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VIEWPOINT

Asylum-seekers falsely implicating themselves in international crimes: should they be informed of the existence of Article 1F of the Refugee Convention?

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Abstract
Case studies in the Netherlands and the UK of asylum applicants excluded or under consideration of exclusion pursuant to Article 1Fa of the Refugee Convention reveal that some applicants falsely implicated themselves in serious crimes or behaviours in order to enhance their refugee claim. This may have serious consequences for the excluded persons themselves, as well as for national governments dealing with them. For this reason we suggest immigration authorities could consider forewarning asylum applicants i.e. before their interview, about the existence, purpose and possible consequences of exclusion on the basis of Article 1F.

Keywords: Asylum seekers; 1F Refugee Convention; war crimes; warning.

Introduction

According to the drafters of the 1951 Convention relating to the Status of Refugees (Refugee Convention) persons with respect to whom there are serious reasons for considering that they have committed a war crime, crime against humanity, or crime against peace, are undeserving of refugee protection. This 'exclusion clause' is set down in Article 1Fa of the Convention. The *travaux préparatoires* indicate that the rationale for the exclusion clause is twofold. 'Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice.[1]'

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[1] As explained in UNHCR's Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (September 2003) ("Background Note 2003")

Article 1Fa exclusions have significant consequences for the deciding governments as well as for the individuals excluded (Zambelli 2001, Juss 2012). For example, EU Member States should ensure that the crimes allegedly committed by Article 1Fa excluded persons are investigated and, where justified, prosecuted in accordance with national law.[2] Also, other states consider themselves under an obligation to prosecute these excluded asylum applicants on the basis of universal jurisdiction, in accordance with the *aut dedere aut judicare* principle in international law (the obligation to extradite or prosecute perpetrators of certain international crimes) (Larseaus 2004, Bond 2012). However, where states cannot prosecute, extradite or return the applicant, governments have to 'manage' the sometimes difficult politics of the on-going presence of these persons (Rikhof, 2012). The excluded individuals themselves, on the other hand, will have no right to refugee protection, may become undocumented migrants, face deportation and are labelled (and may be stigmatized) as alleged war criminals.

Article 1Fa exclusions are often based on the personal accounts of asylum applicants in combination with authoritative reports which describe in general terms the activities of the organization the applicant claimed to have worked for. It is known that in order to substantiate or strengthen their asylum claim, applicants may fabricate accounts about their past experiences and background (Neumayer 2005, van Wijk 2010). It is not unthinkable that applicants who are unaware of the existence of Article 1F fabricate stories about their role in conflicts. They might for example 'make up' that they were active for a certain rebel movement or government institution, hoping that this will convince immigration officials that they risk persecution upon return. For this reason, they may initially falsely implicate themselves in international crimes while being unaware of, or at that time indifferent to, the personal consequences this may have in relation to the 1Fa exclusion clause.

In this article we highlight and discuss indications that asylum applicants in the Netherlands and the UK (may) have provided false accounts, thereby suggesting that they facilitated or committed serious crimes. Both countries have in common that they have a relatively large population of 1FA excluded individuals and that there is considerable public debate about the question what to do with them after they are excluded. We will discuss the consequences this may have for the applicants themselves and the governments deciding on their claims and conclude with

[2] Consideration 7 of the preamble of Council Decision 2003/335/JHA of 8 May, 2003

a proposal to experiment with forewarning asylum applicants before their interview about the existence, purpose and possible consequences of exclusion on the basis of Article 1F.

Methodology

Apart from a review of policy documents, applicable law, academic literature, and interviews with representatives of immigration authorities this article is primarily based on an analysis of assessment interviews and appeals cases in the Netherlands and the United Kingdom. Both authors, independently from each other, were granted permission to analyze the official files of the immigration authorities in the respective countries.

In the Netherlands study, the immigration authorities (*Immigratie en Naturalisatie Dienst*, hereinafter IND) provided one of the researchers the opportunity to analyze the complete digital files of all 693 individuals who, between January 2000 and November 2010, have been subject of 'definite' decisions to exclude them under Article 1Fa. Files of 1F excluded persons typically contain hundreds of pages with a large variety of documents, ranging from the extensive reports of the different asylum hearings and letters from legal representatives, to country reports from the Ministry of Foreign Affairs and NGOs, court files and new procedures. It must be noted that some of the 1F decisions in the meantime may have been revoked or successfully appealed since the moment of data collection.

The UK study involved contemporaneous assessment of the Article 1Fa case files which were the current, active workload of the specialist unit within the (then) UK Border Agency[3] (UKBA) between January 2013 and March 2013. 87 question and answer interviews and witness statements provided by a total of 57 subjects were assessed by physical examination of the 'hard-copy' documents in the case files. The group assessed was reported by the UKBA to be typical in composition and volume of cases routinely considered over a quarterly period. Of the 57 subjects, 31 had been subject of 'definite' decisions to exclude under Article 1Fa.

Although the scope and scale of the datasets vary considerably, the results of the analyses permit this qualitative and explorative study. We

3 'On 26 March 2013, the (UK) Home Secretary announced plans to split the UK Border Agency into 2 separate entities - 1 to deal with immigration and visas, and 1 to take responsibility for immigration law enforcement'. [internet website] 26th March 2013 (Available at https://www.gov.uk/government/news/uk-border-agency-to-split-into-two-new-groups) [last accessed 25th September 2013]

do not seek to quantify the number of asylum applicants who may have possibly fabricated involvement in serious crimes; rather we intend this contribution to be a preliminary exploration of what, to this point, may be a feature hardly discussed in academic and policy literature.

Article 1F exclusion policies in the Netherlands and the UK

Both the Netherlands and UK have ratified the Refugee Convention and it should be expected that they apply the Statute in broadly similar ways noting that both Jurisdictions consider the Article 1F exclusion criteria *before* consideration of inclusion criteria.[4]

Since 2001, officers of the IND refer relevant cases to a specialised '1F unit' when during one of the two initial asylum interviews grounds arise suggesting Article 1F might apply. From that moment, the applicant will be informed that the IND has indications that Article 1F applies and that further investigations will take place.[5] The 1F unit will typically interview the applicant again, possibly on several occasions, and at the start of these interviews, it will be explained to the applicant that the interviews are intended to assess whether Article 1F applies.[6] The interviews, together with the assessment of other material, may lead to a decision to exclude. The excluded person can appeal this decision in court. In the meantime the excluded person will be told to leave the country. The IND submits all files of asylum applicants against whom Article 1F is invoked to the public prosecutor. So far, only four excluded asylum seekers prosecuted by the Dutch Prosecutor have been convicted.

In the UK, usually on the basis of information that an asylum seeker has provided (for example in a written asylum request), a specialist Home Office team may become involved in the interview process when the suspicion of complicity in Article 1Fa-type offences arises. Where appropriate, further interviews and information gathering take place, and then the decision whether or not to exclude under Article 1F is taken. No

4 State practice with regard to assessing inclusion before exclusion or vice versa differs widely. See: D. Kosar, 'Inclusion before exclusion or vice versa: what the Qualification Directive and the Court of Justice do (not) say', in: International Journal of Refugee Law 2013 Vol. 25 No. 1 pp. 87–119

5 The claimant is written to in the following terms: "During the assessment of the application, indications were found that Article 1F of the Refugee Convention might be applicable. For this reason, the file is forwarded for further investigation to the 1F unit of this Service. Any further correspondence can therefore be sent to (...)".

6 The IND interviewer informs the applicant that during the assessment of the application it was found essential to have this follow-up interview in order to assess whether or not Article 1F of the Refugee Convention might be applicable.

written or verbal forewarning is afforded to the asylum applicant before or during any of the interviews that he or she is of Article 1F interest. The first time that an applicant is formally informed about Article 1F is after the decision to exclude has been taken. Such a decision can be appealed in court, but in the meantime the excluded person is expected to leave the country. In the UK only the police services, and not the immigration authorities, can refer a case to the Crown Prosecution Service for consideration of a prosecution on the basis of universal jurisdiction. The process of referral between immigration, police and prosecution authorities in the UK has not yet yielded any convictions.

Consequences of exclusion

Excluded persons have an obligation to leave the country. If, however, they successfully claim that deportation would violate the *non-refoulement* principle of Article 3 European Convention of Human Rights (ECHR), they remain in the Netherlands or the UK but in a legal 'limbo' where government is not allowed to deport them, but they are not granted refugee status. Their non-status can have severe social, psychological and economic consequences for the persons involved. Excluded persons may find themselves subjected to a range of restrictions relating to their employment, residence, education, freedom of movement as well as the duration of their stay (Reijven & Van Wijk, 2012). Exclusion is, technically at least, a permanent situation. At the same time, excluded persons in limbo are a political risk for governments of the respective countries. They face criticism for appearing ineffectual and harbouring alleged war criminals and *genocidaires*.[7] In response, governments typically argue that prosecuting 1Fa excluded individuals is very challenging. While an 'alleged' perpetrator can be excluded by immigration services, a criminal court needs to be convinced 'beyond reasonable doubt'. In addition, governments point to the fact that the alleged crimes happened long ago and evidence is unlikely to be forthcoming, or that it is unsafe to deploy investigators to crime scenes.[8] In this article we would like to argue that another, often overlooked, possibility may also explain the low success rate of prosecutions; that the information used to exclude on the basis of Article 1Fa may be fabricated by some applicants.

[7] For example, see Johnson, D. (2013) '100 suspected war criminals living in Britain', in: Daily Telegraph Online. 30th July 2013. [internet website] (Available at http://www.telegraph.co.uk/news/uknews/crime/10210314/100-suspected-war-criminals-living-in-Britain.html) [last accessed 21st September 2013]

[8] See, for example, the letter of the Dutch Minister of Justice to parliament of 9 September 2008 (TK 2007-2008, 31 200-VI no. 193).

Indications of excluded persons who may have fabricated their accounts

In both countries the decision to exclude is often initiated by, and then based on, the accounts provided by asylum applicants themselves. It is widely recognised in policy and academic literature that asylum claimants may tell lies during their interviews, hoping to strengthen their claim. Yet, it is seldom contemplated that some applicants might also fabricate involvement in serious crimes which could lead to their exclusion. Below, we present examples encountered in our data that suggest fabrication of applicants' involvement in international crimes. As our study shows, it is not uncommon for applicants, when confronted with actual or possible exclusion on the basis of Article 1F, to re-appraise their accounts and to seek to distance themselves from their incriminating commentary offering wholly or substantially contradictory alternatives.

Our study shows that some applicants - when they come to appreciate the implications of their Article 1F admissions - may try to back-track in order to mitigate their legal predicament. Their efforts take different forms; some, for example, argue that they were misunderstood in their earlier interviews or cannot remember what they had said previously but in a later stage have a clearer - and less incriminating - recollection. For example, in the UK study, Subject 49 claimed in an interview in 2002 to be wanted by her Government as a result of carrying out the killing of defenceless villagers. In 2012, when seeking citizenship and after being confronted with her previous 'confession', she could not remember her admissions about killing people ("Did I say that, kill people?") because of feeling "stress" in the first interview. However, she could remember that she had only been defending her base of operations from attack and was "100% sure about that."

There are also applicants who in the process of being interviewed, or after exclusion, 'admit' that they had fabricated their first accounts in order to increase their chances of being granted asylum. However, if they provide no verifiable additional material it is often difficult to establish the veracity of these new 'facts'. For example, Subject 45 in the UK study claimed to have been an intelligence officer for the LTTE (Liberation Tigers of Tamil Eelam). Ten years after that account, when applying for citizenship, she 'admitted' having told lies and that her activities were not "spying on militant groups" as first reported, but occasionally to "give food" to rebels as a sympathiser. Subject 29's first account in 2008 out-

lined that he had been trained and had operated as a member of an intelligence agency implicated in serious human rights abuses. He had explained about his role in torture and his escape from his military unit to avoid continuing such behaviour. In subsequent interviews in 2012, having lost contact with the UK Authorities and then re-presenting himself, he sought to distance himself from his earlier-mentioned connection with torture, even though he had demonstrated on his solicitor the techniques he had been taught. His later account suggested that he had only adopted what had been discussed amongst his colleagues, and that his apparent knowledge of torture techniques had been "hypothetical", which had led to a misunderstanding with his interviewer. He suggested that his incriminating witness statement was "fundamentally" a lie and that he had been no more than a conscript border guard. Similarly, in the Netherlands study, Subject J194 reported subsequently to his initial incriminating account that he had only told the IND that he had worked for the Republican Guard, because his wife had earlier already said so and he did not want to generate any inconsistencies in their respective accounts.

In cases as discussed above, immigration authorities maintained that Article 1F should continue to apply. In both the Netherlands and the UK, first accounts are fundamentally important in the exclusion decision-making process, but more so in the Netherlands where case law provides that initial statements carry more weight than contradictory statements at a later stage.[9] This means in practice that once an asylum applicant states in the initial hearing that he or she committed crimes or belonged to an organization which is believed to have been involved in Article 1F crimes, there is seldom a legal vehicle to 'undo' that admission. This may be different if applicants not only recant their earlier statements claiming that they fabricated their first account, but also provide new and verifiable evidence to support this claim. Most significantly in the context of this article, our study also found evidence of such cases.

In the Netherlands study, Subject LE24 for example claimed to have been the bodyguard of five different warlords in the early 1990s. He admitted that his units had been responsible for ethnic killing of civilians and involvement in pillage. He was excluded in 2002 but in 2009 - having illegally remained in the Netherlands throughout - filed a new claim in

[9] See Council of State 23 June 2003, no. 200300240/1, The Hague District Court AWB 0a/1813 (Rushdie) and Maastricht District Court AWB 02/42704 = 03/18329.

which he suggested that he had fabricated his first application. He provided evidence that he had studied in Nigeria and Ghana in the years he had first claimed to work as a bodyguard in Liberia. He presented a passport, which included numerous entry stamps, and references from universities and colleges which were to prove that his second account was credible. The documents were all analysed by the Dutch authorities and established to be genuine, but he case had not been resolved by the time the research had been concluded.

The case of Subject LI19, also from the Dutch dataset, may suggest that presenting such new evidence after being excluded can sometimes benefit the applicant. He had initially claimed to have worked as an orthopaedist in the infamous Abu Ghraib prison from 1994 to 1998 and conveyed that he had been ordered to perform amputations on prisoners which he had undertaken "uncountable times." The 1F Unit argued that in doing so he had facilitated crimes against humanity and excluded him; a decision which was confirmed in court in 2004. The court argued he could not be deported because of article 3 ECHR protection. 10 months after the court decision, the applicant again requested asylum, claiming to have lied in the first instance. He presented extensive documentation - including an Iraqi passport with entry stamps to Yemen and various employer statements from hospitals in Yemen - to prove that he had worked as a medical doctor there between 1994 and 1998. The IND - after lengthy proceedings - in 2009 requested the Dutch Ministry of Foreign Affairs to verify his account. On the basis of a report which confirmed that the presented documents were original, IND eventually concluded that the applicant had indeed worked in Yemen between 1994 and 1998. Consequently, the Article 1Fa decision was revoked. At the moment of analysis, the applicant's request for a permit on medical grounds had not yet been determined.

How extensive is the problem?

The above demonstrates that certain asylum seekers do indeed fabricate stories. Our analysis, however, does not provide any indication about the scope of the problem. Unfortunately it may be impossible to ever come to a reliable estimation of the number of claimants who have fabricated stories leading to exclusion. One of the complicating factors in this regard is that excluded individuals who fabricated accounts are in a classic 'catch 22' dilemma when deciding whether or not to disclose their lies. Sticking to the story may entail exclusion and its associated limitations on the quality of the applicant's life. Admitting to lying, on

the other hand, could mean that the exclusion decision is revoked. But this is only the case if they can provide verifiable information to substantiate the 'real' account. As illustrated above, this proves to be very difficult in actual practice. Moreover, revocation of the exclusion decision may not, in the end, bring that much benefit, because lying asylum seekers are typically not granted refugee status.

Because of the significant implications of the attribution of exclusions based on false testimonies one could argue that any false admission is already one too many. As Koser (2007) observes, "In most countries, the political significance of irregular migration far outweighs its numerical significance" and this is certainly the case in respect of attitudes towards 'suspected' war criminals. Take the case of the Iraqi doctor (LI19) as an illustration: had he not been in the position to present verifiable documentation to back up his statement that he had lied in the first instance, he may have been destined to live indefinitely as an undocumented alleged war criminal whilst national politicians may have felt compelled to call for his prosecution and investigators to 'chase a ghost'.

Grounds for providing preliminary information on 1F?

In most countries asylum applicants are given a general credibility warning at the start of each asylum interview. One could simply argue that they should not lie and must live with the consequences of dishonesty if they have done so. At the same time, this study casts doubt on the broader as well as the practical consequences of taking such a perspective. With national and international conflicts continuing to drive refugee flows, European states may continue to facilitate further un-witting injustices by excluding asylum-seekers who lie; consigning them to the legal limbo we have described, whilst generating unnecessary controversies and dilemmas for governments. If, as we suspect from our case studies, a problem of fabrication does exist and should be regarded as problematic, this begs the question what might be done to prevent, or at least discourage, applicants from falsely admitting Article 1F-relevant crimes or acts.

Interviews with immigration officials confirm that asylum applicants in the UK are not at any stage informed about the existence, purpose and possible consequences of exclusion on the basis of Article 1F before being excluded.. In The Netherlands immigration officials confirmed that this only happens by the time the '1F Unit' is brought into the process. By that stage, however, possibly fabricated admissions may already have been made in (an) earlier interview(s). From that point, the 'catch

22' situation may arise for the claimant - whether to admit any earlier falsehood or persist with the story.

Whilst some similarities and differences are notable between the 'investigation' process of Article 1Fa cases in the Netherlands and UK, a common vulnerability suggested by the research is the need for a clear explanation of the consequences of exclusion *before* the applicant provides an account. This is arguably first and foremost the responsibility of their legal advisors. But also governments could consider providing such information. A simple statement in plain language to the effect that the interviewing officer has to consider whether there are serious reasons for considering that the subject may have engaged in one or more of the constituent elements of 1F would appear appropriate. We are not aware of any such simple forewarning operating anywhere.

An obvious consequence of such a warning may be that fewer applicants admit involvement in Article 1F-related acts or behaviours. Given that most of the evidence in 1F exclusion cases is typically primarily based on subjects' admissions, this could result in fewer exclusions if the guilty and the innocent heed the notification. Whilst the consequence may be fewer exclusions, the benefits include that fewer applicants end up in limbo and that more focus and effort can be directed towards prosecuting the fewer cases of demonstrable 'merit'. A forewarning could additionally act as a driver for the development of a better, alternative intelligence and investigation purview and, above all, less reliance on sometimes desperate people willing to say almost anything they hope may strengthen an asylum claim.

It will require brave politics to say that the 'no safe haven' policy should be predicated more on rigour and cases of merit than on specious metrics masking catch 22 dilemmas. The consequences of exclusions are so significant for all involved that the interests of fairness, effectiveness and efficiency demand no less. This article provides a warning; isn't it time that asylum-seekers were provided with one as well?

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