

## Harming asylum seekers' chances through poor use of human rights treaties

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**Over the past decade, UK courts and administrative tribunals have become increasingly comfortable relying on international human rights treaties in cases where non-citizens claim asylum or other means of protection from persecution. However, this trend does not mean that these treaties have always been deployed by refugee lawyers in ways which benefit their clients.**

One could argue that the UK is experiencing a golden age of human rights jurisprudence on refugee matters. Ever since the European Convention on Human Rights (ECHR) became part of British domestic law in 2000 through the Human Rights Act (HRA), judges have become increasingly receptive toward human-rights-based arguments asserted by lawyers for refugees. Previously, lawyers representing refugees in UK domestic courts rarely invoked human rights treaties other than the 1951 Convention Relating to the Status of Refugees. As one barrister told me, doing so would incur the judge's scorn: "If you had gone to an immigration tribunal pre-2000 and tried to bring up the ECHR, they'd have looked at you like you were wasting their time."

When the HRA was passed, refugee lawyers litigating in domestic courts suddenly had options beyond the 1951 Convention and no longer needed to demonstrate that their clients would face persecution "for reasons of race, religion, nationality, political opinion or membership of a particular social group". For example, ECHR Article 3 prevents countries from returning refugees to home countries where they risk torture or inhuman or degrading treatment or punishment, regardless of the reason or whether they have been personally targeted. And Article 8 prevents public authorities from interfering with an individual's right to family life, which has enabled many non-citizens to remain in the UK even when they cannot meet the 1951 Convention requirement of a well-founded fear of persecution.<sup>1</sup>

As a result, it has become commonplace for UK lawyers to cite the ECHR in UK domestic courts. According to two barristers: "The ECHR ... is just a part of your day-to-day vocabulary. It is directly applicable in almost all of the work that you do" and "When I started [in the early 1990s] ...[e]verything was the Refugee Convention. [The] European Convention was virtually never raised..."

Lawyers sometimes invoke other human rights treaties as well, especially the Convention on the Rights of the Child, which has effectively now been incorporated into British law.

Nevertheless, when I asked lawyers about situations where invoking human rights treaties in domestic courts might be detrimental to the interests of individual claimants, nearly all of them came up with at least one example:

**When the judge is opposed to, or sceptical about, human rights law:** There is not much a lawyer can do in this situation, given that it may be difficult to raise a human rights argument on appeal if it has not been raised (and rejected) at an earlier stage of the proceedings.

**When the treaty argument complicates matters:** Several lawyers noted that judges, particularly at the first tier of the immigration tribunal, like to keep things simple. One barrister said: "It could be distracting. If you can get what you need from incorporated treaties or domestic law, then you may just overcomplicate and confuse,

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particularly in the tribunal ... by referring to treaties that they don't know about."

**When lawyers assert human rights arguments indiscriminately:** In the process, they obscure their strongest points and damage their credibility with the court. "People feel they have to throw everything in. ... I've sat at the back of the court lots of times and watched judges say 'What does this add to your argument?' Why be put in that position?"

**When the judge sees human rights-based arguments as a sign of desperation:** "I think the sense is, if you've got a proper legal argument you don't need to use the Human Rights Act outside of [when it's] strictly [a matter of] torture... You are only using it because you are desperate and therefore you must have a weak case."

The common risk in all of these situations is that they can result in bad law.

A desperate and ill-prepared lawyer who includes a specious or unnecessary treaty-based argument may create legal precedent which adversely affects not only the current client but also other claimants in the future. This risk is likely to escalate soon, given the consensus view among refugee lawyers that cuts to legal aid in the UK will drive some of the best lawyers from refugee law practice, leaving it wide open for less skilled practitioners. In addition, several lawyers expressed a fear that those who remain will adopt an assembly-line or factory mentality to their work. This approach is likely to result in one of two outcomes for human rights arguments: some lawyers not familiar with such arguments will omit them, even though they might have assisted their clients, and other lawyers will include them in all of their arguments with little thought as to whether they really apply to the facts or might instead alienate a particular judge.

While recognising the risks of making human rights-based arguments under these conditions, lawyers identified two principal ways of maintaining and even expanding

the positive impact of human rights treaties in UK jurisprudence. The first is by appealing to the increasingly internationalist perspective of many judges, particular in the higher courts. Lawyers feel that many judges see themselves operating on a global stage where their decisions are scrutinised by courts, lawyers and academics around the world. If this is true then refugee lawyers would perhaps be wise to consciously appeal to the judge's desire to be at the forefront of – or at least in line with – global legal developments.

A second strategy was explained by some lawyers as "going on and on about it long enough [until] eventually things begin to change. The change you see in the courts is slow... We've been banging on about the rights of the child for decades. It's really only in the last few years that it has made a real difference."

Indeed, several lawyers emphasised the value of continuing to assert human rights-based arguments in a creative, but not desperate, way until a judge in a higher court accepts them.

In the end, most lawyers see the future role of human rights treaties in refugee practice either as a constant struggle against the tightening up of the rules somewhere else every time an advance is made, or as a matter of recognising that the struggle over a broad interpretation of human rights treaties and their applicability to individual cases will not be won overnight: "You win these battles slowly, with incremental development. And eventually you find that the world has moved on, and the things that were controversial ten years ago actually come to be the standard."

In conclusion, human rights treaties have been increasingly accepted by UK tribunals and courts over the past decade. While this is undoubtedly good news for human rights advocates, it is tempered by the consensus among refugee lawyers that treaty-based arguments sometimes can hurt asylum

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claimants and the overall cause of the diffusion of human rights law. These lawyers stress the importance of carefully crafting such arguments rather than adopting a one-size-fits-all approach. The wiser practice, they assert, takes into account the presiding judge, the strength (and number) of other available arguments, and the extent to which courts in other jurisdictions have adopted the proposed argument.

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lawyers who litigate asylum and complementary protection cases before the Asylum and Immigration Tribunal and higher courts. It is part of a larger empirical project analysing the impact of human rights treaties on refugee jurisprudence and practice in Australia, Canada, New Zealand, the UK and the US. The author gratefully acknowledges the National Science Foundation and the Robina Foundation for providing funding.

1. Refugee lawyers also frequently utilise Articles 15 and 23 of the 2004 E.U. Qualification Directive, which offer protection from “serious harm” and require member states to ensure the maintenance of family life, respectively.