

## MODERN SANCTUARY

TERESA SUTTON LLB

Solicitor, Lecturer in Law, University of Westminster

The history of the ancient concept of sanctuary has been discussed in the pages of this Journal in earlier volumes.<sup>1</sup> In response to Professor Baker's article, Fr Robert Ombres, O.P. wrote to the Journal<sup>2</sup> to inform readers that sanctuary had recently been used in America and Britain. The use of this 'modern sanctuary' has been the subject of some lively discussion at a recent London meeting and in Cardiff amongst the Canon Law LLM students.<sup>3</sup> This article seeks to address some of the contemporary issues regarding the modern use of sanctuary in Britain and continental Europe today.<sup>4</sup>

After more than a century of continual reform the privilege of sanctuary was finally abolished towards the end of the reign of James I. Statute provided that '... by the authority of this present parliament, That no Sanctuary or Privilege of Sanctuary shall be hereafter admitted or allowed in any Case.'<sup>5</sup> It has been suggested that this statute abolished the procedural right, rather than the substantive right to sanctuary, as the statute only refers to sanctuary being used as a plea in cases.<sup>6</sup> The nature of the privilege itself, the period of reform that preceded the statute and the circumstances in which the statute was passed would not appear to support this interpretation.<sup>7</sup> In spite of the continued use of some 'pseudo-sanctuaries', after 1624 the privilege of sanctuary does not appear to have any legal basis in secular law. A claim to the privilege did survive in a limited form within the canon law of the Roman Catholic Church until 1983. The Canon Law Code of 1917 declared that '... a church enjoys the right of asylum, so that guilty persons who take refuge in it must not be taken from it, except in the case of necessity, without the consent of the ordinary, or at least the rector of the church.' This provision was not included in the revised 1983 Code.<sup>8</sup>

The modern sanctuary movement originated in America in the 1970s. By the mid 1980s hundreds of churches had declared themselves to be public sanctuaries for Central American refugees who were fleeing from violence and torture at home. The aim of the movement was to provide protection for the refugees until they could return home safely and to challenge perceived injustices in the immigration laws. Such activities led to undercover surveillance operations at churches by government representatives and prosecutions against some sanctuary workers.<sup>9</sup>

Renewed use of sanctuary in Europe, albeit in a somewhat different form to America, was the direct result of the American movement. The first public church sanctuary in Britain occurred in 1985 and since then there have been more than a dozen cases.<sup>10</sup> These modern sanctuary seekers are wanted for deportation as illegal immigrants, not for any

<sup>1</sup> J. H. Baker, 'The English Law of Sanctuary' (1990) 2 Ecc LJ 8. T. Field, 'Biblical Influences on the Medieval and Early Modern English Law of Sanctuary' (1991) 2 Ecc LJ 222.

<sup>2</sup> (1990) 2 Ecc LJ 121.

<sup>3</sup> 'Sanctuary Past and Present' presented by the author at the London meeting on 12th July 1995 and as a lecture in Cardiff on the LLM programme on 15th July 1995.

<sup>4</sup> The author is grateful for the comments made on the paper but wishes to emphasise that the opinions expressed in this article are her own and do not necessarily represent those of either discussion group.

<sup>5</sup> 21 Jac. 1. c. 28, s. 6 & 7 (1623-4).

<sup>6</sup> W. C. Ryan, 'The Historical Case for the Right of Sanctuary' (1987) *Journal of Church and State* 209-232, 229.

<sup>7</sup> Sanctuary was often used as a means of preventing a trial unlike benefit of clergy which was used as a plea at trial.

<sup>8</sup> Letter from Fr Robert Ombres O.P. (1990) 2 Ecc LJ 121. W. R. Jones, 'Sanctuary, Exile, and the Law: The Fugitive and Public Authority in Medieval England and Modern America' in *English Law and the American Experience* E. A. Cawthon and D. E. Narrett eds., (Texas, 1994), 35.

<sup>9</sup> For information on the American sanctuary movement: I. Bau, *This Ground is Holy* (New Jersey, 1985).

<sup>10</sup> Churches Commission for Racial Justice Discussion Paper (CCRJ), *The Churches, Immigration Law and Sanctuary* (1995).

criminal trial. In Britain, modern sanctuary has been used to give the sanctuary-seeker a temporary safe haven in the hope that the Home Office will review and reconsider particular cases often on humanitarian grounds such as family ties or health. As the Catholic Archbishop of Milwaukee has said '[s]anctuary is not an avoidance of justice, but a holy respite so that justice may eventually be done.'<sup>11</sup>

The most notorious case of modern sanctuary in Britain is that of Viraj Mendis who took refuge in the Church of the Ascension in south Manchester. Mendis came to Britain in 1973 to study at university in Manchester. He stayed beyond his leave granted to October 1975, but was not interviewed by police until May 1984. On 18 December 1986 the Secretary of State made a deportation order and on 20 December Mendis took sanctuary. Mendis claimed political asylum on the grounds that if he was returned to Sri Lanka he would be persecuted for his political beliefs and activities. The case received significant media attention which produced both support and criticism of the sanctuary. Some of the criticism centred upon the merits of Mendis' own case. Others within the Church questioned the wisdom of the use of sanctuary in the first place.<sup>12</sup> In a change of policy by the Home Office, Mendis was taken from sanctuary on 18 January 1989. Police officers and immigration officials were obliged to use sledgehammers and hydraulic equipment to enter the church. Mendis was deported to Sri Lanka two days later from where he subsequently travelled to Germany.

The Mendis sanctuary is an emotive subject. The media attention it received between 1986 and 1989 has often meant that it dominates any discussion of modern sanctuary in Britain and obscures other cases. Another instance of sanctuary by Salema Begum, which also occurred in 1986, is one of a number of cases which have resulted in reconsideration by the Home Office. Salema's family had come to Britain in 1973 from Bangladesh but Salema had been left with her grandmother in Bangladesh. When Salema was thirteen she visited Britain to see her family after her grandmother became ill. Whilst she was in Britain, her grandmother died and Salema asked to stay. The Home Office refused and said that she should return to Bangladesh, whereupon Salema took sanctuary at the Chorlton Baptist/United Reformed Church in South Manchester. Eleven days later indication was received that the case would be reconsidered and Salema left sanctuary. After blood tests she was granted permission to stay indefinitely.<sup>13</sup>

The Home Office has consistently taken the view that there can be no recognition of a right to sanctuary. Those involved in modern sanctuary appear to have accepted that modern sanctuary in Britain has no legal basis, but seek instead to rely on a moral and theological platform. Modern sanctuary has been justified in two ways. First, on humanitarian grounds the plight of an individual sanctuary seeker may compel a believer to act. A working party of the Committee for Community Relations of the Roman Catholic Bishops' Conference for England and Wales in 1988 stated that:

[b]ecause the right of free movement and other rights are often not sufficiently recognised in the immigration policies of states, illegal immigrants may often be victims of unjust law. They may be morally justified in evading repercussions of their illegality and others may be morally justified, or even obliged, to assist them. In such a context the increasing phenomenon of sanctuary can be understood as an authentic expression of morality and Christian principle.<sup>14</sup>

Similar expressions of concern have been made by a number of Christian denominations

<sup>11</sup> P. Weller, *The Multi-faith Dimensions of Sanctuary in the United Kingdom* (1989) 17 Pamphlet Library No. 21 Centre for the Study of Religion and Society, University of Kent at Canterbury.

<sup>12</sup> One Minister of State observed that Mendis' '... participation in political opposition to the Sri Lankan government, and his willingness to be identified in that cause, increased quite disproportionately after he had been obliged by circumstances to make an application for political asylum.' [1988] Imm AR 12. R. Cohen, *Frontiers of Identity: The British and Others* (London, 1994), 148.

<sup>13</sup> Community and Race Relations Unit of the British Council of Churches (CRRU), *Why Sanctuary?* (1989). This booklet contains details of a number of cases.

<sup>14</sup> *Briefing* (20 January 1988) 31–39, 39.

and other faiths.<sup>15</sup> Second, sanctuary has been perceived as a means of protesting against an unjust law that needs to be reformed.<sup>16</sup> Concerns about immigration law and practice have been expressed by the churches for over thirty years.<sup>17</sup>

The need for provision for asylum is recognised in international law. The Universal Declaration of Human Rights (1948) provides in Article 14 (1) that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'<sup>18</sup> The United Kingdom opposed the original draft of the Article which would have gone further and included a right to be granted asylum.<sup>19</sup> In addition to Article 14, Article 16(3) provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and State.' The International Covenant on Civil and Political Rights (1966) and the European Convention on Human Rights (1950<sup>20</sup>) do not include a right to seek asylum. However, the European Convention on Human Rights does include other rights which may operate to prevent the return of persons to countries where they could be subject to persecution.<sup>21</sup> The Convention Relating to the Status of Refugees (1951) also requires protection to be provided for refugees. A refugee is defined as a 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.<sup>22</sup>

The methods used to determine refugee status in the United Kingdom<sup>23</sup> have led to some criticism and in exceptional cases, such as that of Viraj Mendis, to instances of sanctuary as a last resort. Some have questioned whether the current United Kingdom policy<sup>24</sup> complies with the spirit of international agreements.<sup>25</sup> If the policy does not so comply then there is further support for the moral arguments behind modern sanctuary.

A key issue for modern sanctuary is whether the practice of offering sanctuary is in itself illegal. The seventeenth century statute which abolished the privilege did not penalise anyone purporting to offer refuge. It simply withdrew the privilege. Those offering modern sanctuary have not been claiming any privilege in terms of a right to refuse entry to the sanctuary. Indeed it has been expressly stated that a sanctuary seeker could be taken at any time.<sup>26</sup> Whilst sanctuary workers in America were prosecuted in the late 1980s, there have been no such steps in Britain. Any possible prosecution would be likely to be based on the offence of harbouring under the Immigration Act 1971. S 25(2) creates two offences: harbouring a person knowing or with reasonable cause to believe that they are an illegal entrant and harbouring a person knowing or having reasonable cause to believe that they are an overstayer.<sup>27</sup> Case law suggests that 'harbouring' simply means

<sup>15</sup> CRRU, *Why Sanctuary?* 29.

<sup>16</sup> For general discussion on Christian opposition to unjust law: S. G. Mackie, *Civil Disobedience as Christian Obedience* (London, 1983).

<sup>17</sup> CCRJ, *The Churches, Immigration and Sanctuary* 1.

<sup>18</sup> Article 14(2) provides that '[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

<sup>19</sup> A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others* (London, 1990), 280.

<sup>20</sup> Together with subsequent Protocols.

<sup>21</sup> P. Sieghart, *The International Law of Human Rights* (Oxford, 1983), 190. D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford, 1993), 328.

<sup>22</sup> 1 A(2).

<sup>23</sup> For information on practice: I. A. MacDonald and N. J. Blake, *Immigration Law and Practice in the United Kingdom* (London, 1991), 290.

<sup>24</sup> This issue is also relevant for the discussion of the use of sanctuary in other European countries included later in this article.

<sup>25</sup> CRRU, *Why Sanctuary?* 24.

<sup>26</sup> CCRJ, *The Churches, Immigration and Sanctuary* 23.

<sup>27</sup> For general information: M. Supperstone and D. O'Dempsey, *Immigration: The Law and Practice* (London, 1994).

to give shelter. If a defendant knows that the person is an illegal immigrant there is no need to show an additional intention to evade the police or immigration authorities.<sup>28</sup> It has been suggested that public sanctuary, unlike private sanctuary,<sup>29</sup> does not constitute harbouring because the sanctuary is open and the sanctuary seeker can be removed at anytime. On balance it would appear that prosecution of those offering sanctuary is theoretically possible in some unsuccessful instances of sanctuary on the basis of current case law, but is extremely unlikely in practice given the circumstances in which shelter is offered. The position is unlikely to be clarified in the absence of a trial. The issue of illegality and possible prosecution is not discussed in the most recent paper from the Churches Commission for Racial Justice.<sup>30</sup> From the lawyer's perspective this issue is a crucial one, delineating the legal protest from the illegal act.

The use of modern sanctuary in Britain has been minimal compared to its use in other European countries such as the Netherlands and Germany. The INLIA (International Network of Local Initiatives with Asylum-seekers) is based at Groningen in the Netherlands. The INLIA is itself active in offering sanctuary within the Netherlands. It is estimated that within the last seven years they have been involved in about two hundred sanctuary actions locally.<sup>31</sup> The INLIA also have responsibility for the Groningen Charter which dates from 1987. The Charter has been signed by over seven hundred churches<sup>32</sup> and pledges the signatories to offer sanctuary in appropriate cases and provide mutual support. The importance placed on the role of sanctuary is emphasised by section three of the Charter:

When we have good reason to assume that a refugee or asylum-seeker, threatened with deportation, is not being given humanitarian treatment, or that decisions are being taken that may seriously affect the quality of his or her existence, we pledge ourselves to take in and protect him or her until a solution has been found that is acceptable to all parties concerned. We will not avoid open confrontation with our governments or direct action of solidarity and protest when in our opinion the situation requires it.<sup>33</sup>

In Germany estimates for May 1994 suggested that there were thirty sanctuaries with one hundred and seventy refugees in them. During the ten years prior to May 1995 two hundred churches had been involved in giving sanctuary to two thousand refugees. Sanctuary has also been used in France, Switzerland, Belgium and Sweden.<sup>34</sup>

Just as the Churches Commission for Racial Justice in Britain has expressly not claimed a legal privilege of sanctuary, so too have the Churches in the Netherlands and Germany accepted to date that there is no legal institution of sanctuary. However, a statement by the Dutch Council of Churches, *Church Sanctuary*,<sup>35</sup> notes that the church institutions offering sanctuary have 'such moral authority' that sanctuary has never been violated in the Netherlands. From this the Council observes that '... when Church communities, *de facto*, offer sanctuary this is accepted by the government.' In the wake of the Mendis case, this is a contrast to the position in Britain. The Dutch Council of Churches specifically recognises the jurisdiction of the State but perceives sanctuary as a means of protest; '... Church sanctuary has a symbolic value. When Church communities offer

<sup>28</sup> Archibold, *Criminal Pleading, Evidence and Practice* (London, 1994) 25–158. *R. v. Mistry*, *R. v. Asare* [1980] *Criminal Law Review* 177.

<sup>29</sup> Where a person is hidden or 'goes to ground' within the private house of an individual.

<sup>30</sup> CCRJ, *The Churches, Immigration Law and Sanctuary*.

<sup>31</sup> R. Mason and D. Forbes, *Nearest Place of Safety* (Brussels, 1994) Quaker Council for European Affairs 55.

<sup>32</sup> Two hundred within Holland. Some signatures are representative of a number of churches. Mason and Forbes, *Nearest Place of Safety* 55.

<sup>33</sup> CRRU, *Why Sanctuary?* 42.

<sup>34</sup> Mason and Forbes, *Nearest Place of Safety* 56–59.

<sup>35</sup> Dutch Council of Churches, commissie justitia et pax nederland, *Church Sanctuary* (1993). I am grateful to The Rev. Mr. Haslam at the Churches Commission for Racial Justice for providing this and *Assistance not Resistance*.

sanctuary they do not threaten the legal system, rather they challenge it, they enter into dialogue with it, and call for innovation.’ The Council recommends some considerations to be taken into account by churches thinking of offering sanctuary. These include suggestions that the sanctuary should only be of a temporary nature and that sanctuary should only be used where there is a ‘real chance’ of the asylum-seeker being granted a right to stay.

The German position is more complicated, perhaps because asylum is more of a political issue in Germany. Germany’s asylum laws have been considerably tightened over the last couple of years and almost ninety-five percent of asylum seekers are now rejected.<sup>36</sup> Support groups have been set up and members of both the Catholic and Protestant Churches have expressed support for sanctuary.<sup>37</sup> However, the most recent discussion document from the Executive Council of the Protestant Church, *Assistance Not Resistance*,<sup>38</sup> has taken a cautious tone. The document notes that the church will ‘respect and stand up for a conscience bound by the word of God’ and acknowledges the value of some acts aimed at bringing about reconsideration of meritorious cases. However, it also expresses the view that an individual must bear the consequences of his or her act where it is illegal: ‘[t]hose who decide to do what is forbidden by law on conscientious grounds, after carefully examining the circumstances and the legal situation, have to take sole responsibility for this and bear the consequences themselves.’

In spite of criticism following the Mendis case, sanctuary has continued to be used in Britain. Some have suggested that the survival of sanctuary is entirely due to the reluctance of the authorities to enter places of worship.<sup>39</sup> There is one current public sanctuary in Britain<sup>40</sup> at the Downs Baptist Church in Hackney where the Ogunwobi family has been sheltering for fifteen months. The family face deportation to Nigeria after being in Britain for ten years. The Home Office are being asked to reconsider the deportation on humanitarian grounds as it is believed that some specialist medical facilities needed by the children will not be available in Nigeria.

Modern sanctuary in Britain appears set to become an important contemporary issue. The Churches Commission for Racial Justice has been very active in its effort to highlight perceived injustices in the current immigration law. In 1994 the Commission published ‘*Breaking up the Family*’, discussing examples of injustices and in 1993/4 formulated a proposal for an amnesty for those who have been in Britain for more than five years with a child over two born and brought up here. The amnesty idea has not been accepted for discussion by the government. In the absence of any other progress, in May 1995 the Commission published a new paper, ‘*The Churches, Immigration and Sanctuary*’, which has adopted a somewhat revised position on sanctuary. The Commission has declared itself willing to give its ‘... full support to those in local churches and communities who feel constrained by conscience to offer sanctuary to those facing deportation ...’ provided that sanctuary is a last resort and one of three conditions is satisfied. These conditions are that there is a well founded fear of persecution, a serious threat to family life or there would be a basic denial of justice and compassion.<sup>41</sup> The current policy on asylum in Britain appears to be becoming more restrictive. In 1994 eight hundred and twenty-five people were granted refugee status compared to one thousand five hundred and ninety in 1993. The number of applications received for asylum had increased by ten thousand from 1993 to 1994. The government has also indicated that further restrictions are to be announced.<sup>42</sup>

<sup>36</sup> ‘Churches Take on Bonn Over Asylum-seekers’ *International Herald Tribune* (18 June 1994).

<sup>37</sup> Mason and Forbes, *Nearest Place of Safety* 56.

<sup>38</sup> EKD Bulletin No. 4, *Assistance Not Resistance* (1994).

<sup>39</sup> *The Daily Telegraph* (6 May 1995).

<sup>40</sup> As at July 1995.

<sup>41</sup> The paper has been commended to churches for discussion and comment. Copies are available from CCJR, Interchurch House, 35, Lower Marsh, London, SE1 7RL.

<sup>42</sup> ‘Howard Acts to Stem Asylum Seekers’, *The Times* (1 July 1995).

Experience in other European countries has suggested that as asylum-seeking is restricted the use of sanctuary can increase. In view of the current government policy on asylum and the increased willingness of the Churches to support provision of refuge, the concept of sanctuary appears to have life left in it for a little longer. Increased use of sanctuary may result in a reconsideration of more cases or it may trigger a renewed clamp down on the practice. In the meantime, those called upon to advise in situations concerning sanctuary will need to make a careful consideration of both the legal and the moral issues involved.