International Human Rights and Refugee Law: The United Kingdom

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This chapter examines the relationship between international and European human rights law and refugee law in the United Kingdom (UK). The relationship is complex. This chapter seeks to sketch that complexity. It first considers the place of refugee law in public international law, and suggests that it is a species of international human rights law which remains relevant and important despite the development of international human rights law over the last half century. The chapter next considers the impact of the Human Rights Act 1998 for aliens resisting removal on protection grounds. It contrasts the early refugee law cases in the UK, where the courts were disinclined to be influenced by human rights norms, with later cases where human rights law has been central to the debate, albeit with varying results. Finally, the chapter considers the impact of the European Union (EU) Qualification Directive1 on the approach to the refugee definition in the UK.

1 Refugee Law: A Critical, if Limited, Species of International Human Rights Law

Hathaway is probably the leading exponent of the widely held view that refugee law is sub-set of international human rights law, and the lex specialis for a particular, vulnerable group of migrants:

[R]efugee law is a remedial or palliative branch of human rights law. Its specific purpose is to ensure that those whose basic rights are not protected (for a Convention reason) in their own country are, if able to reach an asylum state, entitled to invoke rights of substitute protection in any state party to the Refugee Convention. As such, the right of entry which is undoubtedly the most visible consequence of refugee law is, in fact, fundamentally consequential in nature, and of a duration limited by the

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persistence of risk in the refugee’s state of origin. It is no more than a necessary means to a human rights end…

However, the Refugee Convention is also profoundly limited. Its definition of ‘refugee’ is on any view technical: for example, the individual must be (a) outside their country and (b) the harm feared must be for reasons of race, nationality (the immutable statuses), religion, political opinion or membership of a particular social group (the characteristics the individual cannot be expected to change). Victims of natural disasters are typically not within scope, and the Convention reasons speak to civil or political status rather than economic or social disenfranchisement. In this way, by ‘mandating protection for those whose (Western inspired) civil and political rights are jeopardized, without at the same time protecting persons whose (socialist inspired) socio-economic rights are at risk, the Convention adopted an incomplete and politically partisan human rights rationale’.

Be that as it may, the need for specific protection of refugees derives from the historic limitations of public international law, where States, rather than individuals, were rights-holders. Moreover, it was well established by the 1950s that, ‘as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory’. However, the maturation of human rights law over the last 50 years

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2 J.C. Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 5 and see also: 75


5 See among many authorities Gul v Switzerland, app no 23218/94 [1996] ECHR 5 at section 38; and see C. Vincenzi, ‘Aliens and the judicial review of Immigration Law’ (1985) Pub Law 93, for an attack on the origins of this principle. This principle is well-established but its moral justification is suspect; see generally, J.H. Carens, *The Ethics of Immigration* (OUP 2013) arguing that this principle is not justifiable on Rawlsian, Nozickian, utilitarian or communitarian political theory. In recent times it has, correctly, been restricted to decisions relating to aliens which strictly concern entry and expulsion, rather than seeping into others. Contrast the