

## Protecting people seeking asylum in the UK: A legal and welfare needs approach to the asylum determination process

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### Biography

Cinaed has been interested in asylum policy for the last decade, campaigning on the inadequacies in legal and welfare provision for asylum seekers. As a Human Rights activist, he has also campaigned against the deportation of asylum seekers. He has worked as a legal and welfare advocate for asylum seekers and represented asylum seekers at the *Home Office*. He particularly enjoys researching case law and Country of Origin Information.

He was also an organiser of Birmingham's *Men Against Violence*, a joint partnership between the *Community Education Training Academy* in Birmingham and the *West Midlands Police Domestic Violence Unit*. He is a PhD candidate at Kingston University researching how legal and welfare practitioners who are assisting asylum seekers respond to the budget cuts and is writing four working papers that focus on: (1) A genealogical critique of asylum, and UK asylum policy, (2) A dialectical theory of exile and asylum, (3) Nationalism and Identity and the discourse of asylum, (4) The theoretical construct the Asylum Industrial Complex.

### Key Words

Asylum seekers; Refugees; Refugee Convention; 'Geneva Convention'; Subsidiary Protection; Qualification Directive 2011/95/EU; Immigration; Immigration Tribunals; Victims of Torture.

### Abstract

The paper addresses questions concerning the protection needs of asylum seekers that are specific to the asylum determination process. Applicants for asylum in the UK can be granted the protection conferred by refugee status when they have demonstrated that they have met the legal criteria of the 1951 *Convention Relating to the Status of Refugees* and the 1967 Protocol, or can receive Subsidiary Protection under the (recast) *Qualification Directive 2011/95/EU* at either the First Tier or Upper Chamber Tribunal.

The process of determining asylum status can be long, arduous and very challenging, coming upon a background of seriously traumatic events. The paper examines the legal and welfare needs of asylum seekers in relation to the asylum determination process. The paper has been written in the context of the more positive climate provided by the judgement in *NA v The UK [2008] App NO 25904/07* and the *Qualification Directive 2011/95/EU*. The paper has benefited from interviews with legal and welfare practitioners who work with asylum seekers, as well as a sample of asylum seekers in the West Midlands. Throughout the paper, the realities of the exclusion of asylum seekers from access to services that stem from asylum legislation and policy are juxtaposed to these protection needs.

## Introduction

The granting of asylum to refugees is a matter of critical importance. Countess Mar emphasised the dangers of wrong decisions when she stated that, “we must remember that this [the Immigration and Asylum Tribunal] is the only jurisdiction in the country that has the power of invoking the death penalty... You can also impose on people an awful prison sentence. Some of the conditions in the country that asylum seekers come from are appalling’ (Juss, 2004:3). Therefore, accurately ascertaining and meeting the legal and welfare needs of asylum seekers so that they can obtain a just determination is imperative.

Given the importance of the topic, a vast literature has focused on asylum policy and the separate legal and welfare system for asylum seekers that derived from the 1999 *Immigration and Asylum Act* (Bloch, 2000; Cohen, 2002, 2003; Hayes, 2004; Mynott, 2002; Schuster, 2003), documenting numerous problems, such as limited welfare and legal provision (Athwal & Bourne, 2007; BID & Asylum Aid 2005) and limited access to medical care (*Health for Undocumented Migrants and Asylum seekers Network*, 2010). Significantly, recent studies have shown that most asylum seekers have been refused due to divergent interpretations of the *1951 Refugee Convention*, and a lack of consistency in the treatment in the Medical Legal Reports across the Immigration Tribunals (*Committee on Migration, Refugees and Populations*, 2009a,b; Pettitt, 2011; Bohmer & Shuman, 2008; Kagan & Johnson, 2002; Magnusson, 2011). These studies indicate that the issue of asylum is a socially constructed justice issue. Furthermore, the disparities between the different member states of the European Union are one of the reasons for the introduction of the *Qualification Directive 2011/95/EU*. As the directive states (in section 8), through the elimination of these disparities and through the creation of new initiatives as part of the establishment of a common program of protection across the European Union, it is hoped that a higher level of protection for refugees will be achieved.

The aim of this paper is to focus on legal and welfare interventions in relation to asylum seekers that are specifically relevant to the asylum seeking process. The Judgement in the case of *NA v The UK [2008] App NO25904/07* can enhance the asylum determination process. In this important precedent, the *European Court of Human Rights (ECHR)* stipulated that the national authority has a positive duty “if the need arises, to go beyond the evidence provided in the application and to use a wide range of sources of up-to-date information in order to make a proper assessment of the applicant’s case viewed against a understanding of the situation in the receiving country” (*Committee on Migration, Refugees and Population*, 2009a, b: section 71). This precedent helps to lift at least a part of the burden of the asylum seeking process and placing it on the stronger shoulders of state authorities. Asylum seekers will also be able to benefit progressively from the assistance provided by the *Qualification Directive 2011/95/EU*.

It is important to recognise that the concept of need is dynamic, especially when focusing on the vulnerability of those claiming asylum. People claiming asylum, are diverse in terms of socioeconomic position, gender, culture and geopolitical circumstances. Despite these differences, there is much common ground when focusing on the legal needs of asylum seekers as each individual has to meet the criteria of the *1951 Convention Relating to the Status of Refugees* and the 1967 protocol, (which is

often referred to as the ‘Geneva Convention’ though it should not be confused with the Geneva Convention circumscribing allowable actions in war) or subsidiary protection under the *Qualification Directive 2011/95/EU*.

These two measures, the Judgement in the case of *NA v The UK [2008] App NO25904/07* and the assistance provided by the *Qualification Directive 2011/95/EU*, have the potential to provide a far more favourable legal landscape to people who embark on international flight from persecution in the countries that they previously called home. The paper considers how asylum seeking applications can be developed to more thoroughly meet the needs of asylum seekers. The aim is that asylum seekers can be supported in relation to these measures. As well as drawing on the relevant literature, the paper draws on interviews with a sample of asylum seekers and with legal and welfare practitioners assisting asylum seekers in the West Midlands, to better understand the needs of asylum seeking populations. The paper does not however, address the related question of whether borders should be opened entirely. Though this is an obviously relevant question, it requires its own paper (or book), to entirely do it justice.

### **Who are Asylum seekers?**

Asylum seeking is a means of survival and individual autonomy. Those who are fortunate to evade border controls and survive the dangers of crossing borders and human smuggling, must be perceived as part of an individual strategy to survive as well as ascertaining legal protection in another state from imminent harm or even death from the country of origin. The circumstances that the individual or family has fled, can include persecution that is associated with civil war, or targeting as members of a social group, based on ethnicity, religion, diverse sexual orientations and gender. They may be persecuted due to their advocacy for Human Rights. People may face torture and state sanctioned violence if their political beliefs are perceived as a threat in the country of origin. In this sense, asylum seeking may be seen as a critical form of autonomy that is tantamount to “profound acts of self-determination (Lowry and Nyers, 2003: 68).

Asylum seekers are diverse in the way of social status, gender, sexual orientation, ethnicity, cultural and religious compositions as well as their economic, geopolitical and demographic backgrounds and circumstances. Their commonality is that they have fled from countries that are afflicted by war, state violence or discriminatory practices that are endemic and imposed by either occupying forces, the state or non-state actors such as sectarian or ‘rebel’ militias. They have applied for asylum and retain the title of ‘Asylum seeker’ until they have proved to the Asylum Tribunal that persecution took place. The decision rests with the Immigration Judge who may grant refugee status or subsidiary protection, or extend a form of leave to remain or refuse the asylum claim.

An important caveat to note however is that the provisions of the Convention on Refugees do not apply to anyone who has committed a crime against peace, a war crime, or a crime against humanity, or who has committed a serious non-political crime outside the country of refuge or who has been guilty of acts contrary to the purposes and principles of the United Nations. Also, refugee status can be revoked if involvement in such acts is subsequently discovered. The principles of due process must of course apply though to establish whether these types of allegations are well-founded (Kwakwa, 2000).

### **The Precarious Status of Asylum Seekers in Regard to Rights**

Rights are usually conferred by citizenship and so technically speaking, asylum seekers are in a vulnerable space where many of their rights are not yet legally acquired (Brysk & Shafir, 2004). From a normative perspective, the rights of asylum should be understood within the broader framework of international Human Rights law, especially the 1951 *Convention Relating to the Status of Refugees*, (known as the ‘Geneva Convention’ or the ‘refugee convention’). The refugee convention has been described as “an extraordinary bill of rights for refugees,” (Gorlick, 2000:121), especially in its commitment to the principle of non-refoulement expressed in Article 33, which protects refugees from being returned to places where their lives or freedoms could be at risk. However, there is no corresponding right to asylum. Article 14 of the *Universal Declaration of Human Rights* is non-binding, and therefore the right of asylum is at the discretion of a receiving state (Gilbert, 2004:965).

The evolution, historical re-categorizing and redefinition of refugees has been analysed by Tuit (1996) and Scalettaris (2007). This suggests that, ‘rights are a social product, and rest on constructing categories of legal persons’ (Morris, 2010:10). As the media often portrays asylum seekers as illegal migrants, the arguments of rights for asylum seekers must be understood as part of the social process; a terrain of contestation and negotiation throughout the asylum determination process. Presently asylum seekers have minimal social, economic, legal and political rights. They have no voting rights, no right to employment, no land or property rights, no right to family reunion, restricted freedom of movement and no equitable opportunities to education, whilst their individual asylum applications are being processed and determined by the United Kingdom Border Agency. Thus the struggle for refugee status comprises a struggle for ‘the right to have rights’ (Arendt, 1958, 296) which is reminiscent of the inter-war period in which a new category of human beings, who had been deprived en masse of their citizenship, were forced to live outside all legal structures. As part of this struggle the right of asylum is associated with the right for recognition required to attain the socio-legal status of a refugee (Honneth, 1995). It is essential that the right for Human Rights violations to be recognised and the legal and welfare needs of asylum seekers, is connected throughout the asylum determination process. This is especially where legal decision makers should consider all the subjective and objective evidence when determining the life chances of those who have sought ‘justice through sanctuary’.

### **Social needs and social exclusion**

Whether or not asylum seekers should be permitted to engage in paid employment and participate in employment related training, has been a highly contested topic (Mathew, 2012). During the 1980s, asylum seekers were permitted to work whilst their asylum applications were being processed. However since July 2002, asylum applicants have not been permitted to undertake legal employment or vocational training until they are given a positive decision on their asylum application. Thereby the then New Labour government turned asylum seekers, from being members of the productive classes into members of the sub proletariat where they are at risk of being propelled into unlawful and semi lawful activities, out of economic desperation. However, the situation has not been static. *The European Directive 2003/9/EC* (the Reception Directive), mandated that asylum applicants who had waited more than 12 months for an initial decision by

the *Home Office* on their asylum claims could apply for permission to work, but the decision to be taken by the home office is discretionary. Moreover, the Conservative/Liberal Democrat government has subsequently amended the immigration rules so that all asylum seekers who apply for permission to work after 9 September 2010, will be restricted to 'National shortage occupations'. (*Refugee Council*, October 2010).

The Conservative led Coalition Government has continued with its predecessor's exclusionary policy of largely not permitting asylum seekers to work or participate in education provision until their asylum application is processed. A single asylum seeker receives a weekly rate of £35.13. The rate for a single parent with one child is £42.16. Single asylum seekers are expected to live on £5 per day and a parent with a child on £6 per day which arguably means that asylum seekers would very much struggle to meet immediate daily needs. Keeping asylum seekers in severe poverty, excludes people from a variety of social, cultural, and legal activities. Thus, asylum seekers fall within Bradshaw's standards of being 'in need' (1977:73).

Macgregor (1999:100) has argued that in the post welfare, or neoliberal period of history, the move towards a more market based economy has created new perceptions of dividing lines between the deserving and the undeserving poor. Those who do not work are likely to be deemed undeserving. Using McGregor's analysis, Sales (2002:459) observes that asylum seekers are vulnerably placed to be regarded as the undeserving poor. In a cruel twist of fate, asylum seekers are regarded as undeserving because they are unemployed, although it is the state through its own regulations, that is preventing them from engaging in legally employed work. Sales (2002) puts forward the notion that the undeserving migrant makes it easier for governments to exclude migrants from welfare services to evade moral responsibility thought so doing.

Since the enactment of the *Immigration and Asylum Act 1999*, the then Tony Blair's New Labour Government also created a parallel, but separate caste-like system that ensures that people with "temporary" legal status are watched closely by the Home Office, National Asylum Support Service. Asylum seekers were socially excluded from accessing mainstream services such as housing and health care provision (see Bloch 2000, Cohen 2002, 2003 Hayes 2004 Schuster 2003). Levitas (1993: 11) argues that social exclusion is a "dynamic process of being shut out, partially or fully, from any of the social, economic, political, and cultural systems which determine the social integration of a person in society". People claiming asylum experience a dual exclusion. Firstly, they face the far reaching apartness from their country of origin due to the Human Rights abuses that they needed to flee. Secondly, they experience exclusion from the normal services and practices of the societies in which they are newly resident. They are *in* the new societies, but *outside*, because they are not permitted to participate and are not permitted to experience the benefits of those new societies.

As political asylum is central to immigration controls, it is worth noting that immigration policy is a particularly fruitful area for illustrating the way in which health, education, housing and social services and the whole gamut of benefits related to income support, have been used to define the boundary of the nation, and for purposes of inclusion and exclusion (Humphries, 2002:127). For the asylum seekers the term social exclusion is multidimensional and involves the economic, political and "special" exclusion as well as the lack of access to specific areas such as information, medical provision, housing, policing and security (Young 2003:1-3). The notion of social

exclusion for asylum seekers is closely associated with the collective phenomenon associated with poverty and marginalisation which reflects the current situation of contemporary immigration policy.

Throughout the asylum process asylum seekers face many challenges including issues to do with accommodation. Having lost the right to choose where to live under the *1999 Immigration and Asylum Act*, asylum seekers' autonomy of choice has been eroded. Asylum seekers are more likely to be destitute especially if they are denied accommodation, and their situation suggests that some may be very dependent on the voluntary sector. However this is also restricted as all but six nights shelter across the country are reimbursed by housing benefits that are denied to asylum applicants (Wolton 2006 459; Shelter 2004:6). Wolton (2006: 459) further argues that "The key question has been whether, being disallowed to work and for those not entitled to accommodation provision and forced to sleep rough and beg for food or money constitutes "inhuman and degrading treatment" and a violation of Article 3 of the *ECHR*, but what appears to be significant here is that forcing asylum seekers to beg for charity appears to be government policy".

The introduction of the *Legal Aid, Sentencing and Punishment of Offenders Act (2012)* has reduced legal provision for appeals, suggesting that it is all the more important for Immigration Judges to get the asylum decision right first time. Recent studies have shown that most asylum applications for the UK have been refused due to lack of objectivity, poor procedure safeguards in evidentiary assessment in the asylum proceedings, to restrictive and divergent interpretations of eligibility criteria of the 1951 Geneva Convention and to divergent interpretations of the Geneva Convention (Magnusson 2011; Committee on Migration, Refugees and Populations: Parliamentary Assembly, 2009:1). Furthermore, Research carried out by Pettitt (2011) for the Medical Foundation for the Care for Victims of Torture, showed that there was a lack of consistency in the treatment in the Medical Legal Reports across the Immigration Tribunals. As a consequence of inconsistent decision making practices, these studies indicate that there has been a continuum of unmet legal needs which may indicate a history of potential miscarriage of justice which may be perceived as oppression which is defined as a social justice issue.

The precariousness of people claiming asylum strongly suggests that they are a marginalised and oppressed group (Lacroix, 2006: 20) with minimal social, economic, legal and political rights. They have no voting rights, no right to employment, no land or property rights, restricted freedom of movement and no equitable opportunities to education whilst individual asylum applications are being processed and determined by the Home Office. The *1999 Immigration and Asylum Act* reduced appeal rights, and limited access to social, civil and political rights. The erosion of rights underlines the fragility of the rights espoused under the *International Covenant on Civil and Political Rights (ICCPR)*. A study by Persuad (2006) "sought to demonstrate that the ICCPR is a strong tool for the protection of refugees and asylum-seekers," but concluded that "states are far too often disinclined to fully implement the legal protection that the ICCPR provides." There are serious threats to the protective power of the ICCPR in the form of "Violations of reporting obligations, lack of respect for the Committee's interpretation and sometimes blunt refusal."

The impact of war and torture and the experiences of social isolation in the country in which refuge is sought, constitute a dual social exclusion which can produce profound individual physical and mental health problems which are likely to be compounded by the legal uncertainty throughout the asylum determination process (Crowley 2003; Murphy *et al*, 2002; Silove *et al*, 1997; Burnett and Peel, 2001; Carey-Wood *et al*, 1995).

## **The Asylum Operations Model determination process**

The asylum determination process in the UK currently operates under the new *Asylum Operation Model* that was introduced in April 2013. It has six stages: Screening; Designated Executive Officer; First Meeting; Asylum Interview; Asylum Seeker Waits for their Decision. Throughout the asylum determination process decision makers have to refer to the new directive 2011/95/EU which aims to provide a higher degree of protection to asylum seekers.

### **Screening**

When an asylum seeker has applied for asylum in the UK they have to report to one of the screening units in either Croydon, Solihull or Liverpool. Under the new *Asylum Operation Model*, the Home Office has introduced 'triage' and 'routing' stages. The purpose of 'triage' is to identify 'types' of cases and assess them based on the length of time it is likely to take to decide the claim and to finally resolve the case, i.e. to grant leave or to remove the applicant in the case if s/he is refused. Factors such as gender, nationality, age and whether the applicant is a member of a family or a single person will form part of the 'triage' in determining to which 'track' the case is allocated (ILPA 2013). The purpose of this is to establish the applicant's flight itinerary to identify route of entry into the UK, and to determine whether the person is a third country applicant under the Dublin Convention which stipulates that applicants have been in another country where they could have applied for asylum then they could be removed to that country. As part of the screening process, asylum seekers are required to be fingerprinted and photographed to aid physical identification. The biographical data collected is then checked against the *Schengen Information System* and *Eurodec databases* to check if another country should consider their case. After screening, the asylum seeker will be referred to the 'casework hubs' where the initial decision is made.

### **Designated Executive Officer**

Under the new Asylum Operation Model asylum seekers are allocated an Executive Officer, who has the responsibility to make arrangements for the first interview.

### **First Meeting**

The Executive Officer is required to explain the purpose of the asylum interview, which is to establish the facts of an asylum claim.

### **Asylum Interview**

It is during the interview that asylum seekers are expected to give a full account of why they have applied for asylum and why they fear to return to their country of nationality.

### **Non expedited case: 3 sub categories**

The three sub categories are green, amber or red, depending on the length of time a claim is likely to need to be decided; the likelihood that the claim will be granted; and, thirdly, if refused, the speed at which removal can take place. According to the ILPA (2013: 1) the criteria for the three tracks are as follows:

**Green:** Claims that have at least a 47% likelihood of being granted and can be decided quickly.

**Amber:** This track includes unaccompanied asylum seeker minors and others with special circumstances because it is recognised that these claims will need a longer time to ‘process’ given the involvement of other agencies (e.g. Social Services/National Referral Mechanism).

**Red:** Claims that are unsuitable for expedited tracks due to the need for more time or resources.

- Cases that have a medium prospect of a grant but less than 47%.
- If refused, it is likely that removal would be slow/ impossible.

### **Asylum seeker waits for the decision**

In accordance with the Immigration rule 339J, this stage entails the initial assessment by the Executive Officer of the asylum claim, to see whether the individual is eligible for a grant of international Human Rights protection or humanitarian protection. Each officer must determine the credibility of individual testimonies, and link personal circumstances that led to their asylum claim (Clayton 2008: 406).

### **The asylum decision**

Asylum decisions are made at the First Tier Tribunal. If the asylum application is refused there are a number of options. The asylum seeker may have the right to appeal against the asylum decision. If the asylum case has an over fifty per cent prospect of succeeding, the Executive Officer may decide that the asylum seekers may be able to appeal to the Upper Chamber on the grounds of error of law. Permission for such an appeal is sought from the First Tier Tribunal in the first instance, and if refused, then directly to the Upper Chamber Tribunal. On hearing an appeal, the Upper Chamber can decide the matter for itself, or remit the case back to the First Tier, if it considers that the matters need to be reheard (Clayton 2010:255). If appealed at the Upper Chamber Immigration Judges are responsible for making the judgement that will either grant or refuse an asylum application. At the last resort there may be a possibility for an application for Judicial Review. It is from here that the author will define refugee protection which will then be followed by the theory of need and how they can be applied to the particular legal and welfare disciplines related to the asylum determination process.

### **Definition of Refugee and Subsidiary Protection**

In order for the authorities to recognize asylum seekers as refugees and grant some form of legal protection in the UK, the person claiming asylum needs to meet the enumerated grounds of the 1951 Geneva Convention and 1967 Protocol or subsidiary protection under the European *Qualification Directive*. According to article 1A(2) of the Geneva Convention of 28 July 1951 relating to the status of refugees, the term ‘refugee’ shall apply to any 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.”

Hathaway (1984) notes that refugees have escaped from perceived injustices or fundamental incompatibility with the home state, and that the individual is fearful of the authorities who have rendered continued residence in his or her country of origin either impossible or intolerable. Refugee status should be afforded to those that qualify for legal protection. Those who have been granted refugee status have proven that they have either suffered past persecution or have a well-founded fear of persecution based on one of the five enumerated grounds of the 1951 Geneva Convention and the 1967

Protocol. The grounds are as follows: “race”, religion, nationality membership of a particular social group or political opinion. Under international Human Rights law, it is the receiving state that determines whether the asylum claimant is eligible for legal protection and will therefore be granted Leave to Remain as defined under section 33 of the *1971 Immigration Act*, which today suggests an eligibility for up to five years prior to being allowed to apply for settlement status. By contrast the asylum seeker is an individual who has applied for asylum and whose application is under consideration or those who have received a refusal but have not yet returned to their home country’ (Thomas & Abenan 2002:4). An unaccompanied minor seeking asylum is an individual asylum seeker under the age of eighteen years.

Subsidiary protection is for civilians who are under threat in their home countries from “indiscriminate violence in situations of international or internal armed conflict” (Council Directive 2011/95/EU L 337:18). Subsidiary protection suggests a temporary form of leave to remain which is granted for a specified period. Individuals granted subsidiary protection may be subject to the following conditions: Restrictions on employment; No recourse to public funds; Individuals subjected to immigration controls are required to register at a local police station. People may be entitled to Humanitarian Protection and permitted to stay if they face a real risk of danger if returned home. Individuals may also be entitled to discretionary leave to remain and allowed to stay if it is impractical for Human Rights, legal or practical reasons to return them to their own country.

### **Needs of people claiming asylum**

Scott and Marshall (2009: 506) argue that a “need is something that is deemed necessary for the survival of the person. Doyal and Gough (1991) argue that the essential basic human needs encompass physical and mental health and autonomy. Physical survival and personal autonomy are the preconditions for any individual actions that constitute the most basic human needs.

Dywer (2004) has argued that meeting the basic human needs of forced migrants is not central to European member states asylum policy. He argues that many national governments have taken a tough line on asylum, and removed such migrants from the jurisdiction of mainstream welfare systems, as part of the European common asylum policy. An essential characteristic of policy at the Member State level is the reduction in the direct role of the state in meeting the basic needs of forced migrants, especially basic housing and financial needs. Patel & Kelley (2007) have argued that, since 1996, generic asylum teams have been ill equipped in dealing with the complex welfare needs of asylum seekers due to limited training, funding, and a remit to manage and monitor asylum seekers. Their argument derives from local authority asylum teams not having the means to deal with asylum seekers who faced destitution due to being refused accommodation, exclusion from employment, and mainstream services. Hek’s (2005: 5) research on the needs of refugee and asylum seeker children in the UK, argues rightly that refugees have a wide range of needs both emotional and physical, and pointed out that there was a lack of support for unaccompanied minors. However, the above authors only discuss briefly the legal and welfare need of people claiming asylum that are associated with the determination process.

Representatives of the *Home Office Immigration Enforcement Command* have the power to ensure that the refugee protection needs are met by ensuring the appropriate physiological and psychological assessments and provision for professional interpreters as well as Country of Origin Information. Doyal & Gough's (1991:54) theory of human need suggests that in order to optimise and satisfy particular needs people ought to engage to the best of their capability with organisations that have available resources. People claiming asylum should engage not only with the Executive Officer but also with interpreters and with members of the legal and medical professionals who can provide essential assistance to asylum seekers, both in terms of preparing applications and also to provide services during the arduous process of seeking asylum.

The notion of need is 'a dynamic concept, especially within the realms of asylum. Because of the diversity of alleged persecution, the needs of asylum seekers are very divergent, complex and require special attention especially within the diverse disciplines of the Social Sciences, Law and Medicine. Legal and welfare practitioners such as Psychologists and Counselors, Lawyers, Country of Origin experts and Immigration Judges look at asylum seekers' needs through different lenses.

In the UK, policy makers look at asylum needs through the lens of legislation such as the 1999 *Immigration and Asylum Act* and the *UK Borders Act 2007*. Support is granted under Part IV of the former and sections 17 and 18 of the latter. The National Asylum Support Services has responsibility for meeting the needs of asylum seekers. According to the earlier legislation the needs for asylum seekers consist of accommodation and subsistence. Ultimately the state delegates powers to Home Office Case Workers to make initial decisions on asylum claims, as well as meeting the needs of asylum seekers in accordance to the Asylum Policy Instructions. The diversity of perceptions of needs is influenced by discipline. Medical experts may argue that there may be a need to evidence persecution through physiological and psychological evaluations. Country of Origin Experts may argue that, appropriate Country of Origin Information is needed for the objectivity test of the determination process, whilst legal professionals may argue that there needs to be more time to develop asylum cases for the Immigration Tribunal. Whilst those that are concerned with the social welfare of asylum seeker may argue the need for education and work entitlements.

### **Language Needs**

These are fundamental needs that relate not only to the individual subjective testimony which arguably may detail claims of 'alleged' persecution and/or various types of violations, but also with other psychotherapeutic interventions. In order to maintain the protection need standard, the provision of professional interpreters for asylum seekers throughout the determination process would be required. Executive Officers should ensure that appropriate interpreters are used whilst conducting initial interviews as well as other interventions, as people claiming asylum are expected to disclose why they are applying for asylum at the asylum interview. The use of professional interpreters should minimise misinterpretation of why the person is claiming asylum. Historically there has been a lack of interpreting services, for asylum seekers (Kelly & Stevenson 2006). As a consequence, asylum seekers have been forced to use informal methods such as voluntary interpreters, family members and children. The use of informal means of interpreters and the inexperience or familiarity may cause misinterpretations and embarrassment to the individuals concerned as well as ethical concerns that surround

confidentiality. Also, children may be traumatised by repeatedly being exposed to, and having to translate, accounts of the extremely distressing circumstances to which they and the families have been exposed. People claiming asylum derive from a range of different countries that have a myriad of different cultures and traditions. The specific dialect needs and linguistic needs are different. For example, an interpreter from Iran who speaks the official language Farsi may not be *au fait* with certain cultural dialects of the country. According to Minorsky (1945: 76-77) Assyrian people of the Mesopotamian low lands speak with an Aramaic dialect, whilst Kurdish Jews may speak Kurdish, as well as other local dialects. Dialects of Luristan belong to the same class as the dialects of Fars, whereas they digress definitely from the Kurdish dialects, whilst people from the north of the country may speak with a Turkish dialect. Certain words that are used in English may have different meanings in another language or dialect. This may lead to unsuccessful communication of certain words during the asylum interview. Moreover appropriate interpreting services would be required to assist medical and legal practitioners whilst they assess needs and provide therapeutic support.

### **Mental health and welfare needs related to trauma and disclosure**

The field of needs research has relevance, recognising that different kinds of traumatic experiences in different contexts amongst different groups, can nonetheless lead to a common clinical picture (Saporta and Van Der Kolk 1992). These relate to a focus on the legal needs of asylum seekers, and the appropriate use of testimonials and reports from medical and Country of Origin experts in the attempt to satisfy such needs.

Whilst considering the protection needs of asylum seekers, it is worth considering the profound observation by Papadopoulos (1997) that, asylum seekers present perhaps the maximum example of the human capacity to survive despite the greatest of losses and assaults on human identity and dignity. What is important here at this juncture is not to stereotype asylum seekers, but to recognise that individual asylum seekers may have experienced durations of intense and extreme violations which would be deemed as persecution. Although persecution is not defined in the 1951 Geneva Convention, Summerfield, (1996) notes that the use of persecution is a strategy in war, the deliberate process of annihilating the security and mental well-being of a particular community through continuous threat, intimidation and violence, hence the very Human Rights, having been stripped away. EL Jack (2002:11-13) argues that gender related persecution and sexual violence is largely inflicted on women and girls, but men and boys are also raped during armed conflict as rape is used as a form of violence designed to shatter male power. The violent acts may be carried out in full view of family and community, thereby rendering the victims as tainted and unworthy of protection (Bennett *et al*, 1995). As a consequence of these violent acts, individual asylum seekers are very likely to have specific mental health needs similarly to those suggested in May 1999 by the Home Office strategy group handling the reception of 4000 refugees from Kosovo who were "in a serious state of trauma and chronic illness with a need for long-term counselling and support (Summerfield, 2001:161). Asylum seekers are likely to have problems associated with traumatic experiences, losses of status, cultural alienation, loss of family members and friends, bereavement alongside anxiety about the future, to name just a few of the dilemmas that are rooted in the broken social world and disrupted trajectories (Summerfield, 1998).

When individuals arrive into the UK, there is a likelihood that they may suffer from culture shock. Adrian Furnham, (1986) states that, “Culture shock is related to psychological/mental health difficulties that may be due to trauma, and psychological manifestations that include flashbacks, hyper-arousal, which may be anxiety reactions, as well as sadness, and depression. The psychological effects of culture shock may lead to avoidance, especially in regards to discussing violations to Immigration Officers or Executive Officers at the start of the asylum determination process. The notion of culture shock may be compounded by cultural alienation as well as language difficulties. Acculturation is associated with the concept of ‘culture shock’, which describes the process of coming to terms with the otherness of a different society (Aanchawan, T. *et al* 2002; Summerfield, 2001).

The asylum determination process could be seen as an attempt at rebuilding one’s life after seeking asylum. The process could also be interpreted as unwelcoming as individuals may feel that they are under constant threat of being deported by representatives of the *Home Office Immigration Enforcement Command* which may exacerbate great feelings of instability and insecurity. Burnett and Peel’s (2001) study provides evidence that symptoms of psychological distress are common among asylum seekers, especially the experiences of anxiety or depression, panic attacks and agoraphobia and these can also be accompanied by poor sleep patterns. Burnett and Peel found that refugee women were more seriously affected by displacement and more vulnerable to physical assault, sexual harassment, rape and domestic violence. They were also more likely to report poor health and depression than men.

One of the most important needs interventions required for people who have experienced persecution is long term counselling interventions informed by psychotherapeutic models (see Melzac 1999) as well as medical interventions. Dr Duncan Forrest of the *Medical Foundation Caring for the Victims of Torture* makes this explicit in the guidelines on examining torture victims: “Consistency and credibility are continuously assessed as the interview and examination proceed. In coming to a conclusion, the doctor must make a series of judgments, assessing the subject’s demeanour as well as the history and physical signs,” (Forrest & Hutton, 2000: 41). When considering the triage stages of the asylum determination process it could be argued that some experiences of torture and ill-treatment are more likely to emerge over a longer duration of therapy even when the individuals have no memory problems. There are a number of reasons why time is necessary for survivors of persecution. They may feel uncomfortable with disclosure. They may feel feelings of humiliation and shame so that some of their experiences may be unmentionable for them. A torture survivor may fear that disclosure will put them or others at new risk of harm. They may have a distrust of authorities or they may think that no-one will believe them. Or they may fear that they will be blamed for what they have suffered and make efforts to avoid their memories (Bogner *et al*, 2007). Those who have been physically violated may find it difficult to accept the conceptualisation of their experiences under terms such as rape, or other forms of violations. Shame is significantly associated with overall Post Traumatic Stress Disorder and might be linked to the onset, severity and course of Post-Traumatic Stress Disorder (Melloy 2009). Furthermore, some people may find disclosing such depravity as culturally taboo (Bogner *et al*, 2007: 75). People claiming asylum often come from cultures with different attitudes towards sexuality from those of their persecutors. Men and Women who have been subjected to sexual assault may be shunned by their community and family if they admit to this and therefore may not

disclose it in their asylum interview (Bogner *et al*, 2007: 75). As mentioned, the alleged physical and psychological violations meted out to the asylum applicant may be unspeakable and therefore the asylum seeker may find it very difficult and or may not have the capacity to disclose certain violations to a Home Office Executive Officer. The problem here is that an asylum seeker may display certain body languages that may suggest that the person is feeling under duress, especially with disclosure. Body language can easily be misinterpreted. Executive Officers should refer asylum applicants, together with their interpreters, to medical and counselling practitioners at the earliest time possible.

When one considers the requirements of the Geneva Convention and cases that are heard at the immigration Tribunal, there are ethical and moral considerations that practitioners have to consider. As asylum applicant may not be willing to disclose records from the asylum seeker doctor. However all other practitioners concerned may act as corroborative evidence for the asylum applicant. Synthesised physiological or psychological medical reports would be required to carry weight with evidence of treatments that have taken place. There is a likelihood that this evidence may demonstrate that persecution may have either taken place or that the individual asylum seeker has a well-founded fear of returning to his or her country of origin.

The protection needs standard takes into consideration the ethical issues relating to client professional confidentiality, and would require client authorisation for a synthesized report to be given to the legal representatives so that it could be presented in the tribunal. This would be beneficial if the applicant is too traumatised to disclose. The ethical balance here recognises that if there is no evidence then the individual may be refused asylum because they have not been able to meet the strict definition as enacted in the Convention of 1951 and the Protocol of 1967.

The demands of the asylum determination process suggest that there needs to be ongoing community counselling support to deal with the pressures of the determination process. It has been demonstrated thus far that the medical needs related to disclosure are inseparable from the legal requirements to be granted legal protection in accordance with Article 1 of the Geneva Convention. Individuals must meet the minimum standard of proof and demonstrate that they have suffered past persecution or have well-founded fear of persecution based on the one of the five enumerated grounds. The standard of proof is somewhat lower than the balance of probability in that, there need not be more than a fifty per chance (i.e. a probability). On the other hand, there must be more than a minimal possibility of persecution as in the case *Adjei v Canada [1989]* (cited in Rousseau *et al*, 2002:44). Hence if there has been a likelihood that persecution has occurred in the past, then there is a "reasonable degree of likelihood" of future persecution. Having discussed the subjective element above, it is from here that we move onto the objective needs of asylum seekers.

### **Establishing the Credibility of the Claim for Asylum**

As indicated above there is a need to examine the objective element of the asylum determination process. The notion of extrinsic credibility is associated with objective Country of Origin Information that relates to the asylum claimant's country of origin. In accordance with the EU *Qualification Directive* 2006 where "decision makers must assess an applicant's claim and his or her credibility and place his/her story in its

appropriate factual context, that is, the known situation in the country of origin". Following the concept of precedent, the House of Lords established in the landmark case of *Sivakumran* that, in order to qualify as a refugee, it is necessary to establish not only a subjective fear, but one must also establish an objective basis for the fear of persecution. This means that the applicant's fears must be based on the actual risk of that event actually occurring if they were to be returned to their country of origin. So, if a person for whatever reason genuinely fears a particular event but there is no risk of that event of actually occurring, then there is likelihood that they will not be a refugee. In other words, the objective element of the test can override the subjective. The court decided that this interpretation was justified because the convention refers to the fear being 'well founded'. For a claim under Article 3 ECHR, the test is whether there is a "real risk" of torture or ill-treatment. Immigration Judges must take into account all available evidence and come to a clear conclusion.

As suggested in the *Sivakumran* case, one of the fundamental protection needs to be met, is to prove that the individual subjective fear of persecution is based on actual risk of persecutory events that continue to occur in the country of origin. Country of Origin Information enables decision makers to assess whether the asylum seeker's well-founded fear is based on current objective adverse circumstances and to see whether the asylum claim is well founded. The purpose of Country of Origin Information according to Tsangarides (2010:10) details the social, political, judicial and Human Rights profiles of a given country. This information is used within the asylum decision making process to assess the risk upon the return of individuals to their country of origin as well as the credibility and plausibility of individual claims. Expert reports from Amnesty International, Asylum Research Consultancy and Human Rights Watch may accompany specific Country of Origin Information with respect to certain groups targeted and reported violations of rights. The information of the country concerned must be of high quality, properly sourced, and relate to the present condition of the country concerned. Thomas (2010) argues that the production of definitive country information can itself be problematic as the conditions in particular areas of the countries are often changing. Depending on the type of information used, the country guidance may provide a detailed précis of the individual country concerned and may assist in the extrinsic assessment of the prospective risk of persecution.

One of the most fundamental protection needs is for a legal representative who is knowledgeable in international refugee law, Human Rights law and the domestic law. Legal representatives need to specify the type of protection needs based on the type of harm feared, since the result of wrongly classifying a claim has serious consequences for status (McAdam, 2004). Legal representatives should encourage their clients to obtain corroborative evidence from the country of origin to verify that the individual was a member of a certain political or social group or clarify the reason why the asylum seeker fled the country. This would be justifiable as it would adhere to the capabilities version of needs theory, as the information may indicate the reasons why the alleged persecutory events had occurred.

Professional legal representatives would also prepare their clients for what to expect in the immigration Tribunal, especially "when the asylum seeker's credibility may be called into question" (Bhabha, 2002:156). Having the burden of proving that individual asylum claims are 'bono fides', and that their alleged experiences of persecution, meet the criteria of the 1951 Geneva Convention is an enormous task. Therefore the request

for expert reports is essential as expert reports are rarely requested by the authorities for asylum cases, and never by the courts (Good, 2004).

Each asylum claim entails individual testimonials and medical reports that document persecution and other country of origin information documents. The material evidence goes to the core of the assessment of each asylum claim. Immigration Judges sit at the highest level of the Immigration Tribunal. Their position as gate keepers of law requires an authorised interpretation of international Human Rights law and domestic law. In order to decide the merits of the asylum claim Immigration Judges “have to extract the material facts from the potentially voluminous factual claims made by the applicant” (Sweeney, 2009: 712). The assessment of the legal merits of each asylum claim largely rests on what decision makers finds credible and whether there is a reasonable likelihood that the alleged persecution has occurred. Thomas (2006:84) has argued that, one of the intractable issues in assessing credibility, ‘arises from the decision-makers’ own presence of self. Decision-makers may be unaware of the importance of cultural differences between themselves and claimants. In the case *Ibrahim Ali v Secretary of State for the Home Department [2002] UKIAT07001* it was pointed out that:

“[w]hat may be plausible for a person in a western environment may be completely implausible for someone in a non-western environment... [Decision-makers] ... must take great care in not allowing their own perceptions and values to influence that judgment. The decision-maker must conclude whether the cumulative weight of all the relevant and admissible evidence is sufficient to meet the standard of proof.”

Therefore the concept of credence depends on whether the individual decision-makers decide which standard of proof is satisfied if the applicant has demonstrated a reasonable likelihood that persecution has occurred. The subjective concept of weight is central to the concept of standard of proof or as Good (2007: 212) argues, “weight is a question of fact rather than law. To weigh evidence means to assess the reliability, probative value, and its value in assisting in determining the matter in issue in light of all the circumstances of the case”.

In the Tribunal, Immigration Judges have to make an independent decision whether the asylum seeker meets the Geneva Convention threshold, or subsidiary protection and whether the country of origin is safe or unsafe for the person seeking asylum if he or she were to be returned. The task is therefore an “overwhelmingly fact-based form of decision making” (Thomas, 2006). The concept of credibility is fundamental for all asylum applicants, and “remains one of the most persuasive problems for almost all asylum applications made in the UK” (Crawley, 2000: 88). The credibility assessment required by the Home Office, as argued throughout this paper, entails an evaluation of “the current political situation in the applicants country, evidence on the country’s Human Rights record and, if applicable, medical evidence of torture and abuse” (Tufnell, 2003: 432). The central focus for Immigration Judges is to decide whether a removal of an individual from the UK will amount to a potential breach of either the 1951 Geneva Convention or the *European Convention on Human Rights*. This task requires Immigration Judges to assess the nature and risk of harm if a decision is made to deport the individual asylum claimant from the UK. Decisions made by Immigration Judges are especially serious as they may put an asylum seeker’s life in danger if the person is wrongfully deported.

Additionally, Judges will now have a role to play in assessing whether the national authority has fulfilled the responsibilities assigned to it in the case *NA v The UK [2008] App No 25904/07*, of going beyond the evidence accumulated by the applicant and assisting the court by making the relevant evidence available to the court.

## Conclusion

To conclude, this paper has endeavoured to examine the protection needs of those claiming asylum. It has argued for a multi-disciplinary response designed to provide various therapeutic interventions that makes specific reference to the protection needs of asylum seekers throughout the asylum determination process. It has argued that the protection needs of asylum seekers should be assisted by the use of appropriate interpreters, and reports written by psychotherapists and medical practitioners, presented to the Immigration Tribunal. Throughout the asylum determination process, asylum seekers are in need of socio- economic, emotional, linguistic, medical and legal support in order to convey their subjective testimonies, as well as medical and psychological reports. In order to fulfil the objective test, the need for appropriate country of origin information is also required to meet the strict definition as enacted in the 1951 *Convention Relating to the Status of Refugees* and the 1967 Protocol or Subsidiary Protection under the *Qualification Directive 2011/95/EU*.

Moreover, in order to meet the requirements set out in the case *NA v The UK[2008] App No 25904/07* made in July 2008, in the ECHR, the national authority now has a positive duty to go beyond the evidence provided by the application and to use the diverse resources available to state agencies to collate relevant information in order to make a thorough and accurate assessment of the applicant's case (*Committee on Migration, Refugees and Populations* (2009a,b). Following upon the heels on this precedent, the new directive 2011/95/EU came into effect on the 12th of June 2013 providing for the development of Europe- wide protections for asylum seekers. These measures have the social, moral and legal potential to provide a higher degree of protection for those who have experienced torture and persecution from organised violence. They also have the potential to bind the protection of people claiming asylum as survivors of persecution to the Geneva Convention and the 1967 Protocol. Optimistically, future legislation could incorporate, a needs based and Human Rights model under International Human Rights Law in order to meet the needs of asylum seekers, permitting them to contribute to the host countries, rather than promoting social exclusion.

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## Editorial Note

This paper is published in good faith as an academic statement on matters of public interest following independent peer review. Nothing in this paper should be construed as offering legal advice. Where a legal opinion is required, one should be obtained on the relevant specifics.

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