always been a central element of the Christian message.

Lord Atkin famously spoke of the meaning of "neighbour" in the celebrated House of Lords decision, Donoghue v Stephenson [1932] AC 562. It was a negligence claim about the duty of care. Lord Atkin said:

> Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This perhaps may be at the heart of the dilemma which Christians face when considering the refugee crisis. We live in a democratic society by which we accept the decision of the majority, first in electing our representatives, and then when our representatives make their decisions

on our behalf Referendums are not our usual way of governing, and they are only advisory. They don't fit very well, as we are seeing.

What is our proper part in the governing process when we are looking at often unpopular and controversial areas, such as helping refugees and immigration generally? Where and how does the law, i.e., the courts and tribunals fit into the process? Is it legitimate to make the process more effective?

To establish context, perhaps we should begin with a few definitions, some of which you probably know from previous sessions of the Social Justice Group.

Refugee

"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The 1951 United Nations Convention Relating to the Status of Refugees

In the UK, a person is officially a refugee when they have their claim for asylum accepted by the government, or the courts make a ruling to the same effect.

Asylum Seeker:

A person who has left their country of origin and formally applied for asylum in another country but whose application has not yet been concluded.

Refused asylum seeker

A person whose asylum application has been unsuccessful and who has no other claim for protection awaiting a decision. Some refused asylum seekers voluntarily return home, others are forcibly returned and for some it is not safe or practical for them to return until conditions in their country change.

Economic migrant

Someone who has moved to another country to work. The term is not necessarily pejorative, as it could just as easily apply to someone exercising free movement rights within the EU or EEA. Refugees are *not* economic migrants.

And perhaps some recent figures as well? These (all from the Home Office) have an obvious bearing on the numbers of appeals to the tribunal.

Asylum applications in the UK increased by 41% to 36,465 in the year ending June 2016, the highest number of applications since the year ending June 2004 (39,746). Numbers of asylum applications in the first two quarters of 2016 (8,228 in January to March and 7,810 in April to June) have been considerably lower than in the last two quarters of 2015 (10,231 in July to September and 10,196 in October to December), although still higher than the same quarters a year earlier.

In the year ending June 2016, the largest number of applications for asylum came from nationals of Iran (4,910), followed by Iraq (3,199), Pakistan (2,992), Eritrea (2,790), Afghanistan (2,690) and Syria (2,563). Most applications for asylum are made by people already in the country (90% of applications in the year ending June 2016) rather than immediately on arrival in the UK at a port.

This is a point of considerable legal interest and I will come back to it.

There were 1,936 grants of asylum or an alternative form of protection to Syrian main applicants at initial decision in the year ending June 2016. In addition, 2,682 people (including dependants) were granted humanitarian protection under the Syrian Vulnerable Persons Resettlement Scheme (VPRS). On 7 September 2015, an expansion to the existing Syrian VPRS was announced. Through this expansion it is proposed that 20,000 Syrians in need of protection be resettled in the UK by 2020. A total of 2,898 people have been resettled since the Syrian VPRS began, including 2,646 arriving since October 2015. A total of 3,439 people were resettled in the UK in the year ending June 2016 under the Syrian VPRS, the Gateway Protection Programme and the Mandate Scheme.

Estimated figures show the UK had the eighth highest number (44,000) of asylum applications within the EU in the year ending June 2016, including dependants. Germany (665,000), Sweden (149,000) and Hungary (131,000) were the three EU countries that received the highest number of asylum applications, together accounting for 63% of asylum applications in the EU in that period.

It is interesting to note that asylum applications peaked in the early 2000s. They stood at 32,414 in 2015, excluding dependents.

Asylum applications increased from 1987 to 2002, but played a declining role in overall migration from 2003 to 2010. Since 2010 asylum applications have increased but remain well below the levels of the early 2000s.

Asylum applications increased from 4,256 in 1987 to 84,132 in 2002, before falling to 25,712 in 2005. After little change until 2009, applications declined temporarily to 17,916 in 2010. Since then, the numbers have risen each year to reach 32,414 in 2015. The numbers including dependents are slightly higher, at 38,878 in 2015.

Asylum seekers make up a smaller share of net migration than they did in the 1990s and early 2000s. Between 1994 and 2003, asylum seekers' share of annual net migration ranged from 20% to 54% in annual data. This trend had changed decisively by 2004, as net migration again increased and asylum declined. Between 2004 and 2014, asylum ranged from 3% to 10% of net migration, and was estimated at about 7% for 2014.

Resettled refugees are identified outside of the country and brought here with the help of the UK government and the United Nations. The largest resettlement programme in the UK is now the Syrian Vulnerable Persons Resettlement scheme, announced in September 2015.

Asylum adds to the UK resident population in several ways. First, it adds to the legal, permanent ('settled'), population. A minority of applicants gain permission to stay in the UK ('leave to remain'), and may remain long enough to settle in the UK. Leave to remain might mean official recognition as a refugee or permission to stay for 'humanitarian protection' (HP) or through 'discretionary leave to remain' (DL). In each case, the protected individual can stay in the UK for five years and then has the opportunity to apply for indefinite leave to remain.

Second, asylum adds to the temporary population. Applicants who are unsuccessful and eventually leave the UK nonetheless will live in the UK for some time as they await a decision. Any such applicant who lives in the UK for at least 12 months is classified as a 'long-term international migrant'.

A third group is more difficult to count – individuals whose applications for asylum have been rejected, but who have not departed the country. Some of this group applies for 'hard case support', others may have departed outside of official removal or voluntary departure schemes; still others may remain illegally in the UK out of contact with immigration control, and thus uncounted.

Top ten nationalities, UK asylum applicants, 2015

Rank	Country	Number of Applicants	Share of Total
1	Eritrea	3756	9.7%
2	Iran	3694	9.5%
3	Pakistan	3254	8.4%
4	Sudan	3014	7.8%
5	Syria	2846	7.3%
6	Afghanistan	2807	7.2%
7	Iraq	2609	6.7%
8	Albania	1809	4.7%
9	Nigeria	1509	3.9%
10	Sri Lanka	1396	3.6%

The UK's share of Europe's asylum claims declined from 2008 to 2015.

UK asylum applications since 2008 have stayed relatively stable compared to Europe-wide trends. In 2015, asylum claims in European countries (EU-28 plus Norway and Switzerland) reached just over 1,392,000, according to Eurostat. The UK's share of Europe's asylum claims declined from approximately 11% in 2008 to about 3% in 2015. Not exactly the front line, you might think…

So where do the courts and tribunals fit in to all of this? The UK helped draft the Refugee Convention and its amendments in the aftermath of the horrors of WWII. You will recall that the international obligation which the Refugee Convention creates is restricted to 5 specific

categories – see page 2, above. While the understanding of those categories has over time been extended by the courts, there were notable exceptions, e.g., victims of civil war who had to show that they fell within a Refugee Convention category before they were eligible for international protection.

The European Union addressed that in the Qualification Directive of 2004, which extended international protection to victims of internal armed conflict – article 15(c). This was a generous extension. In fact, while the United Kingdom remains in the EU, the Qualification Directive remains the immediate source of international protection law.

One of the United Kingdom's international obligations under the Refugee Convention/Qualification Directive is that there has to be independent review of refused protection applications. This is done by the tribunal judiciary and the High Court.

An asylum claimant must approach the Home Office and submit his or her claim. Usually there is a screening interview which is to establish in broad terms what the claim is about and to identify the applicant. That identity is obviously of great importance. There is usually then a full asylum interview, conducted by an experienced officer. The applicant has the opportunity to submit evidence and is then interviewed in depth. A decision is taken, usually (although not always) in a couple of weeks.

If the Home Office decide to refuse the claim, an applicant has the right to appeal to the First-tier Tribunal, Immigration and Asylum Chamber. A Notice of Appeal must be filed within 14 days. (It is possible to apply for permission to appeal out of time and the tribunal is usually accommodating.)

The appeal then goes forward to a prehearing review and then a full hearing at one of the tribunal's hearing centres – The main centres are Taylor House, in Islington, Hatton Cross at Feltham, Birmingham, Newport, Manchester, Stoke on Trent, Bradford, North Shields and Glasgow. This can involve quite a lot of travel for some appellants.

The hearings are normally before a single judge. A Home Office Presenting Officer appears for the Home Office. Appellants are usually represented. Interpreters are provided as needed. Judgments are supposed to be provided within 10 working days.

Appeals are possible with permission to the Upper Tribunal and then the Court of Appeal. There are numerous onwards appeals. The whole process is closely supervised by the courts, including by way of judicial review.

Under the Immigration Act 1971 (as amended) the Home Office has power to detain persons such as illegal entrants or overstayers on various grounds. This has some similarities with being held on remand while awaiting trial for a criminal offence, but there need be no criminal element as such. The main purpose of immigration detention is to secure a person's removal, with a subsidiary purpose of preventing further offending if applicable. There are also situations where a person is detained for their own protection, e.g., illness. Detention is meant to be a last resort.

Persons who claim asylum on arrival in the United Kingdom will not normally be detained, unless they have a transparently weak case or have committed an immigration or criminal offence. But persons who claim asylum long after arrival, e.g., only after they have been arrested as an illegal entrant or overstayer, or have committed an offence, will often be detained. There is a revised detained asylum process for such cases, usually where the country of origin is readily identifiable and there is no risk on return.

The Home Office have a number of Immigration Removal Centres, such as at Colnbrook (near Heathrow), and Yarls Wood and elsewhere in the country. These have a total of about 3,000 bed spaces and the Home Office try to keep them full. Sometimes ordinary prison beds are used, depending on the individual. As the main purpose of such detention is to secure removal, people are not meant to be detained for long. What happens in reality is not infrequently different, but some reforms are about to come into effect as the result of the Immigration Act 2016. The Home Office will (once the act is in force) have to review detention after 4 months, which means that the case will come before a tribunal judge.

Persons subject to immigration detention can apply to the First-tier Tribunal for bail. On any given day there will be 2 or 3 bail courts running at the larger tribunal centres. These courts are open to the public, like all but a very few tribunal hearings.

If you want to know more about immigration bail, there is a very active charity called BIDS, Bail for Immigration Detainees. This charity

sponsors many bail applications each week and is very effective in its field.

My 17 years' experience as a judge in asylum appeals has reflected world events. When I first started, there were large numbers of appeals from Kosovo, which were supposed to end when UNMIK stabilised the country. In some ways the Kosovo refugees illustrated one of the continuing problems faced by the Home Office in dealing with claims. First there were large numbers and insufficient resources. The ethic divide was, as you will recall, between Serbs (mainly Serbian Orthodox Christians) and Kosovan Albanians (mainly Sunni Muslims). Significant numbers of Albanians from Albania joined in the exodus. They were not entitled to asylum on any basis. They simply wanted a better life. Many settled successfully in the United Kingdom, married and had children. But their deception came to light when they applied for naturalisation as British Citizens, or sought to bring an Albanian spouse or parent. They had been present dishonestly. They were refused British Citizenship or had such citizenship revoked or nullified and some were removed. (There are special provisions to protect children caught up in these situations.)

This is an illustration of how a perfectly good system can be subverted. It also illustrates why it is necessary for the Home Office to take care in the decision making process.

Today the First-tier Tribunal encounters persons whose claim to be Syrian or indeed Palestinian has been rejected by the Home Office. Such persons often turn out to be Egyptian. Egypt's population is 99,000,000 and it is a troubled country, with a significant Christian minority.

In fact, it is very easy to succeed in an asylum appeal to the First-tier Tribunal. The standard of proof which applies is simply a "reasonable likelihood" or "substantial grounds for believing", which is miles away from the civil standard of the balance of probabilities let alone the criminal standard which those who have served on juries or as magistrates will know is "beyond reasonable doubt".

An asylum appellant is not required to produce corroboration of any kind. The theory is that a claimant has neither time nor opportunity to do so. Information about his or her country of origin is available from public sources, above all the internet.

There is a UNHCR Handbook on asylum procedures which is essentially a statement of good practice is assessing asylum claims. Among other things it states that asylum claimants must cooperate in the assessment process and behave honestly.

At the appeal level a difficulty can be that information about background events in a country is available to anyone, so that it is relatively easy for someone to claim, for example, that he or she was at a demonstration at which shots were fired and people arrested.

Because of what is at stake, the benefit of the doubt is given to the appellant provided that his or her claim is plausible. Needless to say, puddings are sometimes over egged at the appeal stage…

Of course you cannot apply for a visa to obtain asylum in the United Kingdom. You have to find a means to reaching the United Kingdom, which is where criminal racketeers come in. There is a large trade in clandestine entry. The going rate from Afghanistan is around $40,000. In a recent appeal, the uncle of an Iranian boy told me his family had paid £25,000. Thus the United Kingdom is at the end of the line and it may be that only those with substantial assets can find their way here and enter the appeal process if refused. The countries nearest the trouble zone have the majority of the refugees, e.g., Iran for Afghanistan, Kenya for Somalia.

I mentioned earlier late claims, technically "sur place" claims. These account for some 90% of appeals. Remember that as a general rule appeals will tend to be the weaker cases, because strong cases will be recognised by the Home Office and granted. It is not unusual to see claims made years after arrival in the United Kingdom, sometimes after all else has failed. Section 8 of the Asylum and Immigration (Treatment of Claimants) Act 2004 applies to such appeals. Sadly this can be a situation of trying to buy time and seeking to benefit from an overloaded system.

I believe that I can reassure you that our judiciary are very diverse, work hard and are committed to justice and upholding the law. Most succeed in leaving any prejudice at the court room door.

How does having a Christian faith affect the work? Very significantly. Justice and mercy are biblical imperatives. Our law has Christian foundations. Obviously it is important to do the work to the very best of one's ability.

There are particular challenges, such as when appeals are brought by members of tiny Christian churches with self-ordained ministers, and persons in the court room are on their knees praying for an outcome which is frankly impossible in legal terms.

One particularly difficult group of cases is where a person claims that he or she has converted to Christianity. How is the sincerity of that conversion to be assessed? Not necessarily by examples of knowledge, but by the explanation of the personal impact…

Much more could be said, but now it's time for questions.