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WHAT SHOULD U.S. POLICY BE TOWARD REFUGEES AND ASYLUM SEEKERS?

Peter Tompkins*

One's first reaction to the above question would be that it is presumptuous of an outsider to offer an opinion on U.S. policy. Further reflection brought reassurance because the answer is the same for every democratic country, and some not-so-democratic ones, which are signatories to the 1951 United Nations Convention. A complacency was soon overtaken by the conviction that the terminology of the question might usefully be challenged, replacing "policy towards refugees" with "approach to the practicalities of immigration control," at which stage things began to look more complicated.

As long as debate is restricted to asylum seekers, this question is easy to resolve. Bearing in mind that the 1951 Convention was drawn up principally to tackle the consequences of persecution by Communist regimes within the former Iron Curtain, it has stood the passage of time remarkably well and shown itself capable of responding to many different forms of oppression. There seem to be only two issues: the terms of the Convention and the way governments interpret "well-founded-fear of return."

There exists little controversy over the first of these and, in any event, there would be general agreement that rewriting the Convention is not a practical proposition. The definition of "well-founded" is more contentious but current practice and policy can be defended on two counts. First, there is a remarkable similarity in developed countries over the proportion of applicants granted refugee status. Second, in nearly every case Governments have identified a second tier of applicants who, whilst not qualifying under the strict terms of the Convention, are nonetheless allowed to remain for humanitarian and compassionate reasons. Thus, in the United Kingdom in 1992, just over 1,000 persons were granted asylum but over 15,000 were given exceptional leave to remain after being denied refugee status. The position is similar in other coun-

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tries, including the United States. This common approach provides a simplistic answer to the question: grant asylum to those who qualify under the Convention, continue to provide a humanitarian backstop for those who do not qualify but who nonetheless are held to be under serious threat, and exclude the rest. No great problems exist in the first two areas; it is the third where governments are currently incapable of achieving their objectives and which has led to asylum becoming inseparable from immigration policy and controls.

Some may judge this proposition to be contentious. While most observers accept that asylum can present common features to like-minded governments they are less comfortable viewing immigration in the same light because of the disparate historical background between the "exporting" nations of Europe and those, such as the United States, Canada, and Australia, which have relied so heavily on immigration in the past for their development. The distinction is, however, much less evident at the present time. In every case, unrestricted immigration is long gone and although the numbers involved vary substantially, programs and objectives are similar across the developed world, with their shared emphasis on family unification and special skills. What they also have in common is that their policies are currently under threat from large numbers of persons wishing to exercise the choice of country in which to live. It is not difficult to demonstrate that recent increases in asylum applications are no more than the latest manifestation of this trend.

What is involved is a major environmental issue, arguably the most important in the medium and long term, because the human population is the only resource on Earth which is expanding. This impinges directly on immigration programs because of the imbalance in the population explosion between the developed and developing worlds. Western Europe has a population of around 400 million, which forecasters predict will remain fairly static. Africa, however, which in 1950 had a population one-half of Europe's, now has around 600 million people, and according to U.N. projections, might have another billion forty years from now. Add to these statistics war, famine, and internal migration, which has resulted in the existence of huge urban conurbations unable to support their increased populations, and it is hardly surprising that large numbers of people in the developing world seek to move to less populous and more peaceful countries with a higher standard of living. While on an individual basis, immigrants can hardly be blamed for aiming to improve their lot, the scale of migration which has already taken place has caused tension within developed countries at a time when they are facing recession and unemployment and when welfare programs to

which their nationals have become accustomed are being put at risk. The consequence has been a spiral of stricter immigration controls and more ingenious ways of evading them. As migratory pressure began to increase, governments reacted with tougher legislation in relation to settlement, only to experience a rise in the number of those seeking initial entry as visitors or students and overstaying. Closing these loopholes was followed by additional evasion via marriages of convenience. The imposition of fresh visa requirements as governments sought to relieve pressure on frontier controls led directly to an upsurge in the use of forged and falsified travel documents, which in turn sparked off penalty legislation putting pressure on carriers to check documents prior to embarkation. The latest development is the so-called inadmissible passenger, who arrives with falsified documents, or no documents at all, and goes on to claim asylum.

Admittedly this is the view of an Immigration Law Enforcement Officer but it is one which is shared by operational staff across the developed world, including many who were previously prepared to look at asylum applicants in a different light. It is one that is not popular with politicians, who are unwilling to admit that their policies are not working, nor with those who prefer to portray democratic governments as harsh and unfeeling, but it is not easily refuted. The pity is that if the truth is not seen for what it is, genuine asylum applicants, and nobody denies that such a group exists, are likely to be overlooked in the face of even more restrictive measures aimed at the unentitled majority. The reality is that increased migratory pressure has created an environment where most immigration policies are irrelevant because they bear so little relation to what actually happens. How this situation has come about, how governments have reacted so far, and what they should do in the future are subjects which merit further consideration.

Democratic governments are usually equivocal about immigration controls. On the credit side there is a laudable ambition not to advance the cause of racism, but some more pragmatic factors are also involved. Politicians on the whole do not understand the complexity of immigration until they encounter it first-hand. Used to identifying an issue of public concern, announcing a solution and sitting back to await the credit, they are shocked to discover, soon after taking office, that immigration is not a single issue but is made up of hundreds of thousands of individual cases, all different, and each with a compassionate aspect capable of turning it into a cause celebre. Where children are involved media exposure can turn the well-intentioned politician, about to authorize the removal of an otherwise undeserving family, into a monster. In

addition, although every developed country is experiencing high unemployment, there is in each one a range of jobs at the bottom end of the market which the indigenous population seems unwilling to fill and where employers, unable or unwilling to pay sufficient wages, hire illegal labor. Finally there is invariably pressure from articulate and aggressive lobby groups, particularly those claiming to champion the freedom of the individual, in the face of which politicians are reluctant to authorize the exchange of information and the enhanced use of detention which are essential to effective enforcement.

Some curious anomalies result from politicians being pulled in different directions. In the United Kingdom equivocation over firm handling of those in breach of controls has resulted in the "Firm but Fair" policy being neither firm nor fair and with contradictions such as "working holidays" continuing to figure. In Hong Kong, leading figures condemn illegal entry from mainland China and the Vietnamese Boat People, but are more reticent, for obvious reasons, about Filipino domestic workers posing as visitors. From the United States, it is reported that illegal aliens will not qualify for the tamper-proof 'Health Card' but will be covered anyway under the new proposals because employers will be required to provide insurance for all employees, whether in the country legally or not. Insurers will be forbidden to notify the INS if they become aware of an employee's illegal status at the same time as the Border Patrol is being provided with additional resources to curtail illegal entry.

Faced with increased pressure from those claiming asylum, governments have reacted in a similar fashion. The first stage is a reluctance to accept the true nature of the problem, which allows backlogs of asylum applications awaiting determination to lengthen to the point where, in the absence of adequate detention facilities, there is no realistic prospect of more than a small minority of those refused asylum being removed. Next comes legislation aimed at speeding up determinations together with vast increases in staff to process applications, with undertakings to clear backlogs and remove unworthy applicants within a set period. This rarely works, somewhere along the way an amnesty or something similar has to be brought into play and the entire cycle starts all over again.

Undeterred by what has happened in the past, politicians, invited to describe their immigration policies, will produce rhetoric about quotas, family unification and special skills together with undertakings to maintain a strict line on enforcement. They will have little or no chance of succeeding because, like their predecessors, they will neglect to provide

adequate control machinery for their policies. A more logical approach, and one which would have every chance of succeeding, would be to consider national objectives in conjunction with an effective enforcement strategy. In almost every country (Australia being a notable exception), radical restructuring of controls would be required, not surprising when most of the current ones were designed before commercial aviation existed and when migratory pressures were very different from what they are today.

Objectives would be likely to include some or all of the following: national security; protection of national culture and language; protection of domestic employment market; safeguarding welfare programs; pressure on public health care, housing, and education; projection of future population levels; attraction of foreign investment; need for special skills; importance of tourism; and foreign policy. Of these, language is usually overlooked, although it is the linchpin of national culture while it will be noted that family unification, the sacred cow of most policy statements, is omitted. This is not to say that family unification should be prohibited, but rather than be paraded as a government priority, that objective should only be allowed subject to qualifications, of which employment and adequate housing should be the minimum.

Once national objectives have been established, it is necessary to determine the type and location of controls necessary for their implementation, with some radical restructuring of traditional arrangements being necessary at the present time. Frontier controls have always been favored by countries like the United Kingdom and Australia, that are able to take advantage of their island position, while those with long land borders have been obliged to look to so-called internal controls, with their emphasis on hotel and police registration and in some cases, Identity Cards. In their present form, neither system can be said to be particularly effective. It would be difficult to find any logical reason for the requirement in the United Kingdom to complete landing and embarkation cards or within Continental Europe for maintenance of hotel registration. Both frontier and internal controls may have a future, but it is likely that this will be in a support role to pre-entry controls rather than as "stand alone" systems.

The most revolutionary change, already well under way, will see the transfer of activity from airport arrivals to airline check-in desks at departure points, as governments concede that once an inadmissible passenger has boarded an aircraft, he or she stands an excellent chance of achieving settlement, particularly where movements are organized by criminals able not only to provide forged or falsified travel documents,

but also to arrange for them to be collected during the flight. The end product of an undocumented passenger applying for asylum is threatening to defeat conventional control arrangements and in the long run to render immigration programs worthless. In these circumstances, it is necessary to prevent the inadmissible passenger from boarding the aircraft.

The essential first step is a visa requirement for those desiring to migrate to foreign countries, in conjunction with penalty legislation, although the consequence of what is proposed would be avoidance of fines by carriers. Visas are of little value, however, unless they are issued only after due consideration by qualified staff. What is required is extension of the United Kingdom model of transferring Immigration Officers from arrival airports to diplomatic missions abroad. The highest level of forgery safeguarding is also necessary. In order to assist carriers to check travel documents, control authorities have introduced training sessions abroad and in some cases have seconded document specialists to overseas airports.

The next step will be to coordinate visa requirements, document checks prior to boarding and the presence of document specialists to ensure that as many passengers as possible can be given full immigration clearance in advance of departure. The means of doing this are already available through the machine readability of passports and visas. Advance Passenger Information, the use of optical character recognition to capture data from travel documents at check-in and to transmit it to control authorities is already applied to around fifty percent of all trans-oceanic flights to the United States; the logical progression will be for the speed of transmission to be increased to allow information to be acted upon before passengers board the aircraft. Where checks give rise to doubts about a passenger's admissibility, the presence of a control authority representative will enable these situations to be resolved. The final safeguard will be a second document check at the departure gate to eradicate the possibility of post check-in impersonation. In this way, entire flights will be able to pass through arrival airports with minimal checks or none at all.

These pre-entry controls will need to be supplemented by equally radical changes after entry enforcement. Three essential requirements are comprehensively enforced employer sanctions, full exchange of information from central and local government departments to control authorities, and most importantly, the provision of sufficient detention accommodation to ensure that the majority of offenders are not left to their own devices while awaiting consideration of their cases. If persons

awaiting consideration of their cases are unable to gain access to employment, welfare benefits, housing and education, there is every prospect that many of them will not take the trouble to attempt to gain entry. The Norwegian experience is relevant. The majority of inadmissible passengers and asylum seekers are housed in camps where the accommodation and food are of a reasonable standard. Lawyers are provided free of charge by the State but no benefits are paid and employment is prohibited. In the five years since 1988 there were 22,000 asylum seekers in Norway, the next lowest European total being Denmark with 33,000. In the United Kingdom where there is a presumption of release from detention there were 121,000.

The genuine asylum seeker will fare better under the new arrangements. At present, one who is obliged to travel with a forged or falsified travel document may find boarding denied by a carrier anxious not to attract a fine. Any possible miscarriage of justice can be avoided by implementing two measures. First, all countries which are signatories to the 1951 Convention should allow asylum applications to be made at diplomatic posts overseas. Second, the presence of a control authority document specialist at the departure airport would enable a claim to be recorded even where boarding is denied. In cases where there is evidence of a danger to life, the carrier could be authorized to transport the passenger without penalty.

In conclusion, the answer to the original question is that apart from the introduction of safeguards to ensure that genuine asylum seekers are not turned away, policy towards them should remain as it is. But maintaining the status quo will become progressively more dependent on controls being made sufficiently effective to enable immigration programs to be maintained. If this does not happen, the genuine asylum seeker is likely to be among the first to suffer.