

‘Take Back Control?’

The Legal Constraints on the UK Government’s Ability to Control Immigration: A Very Different Story

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CONTENTS

EXECUTIVE SUMMARY	4
THE PROLOGUE	8
‘TAKE BACK CONTROL’?	8
GURECKIS, THE RULE OF LAW AND LEGAL CONSTRAINTS	10
SCENE 1 – THE EU (FROM A DIFFERENT ANGLE)	11
BEFORE BREXIT – THE UK’S OPTIMUM OPTIONALITY	11
EU FREE MOVEMENT: LEGAL CONSTRAINTS AND POLITICAL CHOICES	14
SCENE 2 – THE WORLD (IN A DIFFERENT LIGHT)	21
INTERNATIONAL LAW: BARK VERSUS BITE	21
THE GAPS IN INTERNATIONAL MIGRATION LAW	25
INTERNATIONAL LAW STRIKES BACK ... ?	29
THE UK AND FORTRESS EUROPE: A MUTUALLY BENEFICIAL ARRANGEMENT	32
THE UK AND REFUGEES: A STRICTLY ARM’S LENGTH ARRANGEMENT	35
THE DYSTOPIAN GAME SHOW	39
SCENE 3 – BACK AT HOME	42
WELCOME TO THE UK: THE IN-COUNTRY LEGAL WEAPONS DEPLOYED AGAINST IMMIGRANTS	42
SCENE 4 – THE LONG GOODBYE	48
PARTING IS NOT SUCH SWEET SORROW	48
SCENE 5 – BACK AT THE REAL WORLD	54
LAW GRABS THE HEADLINES, ADMINISTRATION GRABS THE SPOILS	54
FEES AND CHARGES: MUNDANE BUT HIGHLY EFFECTIVE IMMIGRATION CONTROL	61
LEGAL CONSTRAINTS REVISITED	64
THE PROOF OF THE PUDDING	67
SCENE 6 – AN ANNUAL MIGRATION REPORT: A NEW ERA	72
CONCLUDING THOUGHTS	77

It has been widely argued that legal constraints on the UK Government's scope for action are largely to blame for the perception that immigration into the UK has not been appropriately controlled. In fact, the Government can -- and does -- exercise far greater control over immigration than is commonly perceived. What might the impact be if this were made clearer to the public?

EXECUTIVE SUMMARY

Reactions to the treatment of members of Windrush generation by UK immigration authorities suggest that many of the UK public were largely ignorant of the practical implications and consequences of the immigration controls exercised in their name. Yet understanding what immigration controls are exercised - and the consequences and limits of those controls - is fundamental to any decisions about the UK's future immigration policy. Despite the importance of understanding the British state's legal powers here, even many those who say they want an open and honest debate about immigration are silent on this topic¹.

The impression given to the public by politicians of all hues has been of an immigration system that is out of control. Successive UK governments have failed to build confidence that their immigration policies properly serve the interests of the UK public². The "out of control" narrative also suggests that even when the Government does try to act in those interests, it faces an endless, fruitless war against international law, EU free movement rules and human rights lawyers. Not surprisingly, many members the public react to these messages by saying that they have lost trust in politicians, and lost faith in the fairness of the system.

This report does not deny the existence of legal constraints on the freedom of the UK Government to manage migration³. Nor does it deny the sometimes dysfunctional day-to-day management of the UK immigration system that has been frequently reported, in most detail by the Chief Inspectors of Borders and Immigration⁴.

But this report does argue that these things should not obscure the wider fact: the UK Government can, and in many areas does, exercise a huge amount of legal and administrative control over immigration. And for the most part, this control dwarfs the legal constraints that the Government itself is under.

¹ House of Commons Home Affairs Committee, 'Immigration policy: basis for building consensus' (12 January 2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/500/50002.htm>.

² *ibid.*

³ Quite a bit has been written on the different technical definitions of a migrant and an immigrant. In particular see Bridget Anderson and Scott Blinder, 'Who Counts as a Migrant? Definitions and Consequences' (The Migration Observatory, 17 January 2017) https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Who_Counts_Migrant.pdf. But this Report uses 'migrant' simply as person moving across a border other than for the purpose of visit, and an 'immigrant' simply as a migrant from the perspective of the receiving country.

⁴ Oliver Wright, 'John Vine: What's gone wrong with immigration - by a man who should know', *The Independent* (4 August 2014) <https://www.independent.co.uk/news/uk/politics/john-vine-what-s-gone-wrong-with-immigration-by-a-man-who-should-know-9647820.html> although there is also evidence that in respect the "sometimes" may be less often than it was: David Goodhart and Richard Norrie, 'The Border Audit: Is the UK border now fit for purpose? A post-Windrush review' (Policy Exchange, July 2018) <https://policyexchange.org.uk/wp-content/uploads/2018/07/The-Border-Audit.pdf>.

Far from being powerless to stop the flow of migration, Global North states, with the UK in the vanguard, have instead come to comprehensively dominate the legal battle over migration. The UK in particular has relentlessly exploited its privileged legal and geographical position, effectively sheltered behind continental Europe. It has been able to join many of Europe's increasingly aggressive attempts to keep away non-EU migrants, while opting out from any EU measures which purport to give rights to those migrants.

In terms of intra-EU migration, the UK has of course been constrained in its control by the right to free movement. But even here the real story has arguably been much more about the impact of political decisions and available controls not exercised – such as the timing of the opening up to the A8 countries' labour force, lack of registration of EU incomers, and lack of exit checks on EU outgoers – rather than the UK's hands being tied. And even here there have been a number of controls that the UK Government has, at least more recently, begun to exercise more aggressively against EU migrants, including restrictions on benefits and removal of EU citizens who have committed criminal offences.

Of course, EU legal constraints are not the only potential restrictions on the UK's immigration controls. Domestic law and international law also play an important part. But this is nowhere near as significant a role in constraining the UK Government as some⁵ seem to think. Indeed, arguably the opposite is true. Domestic law of course brings legal challenges, but not surprisingly gives the Government a large degree of leeway to manage migration in its own interests. And international law protecting migrants is so diffuse and full of gaps that nation states such as the UK have been able to effectively coopt this law to keep migrants away and deny them effective access to rights.

As a result, non-EU migrant workers have few rights in the UK, smuggled migrants are targeted in the name of anti-people smuggling efforts, and even refugees (who have the greatest protection at international law) are in practice largely kept at arm's length by the UK. The UK can largely decide on its own discretion which, and how many, refugees to admit.

The UK has not just piggybacked on, but also actively contributed to, the EU's own efforts in this regard. The EU has actively pushed out its effective external border, not just to the waters of the Mediterranean, but beyond, to Libya, and down into sub-Saharan Africa, cooperating with countries of origin and transit of migrants in order to keep migrant flows constrained and confined. It therefore should be no surprise that the Government's latest Brexit White Paper clearly demonstrates the UK's concern to maintain this position post-Brexit, referring to “a comprehensive, ‘whole of route’ approach that includes interventions at every stage of the migrant journey”⁶. Despite its commitment to end free movement, the Government appears keen for Britain to remain centrally involved in this aspect of EU migration policy and practice.

But the UK does not just exercise its migration management controls beyond the border and at the border. Within the border too, the UK has constructed the “hostile

⁵ Eg Robert Ford, Will Jennings & Will Somerville, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41:9 Journal of Ethnic and Migration Studies, 1391.

⁶ UK Government, 'The Future Relationship Between the United Kingdom and the European Union' (July 2018)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

environment” to seek to address the practical difficulties of removing unwanted migrants once they are here. This has not been done overnight, but has been decades in the making. Building on, and significantly extending, UN- and EU-level legal developments, the UK has dramatically increased the criminalisation of not only irregular migrants’ activities, but also of any assistance provided to them in the course of their entry and stay.

Despite the *legal* offensive aimed at migrants, it is arguably simple *administrative* weapons that are most effective in the UK’s control of (would be) immigrants; both when aimed at those beyond the borders – visa restrictions and carrier sanctions exercising effectively unchallengeable administrative control in preventing access to the country – and also when targeted at those within the borders – such as restricted access to legal aid, the UK’s introduction of non-suspensive appeal rights, immigration detention without time limit, and the often egregious cost of fees for regularising immigration status. Thus are many migrants in practice deprived of any remaining legal protections to which in theory they might still be entitled.

Look at the estimates of irregular migrants within our borders and compare them to the numbers who say they want to come. Look at the trajectory of carrier sanctions fines. Look at the number of deaths in the Mediterranean. Look the costs of people smuggling. All this evidence points to the fact that overall the UK exercises extremely effective control over immigration.

The House of Commons Home Affairs Committee has suggested that the public need better information about the Government’s approach to managing migration flows, and that this could be included in an Annual Migration Report which would detail on an annual basis “the measures taken by the Government to manage [migration] impacts and pressures.”⁷ We agree that one way or another there must be much greater transparency in this area. Without this information the public cannot properly put into context the other information on the management of migration that they will receive, or have any real context of how what has been achieved compares with what is achievable.

The Brexit White Paper hints at this information, but only for those already in the know as to what Frontex, Eurodac and the Khartoum Process actually are. The commitments in that paper are significant to an issue that many voters consider very important. Surely something that is so fundamental to the Government’s management of migration that it is included in the White Paper, (especially when it says so little else on immigration) is, is worth a clear explanation to the public? A high level summary in the Annual Migration Report, spelling out clearly and simply what are the immigration control measures that this country pursues, and the rationale behind them, but also the practical experience and limits to them, would leave the public much better informed about those controls exercised in their name. At the end of this Report ([p.72](#)) we therefore include our suggestion for such a summary.

What might be the impact of such plain-speaking transparency? What would happen if politicians took the time and trouble to explain to voters the full extent of the “control” that is exercised in their name? Some of the public may be pleasantly surprised. Some may be unpleasantly surprised. But the central point is that most would be surprised, and

⁷ Home Affairs Committee ‘Building Consensus’ (n 1).

all would be better informed. Greater transparency could significantly address the feelings of distrust and suspicion and perhaps start to address the concern that the Government is not doing enough to control immigration.

There are a number of other potential benefits too. High profile promises to “take back control” would at last be subjected to meaningful scrutiny. Rather than the immigration debate simply being a choice between different sorts of new restriction on entry, policymakers might be able to consider whether the best response to public opinion on immigration is to change policy or simply to better communicate existing policy. Being more transparent about the true extent and nature of the UK’s control of immigration would not only allow a more informed and balanced debate, but being more transparent about the often stark realities of the means of that control, but also the practical limits to it, would potentially create a real space to debate the actual, lived experience of immigration control.

Only when we have more open and honest acknowledgement of the extent of the Government’s control over immigration will we truly be able to have a fully informed and honest debate about the immigration policy that we want outside the EU. Honesty about the reality of immigration rules – the extent of legal controls but also the limits -- is also vital to prepare the public for the difficult facts of immigration life which almost certainly lie ahead for Brexit Britain. Honestly explaining the reality of immigration controls to the public is surely necessary to ensure Britain does not repeat its recent experience of allowing public anxiety and anger over misperceived immigration policies to build up, unchecked, to the point of political rupture.

THE PROLOGUE

‘TAKE BACK CONTROL’?

The Lesson of the EU Referendum

The EU referendum result is viewed as creating a reset moment for immigration policy in the UK⁸. Amidst the differing views of where to go from here, there at least seems to be some consensus that the UK public have very low levels of trust that the Government are managing immigration into the UK competently and fairly, and that what the UK public want more than anything is much greater transparency, information, openness, and accountability attached to the immigration system, and much greater confidence that there is control over immigration⁹. If the EU referendum vote demonstrated that a majority do not have this confidence, the prevailing sentiment is that the way to regain that confidence is to ‘take back control’, moving to a more restrictive and more toughly enforced immigration system which is ‘fairer’ and ‘more balanced’.

This ‘out of control’ mantra has become deep rooted, a self-reinforcing narrative told by politicians and the media across the political spectrum¹⁰. “A sense of population fluidity combined with very open access to the welfare state significantly exacerbates immigration-related anxiety, a feeling that nobody is really in charge of comings and goings and social entitlements”¹¹. It is hardly surprising that the public is confused and concerned. Or that every aspect of the system then seems to be framed in this light. So for instance the net immigration target is bad, because rather than creating confidence in the public’s mind the target has instead further bolstered the idea that immigration is out of control¹².

And the finger tends to point at the law as the source of the problem, even from those few who are at least willing to challenge the ‘out of control’ mantra¹³.

Legal Constraints to Blame?

Legal constraints on the Government’s freedom of manoeuvre have not only been blamed for the lack of control, but, worse, for actively generating bad policy. Seemingly thwarted by the law from taking action against some migrant groups, the Government has sought to demonstrate its responsiveness to the public mood by taking action where it can, often against more productive and popular groups. It is suggested that the Government “lacks

⁸ Sunder Katwala, Jill Rutter, Steve Ballinger and Ian Robinson, ‘Immigration After Brexit: Challenges for economic stakeholders’ (British Future, March 2017) <http://www.britishfuture.org/wp-content/uploads/2017/03/Fragomen.Final-report.pdf>.

⁹ Jill Rutter and Rosie Carter, ‘National Conversation on Integration: Final Report’ (British Future and Hope Not Hate, September 2018) <http://nationalconversation.uk/wp-content/uploads/2018/09/FINAL-2-national-conversation-september-report-2018-09-final.pdf>.

Also Oral Evidence of Mats Persson to Home Affairs Committee on Post-Brexit migration policy HC 857 (27 February 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/postbrexit-migration-policy/oral/79263.html>.

¹⁰ Myriam Cherti, ‘Does Immigration Enforcement Matter?’ (COMPAS, November 2014) <https://www.compas.ox.ac.uk/project/does-immigration-enforcement-matter-diem/>.

¹¹ Goodhart (n 4).

¹² Home Affairs Committee ‘Building Consensus’ (n 1).

¹³ Goodhart (n 4).

the discretion to be both ‘responsive’ and ‘responsible’”¹⁴. The Government’s action against the Windrush generation is Exhibit A in this category.

The law of immigration controls may seem a technical, academic matter. But it goes right to the heart of the immigration debate in the UK, because it goes to the question of control. And the approach to immigration policy in the UK that is rooted in a ‘take back control’ framework sees law, from asylum to EU free movement, as a key part of the problem, that has led to the current system being unbalanced and unfair. In the debate on the future of the UK’s immigration policy, an awful lot turns therefore on whether this fundamental claim – that the UK immigration system is out of control, and that the law is largely to blame – is correct?

Painting a Different Picture; the Real Reset Moment

This Report argues that this claim is not correct. That while it is true that there are legal constraints on the Government in dealing with immigration -- which are most visible in the legal thrust and counterthrust of individual cases at the micro level -- the impact of this is dwarfed by the amount of power that the law gives the UK Government to manage migration at the macro level. And the amount of control that the UK Government can, and largely does, now, exercise over not only who comes to the UK, but who can realistically come anywhere near the UK. But this Report also points out that the degree of control over immigration that many hold out to the British public is likely simply not practically achievable in the context of other aspects of British society.

The other mantra which has become equally prevalent, at least in the more considered reaches of in the current immigration debate, number one on the Home Affairs Committee’s wishlist, is that “Immigration policy should be informed by honest and open debate and supported by evidence ... challenging myths and inaccuracies about immigration and the asylum system ... to challenge misinformation and build trust, support and credibility”¹⁵. Yet there seems to be little interest in challenging myths and inaccuracies and misinformation around all that has been done to seek to control immigration, but also the extent of what is practically achievable.

This Report endeavours to remedy this, because only then can there really be an open and honest debate. This is fundamental to how the whole immigration debate is framed and understood. It could be potentially transformative in building understanding about what controls there are and how they are in fact exercised, potentially reestablishing trust between politicians and the public and reducing at least some of the anxieties around immigration.

And if control and the law are not the problem that has been painted, we must then ask the question why are so many intent on painting that picture? Asking that could be the real reset moment.

¹⁴ Ford, Jennings & Somerville (n 5).

¹⁵ Home Affairs Committee ‘Building Consensus’ (n 1).

GURECKIS, THE RULE OF LAW AND LEGAL CONSTRAINTS

Noone sitting through the *Gureckis* case¹⁶ at the High Court last November could be under any illusion that the rule of law in support of migrant rights is anything but alive and well in the UK. In a matter of just three days, the UK Government’s written policy of targeting EU rough sleepers for removal was torn up by Mrs Justice Lang. The Government confirmed that it would not appeal the judgment, but would instead amend its policy, with consequences for people beyond just the migrants whose test cases were at issue in the High Court.

Nothing would seem to better encapsulate the legal struggles of the UK Government in the immigration arena. Or better support the perception that legal constraints really do bite on the freedom of the UK Government to impose controls and manage immigration restrictions as the public would like¹⁷.

But, whilst they came together in this particular case, the rule of law and legal constraints on controls exercised against immigrants, are not the same thing. Take Denmark. Ranked number one in the world for rule of law¹⁸, “few other European countries have so significantly changed course with regard to their asylum and immigration policies as Denmark, from adopting the liberal Aliens Act in 1983 to becoming a self-declared hard-line state today”¹⁹. Tenth ranked is Australia, a country whose outsourced offshoring regime, on Nauru and Papua New Guinea, for incarcerating migrants attempting to arrive by sea has in practice proven so difficult to challenge through domestic legal channels that human rights advocates have resorted to seeking to bring Australia before the International Criminal Court, alleging that it has committed crimes against humanity.²⁰ Nor should it be surprising that the UK, ranked 11th, runs one of the largest immigration detention systems in Europe and is the only country within the EU that operates legally allowed indefinite detention of migrants.²¹

¹⁶ *Gunars Gureckis and others -v- Secretary of State for the Home Department* [2017] EWHC 3298 (Admin) <https://www.judiciary.gov.uk/wp-content/uploads/2017/12/r-gureckis-v-sshd-ors-20171214.pdf>.

¹⁷ Ford, Jennings & Somerville (n 5).

¹⁸ World Justice Project: Rule of Law Index 2017-2018

https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf.

¹⁹ Thomas Gammeltoft-Hansen, ‘Refugee policy as ‘negative nation branding’: the case of Denmark and the Nordics’ in Fischer and Mouritzen eds *Danish Foreign Policy Yearbook 2017* (Danish Institute for International Studies, 2017), 99.

²⁰ James Cavallaro, Diala Shamas, Beth Van Schaack, et al., ‘Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity’ (Stanford, 14 February 2017)

<https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/>

²¹ Global Detention Project, ‘Immigration Detention in the United Kingdom’ (11 October 2016) <https://www.globaldetentionproject.org/countries/europe/united-kingdom>.

SCENE 1 – THE EU (FROM A DIFFERENT ANGLE)

BEFORE BREXIT – THE UK’S OPTIMUM OPTIONALITY

But if the EU Return Directive²² prohibits indefinite detention of migrants, how come the UK allows this? Once again, Denmark lights the way:

“Legal geography plays an important role in this respect. Because of its opt-outs on justice and home affairs, Denmark enjoys greater freedom of manoeuvre in introducing sovereign deterrence measures than other member states.”²³

And so does the UK. At least pre-Brexit, the UK arguably enjoys a position of optimum optionality.

‘Fortress Europe’: The EU Builds its Defences against Immigrants

The Treaty of Amsterdam in 1997 (in force 1999) marked a decisive shift in immigration control at the EU level (EU free movement rights, ie internal immigration within the EU (rather than control of immigration from outside the EU) is a totally different regime, which we shall come to).

The Treaty of Amsterdam: For the first time the EU itself, rather than its nations states, became competent to pass binding law in the area of asylum/refugees and also on aspects of immigration by third country nationals from countries outside of the EU. This was the flipside of the integration for the first time of the Schengen system of internal borderless movement as a core concept of the EU. Thus was born the development of the EU Common European Asylum System (CEAS).

Fortress Europe: “Most change at the EU level has come from Member States collaborating to reduce numbers and increase enforcement action against illegal migrants”²⁴. Fixated on protecting the internal Schengen system at all costs through the securitization of the EU’s external borders with increasing border controls and technological surveillance²⁵, this has led to the development of so-called ‘Fortress Europe’. As the 2015 ‘migrant crisis’ escalated, the reimposition of not only internal border controls, but also the erecting of physical barriers across Europe²⁶, added to the obstacle course facing would be immigrants.

²² Council Directive 2008/115/EC of 16 December 2008.

²³ Gammeltoft-Hansen, ‘Denmark nation branding’ (n 19).

²⁴ Ford, Jennings & Somerville (n 5).

²⁵ François Crépeau, ‘Regional Thematic Study: Management of the External Borders of the EU and its Impact on the Human Rights of Migrants’ (Report of the UN Special Rapporteur of the Human Rights of Migrants, document number A/HRC/23/46, 24 April 2013).

²⁶ <https://www.reuters.com/investigates/special-report/migration/#story/38>.

Opt-Out/Opt-In: The UK Holds all the Aces

Notwithstanding all this, the UK though enjoys a special position in respect of the construction of ‘Fortress Europe’, because crucially it secured an opt-out (but with the freedom to opt-in) from each separate CEAS measure.²⁷

In the light of developments within the EU since the 2015 ‘migrant crisis’, with Hungary leading the way for an increasing number of EU states seemingly intent on ploughing their own restrictive furrow, one can certainly question²⁸ whether in practice “the EU has developed the ability to constrain radical restrictive asylum policies”²⁹. But even if the EU had constrained states in that way, that constraint has never applied to the UK.

Indeed, as was reiterated by the UK Government, this was the whole point of it negotiating the ability to remain outside the CEAS; in particular the UK’s concerns with the EU’s approach to the right of asylum seekers to work after a set period, the limits to fast track determination and removal procedures, and the restriction on the amount of time that asylum seekers could be detained³⁰.

The Opt-Out in Practice: The reason that the UK can run an immigration control system including the possibility of indefinite detention is that it opted out of the EU Return Directive³¹. And if one were describing how the UK has played its hand in this area, it is that, at least since the mid noughties, the UK has opted out of those legal instruments that have improved protections for migrants – the EU Reception Conditions Directive³², the EU Qualification Directive³³ and the EU Procedures Directive³⁴.

The UK is also outside of all of the EU measures on immigration from third countries.³⁵ These include the Long-term Residents Directive³⁶ and the Family Reunification Directive³⁷. The House of Lords EU Committee has argued that these “together provide an excellent foundation of rights for migrant workers in the EU ... assimilating the position of long-term third country nationals’ rights to that of migrant citizens of the Union”. But the UK Government’s response has been to move in the opposite direction, imposing minimum income, language skills and life in the UK knowledge requirements,

²⁷ Oral evidence of Sir Ivan Rogers to Home Affairs Committee on Post-Brexit migration policy HC 857 (12 June 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/postbrexit-migration-policy/oral/85010.pdf>.

²⁸ Some are now arguing that the EU common approach on asylum has so fundamentally broken down that it is no longer possible to reach collective EU agreements on this issue any more, and the way through the current impasse in Europe over asylum seeker arrivals ‘now may be a patchwork of political agreements bringing together different groupings of states’, in Catherine Woollard, Secretary General for the European Council on Refugees and Exiles, ‘The Story of the Summit: European solutions not EU solutions’ (ECRE Weekly Bulletin, 29 June 2018) <https://mailchi.mp/ecre/ecre-weekly-bulletin-29062018>.

²⁹ Ford, Jennings & Somerville (n5).

³⁰ Cathryn Costello and Emily Hancox, ‘The UK, EU Citizenship and Free Movement of Persons’ (The Migration Observatory, 1 May 2014) http://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Citizenship_Free_Movement.pdf.

³¹ Council Directive 2008/115/EC (n 22).

³² Council Directive 2013/33/EU of 26 June 2013.

³³ Council Directive 2011/95/EU of 13 December 2011.

³⁴ Council Directive 2013/32/EU of 26 June 2013.

³⁵ Costello and Hancox (The Migration Observatory) (n 30).

³⁶ Council Directive 2003/109/EC of 25 November 2003.

³⁷ Council Directive 2003/86/EC of 22 September 2003.

tightening the restrictions for third country nationals before they can apply for family reunification.³⁸

The Opt-In in Practice: Conversely the UK has opted in to legal instruments, and/or has sought to practically gain access to EU wide mechanisms that have sought to impose greater controls, or to share important data and information, on migrants.

These include the so-called Dublin Regulation³⁹, which determines the EU member state responsible for the examination of each asylum application and potentially allows asylum seekers to be returned to prior countries which they have passed through, as supported by the EURODAC fingerprinting database⁴⁰ (which system fingerprints asylum seekers at their first EU country of entry), the EU's Frontex border force and EUROSUR surveillance system. The UK has also opted in to the EU Facilitation Directive⁴¹ and the EU Anti-Trafficking Directive⁴² to seek to combat the smuggling and trafficking of migrants.

It is of course true that the UK has not been able to opt into every EU policing and security measure that it has wished to regarding immigration control. This is because in some cases other EU members can veto the UK's access, on the basis that particular measures are linked to the Schengen system, which the UK has refused to become a member of. But, despite this, the UK has nonetheless been able to gain access to important border control measures such as the continued development of the Frontex border control force and of the Dublin Regulation.

Access to EU Readmission Agreements: As an EU member state the UK is also *de facto* part of the suite of EU Readmission Agreements, with a wide range of migrant-producing countries around the world, from Albania to the Ukraine. These are part of the EU's machinery for returning irregular migrants back to the countries from whence they came, or potentially even transited through⁴³. We shall see later how challenging this can be in practice. But without these agreements it could be even more difficult. The UK has the benefit of the EU's Cotonou Agreement, concluded with 79 African, Caribbean and Pacific states, which represents the main cooperation agreement on readmission with significant migrant producing countries such as Nigeria, Guinea, the Ivory Coast and Gambia⁴⁴.

³⁸ Costello and Hancox (The Migration Observatory) (n 30).

³⁹ Regulation (EU) No 604/2013 of 26 June 2013.

⁴⁰ Regulation (EU) No 603/2013 of 26 June 2013.

⁴¹ Council Directive 2002/90/EC of 28 November 2002.

⁴² Council Directive 2011/36/EU of 5 April 2011.

⁴³ Benjamin Hulme and Miguel Tell Cremades, 'The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation' (Briefing to European Parliament, 6 February 2018)

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI\(2018\)596843_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI(2018)596843_EN.pdf).

⁴⁴ *ibid.*

Post Brexit: The UK and the EU CEAS

Post-Brexit, the UK’s access to Frontex⁴⁵, to EURODAC, to the EU readmission agreements (including Cotonou), in addition to the EU’s proposed new Entry/Exit System which will record details (including biometric data) of all third country nationals attempting to enter and leaving the Schengen area, are all in doubt.⁴⁶ But it is testament to how much the UK has stood to one side of the development of the EU CEAS -- and how little it is bound by it -- that some lawyers see Brexit as having minimal, if any, impact on the legal framework of the UK’s asylum regime⁴⁷.

Meanwhile issues of European law, such as the workings and possibility for reform of the Dublin Regulation, and the broader mechanism for refugee reallocation, that are threatening not only to tear apart the solidarity of the CEAS, but potentially even the EU itself⁴⁸, seem rather peripheral to the UK.

The Dublin Regulation: is potentially useful to the UK in terms of returning asylum seekers to other countries they have transited through. But in practice it has proven broadly neutral in terms of flows, as migrants that have been transferred out (as returns to first countries of arrival) have been largely balanced by migrants transferred in (under the right to family reunion). In any event, in terms of numbers, for the UK the impact has been minimal, mere hundreds being transferred on either side of the ledger⁴⁹.

All of this is therefore hard to square with the assertion that the EU legal, institutional and governance arrangements for dealing with asylum/refugees, flowing from the Treaty of Amsterdam, have been a constraining factor on the UK Government⁵⁰.

EU FREE MOVEMENT: LEGAL CONSTRAINTS AND POLITICAL CHOICES

What about the right of free movement within the EU? In the last decade, the assertion that the UK could not meaningfully constrain this right while remaining in the EU came to increasingly drive the UK public’s perception of immigration being out of control⁵¹. Most analyses suggest this perception was a key determinant of the outcome of the EU referendum; it was certainly the central theme of the Vote Leave campaign, whose slogan gives this Report its title.

⁴⁵ Ben Taylor, ‘Leaving the European Union: Frontex and UK Border Security Cooperation within Europe’ (House of Lords library, 25 April 2017)

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2017-0039#fullreport>.

⁴⁶ House of Commons European Scrutiny Committee, ‘Documents considered by the Committee on 29 November 2017’ <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-iii/30145.htm>.

⁴⁷ Colin Yeo, ‘The Impact of Brexit on UK Asylum Law’ (Lecture at the Refugee Law Initiative, 27 November 2017).

⁴⁸ Nick Squires and Peter Foster, ‘Italy’s new Eurosceptic government vows to work with Hungary to ‘change the EU’’ *The Telegraph* (5 June 2018) <https://www.telegraph.co.uk/news/2018/06/05/italys-new-eurosceptic-government-vows-work-hungary-change-eu/>

⁴⁹ Home Office ‘Immigration statistics, October to December 2017: How many people do we grant asylum or protection to?’ (21 March 2018) <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-do-we-grant-asylum-or-protection-to>.

⁵⁰ Ford, Jennings & Somerville (n 5).

⁵¹ William Allen: ‘A Decade of Immigration in the British Press’ (The Migration Observatory, 7 November 2016) <http://www.migrationobservatory.ox.ac.uk/resources/reports/decade-immigration-british-press/>.

The story of the last fifteen years has surely demonstrated that the UK Government has not only not been able to exercise control in this area, but also that this has had significant knock-on impacts on other areas of immigration. As Ford, Jennings & Somerville argue:

“They [the UK Government] have been unable to restrict the largest migrant stream causing public concern, labour migration from Eastern Europe, so they have been forced instead to pursue an escalating series of incremental restrictions against other forms of migration to demonstrate responsiveness.”⁵²

Welcoming the A8

Yet the same authors also point out that the crucial decision not to impose labour market restrictions on the eight countries that acceded to the EU in May 2004 was an active political decision⁵³. It was not a decision mandated by law. It is true that, due to the UK’s EU membership, transitional measures could only have delayed the unrestricted access of A8 labour for seven years. But this highlights the fact that it was arguably the political decision around the timing which was the key driver of the ultimate impact.

For two reasons. Firstly, it coincided with a period of strong UK economic growth that sucked in A8 labour. Secondly, because, while the potential impact of this move was considered, crucially the predictive model was based on the assumption that all existing EU countries would open up their labour markets to the A8 labour force at the same time⁵⁴. Whereas in fact only two other countries did so; and one of those, Sweden, had in place significant domestic labour market constraints that arguably materially checked the flow of migrants there⁵⁵.

It is not possible to know what the outcome would have been if the UK had not opened up its labour market to the A8 at that time, ahead of other EU countries. But there is surely a strong case that legal constraints, while providing the overlay, were not the prime cause of the outcome. And, rather, that political decisions and flawed predictive analysis were.

Rights, Restrictions and Controls

So central has the EU free movement right become to the idea of legal constraints on the UK Government’s ability to manage immigration that most people seem unaware of the actual legal constraints on the right of free movement itself – the requirement under the Citizens Directive⁵⁶ that in order to lawfully stay in another EU member state EU citizens must be exercising *treaty rights*.

In essence, this means that EU citizens who wish to stay in another EU member state for more than three months can only do so if they are employed or have some other means to

⁵² Ford, Jennings & Somerville (n 5).

⁵³ *ibid*.

⁵⁴ Erica Consterdine, ‘One Step Forward, Two Steps Back: Evaluating the Institutions of British Immigration Policymaking’ (Institute for Public Policy Research, April 2013) https://www.ippr.org/files/images/media/files/publication/2013/04/one-step-forward_immigration-institutions_Apr2013_10679.pdf.

⁵⁵ See the discussion of Sweden’s experience of labour market regulation of wages in practice restricting low skilled immigration from the EU; in Harvey Redgrave ‘Balanced Migration: A Progressive Approach’ (Institute for Global Change, 28 March 2018) <https://institute.global/insight/renewing-centre/balanced-migration-progressive-approach>.

⁵⁶ Council Directive 2004/38/EC of 29 April 2004.

support themselves without recourse to the state. This condition is hardly surprising. The UK is not the only EU country with a welfare system and social benefits, and there is no reason why many other EU countries would not also have the same concern about EU immigrants from other countries having access to those systems.⁵⁷

Gureckis Revisited: Without this understanding it is easy to misinterpret, and misrepresent, cases such as *Gureckis*. This case most certainly did not say that EU citizens could not be removed even if they were rough sleeping. What it did do was to reiterate that whether EU citizens can be removed depends on whether or not they are exercising their treaty rights, not what their accommodation arrangements are. And the Government's problem in court was that the evidence suggested that their policy, and actions pursuant to it, had focused on the latter rather than the former⁵⁸. So yes the Government came up against legal constraints in this case, but the problems it faced were mostly of its own making.

Free Movement versus Free Stay

Such was the heat of the EU referendum that the smoke obscured the true context of EU free movement rights. A prime example was David Cameron's statement implying that he had wrung out of Brussels a concession that EU citizens who came to the UK but were out of work could not claim unemployment benefit, and after six months of being out of work would then have no continuing right to stay:

*"There are good ways to control migration and there are bad ways. A good way is doing what I did in my renegotiation, which of course hasn't come into effect yet and will if we vote to stay in the European Union, which is to say to people if you come to our country first of all you don't claim unemployment benefit, second of all after six months if you haven't got a job you have to leave."*⁵⁹

This omitted to make any mention that the UK's implementation of EU law on this point already provided for just that. Or that EU citizens coming to the UK who are not in work could not claim Jobseeker's Allowance for the first three months that they are in the UK and, if for any period of six months they are without a job, have no realistic possibility of finding one and require support from the welfare system, then they have no further entitlement to stay.⁶⁰

EU free movement rights are not, and never have been, free stay rights. Yet the then Prime Minister made no effort to explain this to the public. Indeed, his statement suggested the very opposite, and that only his own last minute, heroic effort had managed to extract this concession.

⁵⁷ And they do have the same concern, around access to these benefits; but not though about the free movement right as such. See for instance Eurobarometer 71 (European Commission, January 2010) http://ec.europa.eu/commfrontoffice/publicopinion/archives/eb/eb71/eb713_future_europe.pdf.

⁵⁸ *Gureckis* (n 16).

⁵⁹ As quoted in 'Reality Check: Do EU jobseekers have to leave if they can't find work after six months?' *BBC* (3 June 2016) <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36449974>.

⁶⁰ *ibid*.

In reality, when it comes to the law of EU free movement rights as implemented in the UK, the UK has pushed back increasingly hard. And as a matter of practice, while of course it may have liked to do more⁶¹, the UK has been able to place a number of restrictions on the entitlements to benefits even of EU migrants who are lawfully here, even where those restrictions or requirements have been arguably on the edge of what is legally allowed⁶². A prime example being the view the UK has taken that in order to be viewed as exercising treaty rights “economically inactive immigrants must have private health insurance”⁶³.

What has been triply damaging though has been the reticence of politicians⁶⁴ since the referendum to speak up about the true nature of EU free movement rights. Perhaps some are wary of highlighting the facts in a way that might be seen as disrespecting the “will of the people” who have indicated that they do not like (what they believe to be) EU free movement rights. But this is exactly why it is important to address this issue. Because if those rights are now going to be replaced by something else, in order to sensibly develop that something else we need to understand what we are replacing. Telling the real legal story of EU free movement rights is crucial in understanding and reaching consensus on how, why, and to what extent we might want to change them.

The UK an Outlier

And in telling that story it is also important to make the distinction between what the UK Government does/did do in terms of the controls it exercises in respect of EU migrants versus what it could do/have done. Not just in the case of *Gureckis*, but more broadly, it is hard to escape the fact that, had it wanted to do so, the UK Government could have exercised so much more control, even within the parameters of having to honour the EU free movement right⁶⁵.

*“We already have the power to take back control of the free movement of EU citizens to the UK – we just aren’t using it ... Other countries, such as Belgium, regularly repatriate thousands of individuals based on this directive.”*⁶⁶

Of course, it is hard to remove someone for non-exercise of their treaty rights if you do not know that they are here. And on closer inspection the outcomes seem less the effect of legal constraints than of political decisions. While non-EU citizens staying longer than six months in the UK need to apply for a biometric ID card, EU citizens have been able to come and go from the UK without any registration requirements at all. Yet within the EU

⁶¹ Jonathan Portes, ‘Free Movement After Brexit: Policy Options’ (The UK in a Changing Europe, 6 November 2017) <http://ukandeu.ac.uk/wp-content/uploads/2017/11/Free-movement-after-Brexit-policy-options.pdf>.

⁶² Steven Kennedy, ‘Measures to limit migrants’ access to benefits’ Briefing Paper 06889, House of Commons Library (17 June 2015). <file:///C:/Users/jonathan/Downloads/SNO6889.pdf>.

See also: Costello and Hancox (The Migration Observatory) (n 30)

Matthew Evans, ‘EU Migrants, Abuse and Access to Welfare’ (2015) 29(3) *Immigration, Asylum and Nationality Law*, 272.

Neville Harris, ‘Demagnetisation of Social Security and Health Care for Migrants to the UK’ (2016) 18(2) *European Journal of Social Security*, 130.

⁶³ ‘Exit Strategies’, *The Economist* (4 March 2017) 50.

⁶⁴ A rare exception being Lord Bilimoria: ‘Britain doesn’t need to ‘take back control’ of immigration. We already have it.’ *The Guardian* (31 July 2017)

<https://www.theguardian.com/commentisfree/2017/jul/31/britain-take-back-control-immigration-eu-directive-brexit>.

⁶⁵ Portes, ‘Policy Options’ (n 61).

⁶⁶ Bilimoria (n 64) and <https://www.gov.uk/government/publications/exit-checks-on-passengers-leaving-the-uk/exit-checks-fact-sheet>.

free movement rules there is nothing requiring this to be the case. Indeed the opposite is true: Article 8 of the Directive specifically allows for a registration process of those coming in.

Expert Evidence on the Free Movement Approach Elsewhere in Europe:

“What Spain and a lot of other member states do, which we have never done, is take advantage of the provision in the citizens’ rights directive that allows for registration of all EU migrants.”⁶⁷

“Inside the existing EU legislation there are a number of possibilities. It is not that everybody can walk in or out of a country. A number of conditions can be put in place, as Belgium does, for example. One conclusion might be that in the past Britain has never used 100% this room for manoeuvre inside the EU legislation ... Mainly it is registration that you have to do ... I repeat that my impression has always been that Britain has never used 100% the possibilities of the room for manoeuvre in the EU legislation on labour mobility, which has been used by other countries that have made a number of requests, who have a number of requirements, who have put a number of conditions. That never existed in the past in Britain”.⁶⁸

“We could have done much more domestically on registration schemes and things that would have made access to our labour market more difficult for foreigners without any constraint from Europe and without being deliberately discriminatory.”⁶⁹

Similarly, the UK Government’s decision in 1998 to remove exit checks at the border⁷⁰, which arguably played a significant role in creating an impression in the minds of the UK public that not only the EU right to free movement, but immigration more broadly, was out of control, was a political decision.⁷¹ Even today there is continuing debate and uncertainty about how accurate the official statistics are on EU (versus non-EU) migrant numbers in the UK⁷².

⁶⁷ Oral evidence of Catherine Barnard to Home Affairs Committee on Post-Brexit migration policy HC 857 (27 February 2018)

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/postbrexit-migration-policy/oral/79263.pdf>.

⁶⁸ Oral evidence of Guy Verhofstadt to Home Affairs Committee on Post-Brexit migration policy HC 857 (20 June 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/postbrexit-migration-policy/oral/85782.pdf>.

⁶⁹ Sir Ivan Rogers to Home Affairs Committee (n 27).

⁷⁰ The history of UK border exit checks is summarised at Border Force/Home Office, ‘Exit checks fact sheet’ Policy Paper (29 March 2015) <https://www.gov.uk/government/publications/exit-checks-on-passengers-leaving-the-uk/exit-checks-fact-sheet>.

⁷¹ Bilimoria (n 64).

⁷² Jonathan Portes, ‘Misunderstanding Migration’ (The UK in a Changing Europe, 7 June 2018).

<http://ukandeu.ac.uk/misunderestimating-migration/>.

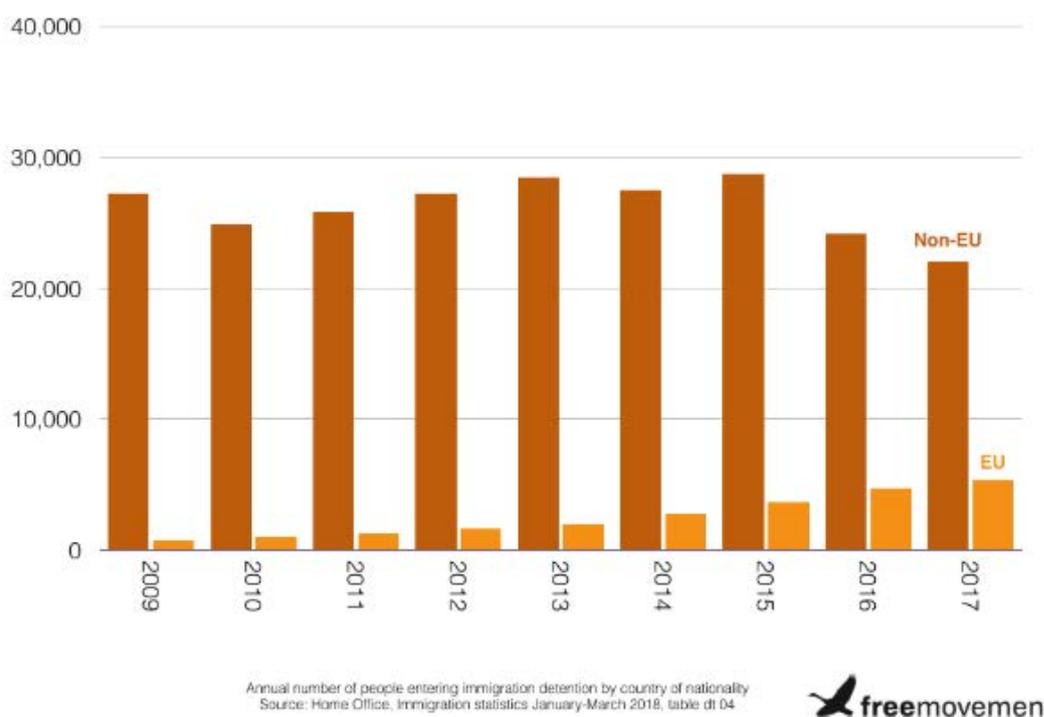
Also Marley Morris, ‘Has the government been overestimating net non-EU immigration?’

<http://blogs.lse.ac.uk/brexit/2018/07/13/yet-another-embarrassment-for-the-government-on-immigration/> and Carlos Vargas-Silva and Yvonne Markaki, ‘Briefing: EU Migration to and from the UK’ (The Migration Observatory, 30 August 2017) <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/EU-Migration-to-and-from-the-UK17.pdf>

But No Longer Light Touch

Even within this context, however, at least more recently⁷³ it is not correct to say that the UK Government does not seek to enforce returns of those EU migrants whom it believes are not exercising treaty rights, or those who it can argue, as EU law permits, have forfeited those rights through criminal or other activity adjudged to be deleterious to society. The Government’s ‘Operation Nexus’ is a cross-organisational effort between the Home Office and the police designed to pro-actively identify foreign national offenders liable for removal from the UK⁷⁴. Indeed the Home Office’s figures show a continued rise in the number of EU nationals being held in immigration detention.

Figure 1: Immigration detainees by nationality



Source: Home Office Immigration Statistics January-March 2018 as stated in Free Movement⁷⁵

And that two thirds of foreign national offenders now being removed from the UK are from the EU⁷⁶.

⁷³ Portes, ‘Policy Options’ (n 61).

⁷⁴ Home Office <https://www.gov.uk/government/publications/operation-nexus-high-harm>.

⁷⁵ Conor James McKinney, ‘Latest UK immigration statistics’ (Free Movement, 24 August 2018) <https://www.freemovement.org.uk/uk-immigration-statistics/>.

⁷⁶ Home Office, ‘Immigration statistics October to December 2017: How many people are detained or returned?’ (21 March 2018) <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-are-detained-or-returned>.

EU Removals: 2016 figures show that two of the top ten countries by removal numbers (enforced removal plus voluntary departure) are two of the main EU migrant producing countries, Poland and Romania, and that the fastest growing stream of returns is now the European one⁷⁷, 2017 figures show that Romania and Poland rank first and third, and overall make up one quarter, of enforced returns from the UK⁷⁸.

The Relative Ease of EU Returns: Indeed perversely this can be viewed as one of the advantages of the Citizens' Rights Directive. In setting out when an EU citizen can be removed for not exercising their treaty rights, or when they otherwise will forfeit them, the Directive provides a relatively clear framework in which returns can be processed.

Returning EU citizens is less likely to run into two of the practical roadblocks which, as will be seen later in this Report, are often encountered when seeking to return non-EU migrants:

- (1) not being sure where the migrant is from, particularly as the migrant may lack documentation; and
- (2) the 'country of origin' being unwilling to take back the migrant.

This relative ease of return is why EU countries are now near the top of the UK charts for forced returns and why "As a share of those detained under immigration law, EU citizens now make up 16%; of those who are removed they make up almost a third"⁷⁹.

This is not to say that the UK's EU membership, and therefore acceptance of the EU right to free movement, have not brought legal constraints on the UK's ability to control immigration from other EU countries. Of course they have. But the evidence suggests that the degree to which the UK has been limited by legal constraints, and unable to exercise controls, in this regard has been significantly exaggerated. Indeed it has arguably come to provide a convenient smokescreen, and indeed a scapegoat, for political decisions.

⁷⁷ Scott Blinder: 'Deportations, Removals and Voluntary Departures from the UK' (The Migration Observatory, 4 October 2017) <https://migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/>.

⁷⁸ Home Office, 'Immigration statistics October to December 2017 (n 76).

⁷⁹ The Economist, 'Exit Strategies' (n 63).

SCENE 2 – THE WORLD (IN A DIFFERENT LIGHT)

INTERNATIONAL LAW: BARK VERSUS BITE

The Grandparents of International Human Rights Law and their Local Offspring

So much for European law. If it is alleged that the UK Government’s ability to effect “restrictive reform is constrained by international and European law”⁸⁰, what of international law?

There is no denying the longevity and potential power of those international human rights instruments forged in the multilateral aftermath of World War II, most particularly in the migration space the 1951 United Nations Convention Relating to the Status of Refugees (as subsequently expanded by the 1967 Protocol) (“Refugee Convention”) and the 1950 European Convention on Human Rights (“ECHR”), also as subsequently importantly amended.

The UK’s Dynamic and Resourceful Legal Practitioners: It might seem surprising that some have argued that international law could be held responsible for the fact that, in terms of immigration control, “the discretion available to Thatcher-era policy-makers is a thing of the past”⁸¹, given that the Refugee Convention and ECHR also of course pre-dated that era.

But it is certainly true that these instruments have become increasingly relevant over time in the UK, evolving in the hands of innovative, energised legal practitioners who have been able to found ever more dynamic and resourceful legal arguments on them. In challenging immigration controls both Article 3 (prohibition of (return to) torture, inhuman or degrading treatment) and Article 8 (right to respect for private and family life) of the ECHR have in particular been aggressively and creatively deployed and developed by human rights defenders.

The perception of diminishing Government discretion is also animated by the belief that international law has been weaponised by domestic legal developments. In this respect, in the UK the finger points in particular at the Human Rights Act 1998 (“HRA”) which incorporated the ECHR into English law, and the 2008 lifting of the UK Government’s prior reservation on the Convention on the Rights of the Child (“CRC”), which reservation had allowed the Government to disapply the application of the CRC in immigration matters⁸².

Imbalance or In Balance?

But there are good arguments that the role of the ECHR/HRA as a constraint on the UK Government has been significantly overemphasised.

⁸⁰ Ford, Jennings & Somerville (n 5).

⁸¹ *ibid.*

⁸² *ibid.*

The UK and the ECtHR: Much was made of the over decade-long stand-off between the European Court of Human Rights (“ECtHR”) and the UK Government over the Court’s ruling over votes for prisoners. But the fact that a compromise was eventually reached⁸³ shows the limited enforcement power that the ECtHR has in practice, even in a country as law abiding as the UK.

This case may also give the misleading impression that the UK suffers extensively at the hands of the ECtHR. But it does not. In the two decades to 2017 the UK lost less than one in fifty of the cases brought against it, if one takes into account the vast majority against it which were ruled inadmissible. In the most recent years this rate has declined even further⁸⁴. Of course it could be argued though that this just demonstrates that the UK has fully assimilated the ECHR into its own legal regime under the HRA.

But in any event it is also easy to forget that these legal instruments contain a greater degree of balance than they are commonly credited with, which allows states significant room for manoeuvre.

Article 5: (right to liberty and security) explicitly includes a carve-out for administrative detention for immigration purposes. It is this which in effect allows for the UK’s detention of the 30,000 plus migrants who annually pass through immigration detention centres in the UK.

Article 8: (right to private and family life) is a qualified right, ie the right needs to be considered proportionately⁸⁵ against a whole array of potential countervailing interests: of national security, public safety, economic wellbeing, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights and freedoms of others. A recent example of this in practice was the case of *DW (Jamaica)* where the Court of Appeal held that the UK public interest in serious criminal offenders being deported had been given insufficient weight against the impact of the deportation on the offender’s four children⁸⁶, not the other way round.

Save the Children

Looking at the outcome for children is instructive, as in many senses they are the category that in theory most benefits from legal constraints on the Government. And in practice one of the most successful uses of Article 8 has been to challenge immigration controls when children are impacted by removal/deportation decisions. It is also the case that

⁸³ Owen Bowcott, ‘Council of Europe accepts UK compromise on prisoner voting rights’ *The Guardian* (7 December 2017) <https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights>. <https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights>.

⁸⁴ Written Evidence from Dr Alice Donald to the House of Commons Joint Committee on Human Rights (30 May 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/enforcing-human-rights/written/83682.html>.

⁸⁵ *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60.

⁸⁶ *DW (Jamaica) v Secretary of State for the Home Department* [2018] EWCA Civ 797.

immigration detention rates of children have fallen in the UK in recent years, albeit from a relatively high level⁸⁷. And that Section 17 of the Children Act 1989 can have a significant practical impact in requiring local authorities to safeguard and promote the welfare of children, whatever their immigration status, in the range and services that they provide. But again some circumspection is due.

Convention on the Rights of the Child: Commentary at the time of the Government's announcement of its lifting of the immigration reservation on the CRC suggested that it was motivated primarily to deflect attention from censure of the UK by both the UN Committee on the Rights of the Child and the Council of Europe Commissioner for Human Rights over the UK's treatment of migrant children.⁸⁸

While numbers of children in detention have dropped since, even leading legal advocates for the potential power of the CRC admit that, when one looks at its current use in practical legal argument, its impact appears to be minimal. Indeed a review of 2,500 relevant decisions taken by courts in the Global North, including the UK, show that the CRC was cited in less than 5% of them.⁸⁹

Fees or Penalties? Rights versus Control: As shall be seen later, while seemingly mundane, the level of fees charged, whether for legal entry or for regularisation of immigration status, is a highly effective form of practical immigration control. This has proven particularly so in the case of children.

The Home Office has received almost £100 million in fees relating to children registering as British citizens in the last five years.⁹⁰ The cost of entry visas, as well as of UK citizenship applications, where children are involved, can be prohibitively expensive, and out of all proportion to what is charged in other European states.⁹¹

These are not the only barriers impacting children. Over 100,000 irregular migrant children are estimated to live in the UK and perhaps most of any group "stand at the intersection of diverging and to some extent contradictory policy agendas, namely the protection of children and children's rights, and the enforcement of immigration

⁸⁷ Immigration Detention in the United Kingdom (n 21).

⁸⁸ Rebecca Wood, 'Charities call on government to turn 'rhetoric into reality'' (IRR, 7 October 2008) <http://www.irr.org.uk/news/charities-call-on-government-to-turn-rhetoric-into-reality/>.

See also Refugee Council, 'UK to lift reservation on United Nations Convention on the Rights of the Child' (23 September 2008)

https://www.refugeecouncil.org.uk/latest/news/637_uk_to_lift_reservation_on_united_nations_convention_on_the_rights_of_the_child.

⁸⁹ Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017).

⁹⁰ Colin Yeo, 'Home Office makes almost £100 million from children registering as British citizens' (Free Movement, 4 July 2018) <https://www.freemovement.org.uk/home-office-makes-almost-100-million-from-children-registering-as-british-citizens/>.

⁹¹ *ibid.* Also May Bulman, 'Cost of British citizenship for children is now 22 times more expensive than Germany' *The Independent* (13 December 2017).

<https://www.independent.co.uk/news/uk/home-news/british-citizenship-children-cost-expensive-france-belgium-eu-too-much-immigrants-uk-a8107621.html>.

Recruitment and Employment Confederation, 'Building the Post-Brexit Immigration System: An analysis of shortages, scenarios and choices' (June 2017)

https://www.rec.uk.com/_data/assets/pdf_file/0005/376160/Buiding-the-Post-Brexit-Immigration-System-09.06.17.pdf.

control”⁹². A key contributor to this is the fact that ‘jus soli’, ie UK citizenship being derived simply from being born in the UK, regardless of the immigration status of one’s parents, was ended by the 1981 British Nationality Act.

While unaccompanied asylum seeking children are seen as one of the most protected of the children groups, a recent report from the Chief Inspector of Borders and Immigration suggested that their treatment at the hands of the UK immigration system could be improved⁹³. Others have used stronger words to describe the UK’s approach to the plight of child refugees, “caught between the visceral politics of migration on the one hand and Britain’s historic ideals on the other, but ultimately left neglected and unwanted”⁹⁴. Nor do the statistics show unaccompanied asylum seeking children getting an easy ride. A quarter of such applicants are refused, either because it is decided to be safe to return them or they are adjudged to be over 18⁹⁵, one of the UK media’s favourite topics⁹⁶.

Abu Qatada

When it comes to analysing the impact of international law on the UK Government’s ability to control migration it is important to distinguish its bark from its bite. The case of the UK’s attempts to remove Abu Qatada is instructive.

The Case: turned on the fact that under the Refugee Convention those convicted of certain crimes or deemed a threat to national security cannot successfully claim protection as a refugee and can therefore be removed. Whereas certain protections provided by the ECHR are absolute. In Abu Qatada’s case the protection at issue was the Article 6 right to a fair trial. And the ECtHR determined that that right would be infringed if Abu Qatada was returned to Jordan for trial, as evidence gathered by torture could be used against him⁹⁷. In the end a compromise was reached. The UK and Jordan signed a treaty providing assurance that evidence potentially gained through torture would not be used, Abu Qatada was returned for trial to Jordan, and was acquitted.

Unqualified ECHR rights such as Article 3 and Article 6 have certainly been a high-profile thorn in the Government’s side. But in practice they are only relevant in certain very specific and limited situations. It would be a severe miscalibration and misrepresentation to view them as a meaningful constraint on broader immigration policy. And, importantly, as has been seen, Article 8, which is the right which is much more widely applicable in the immigration space, is a qualified, not an absolute, right.

⁹² Nando Sigona and Vanessa Hughes, ‘No Way Out, No Way In’ (COMPAS, May 2012)

https://www.compas.ox.ac.uk/media/PR-2012-Undocumented_Migrant_Children.pdf.

⁹³ Independent Chief Inspector of Borders and Immigration, ‘Unaccompanied Asylum Seeking Children’ (28 March, 2018) <https://www.gov.uk/government/news/inspection-report-published-unaccompanied-asylum-seeking-children>.

⁹⁴ Yasmin Ibrahim, ‘The Child Refugee and the ‘Jungle’ Camps of Calais’ (ECRE Weekly Bulletin, 7 September 2018).

⁹⁵ Home Office, ‘Immigration statistics October to December 2017 (n 76).

⁹⁶ ‘Gnashing of teeth’, *The Economist* (29 October 2016) 24.

⁹⁷ Ravi Somaiya and John Burns, ‘European Court Rules Britain Cannot Deport Terrorism Suspect’ *New York Times* (New York, 17 January 2012) <https://www.nytimes.com/2012/01/18/world/europe/european-court-overrules-britain-on-terror-detainee.html>.

There is another explanation as to why ECHR rights have increasingly been used as the weapon of choice by immigration lawyers. And rather than demonstrating the weakness of states in the face of international law, it instead demonstrates their strength. And this is the fact that migrant protections available under international migration law are in fact relatively weak. And as such, while these can place some legal constraints on states in the context of their exercise of immigration controls, these constraints are dwarfed by the powers that are reserved to states or which states have carved out from the spaces within the legal protection regime.

THE GAPS IN INTERNATIONAL MIGRATION LAW

The International Legal Framework Governing Migration

Following on from the 2016 New York Declaration for Refugees and Migrants⁹⁸, two Global Compacts are currently being finalised, one on refugees and one separately on migrants more generally. These are soft law instruments, ie they are not directly legally binding or enforceable. On the face of it this may seem odd, at least in the case of refugees. After all, for refugees there already exists the hard law of the Refugee Convention; why the need for a soft law Global Compact?

In the migrant space it highlights that, unlike the United Nations High Commissioner for Refugees (UNHCR), prior to the New York Declaration the International Organization of Migration (IOM) stood completely outside of the UN system. This is despite the fact that the vast majority of migrants are not of course refugees. It also highlights the point that there is no all-encompassing hard law covering migration.

A Patchwork of Holes: International migration law consists of a patchwork of customary international law overlaid with a patchwork of international legal treaties.⁹⁹ As the only vehicle for creating universal norms binding on all states and directly enforceable in domestic courts, customary international law is in theory an extremely powerful force.¹⁰⁰ But in practice, customary law on migration lacks the detail to impose meaningful constraints on states. International treaties have been agreed in order to fill in the detail, at least in some areas. But these too have gaps: all around, in between, and even within the key legal instruments. States can take advantage of these gaps to assert their sovereignty. And they have done so.

The three core building blocks of international migration law focus on refugees, migrant workers and smuggled migrants¹⁰¹. Some gaps are more obvious than others. This segmented approach means that not all categories of migrant are covered. Then of course there is the fact that international treaties are only binding on those states that agree to be bound by them.

⁹⁸ New York Declaration for Refugees and Migrants, 19 September 2016 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1.

⁹⁹ Vincent Chetail, 'The Architecture of International Migration Law; A Deconstructionist Design of Complexity and Contradiction' (2017) 111 American Journal of International Law, 18.

¹⁰⁰ Vincent Chetail, 'The UN Global Compact on Migration: What Role for International Law?' (Queen Mary Annual Lecture in Migration Law, 22 January 2018).

¹⁰¹ *ibid.*

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("Migrant Workers Convention"): This was adopted in 1990, and has been in force since 2003. It is the most comprehensive international treaty in the field of migration and human rights. Yet to date it has only been ratified by 51 states, none of them the industrialised, migrant worker receiving states of the Global North.

Then for each treaty there is the detail of the treaty itself. The Smuggled Migrants Protocol¹⁰² is the core international migration law development of the last twenty years. Like the Refugee Convention and the ECHR, it is a creature of its time. But the time of the Smuggled Migrants Protocol was fifty years after those other instruments. Its context was therefore very different, at a time when the world had turned from concerns with protecting migrants to concerns with controlling them. Thus, while ostensibly aimed at protecting smuggled migrants, by criminalising those who facilitate migrants' arrival, the Protocol in practice subjects migrants themselves to significant controls on their movement.

Smuggled Migrants Protocol, Sign of the Times: From states' control perspective this Protocol is a magical concoction of international law. A legal instrument that coopts human rights law and concepts in the name of 'protecting' smuggled migrants, while in reality providing the legal foundation for states to aggressively do all that they can to keep migrants a long way away. States intercepting migrant boats at sea can now argue that not only is this not a breach of the law, but rather they are fulfilling their cooperation responsibilities against smuggling under the Protocol. This might explain why three times as many states have ratified the Smuggled Migrants Protocol as have ratified the Migrant Workers Convention.

Refugees: States Push Back

It may also explain why, in law at least, refugees are often regarded as the most privileged and protected class of migrant. Because they have an international treaty, the Refugee Convention, solely devoted to their protection. And this has been ratified by 146 states.

Yet when one looks at the legal definition of a refugee one is struck by all the spaces around and within it. Indeed the Global North states, with the UK at the core, have been so laser-focused on exploiting the gaps that they have not only found, but themselves creatively developed, legal spaces from which to exert their own controls that the drafters of the Refugee Convention could scarcely have imagined.

The Refugee at Law: is defined as someone who is outside their country and has a well-founded fear of being persecuted there for reasons of race, religion, nationality, membership of a particular social group or political opinion, and therefore should not be forced to return there. An 'asylum seeker' is someone whose claim to refugee status has yet to be officially determined.

¹⁰² Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, 2000.

The most crucial legal space arises from the fact that while there is a right to ‘non-refoulement’, ie the right not be returned to danger in another country, there is no right requiring states to allow, or event to assist, arrival in order for that right to be claimed. Global North states can therefore respond to the potential obligation to take in refugees simply by actively seeking to prevent their arrival.

States have exploited this opportunity, developing “policies that work at the fringes or in the interstices of international law in order to recoup sovereign maneuverability”¹⁰³, to effectively prevent unwanted migrants, regardless of whether or not they are or may be refugees, from engaging their legal rights, simply by stopping them arriving in the first place. In the legal world these strategies are known as ‘non-entrée’.

Non-Entrée: States Take Control

The Impact of Non-Entrée: Varied in nature, from the mundane to the spectacular, what non-entrée strategies have in common is that they are supremely effective. Sweden’s imposition of a visa requirement on Bosnians in 1992 led immediately to a 90% reduction in asylum seekers.¹⁰⁴ “In 2001, there were 44 unauthorised boat arrivals in Australian waters carrying 5516 people ... The Howard government then brought in the ‘Pacific Solution’, and in 2002 there was just one unauthorized boat arrival carrying one person”.¹⁰⁵ The Italy-Libya deal of 2009 resulted in a 90% reduction in migrant arrivals from Libya¹⁰⁶. In July 2008 UK Immigration Minister, Liam Byrne, stated that “Airline liaison officers have assisted in preventing nearly 180,000 people boarding planes [bound for the UK] over the last five years”.¹⁰⁷ The list could go on. And on.

Out of the seemingly smallest of legal spaces, Global North states, with the UK in the vanguard, have fashioned, developed and constructed a restrictionist edifice from which it is the states who in practice exert the vast majority of the legal constraints, on even the most protected of migrant groups, not the other way round. The “three broad zones of exclusion”¹⁰⁸ of the Global North have constantly evolved their defences and responses as they have learned from, and leveraged off, each other’s stratagems.

A Short History of Non-Entrée in Three Chapters: One can identify three broad eras of non-entrée strategies¹⁰⁹.

In the 1980s, the UK was at the forefront of the development and refinement of procedural blocks to comprehensively push out the effective border and keep migrants

¹⁰³ Thomas Gammeltoft-Hansen and Nikolas Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) 5:1 *Journal on Migration and Human Security*, 28.

¹⁰⁴ M Kjaerum, ‘Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?’ (2002) 24 *Human Rights Quarterly* 515.

¹⁰⁵ Matthew Franklin and Lanai Vasek, ‘Labor urged to revive Pacific Solution by refugee activists’ *The Australian* (Sydney, 4 June 2011).

¹⁰⁶ Calculated May–August 2008 versus May–August 2009, Bernard Ryan, ‘Extraterritorial Immigration Control; What Role for Legal Guarantees?’ In Ryan and Mitsilegas (eds), *Extraterritorial Immigration Control; Legal Challenges* (Nijhoff 2010) 32.

¹⁰⁷ House of Commons Debates 22 July 2008, vol 479, col 1353W.

¹⁰⁸ Broadly Fortress Europe, US/Mexico border and Australasia, see Penny Green & Mike Grewcock, ‘The War against Illegal Immigration: State Crime and the Construction of a European Identity’/ (2002) 14(1) *Current Issues in Criminal Justice*, 87.

¹⁰⁹ Gammeltoft-Hansen, ‘Deterrence Paradigm’ (n 103).

overseas. These blocks included imposing visa requirements on any significant migrant producing countries and the introduction of carrier sanctions, that is the fining of airlines who allowed migrants to board inbound transportation without the correct documentation¹¹⁰, combined with the posting of a network of immigration officers overseas.

In the 1990s Global North states became even more expansive in their non-entrée vision, initiating interception and pushbacks of migrants at sea and other forms of extraterritorial migration control.

But this was as nothing to the 2000s which witnessed the build out through an ever more complex web of bilateral and regional agreements that actively seek the cooperation of countries of origin/transit¹¹¹, to divert, constrain and restrain migrants aiming for Europe before they ever reach its borders or even, more recently, the Mediterranean itself¹¹². Examples abound: the most famous may be the EU-Turkey deal, but other examples include the Italy-Libya deal¹¹³, the EU Migration Partnership Framework (covering Senegal, Mali, Niger, Nigeria and Ethiopia)¹¹⁴ and the EU-Horn of Africa Migration Route Initiative (Khartoum Process)¹¹⁵ in which the UK has played a leading part¹¹⁶.

A mixture of incentives and threats supports the negotiation of these initiatives.

The Carrots and Sticks of International Cooperation: Financial contributions are of course directed towards strengthening border controls, such as the up to €50 million paid by the EU to support the operationalisation of the G5 Joint Force (Mali, Mauritania, Niger, Nigeria and Chad) for securing sensitive border regions¹¹⁷. But cooperation may also be secured through promises of unlocking development aid or of regional treaty accession.¹¹⁸

¹¹⁰ Prakash Shah, *Refugees, Race and the legal Concept of Asylum in Britain* (Cavendish Publishing 2000) c 7.

¹¹¹ Thomas Gammeltoft-Hansen and James Hathaway, 'Non-refoulement in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law*, 235.

¹¹² Caitlin Chandler, 'How Far Will the EU Go to Seal its Borders' *Dissent Magazine*, Summer 2018 <https://www.dissentmagazine.org/article/how-far-eu-seal-borders-khartoum-process-central-mediterranean-migration>.

Adam Roberts, 'On the move' in 'The World in 2018', *The Economist*, 95.

¹¹³ Stephanie Kirchgaessner and Lorenzo Tondo, 'Italy's deal with Libya to 'pull back' migrants faces legal challenge' *The Guardian* (8 May 2018) <https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations>.

¹¹⁴ European Commission, 'Migration Partnership Framework: A New Approach to Better Manage Migration' (18 October 2016) https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf.

¹¹⁵ 'The road less taken', *The Economist* (27 May 2017) 50.

¹¹⁶ 'Immigration and Africa: Hello right hand, meet left hand', *The Economist* (1 October 2016) 29.

¹¹⁷ European Commission, 'Press release: Partnership Framework on Migration; Commission reports on results and lessons learnt one year on' (13 June 2017) http://europa.eu/rapid/press-release_IP-17-1595_en.htm.

¹¹⁸ Thomas Gammeltoft-Hansen, 'The Law and Politics of Non-Entrée' (lecture at University of Oxford Refugee Studies Centre, 4 June 2014) <https://www.rsc.ox.ac.uk/news/the-law-and-politics-of-non-entree-thomas-gammeltoft-hansen>.

Initially, low level incentives were provided as part of these deals, but increasingly these cooperation agreements can come with a significant financial contribution attached. Up to €88 billion is now committed to European investment in migrant producing states under the Migration Partnership Framework¹¹⁹.

Not surprisingly there is evidence that publicity of these deals can itself cause costs to spiral, as countries on the migrant routes then demand further funding to secure their continued cooperation in ‘managing migration’.¹²⁰ Niger is a good example:

“[President] Issoufou hailed "the good collaboration" with the European Union in the fight against illegal migration, but said the 1.8 billion euro fund set up by the EU for his country as "not enough". "It's a drop in the ocean in our funding needs," he said.”¹²¹

But some of these financial contributions are indirect. Under the Khartoum Process the contributions are directed through charities and aid agencies¹²². And these initiatives may be supported by other ‘soft’ initiatives; the UK even going so far as to sponsor information campaigns or collaborate on developing soap opera plotlines that dissuade emigration, which are then broadcast in key migrant producing countries¹²³.

Arrangements such as these seek to ensure that migrants are held back and controlled as far away as possible: in the ‘first country of arrival’, ‘safe countries of origin’ or ‘safe third countries’, often with little regard to how safe these countries actually are. Indeed there is a concern that in paying unsavoury regimes to confine migrants and prevent onward transit, economic migrants may be thwarted but simply be substituted by refugees generated instead¹²⁴.

INTERNATIONAL LAW STRIKES BACK ... ?

Where is the law in all of this? Many of these stratagems by states are in practice hard to challenge legally, even where they are in breach of states’ international law commitments.

There have though been successful legal challenges to some of these steps. The ECHR case of *Hirsi*¹²⁵ is case in point. (Note again the use of the ECHR, rather than migration law, to challenge state action.)

¹¹⁹ ‘Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration’ (European Commission – Press release, 7 June 2016) http://europa.eu/rapid/press-release_IP-16-2072_en.htm.

¹²⁰ Peter Tinti and Tuesday Reitano, *Migrant, Refugee, Smuggler, Saviour* (Hurst 2016).

¹²¹ ‘Niger will continue to welcome African migrants: president’ *Mail Online* (7 July 2018) <http://www.dailymail.co.uk/wires/afp/article-5929557/Niger-continue-welcome-African-migrants-president.html>.

¹²² Patrick Kingsley, ‘By Stifling `Migration, Sudan’s Feared Secret Police Aid Europe’ *New York Times* (22 April 2018) <https://www.nytimes.com/2018/04/22/world/africa/migration-european-union-sudan.html>

¹²³ Cherti (n 10).

¹²⁴ The Economist, ‘Right Hand Left Hand’ (n 116).

Also George Soros, ‘Opinion: George Soros explains his audacious plan to save Europe’ (30 May 2018) <https://www.marketwatch.com/story/george-soros-explains-his-audacious-plan-to-save-europe-2018-05-29>.

¹²⁵ *Hirsi Jamaa and Others v Italy*, App No. 27765/09 (ECtHR, 23 February 2012).

Hirsi: challenged Italy's interception and return of migrants on the high seas en route from Libya, on the basis that Italy could not legally take control of migrants at sea before their arrival and collectively push them back to Libya without considering which of those migrants needed protection and whether any of them were refugees.

Indeed those studying the case reports of the ECHR could be forgiven for concluding that states are locked in an endless, losing, legal battle against smuggled migrants, thwarted by an overlay of international human rights, refugee, and even maritime law.

Really?

One must ask though whether even refugees have in practice benefited from the *Hirsi* decision? On a broader scale the answer would surely be a resounding 'no'. Refugee lawyers got excited last October when, five years after *Hirsi*, 'a new *Hirsi*' emerged, a case in the ECHR against Spain in respect of a group of migrants who had managed to scale the three consecutive barriers at the Melilla border, but were then simply returned to Morocco without any assessment of their circumstances¹²⁶. In terms of states' actions, nothing had changed since *Hirsi*.

Now, over six years on from *Hirsi*, Italy's actions in the Mediterranean to turn back migrants may once again be subject to ECHR scrutiny: 'Italy's deal with Libya to 'pull back' migrants faces legal challenge'¹²⁷. The headline screams legal constraint on states. But in the meantime the reality is that the states' strategy has for now proved very effective.

Thousands of migrants have been prevented from leaving Libya¹²⁸, and will continue to be so. The success rate for those making this journey has halved over the past year, as a result of the increasingly aggressive state tactics towards humanitarian assistance in the Mediterranean, and the revitalisation of the Libyan coastal patrols, to which Italy and the EU have committed €285 million in funding up to 2023¹²⁹, and which is at last appearing to pay dividends for those seeking to outsource the barrier at Europe's effective southern border.¹³⁰

¹²⁶ Annick Pijnenburg, 'Is N.D. and N.T. v Spain the new *Hirsi*?' (European Journal of International Law blog, 17 October 2017) <https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/>.

¹²⁷ Kirchgaessner and Lorenzo Tondo *The Guardian* (n 113).

¹²⁸ 'I sold all I had to go to Europe - now I'm home, and broke' (BBC, 7 May 2018) <http://www.bbc.co.uk/news/stories-44007932>.

¹²⁹ Nikolaj Nielsen, 'EU and Italy put aside €285m to boost Libyan coast guard' *EUobserver*, 2 November 2017 <https://euobserver.com/migration/140067>.

¹³⁰ Chico Harlan, 'Fewer migrants are making it to Europe. Here's why' *The Washington Post* (23 July 2018) https://www.washingtonpost.com/world/europe/fewer-migrants-are-making-it-to-europe-heres-why/2018/07/23/80b56082-8c57-11e8-9d59-dccc2c0cabcf_story.html?utm_term=.309f8aee8d62.

Lessons from the Evolution of Italy: When considering how Global North states, including the UK, have viewed their international legal obligations, the evolution of the Italian approach is instructive, as Italy has been on the frontline of this struggle for the last twenty years.

Back in 1997, Harding reports that, wary of the risk of migrants being drowned, the Italian coastguard's policy was to allow smugglers to land migrants safely before seeking to intercept the smugglers on their return journey.¹³¹

Yet twelve years later things had changed entirely. Italy was concluding deals with Libya to reduce migrant inflows and complementing this with the sorts of pushbacks that were challenged in *Hirsi*.

Today, Italy has scant regard for the safety of migrants, its primary concern being to threaten NGOs who rescue migrants from the waters of the Mediterranean, to impound their boats,¹³² and, where they can, to stop them from docking on their shores¹³³.

In fact successful legal challenges against EU states' operations at sea have only encouraged those states to push out their effective border controls yet further. This has generated the situation we see today, where Global North states' contributions to, and cooperation with, the Libyan coastguard now means that, in contravention of international law, migrants are increasingly prevented from leaving Libya's shores in the first place¹³⁴, let alone arriving anywhere.

The legal headline, this time that crimes against migrants in Libya may be investigated by the International Criminal Court¹³⁵, once again grabs the attention. But the reality is that this challenge is unlikely to progress anywhere. In the meantime many migrants are consigned to the most uncertain and desperate situation¹³⁶.

Even reaching Libya is now beyond many. The flow of African migrants up through the Sahara "has now dried to a trickle"; from nearly 30,000 per month two years ago, numbers of migrants moving north through Niger have now slowed to barely 1,000 per month¹³⁷. In the key transit city of Agadez in Niger, "EU interventions have shut down the irregular migration industry to a large extent".¹³⁸

¹³¹ Jeremy Harding, *Border Vigils: Keeping Migrants Out of the Rich World* (Verso 2012).

¹³² Lorenzo Tondo, 'My crew saved 218 migrants from drowning – so why are we the enemy?' *The Guardian* (24 March 2018) <https://www.theguardian.com/world/2018/mar/24/proactiva-open-arms-rescue-boat-saved-218-from-drowning-mediterranean-migrants>.

¹³³ 'Italy's Matteo Salvini shuts ports to migrant rescue ship' *BBC* (11 June 2018) <https://www.bbc.com/news/amp/world-europe-44432056>.

¹³⁴ http://www.ansa.it/english/news/general_news/2018/07/17/libyan-coast-guard-stops-boat-3_39e8520f-7e40-4df3-9e95-03699eba3a53.html and <http://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants>.

¹³⁵ 'ICC examines migrant-related crimes in Libya' (29 June 2017) <<https://sea-watch.org/en/icc-in-the-hague-to-investigate-libyan-coastguard-on-the-initiative-of-sea-watch/>>.

¹³⁶ 'Migrant slavery in Libya: Nigerians tell of being used as slaves' *BBC* (2 January 2018) <http://www.bbc.co.uk/news/world-africa-42492687>.

¹³⁷ 'Last stop before the desert' *The Economist* (7 July 2018), 41.

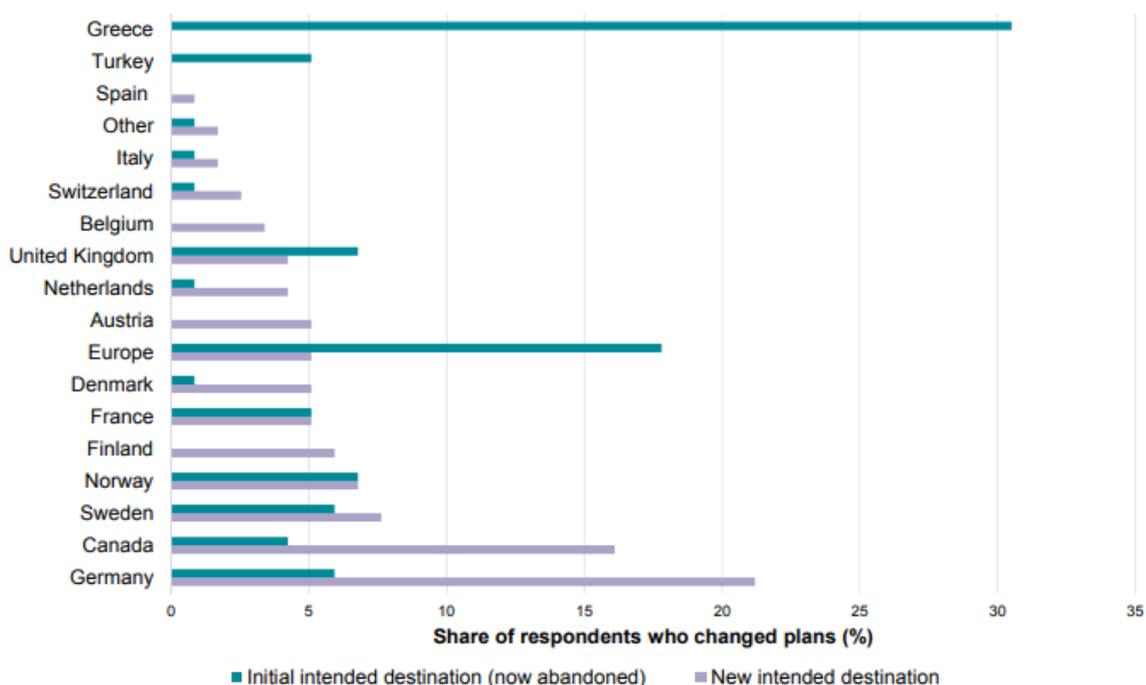
¹³⁸ Fransje Molenaar, 'Roadmap for sustainable migration management in the Sahel: lessons from Agadez (Clingendael Netherlands Institute of International Relations, November 2017) https://www.clingendael.org/sites/default/files/2017-11/PB_Roadmap_for_sustainable_migration_management.pdf.

THE UK AND FORTRESS EUROPE: A MUTUALLY BENEFICIAL ARRANGEMENT

Shielded By, Piggybacking On, Contributing To

It is from this perspective that one comes to most appreciate just how significantly the UK benefits from its geographical separation as a relatively remote outpost of 'Fortress Europe'. And how significantly the UK has been shielded by this. Recently released data shows that during the 2015 'crisis' the UK benefited most of any country from migrants who had reached Greece changing their mind as to their final destination.

Figure 2: Initial and new intended destinations among respondents who reported changing their plans whilst in Greece (%), 2015



Source: MPI Europe¹³⁹

But the UK has also successfully both piggybacked on Fortress Europe's increasingly sophisticated and aggressive extra-territorialisation of border controls, but also has actively contributed to them. For instance the Royal Navy plays a key role in training the Libyan coastguard to secure its borders and prevent migrants from leaving Libyan waters¹⁴⁰. Another example is the UK's interaction with the European Border and Coast Guard Agency, commonly known as Frontex. The UK has been able to take part in Frontex operations, and even secure observer status on its management board, despite not even being a member of the Schengen area that Frontex has been established to protect.

¹³⁹ Katie Kuschminder, 'Deciding Which Road to Take; Insights into How Migrants and Refugees in Greece Plan Onward Movement (Migration Policy Institute Europe, August 2018) <https://www.migrationpolicy.org/research/migrants-refugees-greece-onward-movement>.

¹⁴⁰ Lizzie Dearden, 'UK accused of trapping refugees in warzone after Boris Johnson vows to stop 'illegal migrants' crossing Med' *The Independent* (23 August 2017) <https://www.independent.co.uk/news/uk/home-news/refugee-crisis-libya-latest-mediterranean-sea-boris-johnson-vows-uk-stop-illegal-migrants-isis-gna-a7909216.html>.

The Rise and Rise of Frontex: Frontex primarily coordinates border control at the EU's external borders as well as assisting in returns of non-EU nationals. Its legal powers were further enhanced in 2016¹⁴¹, in tandem with the shift of emphasis in the EU's border controls regime from search and rescue to non-rescue and repulsion of migrants at all costs¹⁴².

The Return Support Unit of Frontex has been upgraded into the European Centre for Returns. Its coordinated return operations increased by 47% in 2017¹⁴³. The 2017 mid-term review of the European Agenda on Migration called for a yet further upgrade to Frontex's capacity to "drive and coordinate the EU-wide management of returns".¹⁴⁴

The European Commission proposes to create a standing corps of around 10,000 border guards by 2027, which will also provide financial support and training for the increase of national border guards in each member state, allied to the further development of EU wide information systems for borders, migration management and security¹⁴⁵.

And amidst all the claim and counterclaim of the latest EU diplomatic crisis around managing migration and better sharing its pressures, the one common denominator seems to be a will to commit yet still further resources to bolster Frontex¹⁴⁶.

The UK and Frontex: The UK's participation in joint operations with Frontex has involved operations focused on land ('Poseidon Land', targeting irregular migrants on the Greece/Turkey and Bulgaria/Turkey land borders), air (Air Focal Points, targeting the routes used for illegal migration into the EU by air), sea ('Poseidon Sea', targeting irregular migration by sea from Turkey to Greece, 'Indalo', targeting irregular migration by sea between Algeria/Morocco and Spain, 'Hermes', targeting irregular migration in the Central Mediterranean area (Libya and Tunisia) towards Italy, and 'Aeneas', targeting illegal migrants from Turkey, Albania and Egypt to the South East coast of Italy)¹⁴⁷. Note the Home Office's interchangeable use of the words "illegal" and "irregular". We shall come later to how the mere exercise of administrative discretion generates these concepts.

¹⁴¹ Regulation (EU) 2016/1624.

¹⁴² Niamh McIntyre, 'EU 'leaving migrants to drown' say rescuers who saved 2,000 from Mediterranean in single day' *The Independent* (15 April 2017) <https://www.independent.co.uk/news/world/europe/eu-leaving-migrants-drown-frontex-say-rescuers-2000-saved-italy-libya-mediterranean-a7684911.html>.

¹⁴³ Churches' Commission for Migrants in Europe, 'Recommendations for humane return policies in Europe' (30 May 2018) http://www.ccme.be/fileadmin/filer/ccme/20_Areas_of_Work/01_Refugee_Protection/2018-05-30_position_paper_return_FINAL.pdf.

¹⁴⁴ European Commission, 'State of the Union 2017 – Commission presents the next steps towards a stronger, more effective and fairer EU Migration and Asylum Policy' (Brussels, 27 September 2017) http://europa.eu/rapid/press-release_IP-17-3406_en.htm.

¹⁴⁵ European Commission, 'EU Budget for the Future, The Multiannual Financial Framework 2021-2027' (2 May, 2018) https://ec.europa.eu/commission/sites/beta-political/files/communication-modern-budget-may_2018_en.pdf.

¹⁴⁶ <https://global.handelsblatt.com/politics/merkel-macron-eu-deal-euro-zone-bavarian-csu-937002>.

¹⁴⁷ Home Office Review of the Balance of Competences between the United Kingdom and the European Union: Asylum & non-EU Migration (February 2014).

For states, another advantage of these increasingly extended chains of cooperative migration control between different state and quasi-state actors has been to increase control while at the same time undermining legal accountability:

The Chain Blame Game: *“Frontex can blame member states for human rights violations in joint operations; the Spaniards can shrug at reports of violence committed by their Moroccan colleagues or blame defense companies for lethal fence technology; the Moroccans can point a finger at Algerian soldiers, smugglers, or European push-backs... Most important, European politicians absolve themselves of blame ...”*¹⁴⁸

The Brexit White Paper and the ‘Whole of Route’ Approach

Section 2.5.1 of the UK Government’s “Future Relationship” Brexit White Paper¹⁴⁹ evidenced the UK’s continued commitment to “a significant presence overseas, conducting capacity and capability building in source and transit countries” and to “a comprehensive, ‘whole of route’ approach that includes every stage of the migrant journey”, which then goes on to specifically touch on the importance of Frontex, Eurodac, strategic partnerships, international dialogues and the Khartoum process.

This Section of the White Paper elicited little comment. Perhaps its import was lost on most commentators. But in the light of what has been highlighted thus far in this Report, its context can be properly appreciated. And it is not surprising that the Government should be so keen to stress that Brexit should on no account interfere with the current approach.

It is worth setting this Section out in full:

2.5.1 Asylum and illegal migration

98. Properly managed migration brings benefits to local communities and economies. But high levels of illegal migration present a global challenge, enabling organised crime, people trafficking and modern slavery to prosper.

99. The UK has a significant presence overseas, conducting capacity and capability building in source and transit countries and deconstructing criminal business models, through participation in development programmes and through seconded national experts. It is vital that the UK and the EU establish a new, strategic relationship to address the global challenges of asylum and illegal migration.

100. The UK therefore proposes a comprehensive, ‘whole of route’ approach that includes interventions at every stage of the migrant journey and ensure no new incentives are created to make dangerous journeys to Europe. It should cover:

a. ongoing operational cooperation, for example working with Frontex to strengthen the EU’s external border, and Europol to combat organised immigration crime;

b. a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through, or have a connection with, in order to have their protection

¹⁴⁸ Ruben Andersson, *Illegality Inc.* (University of California Press 2014).

¹⁴⁹ UK Government, ‘The Future Relationship Between the United Kingdom and the European Union (n 6).

claim considered, where necessary. People should be prevented from making claims in more than one country, and on multiple occasions. A clear legal structure, facilitated by access to Eurodac (the biometric and fingerprint database used for evidencing secondary asylum claims) or an equivalent system will help achieve this;

c. new arrangements that enable unaccompanied asylum-seeking children in the EU to join close family members in the UK, where it is in their best interests and vice versa;

d. a continued strategic partnership to address the drivers of illegal migration by investing and building cooperation in source and transit countries;

e. continued UK participation in international dialogues with European and African partners, frameworks, and processes, such as the Rabat and Khartoum Processes, to tackle illegal migration upstream; and

f. the option to align and work together on potential future funding instruments through the cooperative accord on overseas development assistance and international action outlined in chapter 3.4.

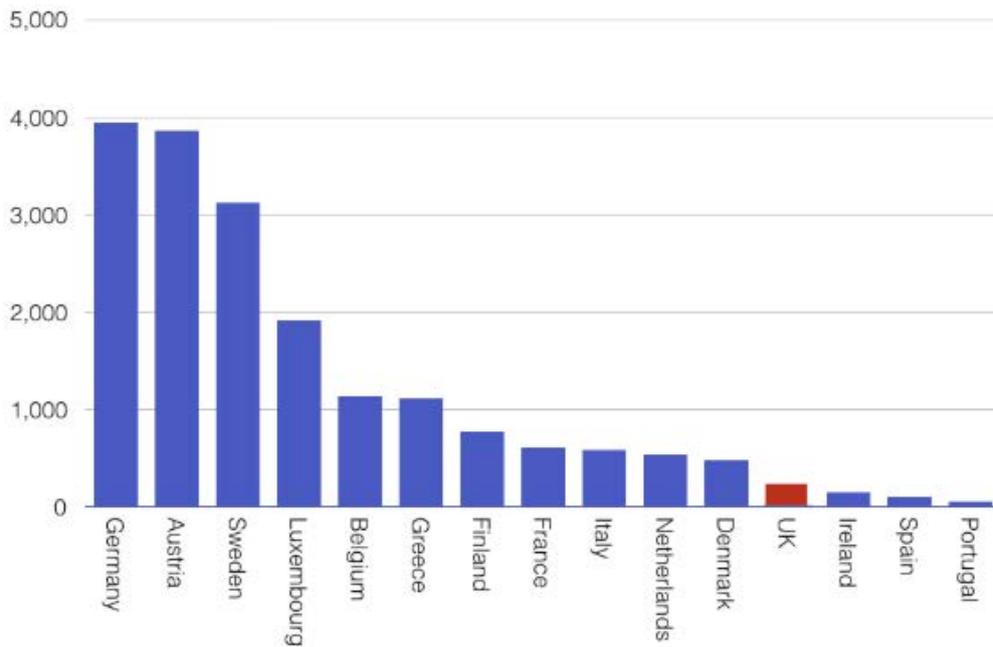
THE UK AND REFUGEES: A STRICTLY ARM'S LENGTH ARRANGEMENT

In the context of the UK's relative geographical isolation, but also its political position within the EU of being able to keep all of its own border controls while leveraging off and feeding into the EU's own increasingly aggressive border controls, it is not surprising that the UK is now relatively able to effectively control the arrival of migrants on its shores, and to a large extent dilute, and indeed in practice bring an element of discretion to, its international law commitments towards refugees.

In 2015, a year of considerable refugee influx into Europe, the UK only received first time asylum applications at a level of 591 per million of inhabitants. Of other Western European countries, only Ireland, managed a figure below 1,000¹⁵⁰. Today the UK remains near the foot of this particular chart.

¹⁵⁰ 'Record number of over 1.2 million first time asylum seekers registered in 2015' (Eurostat News Release, 4 March 2016) <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6>.

Figure 3: Asylum grants per million of population



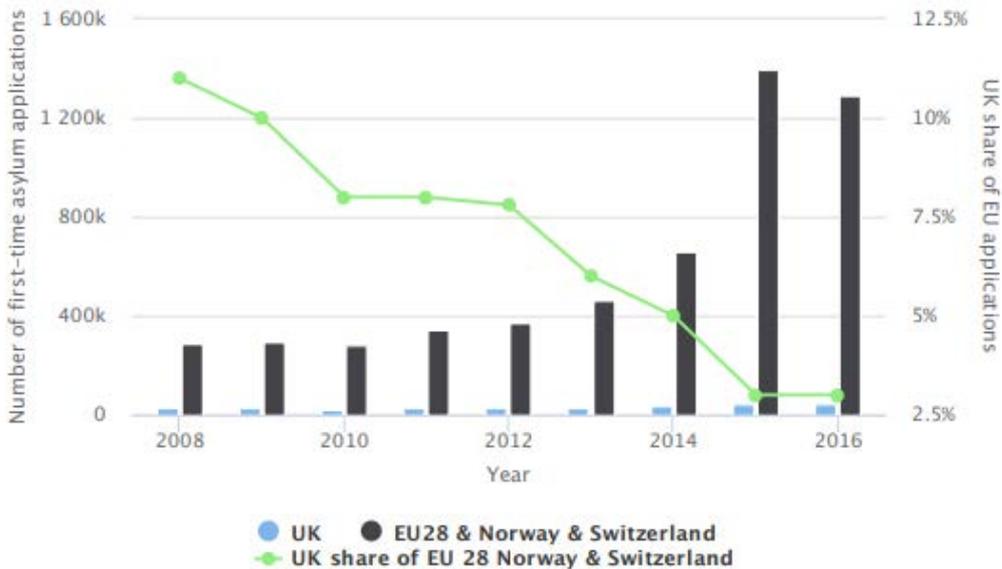
Positive first instance and final decisions on asylum, 2017, EU-15 countries
 Source: Eurostat news release 67/2018 (19 April 2018), page 3



Source: Eurostat news release as stated in Free Movement¹⁵¹

And the UK's share of asylum claims in the EU has plummeted.

Figure 4: Asylum claims in UK & Europe, 2008- 2016



Eurostat, annual aggregated data (rounded). Home Office, Immigration Statistics, Table as_02.

Note: Figures relate to claims, not individuals; people who apply in more than one EU country will be counted more than once.

Source: Scott Blinder, 'Migration to the UK: Asylum' (The Migration Observatory Briefing, 26 October 2017)¹⁵²

¹⁵¹ Conor James McKinney, 'Five things you didn't know about refugees in the UK' (Free Movement, 19 June 2018) <https://www.freemovement.org.uk/statistics-refugees-uk/>.

¹⁵² <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Asylum17.pdf>.

Not surprisingly the UK did not opt in to the EU's mandatory relocation plans to attempt to achieve a fair allocation of the refugee influx into Europe between member states (not that that has proven practically implementable in any event). In fact, the UK has been able to stand aside from that row and plot its own course. It has so successfully controlled its intake of Syrian asylum seekers that it has felt able to offer resettlement places under its own Vulnerable Person Resettlement Scheme¹⁵³.

It is testament to the control that the UK has been able to achieve in this area that, from its peak in the mid noughties, UK media and public attention on asylum seekers has dropped significantly,¹⁵⁴ to the point where they are rarely mentioned in popular newspapers or political debate.

How States Turn the Tables

Global North states such as the UK have comprehensively asserted their own agendas on observing their responsibilities to refugees, not only by erecting their own formidable 'whole of route' deterrence regime, but by actively developing their own non-entrée concepts in the spaces in between. States have done this by taking concepts that were not expressly prohibited by the Refugee Convention, and turning those into their own strategies for controlling refugees.¹⁵⁵

Examples of this are the concept of 'safe third country', where states justify returning refugees who have passed through other countries, and which is at the core of the EU-Turkey deal. And the systematic use of 'immigration detention', of which the UK is a prime exponent. Those who brought into being the Refugee Convention would not have envisaged a situation where countries receiving asylum seekers invited in police from the country that they are fleeing from, in order to interrogate them, as some European countries have done in partnership with the Sudanese police¹⁵⁶.

Those focusing on the UK case law around the refugee definition and noting its "widening the understanding of persecution to include threats against sexual minorities (2010 HJ and HT case) and threats from non-state actors (1998 Adan case)", and using that as evidence of reducing Government control¹⁵⁷, risk missing the wood – the degree to which states such as the UK have instead been able to use the parameters of the Refugee Convention to their own political advantage and their own policy ends – for the trees.

The legal definition of a refugee means that past persecution, even if believed, is not sufficient. The requirement for a well-founded fear of persecution if returned brings a large degree of subjective judgment and discretion into the decision¹⁵⁸. This has allowed

¹⁵³ Home Office, 'Immigration statistics October to December 2017 (n 49).

¹⁵⁴ William Allen, *The Migration Observatory* (n 51).

¹⁵⁵ Gammeltoft-Hansen, 'Deterrence Paradigm' (n 103).

¹⁵⁶ Patrick Kingsley, *New York Times* (n 122).

¹⁵⁷ Ford, Jennings & Somerville (n 5).

¹⁵⁸ Kirstie Brewer, 'Asylum decision-maker: 'It's a lottery' *BBC* (8 May 2018) <http://www.bbc.co.uk/news/stories-43555766>.

the UK to declare certain key countries of origin safe, often on the thinnest of evidence and at odds with the approach of other states¹⁵⁹.

Blurred Lines, Unclear Commitments

But more nuanced than this has been the advantage which states have taken of the blurred lines that inevitably arise around the *definition* of refugee. Indeed states such as the UK have been able to use the very definition of ‘refugee’, and the privileged legal position of refugees, to drive a wedge between different categories of migrant.¹⁶⁰

The Impact of the Smuggled Migrants Protocol: States have also been able to exploit the this Protocol. The “imputation of double criminality: not only do [refugees] flout national boundaries but they consort with criminal smuggling gangs to do so”¹⁶¹ has allowed states to further blur the lines between different categories of migrants, who increasingly are smuggled alongside one another in mixed flows¹⁶². It has even allowed states to blur the line between the smuggler and the smuggled. Some states have argued that even the most minor collusion of smuggled migrants with their smugglers can implicate those migrants themselves as smugglers, and therefore fatally undermine any claim they may have for refugee status¹⁶³.

But states do not themselves need to do much blurring. Real life does it for them. Because if “political upheavals, conflicts and economic difficulties often occur simultaneously giving people multiple motivations for the decision to move”¹⁶⁴, where does the line lie between those fleeing persecution and those fleeing a life that has simply become intolerable? Does the fact that “conflict, particularly when it becomes protracted, undermines the ability to earn a livelihood and feed a family by killing primary breadwinners, destroying businesses and making it impossible to travel to work” turn a refugee who can successfully claim protection into an economic migrant who cannot?¹⁶⁵ Does an Afghan refugee who flees to Iran, or a Syrian refugee who flees to Turkey, but then find that they cannot work and make a life for themselves in those countries, and then moves on into Europe, months or years later, thereby forfeit their refugee status?

In the words of Crawley and Skleparis: “In expressing the need to create a life and not only to live, ‘refugees’ have ‘shown their hand’, revealing themselves to be ‘migrants’ in search of economic betterment”.¹⁶⁶ Blurred lines, or interstices, these are all difficult

¹⁵⁹ See the dramatic impact on Eritrean asylum seeker rejections when the UK continued to rely on a Danish report that Eritrea was safe, even though the report’s findings had been so undermined that the sponsor of the report had itself decided to disregard its own report, in ‘Turned away’, *The Economist* (12 December 2015) 28.

¹⁶⁰ Heaven Crawley and Dimitris Skleparis, ‘Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe’s ‘migration crisis’’ (2018) 44(1) *Journal of Ethnic and Migration Studies*, 48.

¹⁶¹ Harding (n 131).

¹⁶² Crawley and Skleparis, ‘Categorical Fetishism’ (n 160).

¹⁶³ *MV Sun Sea* case – Sri Lankan refugees incentivised to provide minor assistance with chores on the boat they were being smuggled on were then refused refugee status: James C. Hathaway, ‘Prosecuting a Refugee for “Smuggling Himself’, Public Law and legal Theory Research Paper series, paper No. 429 (University of Michigan, 2014).

¹⁶⁴ Crawley and Skleparis, ‘Categorical Fetishism’ (n 160).

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

questions which the law throws up, and which states have taken full advantage of. Indeed from this perspective refugee resettlement schemes can themselves be viewed as reinforcing the idea that those being relocated from close to their country of origin are somehow more legitimate beneficiaries of asylum than those who make these more protracted and disjointed journeys.¹⁶⁷

THE DYSTOPIAN GAME SHOW

Happy Campers?

In the light of all this one can now better appreciate why, despite the hard law of the Refugee Convention, even many refugee advocates have accepted the need for the restated international soft law of the proposed Global Compact on Refugees. They are getting desperate.

Indeed one of the leading academic authorities on refugee law, Professor James Hathaway, has gone as far as to say that the existing international asylum system needs completely restructuring in the way that it deals with access, assessment and assignment of responsibility between states. And that the system has become completely imbalanced in favour of the Global North states.

The North-South Divide: 90% of the world's refugees find protection in the Global South, with little support from the Global North. Annually only 1% of refugees are resettled to the Global North, leaving most in protracted refugee situations (the average length of which is now 17 years¹⁶⁸), many stuck in UNHCR camps in the Global South¹⁶⁹.

UNHCR and States: As Hathaway never tires of pointing out, states make international law. International law therefore only has binding authority to the extent that states continue to allow it to do so. The UN High Commissioner for Refugees ("UNHCR"), the UN body responsible for overseeing states 'compliance' with their obligations under the Refugee Convention, is not an all-powerful international body. Rather it is an underfunded agency, with no fixed funding, and dependent, year on year, on donations from the main Global North states over whom it is supposedly exercising some authority.

The UNHCR's continued existence as an functioning body is effectively dependent on its main donor, the US.¹⁷⁰ If the US decides that it wants to significantly reduce its commitment to resettle refugees, as it has done under the Trump administration, then the US can immediately and unilaterally do so. The same for the UK. All four refugee resettlement schemes which the UK operates¹⁷¹ are totally within the UK's own control.

¹⁶⁷ *ibid.*

¹⁶⁸ 'Resolve conflicts or face surge in life-long refugees worldwide, warns UNHCR Special Envoy' (UNHCR, 20 June 2014)

<http://www.unhcr.org/uk/news/press/2014/6/53a42f6d9/resolve-conflicts-face-surge-life-long-refugees-worldwide-warns-unhcr-special.html>.

¹⁶⁹ James C. Hathaway, 'The UN's 'Comprehensive Refugee Response Framework': Actually a 'Contingent Refugee Assistance Project': The Global Cop-Out on Refugees', Lecture at the Institute of Advanced Legal Studies (London, 21 May 2018).

¹⁷⁰ <http://www.unhcr.org/donors.html>

¹⁷¹ UK Government, 'Immigration statistics October to December 2017 (n 49).

Those refugees who can will often do anything to keep out of UNHCR's camps:

*"They have heard that less than two percent ever get resettled through the UN ... and most of the rest languish in detention for anything up to fifteen years, while their lives leach away and their children grow up without a country, education or liberty"*¹⁷².

That some refugees take huge risks to escape the very system which states have established to protect them is the ultimate indictment of that system. It is not surprising that Global North states such as the UK are quite content giving refugees 'privileged treatment' and paying lip service to the Refugee Convention. Indeed perhaps the ultimate irony is that the country currently providing protection to, and opportunities for, refugees that is closest to the spirit of the Refugee Convention is Turkey, a country which in respect of the Syrian refugees within its borders does not even view itself as being bound by the Refugee Convention¹⁷³.

Glittering Prize

In this context, it is worth interrogating the recommendation by the Home Affairs Committee that the Government should do "more to challenge public misconceptions about people seeking asylum. In particular, a much clearer differentiation must be made between asylum and migration for other reasons"¹⁷⁴. This is not the first time such a suggestion has been made, but some of the UK public still seem a little sceptical¹⁷⁵.

In truth, the reality of migrant experiences just do not divide as cleanly or neatly as the HAC supposes. If the asylum process has "become something akin to a dystopian game show: the refugees must brave untold hardships to reach their destination, but a glittering prize awaits them once they arrive"¹⁷⁶, it is not surprising that some of those seeking asylum do so not because they meet the legal definition of a refugee, but because they know that it is their only realistic chance of lawful entry and stay. The risk of such a system is that the whole process risks appearing out of control and unfair, losing legitimacy in the eyes of the public. In failing to be more honest about this, the HAC risks perpetuating exactly what it says it is keen to move away from.

Hathaway's Proposal: This is exactly what Professor Hathaway's proposals seek to address. His ideas on how to reform the refugee status determination and allocation system go right to the heart of addressing the "dystopian game show" problem, by moving to a system where arrival of a refugee in a particular country gives access to an international refugee determination system, but not a right to stay in that particular country¹⁷⁷.

¹⁷² Robin de Cresspigny, *The People Smuggler* (Penguin 2012).

¹⁷³ 'Home from home', *The Economist* (25 August 2018).

¹⁷⁴ Home Affairs Committee 'Building Consensus' (n 1).

¹⁷⁵ Rutter and Carter, 'National Conversation' (n 9).

¹⁷⁶ 'Special Report on Migration', *The Economist* (28 May 2016).

¹⁷⁷ Indeed one can see the 'regional disembarkation platforms' now being proposed again by the EU in the same light, albeit of course being driven from a very different perspective and motivation; David Herszenhorn and Jacopo Barigazzi, 'EU leaders consider centers outside bloc to process refugees' *Politico*, 21 June 2018 <https://www.politico.eu/article/regional-disembarkation-platforms-eu-leaders-consider-camps-outside-bloc-to-process-refugees/>.

And whilst states' responses have thus far been instrumental in fostering the development of the people smuggling business, this revised system should undermine that market, given that arriving in a certain country would from then on give no assurance that one would be allowed to stay in that particular country, even if determined to be a genuine refugee.

People smuggling leads us to our next section. The fact that the UK Government has not merely been satisfied with manning the borders and expansively exploiting the gaps in international law to keep migrants away. But has also used these interstices to erect a myriad of escalating legal constraints to bear down on migrants even after they have actually managed to arrive. And, even more so than other states, the UK has been able to use the promises to wage war on people smuggling to aim these measures not just directly at migrants themselves, but perhaps more importantly at those who may, either advertently or not, assist immigrants in some way.

SCENE 3 – BACK AT HOME

WELCOME TO THE UK: THE IN-COUNTRY LEGAL WEAPONS DEPLOYED AGAINST IMMIGRANTS

The official explanation of the UK’s opt-out from the Schengen system is that, compared with other EU members, Britain’s geography and traditions mean that the UK relies more on border controls and less on internal controls such as identity checks¹⁷⁸. Allied to the UK’s efforts to prevent unwanted migrants even reaching its shores in the first place, this might lead one to suspect that the UK might rest on its laurels at this point. But nothing could be further from the truth. A significant amount of immigration control is carried out *within* the UK’s borders¹⁷⁹.

The Long Gestation of the Hostile Environment

Notwithstanding the recent attention on various aspects of the “hostile environment”, particularly as a result of the scrutiny on the treatment of the Windrush generation, the hostile environment was not born overnight. In fact, as “pathways into irregularity have significantly changed, moving from mostly clandestine entry to visa overstaying”¹⁸⁰, this approach has taken shape over the last twenty years, with the UK Government erecting a myriad of increasingly aggressive domestic legal constraints bearing down on any unwanted migrant who has managed to arrive.

The Hostile Environment’s Misspent Youth: From the late 1990s in particular, “there has been a growth of measures designed to impair the life of asylum seekers in the UK. They are prohibited from seeking paid employment, and they receive welfare at a fraction of the level of residents, they are subject to possible detention and cannot choose where they live, being subject to dispersal around the UK “often to its most marginalised and least salubrious parts”¹⁸¹.

Some have even gone so far as to argue that, given the restrictions on both rights and opportunities that the UK has imposed on asylum seekers, opting for complete illegality might be preferable to the “cycle of immiseration and perpetual legal struggle” to which asylum seekers are condemned.¹⁸²

The Hostile Environment Comes of Age: But this might be thought of as nothing compared with the measures targeted at other categories of migrant: “From 1999 to 2009 new legislation created 84 new immigration offences, more than double the

¹⁷⁸ Costello and Hancox (The Migration Observatory) (n 30).

¹⁷⁹ Oral Evidence of Catherine Barnard to Home Affairs Committee (n 67).

¹⁸⁰ Cherti (n 10).

¹⁸¹ Matthew Gibney: ‘Asylum Policy’ (The Migration Observatory, 29 March 2011)

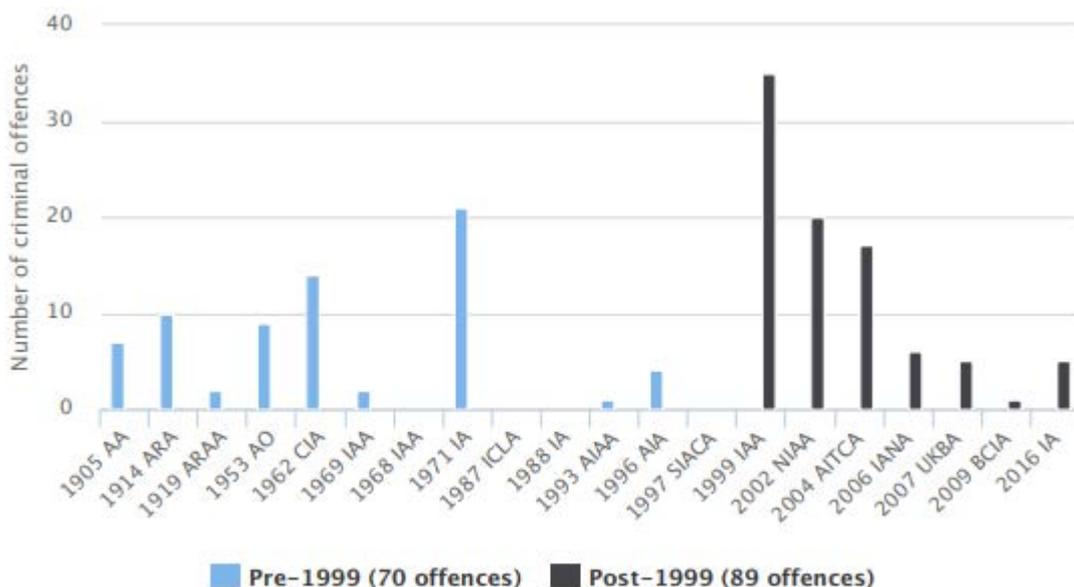
<https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-Asylum.pdf>.

¹⁸² Bill Jordan and Franck Duvein, *Irregular Migration: The Dilemmas of Transnational Mobility* (Edward Elgar, 2003).

number of offences that had been created since 1905 [when the initial Aliens Act was introduced]”.¹⁸³

And these efforts seem to have reached a crescendo in the last five years, as the Immigration Acts of 2014 and 2016 have seen a proliferation of laws aimed at further blocking the airways through which unwanted migrants in the UK gain the necessary oxygen to sustain themselves: targeting employment, housing, education, medical treatment, banking, even driving¹⁸⁴.

Figure 5: Criminal offences introduced in immigration acts



Source: Aliverti (The Migration Observatory) (n 183).

This period is one where some have argued that there were in fact increasing legal constraints on the Government’s ability to act against immigrants¹⁸⁵. But these metrics do not suggest a government that is suffering under undue legal constraints in its pro-active pursuit of immigration control. Many of these new offences attach to the immigrant themselves, even extending so far now as to include an offence of driving when unlawfully in the UK¹⁸⁶. And of course commission of offences often opens up the possibility of removal of the migrant; in fact administrative removal rather than criminal prosecution is by far the most common outcome.

The Hostile Environment’s Chilling Effect

But action against immigrants themselves is really just the tip of the Government’s legal powers. Perhaps a more important lever has been the legal threat directed at those who may, either advertently or not, assist immigrants in their illegal entry or stay in the UK. In

¹⁸³ Ana Aliverti, ‘Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement’ (The Migration Observatory Briefing, 12 October 2016) https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Immigration_Offences.pdf.

¹⁸⁴ Liberty ed. ‘A Guide to the Hostile Environment’ (April 2018) <https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf>.

¹⁸⁵ Ford, Jennings & Somerville (n 5).

¹⁸⁶ Section 44 Immigration Act 2016.

this area the legal benchmark is set by the Smuggled Migrants Protocol. The Protocol was implemented in the EU through the EU 'Facilitators Package' (the EU Facilitation Directive¹⁸⁷ together with the Council Framework Decision¹⁸⁸ implementing it).

The EU Supercharges the Smuggled Migrants Protocol: As formulated by the UN, the Smuggled Migrants Protocol targets organised criminal groups who obtain a financial or other material benefit by facilitating illegal entry or residence of migrants. It makes clear that humanitarian actors are not targeted. But (much to the irritation of the UN) the EU Facilitators Package significantly extended EU states' powers beyond what the UN Protocol had set out.

Crucially the EU offence of people smuggling was not just restricted to organised criminal groups. Nor did it require a financial or material benefit at all for an act to still constitute an illegal facilitation of entry. Indeed it instead gave member states the option of how to deal with humanitarian actors who assist migrants. It is alleged that this fear of prosecution has created a chilling effect, leading seamen to dispose of rescued migrants overboard and rescuers to leave migrants to drown¹⁸⁹.

The UK Supercharges the EU's Powers: Unsurprisingly the UK was quite content to opt in to this particular piece of EU legislation¹⁹⁰, implemented through the Nationality, Immigration and Asylum Act 2002. While the Immigration Act 1971 already contained an offence of facilitation of unlawful immigration, this was significantly widened and extended by the 2002 Act.¹⁹¹

And in terms of its exercise of member state discretion to exempt humanitarian actors viewed as assisting with illegal entry, the UK only extended the benefit of that to those acting on behalf of an organisation specifically aiming to assist asylum seekers. When it comes to those assisting irregular stay, the UK is harsher than even the EU Facilitators Package. Unlike a number of its EU neighbours, the UK does not require any financial or material benefit for the conduct to be punishable¹⁹².

¹⁸⁷ Council Directive 2002/90/EC (n 41).

¹⁸⁸ 2002/946/JHA.

¹⁸⁹ For instance: Frances Webber, 'Asylum: from deterrence to criminalisation' (Institute of Race Relations, Bulletin No. 55, Spring 2006) <http://www.irr.org.uk/publications/issues/from-deterrence-to-criminalisation/>.

John Hall 'Rescuers unable to help 31 refugees who drowned due to laws preventing people smuggling' *The Independent* (London, 26 January 2016) <https://www.independent.co.uk/news/world/europe/rescuers-unable-to-help-31-refugees-who-drowned-because-they-feared-being-charged-with-people-a6834056.html>.

¹⁹⁰ The UK has since opted out of just the Framework Decision (not the Directive) although the Framework Decision remains transposed into domestic law – see European Commission Staff Working Document, 'Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)' (Brussels, 22 March 2017) [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD\(2017\)0117_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf).

¹⁹¹ <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

¹⁹² European Union Agency for Fundamental Rights, 'Criminalisation of migrants in an irregular situation and of persons engaging with them' (2014) <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>.

Employers Sanctions: More Bite at Last?

Another key area of assistance is offering employment. The UK has for over twenty years now imposed legal sanctions against employers found to be employing undocumented migrants. But it is in the last decade that enforcement muscle has really been put behind the letter of the law. Civil penalties were first introduced in 2006¹⁹³. Prior to that only criminal sanctions were available, which perhaps explains a seeming reluctance to penalise employers in practice.

The financial penalty on employers has also been significantly ratcheted up, raised from £5,000 per illegal worker in 1997 to £10,000 in 2008 to £20,000 in 2014. The Immigration Act 2016 then went further, bringing in an unlimited fine with the possibility of a prison sentence of up to five years.

The EU Comes to the Party; the UK's Response: In 2009, the EU legislated in this area through the Employer Sanctions Directive¹⁹⁴. Although the Directive contained many provisions similar to those already in the UK legislation, the UK Government decided that it would not opt in to the EU directive in this area. One of the reasons given was that it obliged employers to pay for the work that undocumented migrants had already done if they had been paid under the national minimum wage¹⁹⁵.

The detail of UK legislation evidences a clear trajectory. The 1971 Immigration Act set a maximum penalty of six months' imprisonment for harbouring an illegal entrant or overstayer. Today, the UK's offence of assisting someone to remain in the country illegally now carries a maximum penalty of fourteen years' imprisonment.¹⁹⁶

Sergio Carrera et al, study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 'Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants' (2016)
[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf).

¹⁹³ Cherti (n 10).

¹⁹⁴ Council Directive 2009/52/EC of 18 June 2009.

¹⁹⁵ Written ministerial statement laid in the House of Commons, 24 May 2011, as discussed in Sonia McKay, 'Undocumented migrants, employers and sanctions' (8 March 2017)

<http://www.ier.org.uk/sites/ier.org.uk/files/Sonia%20McKay%20paper.docx>.

¹⁹⁶ Webber, 'From deterrence to criminalisation' (n 189).

The UK and the EU; A Different Mindset Within a Common Approach: Something else is also clear in this respect; the UK’s legal distance from the EU. The UK may have leveraged the EU’s efforts where it has been in the UK’s interests to do so to repel migrants. But the UK’s approach nevertheless stands out even from the rest of the EU.

For while over the last twenty years the EU has itself moved to legislate and control immigration from outside the EU in almost every way imaginable, some of those measures have at least had an eye to some balance between migration control and migrants’ rights. Indeed an example of this is the EU’s approach to employment of irregular migrants, aiming to prevent their employment but also protecting their rights where they have been paid under the national minimum wage¹⁹⁷.

The UK’s reaction against this demonstrates a more extreme mindset; its refusal to accept that balance. This may explain, in terms of the type of punishment imposed on those facilitating irregular entry, transit or stay, why the maximum custodial sentence is one year in Spain but fourteen years in the UK¹⁹⁸.

The UK has always been ahead of the pack when legally constraining migrants. It generally imposed legal constraints on those assisting migrants before the EU went down this route and legislated in these areas. And when the EU did introduce legislation in these areas the UK Government then considered whether the EU’s approach gave it more powers versus migrants/to control immigration? If yes, it chose to opt-in to the EU legislation; if not, and particularly if the legislation sought to give the migrants themselves any rights, it did not.

Irregular Migrant Labour: Penalisation or Utilisation?

Under the Immigration Act 2016, irregular migrants themselves, as well as their employer, can now be subject to employment sanctions. Some have argued that “the very fact that sanctions exist results in more exploitative working relationships”¹⁹⁹, as employers can use the potential threat of reporting illegal migrants in their workforce to exert power over those workers.

Indeed, when combined with the UK’s refusal to ratify the Migrant Workers Convention, some have suggested that not only is the Government not constrained, but indeed that in not following the EU’s approach of protecting irregular migrants’ wage rights²⁰⁰, the Government has deliberately *incentivised* the use of irregular labour, that the UK has constructed a system which embeds the discretion -- through a liberal attitude to enforcing employment regulations and employer sanctions²⁰¹, including collecting employer sanction fines even when levied²⁰², and enforcing anti-slavery/trafficking

¹⁹⁷ Costello and Hancox (The Migration Observatory) (n 30).

¹⁹⁸ Carrera et al, ‘Fit for Purpose?’ (n 192).

¹⁹⁹ McKay, ‘Undocumented migrants, employers and sanctions’ (n 195).

²⁰⁰ Costello and Hancox (The Migration Observatory) (n 30).

²⁰¹ Jordan and Duvell (n 182).

²⁰² Dominic Casciani, ‘Two-thirds of fines for illegal workers uncollected’ *BBC*, 1 August 2013 <https://www.bbc.co.uk/news/uk-23535938>.

legislation²⁰³ -- to permit the exploitation of migrant labour for the advantage of the UK economy. Others argue that not only is this permitted, but that the UK economy has in fact become reliant on this labour.²⁰⁴

At the same time though, fines against employers under the sanctions regime have steadily risen.²⁰⁵ Yet the available data suggests that the focus of employer sanctions enforcement has not been on bigger firms, but on smaller employers who themselves are often migrants²⁰⁶. This should not be surprising; after all it might be argued that migrant employers may be more likely to employ illegal migrant labour.

But it does demonstrate that the employer sanctions regime in the UK arguably now offers discretion to target both migrants as employers, and migrants as employees. And either way the UK Government has significant leeway to calibrate the nature and focus of employment enforcement, and, should it so desire, to balance in its own interests the needs of its immigration policy on the one hand and its market economy on the other. This outcome hardly seems indicative of a lack of control. Indeed the very opposite is true: the UK authorities' ability to exert control over migrants in the labour market has *increased*.

But it is not just new laws, or even older laws newly bolstered, that are being used against migrants and those who assist them. Some older laws are also now being used in new and unprecedented ways.

²⁰³ 'Of manacles and manicures', *The Economist* (4 August 2018) 22.

²⁰⁴ Martin Baldwin-Edwards, 'Towards a Theory of Illegal Migration: Historical and Structural Components' (2008), 29(7) *Third World Quarterly*, 1449.

Also Steve Tombs, 'State-Corporate Symbiosis in the Production of Crime and Harm' (2012) 1(2) *State Crime Journal*, 170; and Stephen Castles, 'Why migration policies fail' (2004) 27(2) *Ethnic and Racial Studies*, 205.

²⁰⁵ Aliverti (The Migration Observatory) (n 183).

²⁰⁶ McKay, 'Undocumented migrants, employers and sanctions' (n 195).

SCENE 4 – THE LONG GOODBYE

PARTING IS NOT SUCH SWEET SORROW

The Stansted Fifteen: In March 2017, fifteen protesters successfully prevented a deportation charter flight departing from Stansted, by breaching the airport perimeter and locking themselves together and to the plane wheels. They are being prosecuted for the crime of ‘endangering an airport’ under Section 1, Aviation and Maritime Security Act 1990. This crime was introduced as an anti-terrorism measure after the Lockerbie bombing. It carries a potential life sentence²⁰⁷.

The Challenges of Forced Removal

What this incident also demonstrates is how hard it can be to return/remove/deport (these words all have slightly different technical meanings and legal contexts but essentially all mean sending irregular immigrants back to where they came from) migrants once they are within the borders.

This reveals another aspect of the “out of control” mantra; that it often attaches itself to unrealistic expectations of what is achievable. The authorities are berated for lax enforcement, for unacceptable failures, for betraying the public, for undermining faith in the fairness of the system, etc. But in terms of removals, this criticism itself risks setting unmeetable expectations, exacerbating exactly what it claims it wants to dispel – public anxiety and mistrust.

The common reason the UK Government does everything that we have seen so far (the large amounts of money and energy expended on non-entrée strategies, the laws leveraged, the deals with far off countries, all to keep migrants as far away from its shores as possible, the controls exercised over the UK’s borders, and the construction of the hostile environment to try to convince unwanted migrants who have made it to the UK to leave of their own accord) is that it is logistically so challenging to forcibly remove migrants on any scale. The UK is not the only country to struggle with this²⁰⁸.

Of course, as part of this struggle there are legal challenges on behalf of those being removed. Within any fair enforcement system there should be. Was it fair that members of the Windrush generation could potentially be removed without an appropriate legal review? The Home Affairs Committee was very clear about this even before the Windrush issue broke: “Recent high-profile reports of the Home Office threatening to deport individuals based on inaccurate and untested information, and before an independent appeal process, risk undermining the credibility of the whole system.”²⁰⁹

What is not openly and honestly addressed though is the host of *practical* challenges that make removal so difficult. And this is not now just talking about a minority of sympathisers bolting themselves to aircraft wheels. In 2014 an independent inspection of the Home

²⁰⁷ Graeme Hayes, Steven Cammiss and Brian Doherty, ‘Deportation and direct action in Britain: the ‘terrorist trial’ of the Stansted 15’ (openDemocracy, 16 March 2018) <https://www.opendemocracy.net/graeme-hayes-steven-cammiss-brian-doherty/deportation-and-direct-action-in-britain-terrorist-trial-o>.

²⁰⁸ The Economist, ‘Exit Strategies’ (n 63).

²⁰⁹ Home Affairs Committee ‘Building Consensus’ (n 1).

Office's approach to the population who no longer had a legal right to be in the country noted that while the department had appointed an outsourced provider, Capita, to help tackle the issue, "Of the 120,000 people whose cases were sent to Capita for contact to be made ... less than 1% had left as a result of Capita's intervention".²¹⁰

Don't Scare the Horses

When it comes to forced removal, the protection which the UK enjoys from its geographic isolation is reversed – it creates a complication. The UK does not have a Mexican border so it cannot simply load immigrants on to buses to be deposited over the other side. And the UK is not depositing them all in one place – immigrants have come to the UK from far and wide and need to be returned accordingly.

Commercial or Charter Flights? Putting immigrants to be removed on scheduled passenger flights is the most cost-effective approach. But the situation is then not so easy to control.

Migrants' supporters can take advantage of the sensitivities of commercial airlines, as happened, in October 2017, when a "twitterstorm" resulted in Virgin airlines refusing to return a Nigerian lesbian woman on its flight²¹¹. Just last month an activist was able to disrupt a commercial flight to prevent the deportation of an Afghan asylum seeker²¹².

Immigrants being removed from the UK can themselves cause a scene. They can resist and need to be restrained. They can die, in front of other passengers²¹³. This can be disturbing²¹⁴.

As a result, the UK Government has increasingly moved to charter its own flights to carry out removals.

But charter flights are costly. Information extracted under the Freedom of Information Act (by the No Deportations campaign) shows that for 2016 the cost per migrant removed was nearly £5,500²¹⁵. The annual cost of deportations in Europe is estimated at approx. €1 billion.²¹⁶

²¹⁰ Independent Chief Inspector of Borders and Immigration, 'An Inspection of Overstayers: How the Home Office handles the cases of individuals with no right to stay in the UK' (December 2014) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547391/Overstayers-Report_Dec_2014.pdf.

²¹¹ <https://twitter.com/hashtag/FreeNneka?src=hash%20and%20http://www.independent.co.uk/news/uk/home-news/nneka-obazee-lesbian-woman-nigeria-suicide-attempt-deportation-home-office-a7973896.html>.

²¹² David Crouch, 'Swedish student's plane protest stops Afghan man's deportation 'to hell' *The Guardian*, 26 July 2018 <https://www.theguardian.com/world/2018/jul/25/swedish-student-plane-protest-stops-mans-deportation-afghanistan>.

²¹³ Matthew Taylor and Robert Booth 'G4S guards found not guilty of manslaughter of Jimmy Mubenga' *The Guardian* (16 December 2014) <https://www.theguardian.com/uk-news/2014/dec/16/g4s-guards-found-not-guilty-manslaughter-jimmy-mubenga>.

²¹⁴ Dan Milmo 'Jimmy Mubenga: Questions raised over flight guidelines for deportations' *The Guardian* (15 October 2010) <https://www.theguardian.com/uk/2010/oct/15/jimmy-mubenga-questions-guidelines-deportations>

²¹⁵ <http://www.no-deportations.org.uk/>.

²¹⁶ 'The Migrant Files, The Money Trails' (18 June 2015) <http://www.themigrantsfiles.com/>.

The use of charter flights also logistically impacts the numbers that can be returned. For the first three months of this year it took over 1,000 security officers to accompany 400 migrants being returned on twelve flights²¹⁷. A report, by the Independent Monitoring Board Charter Flight Monitoring Team revealed that deportation flights have departed from Britain with as many as three staff for every foreign nationals on board.²¹⁸

I (Don’t) Want You Back

But to even get to that point will likely require considerable time and energy, potentially at the most senior political levels, as well as serious financial commitments.

Pakistan: The first in a new wave of migrant return charter flights to Pakistan in late 2011 came after a visit by the Prime Minister to negotiate a new “Enhanced Strategic Dialogue”. This included an objective of increasing bilateral trade to £2.5 billion per year as well as a £650 million “education aid” programme. The first flight itself took place on the same day as a visit to Pakistan by then home secretary Theresa May.”²¹⁹

But even when agreements for returns can be put in place between countries, roadblocks can still occur. There can be disputes over the identity and nationality of those migrants being returned, many of whom do not have identity papers. A number of key migrant producing countries will not accept the biometric identity document that the UK now creates for non-EU migrants.²²⁰ All this can lead to a refusal of the recipient country to take migrants back. Notwithstanding the EU-Pakistan readmission agreement, a returns flight from Greece to Pakistan had to return to Athens when Pakistan refused to allow the disembarkation of a number of the passengers²²¹.

India, Iraq and China: Other countries simply refuse to take back their citizens.

A memorandum of understanding was signed between the UK and India earlier this year under which India pledged to accept most of its immigration offending nationals back on UK documentation. But the full agreement has still not been signed, seemingly a victim of the fallout of concerns with the UK Government’s approach that emanated from the Windrush episode²²².

The Iraqi parliament has banned the forced return from Europe of failed asylum seekers and threatened to fine airlines that take part in deportation programmes.²²³

Some countries string out negotiations indefinitely. Despite the EU concluding readmission agreements with both Hong Kong and Macao in 2004, it simply does not

²¹⁷ <http://www.no-deportations.org.uk/>.

²¹⁸ May Bulman, ‘Immigrants ‘treated as commodities’ during removal flights from UK, watchdog finds’ *The Independent* (12 June 2018) <https://www.independent.co.uk/news/uk/home-news/immigrants-subject-to-excessive-and-illjudged-use-of-restraint-during-removal-flights-from-uk-a8394671.html>.

²¹⁹ ‘Deportation Charter Flights: Collective Expulsion in 2017’ (Corporate Watch, 6 January 2017) <https://corporatewatch.org/deportation-charter-flights-collective-expulsion-in-2017-2/>.

²²⁰ Goodhart (n 4).

²²¹ ‘Pakistan blocks 30 migrants deported from Greece’ (BBC, 4 December 2015) <http://www.bbc.co.uk/news/world-asia-35003261>.

²²² Goodhart (n 4).

²²³ Owen Bowcott, ‘Iraqi parliament refuses to accept nationals deported from Europe’ *The Guardian* (2 July 2012) <https://www.theguardian.com/world/2012/jul/02/iraq-parliament-deported-nationals-europe>.

have sufficient carrots and sticks to convince the Chinese to take their own citizens back. The EU readmission agreement with China has now been ‘under negotiation’ for over fifteen years.

The EU is now looking to get even tougher, utilizing its visa policy to try to leverage more effective agreements on readmission with a proposal that the EU Visa Code be amended to include a new mechanism to attach stricter visa conditions to any country that does not sufficiently cooperate on the readmission of its own irregular emigrants.²²⁴ What impact this may have remains to be seen.

Of course the flipside of the ‘visa stick’ is the ‘visa carrot’, ie better visa treatment for those countries that sign and abide by readmission agreements. But this creates a conundrum, which is encapsulated in Migration Watch’s plans for non-EU net migration reduction. A proposal that:

“(d) Full bilateral readmissions agreements should be pursued with source countries. The offer or potential removal of visa-free access and the UK’s aid budget should be used as leverage to encourage other countries to take back overstayers.”

is immediately followed by

“e) In tandem with d) above, there should be a review of arrangements for the nearly 60 countries whose nationals do not require visas to visit the UK. This should include an investigation into the level of overstaying that has resulted from non-visa travel.”²²⁵

That is the conundrum. If you hold out visa-free access as a carrot you risk creating the very problem you are trying to address.

The Hostile Environment Through a Different Lens

The Home Affairs Committee may criticise the Government for relying “on its “hostile environment” policy as a panacea for enforcement”²²⁶. But, if border controls will never stop everyone, not least because the country is to remain open to visitors, tourists and students, and if registration or ID card schemes are viewed as unpalatable, one could argue that the Home Office’s increased reliance on the dissuasive influence of the hostile environment is not an unreasonable or unrealistic response to the problem. In tandem with this, in recent years the Home Office has increasingly focused on ‘voluntary departures’ (‘voluntary’ only in the sense of the method of departure, not in the choice of whether or not to return, enforced removal proceedings already having been initiated) instead of forced returns²²⁷. Which again is a not an unreasonable response to the costs and practical difficulties of the latter.

²²⁴ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) (14 March 2018) https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/201780314_proposal-regulation-establishing-community-code-visas_en.pdf.

²²⁵ Migration Watch UK, ‘How to deliver a significant reduction in non-EU net migration’ (31 August 2018) <https://www.migrationwatchuk.org/briefing-paper/453>.

²²⁶ Home Affairs Committee ‘Building Consensus’ (n 1).

²²⁷ Blinder (The Migration Observatory) (n 77).

In addition, evidence shows that assisted voluntary return and reintegration programmes are more efficient in terms of ensuring returned migrants can make a life back in their home country, and stay there, particularly where they may have been away for some time and/or have relatively little connection with that country any more²²⁸. But this has never been explained to the public, and the public’s sensitivities can complicate matters. Indeed there is a suggestion that “the UK Government publicly fixates on enforcing removal to avoid political backlash over what can be construed by some as ‘bribing’ irregular migrants to return home”²²⁹ and that “both for supporters and opponents of a tough immigration stance there is too much focus on involuntary deportation as a measure of success or shame”²³⁰.

The Scores on the Doors

Within the constraints of what it can do though, the control the UK Government has been able to exercise over the numbers of asylum seekers coming in to the country has meant that the number of asylum seekers being removed is now at a record low. This in turn has allowed a greater focus on higher risk groups; numbers of foreign national offenders being removed, though now plateauing, have recently hit a high, now surpassing the numbers of asylum seeker removals.²³¹

The Role of Immigration Reporting and Detention: Of course, in order to implement an effective removals process for unwanted migrants, you need to know where the migrant is and have sufficient control over them. For all its alleged failings in this respect, the UK arguably does not score so badly on this front. The group of people irregularly in the country, but known to the authorities and subject to regular reporting at a reporting centre, is currently 80,000.

On top of that the UK operates an estate of ‘immigration removal centres’ with no explicit legal constraint on the length of detention, and which, from a tiny base in the early 1990s, is now one of the largest in Europe. This estate can confine up to 4,000 people every day and was running at a level of detentions of over 30,000 per year²³², although there has been a slight decline over most recent years to the current reported figure of just over 26,000²³³.

The Shaw Report in 2016 calculated the costs of the detention estate at “just under £34,000 per detainee place per year. This contrasted with an estimated annual cost of £4968 to monitor a migrant using an electronic monitoring device”.²³⁴

Others use slightly different terminologies to cover the different shades of return; ECRE term the mid-ground between forced return and true voluntary return as ‘mandatory return’: in European Council of Refugees and Exiles, ‘Voluntary Departure and Return: Between a Rock and a Hard Place’ (24 August 2018) <https://www.ecre.org/ecre-policy-note-voluntary-departure-and-return-between-a-rock-and-a-hard-place/>.

²²⁸ CCME (n 143).

²²⁹ Cherti (n 10).

²³⁰ Goodhart (n 4).

²³¹ Blinder (The Migration Observatory) (n 77).

²³² Immigration Detention in the United Kingdom (n 21).

²³³ Home Office ‘Immigration statistics, year to June 2018: How many people are detained or returned?’ (23 August 2018) <https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2018/how-many-people-are-detained-or-returned>.

²³⁴ Terry McGuinness and Melanie Gower, ‘Immigration detention in the UK: an overview’ (House of Commons Library Briefing Paper Number 7294, 29 August 2018) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7294#fullreport>.

Annual migrant removals (including voluntary departures after the initiation of removal) from the UK have recently been running at around 40,000. There is still a degree of debate around this data²³⁵. And the most recent figures indicate a further decline in enforced returns, although the overall picture is unclear as voluntary returns take longer to feed into the numbers as matching checks are made on travellers after departure²³⁶. In the light of all the practicalities that it has to address in order to effect removals, it can be argued that the UK Government is exercising about as much control through removals as is reasonably achievable.

But if practicalities can be used to thwart the Government's control of immigration in getting rid of people once here, practicalities can also be used as one of the most effective weapons that the Government can wield on a wide range of different fronts to exercise that control in the first place.

²³⁵ Blinder, (The Migration Observatory) (n 77).

²³⁶ Home Office 'Immigration statistics, year to June 2018 (n 233).

SCENE 5 – BACK AT THE REAL WORLD

LAW GRABS THE HEADLINES, ADMINISTRATION GRABS THE SPOILS

How it Works

For those still not convinced that legal constraints on the UK Government are not as material as they may seem, relief is at hand. Because even where states are under legal constraints, they often neatly sidestep those by simply turning law (which they don't completely control) into administration (which they do). They can thus win the war on removals *even when* they appear to be losing the legal battle. Which is perfect for states, as they can then use these apparent legal struggles to justify yet further restrictions, and justify turning yet more previously legal processes into administrative ones.

Across the Atlantic; A Perfect Example: Diverting attention for one moment across the Atlantic, the ongoing legal struggles over President Trump's 'Muslim Ban' provides a good example of this. Looking at the media headlines it is hard to see anything other than a policy which became mired in a legal challenge for eighteen months, constraining the President's freedom of action.

But if you look at the actual outcome in the meantime, this was that the US refugee resettlement program numbers have been cut to their lowest in almost forty years²³⁷. And Syrian refugee numbers admitted to the US fell from over 15,000 in 2016 under the Obama presidency to only 11 in the first quarter of this year.²³⁸

This has been by simple, administrative action, the Government able to throw "sand into the gears ... turning up the security vetting to keep everyone out".²³⁹ Even in the midst of this seemingly most prolonged and heated of legal battles, one might therefore justifiably conclude that the US President is not really labouring under the severe legal constraints that he rails against.

Meanwhile, the lack of real legal protections for those who want to come means that away from the media spotlight, and the judges, and the state challenges, the practical outcome is quietly dictated not by high-flown legal and constitutional argument, but rather by everyday administrative processes.

A Fair Trial?

Back to the UK, here is a graph showing the number of asylum applications in the UK since the turn of the millennium²⁴⁰.

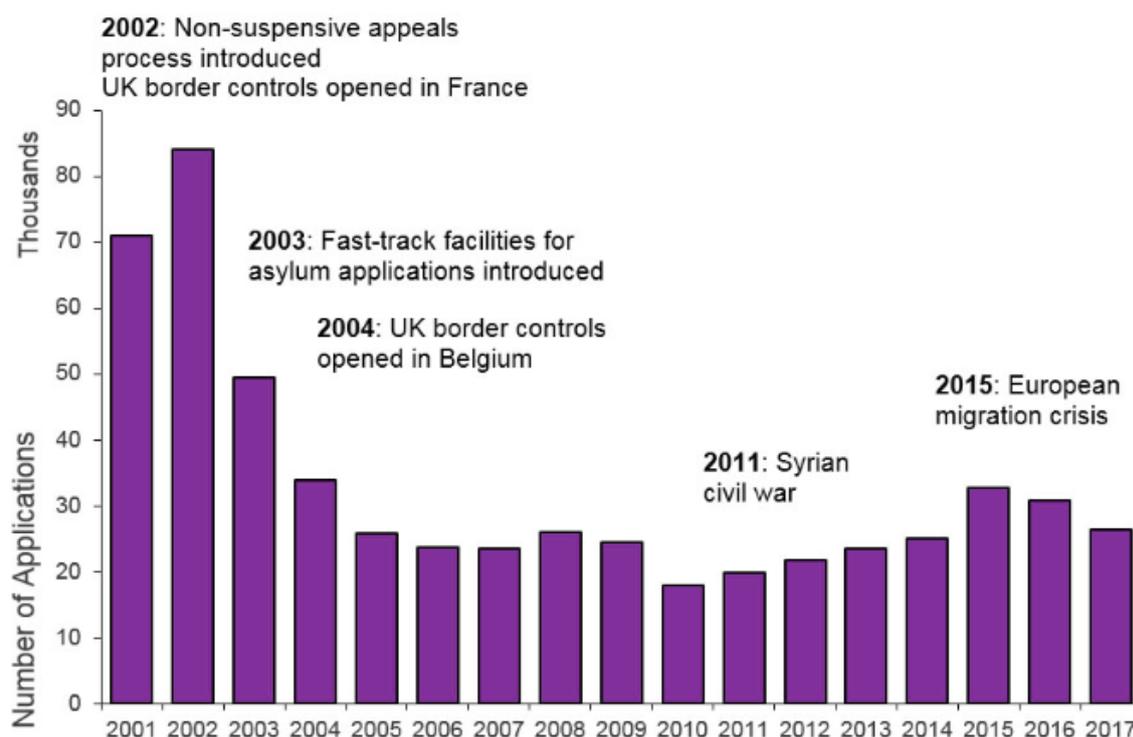
²³⁷ 'Yearning to be free? Bad luck', *The Economist* (21 April 2018).

Also Jeremy Weinstein and Jeremy Ferwerda, 'Trump has undercut U.S. Refugee Resettlement. Here's One Way to Restore It' (12 February 2018) <http://foreignpolicy.com/2018/02/12/trump-has-undercut-u-s-refugee-resettlement-heres-one-way-to-restore-it/>.

²³⁸ Deborah Amos, 'The U.S. Has Accepted Only 11 Syrian Refugees This Year' <https://www.npr.org/sections/parallels/2018/04/12/602022877/the-u-s-has-welcomed-only-11-syrian-refugees-this-year>.

²³⁹ The Economist 'Bad Luck' (n 237).

²⁴⁰ UK Government 'Immigration statistics October to December 2017' (n 49).

Figure 6: Number of asylum applications in the UK, 2001 - 2007

Source UK Government Immigration Statistics, February 2018

While of course a number of different factors affect these numbers, these figures demonstrate the degree of control the UK has been able to exercise over refugee intake in the last decade, even as significant international conflicts generated large numbers of refugees.

They also suggest the most significant impact on application numbers has come not from external events generating migrant flows, but rather changes to the administrative process for dealing with applications and appeals, such as withdrawing in-country appeal rights ('non-suspensive appeals') for certain categories of applicant and the introduction of the fast-tracking of those asylum claims that were deemed by the Government unlikely to succeed.

The Detained Fast-Track: Even where such process changes are subsequently successfully legally challenged, as indeed was the case with the UK's 'detained fast track' asylum processing regime, this can take a number of years²⁴¹.

In fact what can appear as a dramatic legal victory could instead be argued to highlight the power of the UK Government to deny immigrants access to justice in practice.

"This ruling confirms that for 10 years the Home Office was putting asylum seekers through a detained process that was unlawfully unfair. Countless thousands of people will

²⁴¹ Diane Taylor, 'High court rules more than 10,000 asylum seekers treated unfairly' *The Guardian* (20 January 2017) <https://www.theguardian.com/uk-news/2017/jan/20/uk-high-court-rules-10000-asylum-seekers-treated-unfairly-detained-fast-track>.

have been deported without ever having a lawful hearing of their cases. Nobody knows what happened to them."²⁴²

And this is in a country where even those more sceptical of the notion of human rights seem to make an exception for "the right to a fair trial".²⁴³

The Immigration Tribunal has recently confirmed that where the intention is to remove a migrant from the UK, rather than to prosecute, Immigration Officers do not need to comply with the protections for a suspect that would be required under the Police and Criminal Evidence Act. So no need to caution the suspect, to offer an interpreter, to allow access to a lawyer, or to make a contemporaneous, full and accurate record of the interview²⁴⁴.

Operation Nexus: provides another example of the potential administrative undermining of the right to a fair trial when it comes to establishing immigration status. The Government explains Operation Nexus as strengthening cross-organisational working between the Home Office and police in order to identify foreign national offenders liable for removal from the UK.

The outcome of this though is a blurring of the lines that allows police officers to interview migrants and to question them about their immigration status without the legal protections that are present in the formal criminal process; in effect 'foreign national offenders' are no longer defined as only those who have received a proven criminal conviction²⁴⁵.

Access to Justice?

This leads on to another aspect of how administrative power has more recently been used by the UK Government to undercut legal challenges to immigration controls. This has been cuts to funding. In seeking to challenge the legality of Operation Nexus in the courts, the AIRE Centre legal charity had to resort to crowdfunding²⁴⁶.

Legal Aid: The dramatic cuts that have been made to legal aid in recent years in many areas, including those relating to immigration claims, has led to some of the most high-profile immigration advisory firms shutting down²⁴⁷.

In Switzerland the tightening of immigration procedures has been somewhat counterbalanced by increased availability of free legal assistance²⁴⁸. But in the UK legal

²⁴² *ibid.*

²⁴³ James Dobson, Freddie Lloyd and Ryan Shorthouse, 'Individual Identity: Understanding how conservatives think about human rights and discrimination' (Bright Blue, 2017) <https://brightblue.org.uk/research/human-rights/>.

²⁴⁴ *Elsakhawy* [2018] UKUT 86.

²⁴⁵ 'New challenge to Theresa May's 'hostile environment' and the unlawful deportation of EU nationals' (AIRE Centre, 20 April 2018) <http://www.airecentre.org/news.php/301/new-challenge-to-theresa-mays-hostile-environment-and-the-unlawful-deportation-of-eu-nationals>.

²⁴⁶ <https://www.crowdjustice.com/case/challenge-operation-nexus/>

²⁴⁷ Owen Bowcott, 'Tens of thousands lose support as Immigration Advisory Service closes' *The Guardian* (11 July 2011) <https://www.theguardian.com/law/2011/jul/11/immigration-advisory-service-closes-blames-government>.

²⁴⁸ ECRE Weekly Bulletin, 'Switzerland: Asylum ordinances amended in last round of asylum reform' (15 June 2018) <https://mailchi.mp/ecre/ecre-weekly-bulletin-15062018>.

aid for asylum cases has not only been repeatedly cut²⁴⁹, but withdrawn completely for people facing removal or deportation, for non-asylum cases (another incentive to make an asylum claim) including those impacting children²⁵⁰, for Article 8 ECHR claims, and for refugees seeking family reunion.²⁵¹

Some have suggested that ending of free legal advice for Windrush cases in 2013 was one of the primary causes for the lack of scrutiny of the controls exercised by the Government in these cases.²⁵²

Even where legal aid is in theory still available, “The Joint Committee on Human Rights warned that large parts of the country have become “legal aid deserts”, practitioners withdrawing from providing legal aid services because they can no longer afford to do this work”.²⁵³

And even in the most desperate of circumstances, in immigration detention, where access to legal advice is supposedly assured, the reality is that almost a third of detainees have not had practical access to legal advice²⁵⁴. Indeed, even David Goodhart of Policy Exchange – who is rarely accused of being a bleeding-heart liberal on these matters -- seems surprised at “how few rights immigration detainees have”²⁵⁵.

In-Country versus Out-of-Country Administrative Action

In-country administrative action is a very strong element of the Government’s control over migrants. But it can never be completely immunised from legal attack.

In-Country; Susceptible to Attack: For example, the ultimately successful challenge not only to the detained fast track approach, but also, in *Kiarie and Byndloss*, to another of the processes brought in by the Government to remove migrants before they could properly exercise their appeal rights²⁵⁶.

And the *Hardial Singh* judgment does at least require the power to detain immigrants to be strictly and narrowly understood as being exercised only where there is a reasonable prospect of their removal²⁵⁷. In-country administrative action is also more likely to attract domestic media attention; indeed in some respects, if the ‘hostile environment’

²⁴⁹ <https://www.asylumaid.org.uk/access-to-justice/>.

²⁵⁰ Although the UK Government has now bowed to pressure to at least “bring immigration matters for unaccompanied and separated children [back] into scope of legal aid”; May Bulman, ‘Government reinstates legal aid for child migrants in major U-turn’ *The Independent* (13 July 2018) <https://www.independent.co.uk/news/uk/home-news/child-migrants-legal-aid-government-lucy-frazer-childrens-society-a8444466.html>.

²⁵¹ The Legal Aid, Sentencing and Punishment of Offenders Act 2012.

²⁵² Nick Nason, ‘Windrush children: why Commonwealth citizens are being denied immigration status’ (Free Movement, 13 April 2018) <https://www.freemovement.org.uk/why-caribbean-commonwealth-citizens-are-being-denied-immigration-status/>.

²⁵³ May Bulman, ‘Legal aid cuts have made human rights ‘unaffordable’, warn MPs’ *The Independent* (18 July 2018) <https://www.independent.co.uk/news/uk/home-news/legal-aid-cuts-human-rights-unaffordable-committee-refugee-action-asylum-seekers-a8452661.html>.

²⁵⁴ Bail for Immigration Detainees (Research published 5 December 2017) <http://www.biduk.org/posts/328-six-monthly-survey-reveals-less-than-half-of-those-questioned-have-a-legal-representative>.

²⁵⁵ Goodhart (n 4).

²⁵⁶ R (on the application of Kiarie) v Secretary of State for the Home Department, R (on the application of Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.

²⁵⁷ R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB).

is going to have its desired impact then it is meant to do so. But this can backfire. It can produce stories close to home that may potentially be damaging to the Government. The Windrush revelations were an example of this.

Out-of-country administrative action on the other hand is something else entirely. In a world of bluster and bark, out-of-country administrative immigration controls lie largely hidden in plain sight, achieving their desired result in the most unassuming, but most efficient, of fashions.

And even when the immigration frenzy meter is off the scale, they attract almost no public or political comment. Indeed the most powerful weapons in the UK's arsenal in managing immigration are now so much part of the background administrative wallpaper of everyday life that they are effectively out of reach of legal challenge.

Visa Requirements: The Jewel in the Crown

Visa requirements are the centrepiece of the administrative approach, the perfect example of states' power in the face of purported legal constraints. Visas are used to control not just those with few, if any, protections under international law. They can be, and often are, used to prevent the arrival of exactly those migrants who have the most rights under international law: refugees. And international law has proved powerless to stop this.

The 'St. Louis' Jews: It is not a new development for governments to control migration by insisting on entry papers, which are practically unobtainable, from people that wish to exclude. The story of the 900 Jewish refugees who departed the Third Reich just a few months before the outbreak of the Second World war on the German ocean liner, *MS St. Louis*, but were denied access to Cuba, the United States and Canada, before being returned to their fate in Europe, is well recorded²⁵⁸. Less well recorded is that by 1939 only the city of Shanghai remained freely open to refugees from Nazi Germany without entry papers.²⁵⁹

The UK's Track Record: The UK has made no pretence that its visa requirements are anything other than aimed at migrant producing countries, including, indeed sometimes particularly, those whose migrants are likely to claim refugee protection.

In 1985, when discussing the visa requirements for Sri Lankans, Home Secretary Douglas Hurd was explicit that the measure was a response to the flow of Tamil asylum seekers.

And the same approach was followed in respect of flows from Turkey (1989), Yugoslavia (1992), Colombia (1997) and onwards.²⁶⁰

²⁵⁸ 'SS St Louis: The ship of Jewish refugees nobody wanted' (BBC, 13 May 2014) <http://www.bbc.co.uk/news/magazine-27373131>.

²⁵⁹ Ryan, 'Extraterritorial Immigration Control' (n 106).

²⁶⁰ Ibid.

From Prague to Aleppo; Different Time, Same Result: Indeed this rationale motivated the stationing of UK Immigration Officers at Prague airport, whose actions in preventing potential Roma asylum seekers from boarding a flight to the UK were the subject of the landmark 1980s *Roma Rights* case²⁶¹. The UK's discretion to control its borders in this way was upheld in international law.

Thirty years later, the European Court of Justice addressed the case of whether, under the EU Visa Code, Belgium was free to refuse the grant of a humanitarian visa to a Syrian family fleeing Aleppo²⁶². The court once again held in favour of state discretion.

For all practical purposes it has proved impossible to successfully challenge the visa decisions of the Global North states. For nearly one hundred years it has been the position that consular decisions to refuse visas are not reviewable by the US Courts. While the EU does allow an appeal right against visa refusals, in practice such rights are unexercisable from abroad.²⁶³

Visa requirements have a power inverse to their profile. They dictate who can come and who cannot, who can stay and for how long, and what they are tagged with; who is, or becomes, "irregular" which in state rhetoric then becomes synonymous with "illegal".

The Government's statistics show hundreds of thousands of visa refusals²⁶⁴. But they do not show those who never applied because of the inevitability of the outcome. Because, as Nathan Smith has said in the context of the US system, in practice "our immigration system permanently shuts out most of humanity based on their place of birth"²⁶⁵.

Carrier Sanctions: The Sting in the Tail

Carrier Sanctions; the Unsung Hero of Immigration Control: Documentation requirements are enforced by immigration officers stationed overseas, in tandem with the carrier sanctions regime. The latter is the requirement that airlines are fined (and must meet the cost of returning the traveller to whence they came) if they transport into the UK a traveller who lacks the proper documentation. Carrier sanctions have proven to be one of the most effective ways by which states can control their borders. While at the same time profiting²⁶⁶.

In practice such checks are generally carried out by airlines without mind to human rights concerns. In effect crucial decisions on non-admission are free from effective

²⁶¹ *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55.

²⁶² *X and X*, Judgment C-638/16 PPU (CJEU, 7 March 2017).

²⁶³ Ryan, 'Extraterritorial Immigration Control' (n 106).

²⁶⁴ UK Government, 'Immigration statistics October to December 2017, How many people come to the UK each year?' <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-come-to-the-uk-each-year>.

²⁶⁵ Nathan Smith, 'Don't Restrict Immigration, Tax It' (TCS Daily, 20 June 2006).

²⁶⁶ Amnesty International, referring to a Parliamentary statement that, in the almost 10 years from the introduction of the carrier sanctions regime in the UK, fines totalling almost £100 million had been paid, in 'Cell Culture: The Detention & Imprisonment of Asylum-seekers in the United Kingdom (1996).

challenge.²⁶⁷ And this has proven a very effective means of border control, making sure that unwanted migrants cannot even make it to the border.

Not only has the number of travellers denied entry on arrival at the border “almost halved over the preceding 10 year period”, but “the largest number of refusals (about 10%) are Americans who have come believing that they can work in the UK without a work permit”²⁶⁸, ie are not unwanted at all, just not wanted in that particular capacity.

The Sri Lankan Civil War; Lessons and Legacy: One of the first examples of such all encompassing administrative tactics being used in tandem to target and keep out those fleeing their country was the UK’s response to the flow of Sri Lankan Tamil refugees in the 1980s²⁶⁹. Aggressive, targeted use of traditional non-entrée practices were combined with pejorative state rhetoric, which foreshadowed much of the interplay of legal constraints and political weapons that were to be used against migrants in the years ahead.

The UK Government first required Sri Lankans to obtain visas in advance of travel to the UK. It then introduced carrier sanctions legislation and checks at overseas airports. At the same time the Government deployed the term ‘bogus’ to apply to those Sri Lankans who fled using false papers or who had transited through a third country.²⁷⁰

An important element of the power of non-entrée strategies is that they are symbiotic; one strategy can pave the way for another. Visa restrictions may cause refugees to transit through a third country to circumvent such restrictions; this then provides the justification for the receiving state to argue that the refugee passed through a safe third country and should return there.

In fact the Government left it deliberately unclear how the new laws it was bringing in to combat the Sri Lankan influx interacted with its international law commitments to refugees, in particular whether the new carrier sanctions fines it had introduced were or were not to be waived for refugees.

Some may suggest that “the discretion available to Thatcher-era policy-makers is a thing of the past”²⁷¹ but, if anything, since that time the administrative barriers against migrants have only been raised ever higher, and non-entrée strategies significantly augmented, not reduced. Indeed it was arguably the UK’s aggressive reaction in taking such decisive control of the Sri Lankan situation which catalysed other EU countries to do the same, to move towards greater coordination and harmonization of approaches across the region which in effect kick-started the development of enhanced, EU wide non-entrée practices against migrants.²⁷²

²⁶⁷ Thomas Gammeltoft-Hansen, ‘The rise of the private border guard’ in Gammeltoft-Hansen and Sorensen (eds), *The Migration Industry and the Commercialization of International Migration* (Routledge 2013) 128.

²⁶⁸ Goodhart (n 4).

²⁶⁹ Shah (n 110).

²⁷⁰ *ibid.*

²⁷¹ Ford, Jennings & Somerville (n 5).

²⁷² Shah (n 110).

It is, of course, the power of these administrative travel constraints against migrants which have proven such a fertile ground for people smugglers to sow their service offering. Indeed carrier sanctions regimes are now legitimised, indeed mandated by a number of international and regional legal instruments: in the UN Smuggled Migrants Protocol, in the EU through the Schengen Implementing Convention and the EU Carrier Sanctions Directive (which the UK opted into)²⁷³.

The lack of clarity over the interaction of refugee rights and carrier sanctions has largely continued; indeed the negotiation records of the agreement of the EU Carrier Sanctions Directive suggest that this fudge was states' deliberate intention²⁷⁴. Thus are migrants deprived of the protection of international law and instead subjected to effectively unchallengeable administrative control.

Despite the financial penalties, carriers themselves have adjusted to this regime, and they generally come to an accommodation with the relevant government as to how the system will operate²⁷⁵. The UK is no exception²⁷⁶. Carrier sanction fines are considered an accepted cost of doing business, only challenged where their imposition is viewed on the particular facts of the particular case to be unfair; to the airline, not the migrant.²⁷⁷

FEES AND CHARGES: MUNDANE BUT HIGHLY EFFECTIVE IMMIGRATION CONTROL

Monetising Constraint

The topic of carrier sanction fines leads on to perhaps the most mundane seeming of administrative requirements which allow the Government to exercise control over immigration. Fees, fines, surcharges. In the UK immigration system these abound: visa fees, fees for changing immigration status, including obtaining permanent residence and naturalisation, international student tuition fees, NHS surcharge fees, employer immigration skills charge, carrier sanctions fines, employer sanctions fines, right to rent fines.

These costs serve not only to dissuade people from coming here and keep people out, but also allow the Government to profit from those who are both legally, and illegally, here. Many may serve a multiple function: that international students from outside the EEA pay up to four times as much as UK students²⁷⁸ may generate significant revenue (to the extent that international students may be cross subsidising education for a number of home students²⁷⁹). But it may also dissuade, or practically prevent, a large number of

²⁷³ Council Directive 2001/51/EC of 28 June 2001.

²⁷⁴ Ryan, 'Extraterritorial Immigration Control' (n 106).

²⁷⁵ *ibid* on the requirements of the Dutch immigration authorities' Memorandum of Understanding with KLM.

²⁷⁶ Goodhart (n 4).

Cherti (n 10).

²⁷⁷ Clyde & Co., 'Ryanair v Secretary of State for the Home Department: a more reasonable standard in respect of carrier responsibility for identification of passengers?' (30 June 2016)

<https://www.lexology.com/library/detail.aspx?g=ecc60f23-22d2-4f96-b399-d26cf31b227c>.

²⁷⁸ Judith Burns, 'International students pay premium at UK Universities', *BBC* (9 August 2013)

<http://www.bbc.co.uk/news/education-23614142>.

²⁷⁹ Ruchi Hajela and Madeleine Sumption 'Non-EU Higher Education Students: Impact on the UK Economy' (The Migration Observatory, 2 October 2017) https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/07/Briefing-Higher_Education-3.pdf.

international students from coming to access the opportunity of a British higher education in the first place.

Indeed, in materially impacting migrants' ability to practically access the UK, or their rights once here, the size of some of these fees can be a surprisingly effective means of immigration control.

Windrush Shines a Light: In the Windrush episode the fee for obtaining a "No Time Limit" stamp to prove entitlement to stay was cited as one of the factors that had dissuaded a number from taking this action²⁸⁰. This fee was subsequently waived in the rush to stem the adverse public reaction²⁸¹.

Following the Windrush episode, the topic of fees has at last received a little more publicity. The ensuing scrutiny has highlighted other similar cases. Afghan interpreters who had served with British troops fighting against the Taliban were facing return to Afghanistan unless they paid £2,389 to apply for indefinite leave to remain. But, post Windrush, the fees were waived²⁸².

It seems that this scrutiny is now being applied more holistically, with the Chief Inspector of Borders and Immigration issuing a call for evidence on the Home Office's approach to charging for its services²⁸³.

Out of all Proportion: Eye-watering fees are applied to even ordinary families trying to regularise their situation. The cost for each family member applying for indefinite leave to remain is £2,297, with the Home Office's own figures showing this amounts to an 811% profit on the processing cost.²⁸⁴ And for a British citizen to bring a spouse into the UK, the absolute minimum cost for the path from entry to citizenship is £7,275.²⁸⁵

Profits seem rather healthy too in the visa administration outsourcing business. VFS Global, a Kuoni subsidiary controls half of the visa application market worldwide and is used by the UK for out of country visas processing. This business accounts for only 5% of Kuoni's revenues but more than 60% of its operating profits.²⁸⁶

What is particularly striking is not just how much costs and profit margins have risen in recent years, but the disparity this has now resulted in compared with the approach of other major Global North states. For those already here, the cost of British citizenship

²⁸⁰ Nason, 'Windrush' (n 252).

²⁸¹ Conor James McKinney, 'What the Home Office is (finally) doing for the Windrush generation' (Free Movement, 25 April 2018)

²⁸² 'Afghan interpreters' UK immigration fee waived', *BBC* (4 May 2018) <https://www.bbc.co.uk/news/uk-43998925>.

²⁸³ Chief Inspector of Borders and Immigration, 'Call for evidence: Home Office approach to charging for services' (18 June 2018) <https://www.gov.uk/government/news/call-for-evidence-home-office-approach-to-charging-for-services>.

²⁸⁴ The Home Office's own figures for immigration and asylum fees unit costs (2017) stated in 'Failures in UK immigration and asylum undermine the rule of law' (The Law Society, 12 April 2018) <http://www.lawsociety.org.uk/news/press-releases/failures-in-uk-immigration-and-asylum-undermine-the-rule-of-law/>.

²⁸⁵ Nick Nason, 'Comment: What is driving the Home Office fees increase' (Free Movement, 2 July 2018) <https://www.freemovement.org.uk/comment-what-is-driving-the-home-office-fees-increase/>.

²⁸⁶ 'A strange sort of welcome', *The Economist* (2 January 2016).

for children is now £1,012²⁸⁷, over twenty times as expensive as in Germany²⁸⁸. For those seeking to enter, a skilled migrant entering the UK for five years under a sponsored Tier 2 visa, with a partner and three children, would incur fees of over £16,000, in contrast with less than £4,000 in Australia and less than £1,000 in Canada and Germany²⁸⁹.

In fact one could argue that rather than labouring under the burden of legal constraints on targeting migrants, the UK Government has now assembled a formidable number of tools not only for constraining migrants, but also for monetising that constraint²⁹⁰. Indeed that this monetisation has increasingly become the core animating rationale behind the development of a self-funding UK immigration system. Or as Goodhart puts it, “Fee income has taken on a life of its own and needs to be reconnected to public policy goals”²⁹¹. The British Government not only has control over many aspects of immigration, it uses that control to make money.

The UK’s Aim of a Self-Funding Immigration System: “By 2019-20 the Borders, Immigration and Citizenship system (excluding customs and asylum functions) is planned to be fully funded through income”²⁹². It has even been suggested that this may have led to an increase in applications being turned down on technicalities, then requiring a further set of fees for the re-application²⁹³.

Increases in visa fees are specifically flagged as helping to achieve that goal²⁹⁴, but already for the year to July 2016 the National Audit Office report showed both the HM Passport Office section and UK Visas & Immigration section generating a healthy profit²⁹⁵.

This focus on monetisation can also be seen in other parts of the system. Under the employer sanctions regime, the increases in the level of fines has meant that while raids on employers net only a relatively small number of illegal immigrants, they can generate a healthy financial return²⁹⁶. Indeed for the year to July 2016 the National Audit Office

²⁸⁷ Solange Valdez-Symonds, ‘Guest post: the fee for children to register as British is the next Windrush scandal’ (Free Movement, 20 April 2018) <https://www.freemovement.org.uk/fee-registration-child-british-citizenship-windrush-scandal/>.

²⁸⁸ *ibid*.

Also May Bulman, ‘Cost of British citizenship for children is now 22 times more expensive than Germany’ *The Independent* (13 December 2017).

<https://www.independent.co.uk/news/uk/home-news/british-citizenship-children-cost-expensive-france-belgium-eu-too-much-immigrants-uk-a8107621.html>.

²⁸⁹ Recruitment and Employment Confederation, ‘Building the Post-Brexit Immigration System: An analysis of shortages, scenarios and choices’ (June 2017)

https://www.rec.uk.com/_data/assets/pdf_file/0005/376160/Buiding-the-Post-Brexit-Immigration-System-09.06.17.pdf.

²⁹⁰ Sarah Marsh, ‘“A money-making machine”: families struggle to pay Home Office charges’ *The Guardian* (24 June 2018) <https://www.theguardian.com/uk-news/2018/jun/24/home-office-charges-families-struggle-to-pay-money-making-machine>.

²⁹¹ Goodhart (n 4).

²⁹² National Audit Office, ‘Home Office Departmental Overview 2015-16 (January 2017).

²⁹³ Amelia Hill, ‘Home Office makes thousands in profit on some visa applications’ *The Guardian* (1 September 2017) <https://www.theguardian.com/uk-news/2017/sep/01/home-office-makes-800-profit-on-some-visa-applications>.

²⁹⁴ National Audit Office (n 292).

²⁹⁵ *ibid*: HM Passport Office, £507.6 million income on expenditure of £369.7 million; UK Visas & Immigration, £1,257 million income on expenditure of £906.4 million.

²⁹⁶ At least in terms of the gross value of penalties issued (before adjustments made following any objections/appeals): Home Office, ‘Illegal working penalties: quarterly totals’, eg Q3 2016: 662 raids, 1.28

report showed an overall income of £63.9 million for the Home Office’s Immigration Enforcement section.²⁹⁷

LEGAL CONSTRAINTS REVISITED

None of this is to say that the UK Government is not under legal constraints in controlling immigration, but rather to set those constraints in the appropriate context. Those arguing that human rights law meaningfully constrains the Government’s action understandably often focus on headline cases²⁹⁸. But this Report would argue that set against that, the sheer scale of measures designed to keep migrants away, out, and from even accessing the justice system once in, means that these cases have a relatively minimal constraining effect in the context of the overall numbers.

Set against the legal challenges that it faces, the UK Government, along with its fellow Global North states, have invested significant time and money in ever more inventive, indirect and difficult to challenge ways to control the movements of migrants. And in this regard the UK has been able to combine its own individual efforts with successfully piggybacking off the increasingly aggressive approach of ‘Fortress Europe’. As a result, many of the main legal battles between migrants and states are happening further and further away, whether relating to the restrictions on migrants leaving Libya or the pushback of migrants at the border of the Spanish enclaves of Ceuta and Melilla in North Africa.

Indeed one can argue that legal challenges against states are increasingly the result of states’ aggressive use of extra-territorial controls and that a number of these challenges are only arising at all because of the dramatic and draconian efforts that the UK (and other European governments) have made to keep/push migrants away. Within the context of what is achievable, states have pushed out their borders so far that this must almost inevitably trigger legal resistance at some point. But is that resistance really undermining their efforts to manage immigration?

Judicial Review

In the UK it has been argued that “administrative law has played a key role in constraining policy-makers” since around half of all Judicial Review cases since 1997 have concerned asylum and migration decision-making.²⁹⁹ The first thing to say about the UK asylum system is that it seems almost designed to push a number of cases (over one third) -- where the asylum-seeker is ultimately going to be successful -- to the appeal stage³⁰⁰. What may look like a significant successful legal challenge to the Government is therefore

illegal immigrants found per raid, £10.24 million in fines; Q3 2017: 600 raids, 1.37 illegal immigrants found per raid, £9.68 million in fines.

²⁹⁷ National Audit Office (n 292).

²⁹⁸ Ford, Jennings & Somerville (n 5).

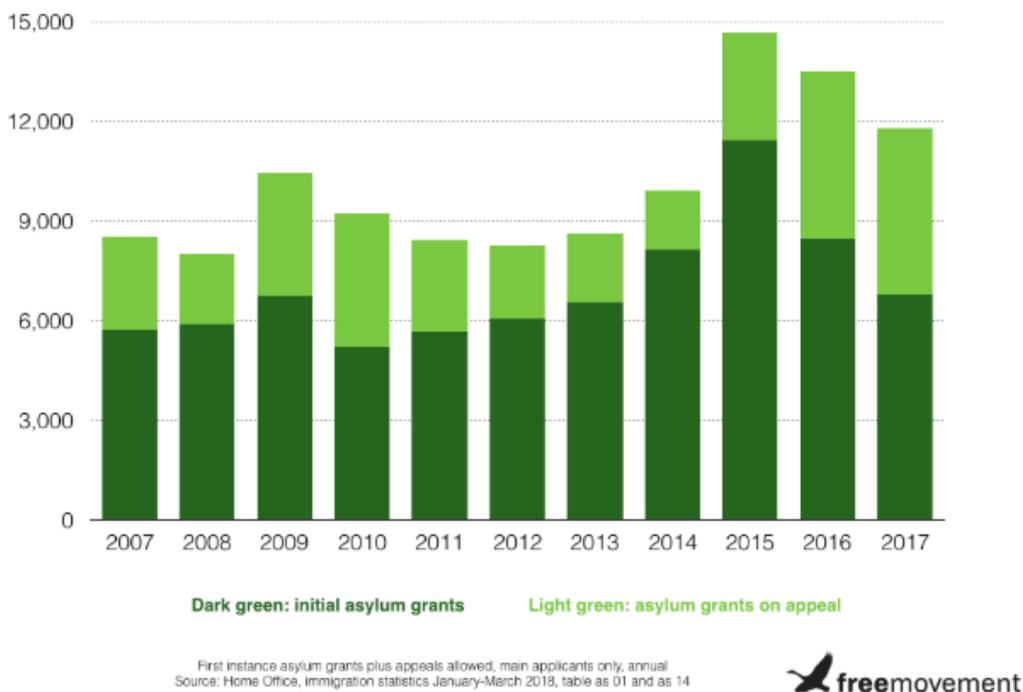
²⁹⁹ *ibid*

³⁰⁰ ‘Inside Britain’s asylum appeal system – what it’s like to challenge the Home Office’

<https://theconversation.com/inside-britains-asylum-appeal-system-what-its-like-to-challenge-the-home-office-88907>.

in effect driven by the extremely adversarial way in which the Government itself has designed the system³⁰¹.

Figure 7: The importance of appeals



Source: Free Movement³⁰².

So if the Home Office had simply made the final decision in the first place, those cases would not have to come to court, twice. Indeed the statistics now show that for the first time more appeals are being successful than are being rejected; “The success rate for migrants in their First-tier Tribunal appeals was 52% for cases heard between April and June 2018 – an all-time high”³⁰³.

Secondly though, the growth of judicial review cases can be viewed as a natural corollary of the Government aggressively taking as much as it can that could be a legal challenge and turning that into an administrative decision. From the decision that certain types of migrants can only appeal against UK immigration decisions from outside of the country, to the large numbers of migrants confined in immigration detention facilities, and the decisions on removal from the country, these are decisions not made by the courts but by government officials. If there was any doubt that official administrative decision making can have a serious impact on migrants’ lives, the Windrush episode should give pause for thought.

³⁰¹ Goodhart (n 4).

³⁰² Conor James McKinney, ‘Latest UK immigration stats: Home Office now loses most appeals’ (Free Movement, 13 September 2018) <https://www.freemovement.org.uk/uk-immigration-statistics/>.

³⁰³ *ibid.*

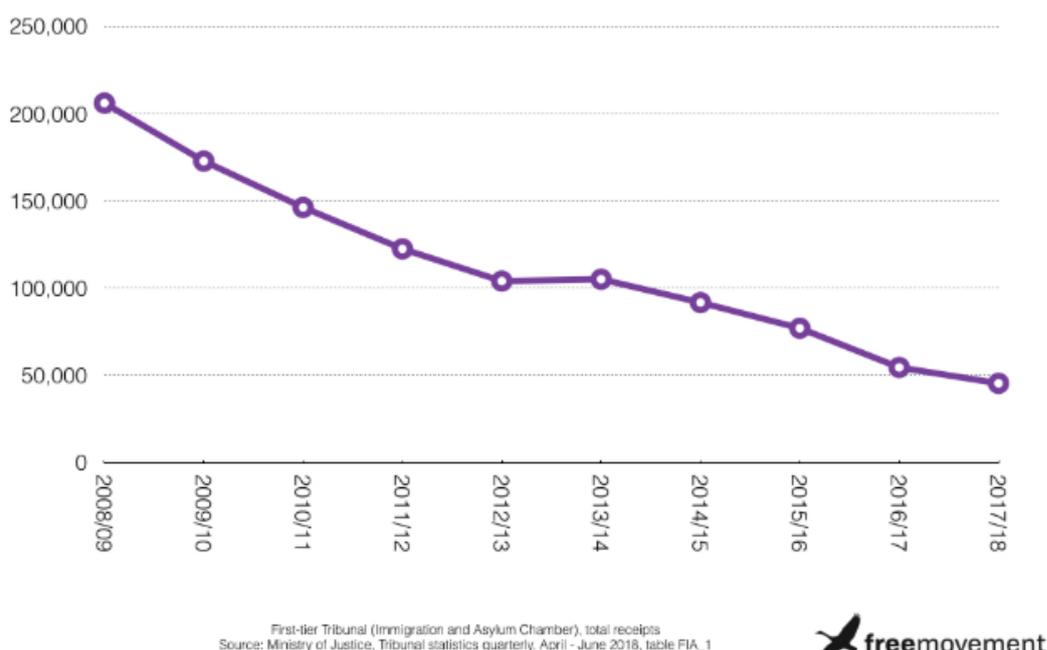
Why Judicial Review? In a country with as strong a legal base as the UK this inevitably then leads to legal challenges of some of these administrative decisions. This can only be effected by way of judicial review.

Indeed there is evidence that a major contributor to the increase in judicial review challenges is the closing off of the normal routes of legal challenge, the fact that the costs of appeals are now so high and indeed, in a number of cases, that the right of appeal has either been removed altogether³⁰⁴ or can only be exercised from out-of-country³⁰⁵.

This is a factor from refusals of visit visas³⁰⁶ all the way through to the revised Windrush process. Although the draconian approach to evidentiary requirements may now have been moderated for the latter, there is still no appeal process, so in effect judicial review is the only route to appeal³⁰⁷.

All of this has had a large impact on the number of immigration tribunal appeals.

Figure 8: Immigration tribunal appeals



Source: Free Movement (n 302).

³⁰⁴ The Law Society (n 284).

Colin Yeo, 'Comment: migrants need the right to work while fighting immigration cases' (Free Movement, 28 August 2018) <https://www.freemovement.org.uk/comment-right-to-work-immigration-appeals/>.

³⁰⁵ Nath Gbikpi, 'Where are we at with out-of-country appeals? The aftermath of Kiarie and Byndloss' (Free Movement, 9 July 2018) <https://www.freemovement.org.uk/where-are-we-at-with-out-of-country-appeals-the-aftermath-of-kiarie-and-byndloss/>.

³⁰⁶ Iain Halliday, 'What's going on with UK visit visas?' (Free Movement, 13 August 2018) <https://www.freemovement.org.uk/uk-visit-visas/>.

³⁰⁷ Tim Buley, 'An overlooked weapon in Windrush cases: judicial review' (Free Movement, 30 May 2018) <https://www.freemovement.org.uk/an-overlooked-weapon-in-windrush-cases-judicial-review/>.

So rather than representing a material constraint on the UK Government, judicial review challenges are arguably evidence of the contrary, of how much territory the Government has managed to successfully annex in its war to make fundamental controls over immigration a mere function of its administrative machinery. In this context legal constraints that do arise in reality represent a relatively small, although nonetheless extremely resourceful, rearguard legal action against the UK Government's increasingly expansive and aggressive use of administrative powers.

THE PROOF OF THE PUDDING

How Might We Think About Immigration Control?

Immigration Control Metrics? How might we think about the relative success of control in terms of the evidence available? The numbers overstaying? The numbers who feel that to move they have no option but to engage with the people smuggling industry? And the escalating financial cost of doing so? And human cost of doing so – the numbers who die trying? The numbers who would like to move but see no way in and therefore never even try in the first place?

Overstaying

Inevitably those who are critical of the UK's control of immigration tend to focus on the number of irregular migrants who have arrived. Or, rather, the fact that no one is sure how many are here. This is one of the reason that estimations of this figure are inherently so contested³⁰⁸.

It is estimated though that at least nine out of every ten migrants into Europe in the first place enter Europe legally.³⁰⁹ For the UK, despite the concerns raised from time to time with the management of border controls³¹⁰, the major route in for the irregular population seems to be entering legally but then overstaying³¹¹.

Downward Revision: *"Since 2015 it has been possible for the Home Office to make reasonably accurate estimates of the number of visa overstayers because the quality and coverage of the exit data has been broadly good enough to check against the names of visa-holders whose visas have expired."*³¹²

This recent evidence suggests that nowhere near as many people as had previously been thought overstay their legal permission to be here. The very latest exit check data, the third report since the reinstatement of the Home Office exit check programme, points to only 3% of non-EEA nationals overstaying, which breaks down into 2% of visitors,

³⁰⁸ Franck Duvell, 'Has the number of irregular migrants in the UK increased?' (COMPAS, 2 May 2017) <https://www.compas.ox.ac.uk/2017/does-immigration-enforcement-matter-diem-project-news/>

³⁰⁹ Hein de Haas, 'Myths of migration: Much of what we think we know is wrong' (29 March 2017) <http://heindehaas.blogspot.com/2017/03/myths-of-migration-much-of-what-we.html>.

³¹⁰ Tom Whitehead, 'Fears over loophole in airport security' (*Daily Telegraph*, 1 December 2010) <https://www.telegraph.co.uk/news/uknews/immigration/8170726/Fears-over-loophole-in-airport-security.html>.

³¹¹ Cherti (n 10).

³¹² Goodhart (n 4).

2.4% of students and 4.2% of workers. And of the 3% overstaying, one sixth of those still departed, just late.³¹³

Under the Radar

Of course, since many would-be migrants cannot practically obtain entry visas, some make alternative transit arrangements. People-smuggling is both a threat to, but also a corroboration of, the success of the immigration control system. It has been the success of states’ defence of their sovereignty and their ability to exploit the gaps in their legal obligations that has spawned the people-smuggling industry on its current scale.

States and smugglers can seem locked in a symbiotic embrace at the expense of migrants’ rights³¹⁴. Indeed, for refugees, the lure of the legal protections of the system once accessed, combined with the lack of any scope to actually access the system from outside the system, looks rather like a system specifically designed to encourage the emergence of a migrant smuggling industry³¹⁵. The outcome of the *X and X* case (the refusal to grant humanitarian visas even where there was clear evidence of humanitarian need) for instance led *The Economist* to conclude: “For now, the smugglers’ business model is safe”³¹⁶.

State Power, Escalating Smuggling Costs: The escalating revenues for the people smuggling business speaks to states’ power³¹⁷. The costs of this industry are a good indicator that the legal and administrative barriers to entry have simply become too high for most migrants to scale unaided.

Indeed the evidence shows that the increased risks and complexities attendant on circumventing states’ non-entrée strategies has led to ever extended and sophisticated chains of people smuggling operations, around which a wide range of associated support services – from money transfer to document forgeries to multiple safe houses en route – orbit³¹⁸.

And the actions that states have taken against people-smuggling have often driven out the smaller local actors, with the result that “the industry has been consolidated in the hands of the more criminal and exploitative actors”³¹⁹. With this in mind it is not surprising that the costs of people smuggling have also escalated significantly³²⁰.

³¹³ Home Office, ‘Third report on statistics being collected under the exit checks programme’ (23 August 2018) <https://www.gov.uk/government/statistics/third-report-on-statistics-being-collected-under-the-exit-checks-programme>.

³¹⁴ Green & Grewcock, ‘The War against Illegal Immigration’ (n 108).

³¹⁵ Tinti and Reitano (n 120).

³¹⁶ ‘Humanitarian visas: Another way in?’ *The Economist* (London, 11 March 2017).

³¹⁷ Peter Andreas, ‘Redrawing the Line: Borders and Security in the Twenty-First Century’ (2003) 28(2) *International Security*, 78.

³¹⁸ Tinti and Reitano (n 120).

³¹⁹ Molenaar, ‘Lessons from Agadez’ (n 138).

³²⁰ Nicholas Kulish, ‘What it costs to be smuggled across the US Border’ *New York Times* (30 June 2018) <https://www.nytimes.com/interactive/2018/06/30/world/smuggling-illegal-immigration-costs.html>.

Dying Versus (Not) Trying

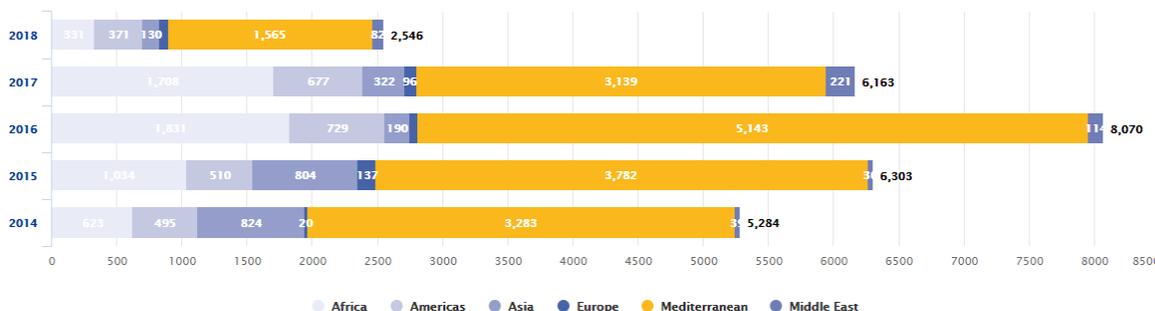
If, rather than focusing on the number of irregular migrants who have arrived in the UK, one considers those who do not make it here, there are a few data points which might provide some insight. The first is the number of migrants who die trying. The second is the number of those who would like to try, but have not done so. When one considers migration from these perspectives, the efficiency of “control” takes on quite a different light.

Deaths of migrants in transit are testament to states’ level of control.³²¹ There is arguably no greater advertisement for the power of the non-entrée system in Europe than the numbers who die trying to overcome it.

Deaths in the Med: Of course not all of these migrants are bound for the UK. But the figures from the Mediterranean show that from the turn of the millennium up until September 2015, 30,000 migrants had died trying to cross³²². And they continue to show that the Med accounts for on average around 60% of total migrant deaths globally each year, with the average annual death toll over the most recent five year period running at just shy of 4,000³²³.

Whilst less migrants have been seeking to cross the Med this year, aggressive EU state tactics (both directly and through the Libyan coastguard) that have meant that only one humanitarian rescue boat continues to operate in the Med appear to have contributed to a current spike in the death rate³²⁴.

Figure 9: Recorded migrant deaths by region



Source: <https://missingmigrants.iom.int/> to 11th September 2018

³²¹ Andreas, ‘Redrawing the Line’ (n 317).

³²² Office of the High Commissioner for Human Rights, ‘People on the move have human rights which require protection’ (25 September 2015) <https://www.ohchr.org/EN/NewsEvents/Pages/PanelMigration.aspx>.

³²³ <https://missingmigrants.iom.int/>.

³²⁴ The Washington Post, ‘Fewer migrants are making it to Europe’ (n 130).

See also Chico Harlan, ‘The retreat of rescue ships from the Mediterranean is a sign of changing odds for migrants’ *The Washington Post* (16 June 2018) https://www.washingtonpost.com/world/europe/the-retreat-of-rescue-ships-from-the-mediterranean-is-a-sign-of-changing-odds-for-migrants/2018/06/15/099b74f0-6e61-11e8-b4d8-eaf78d4c544c_story.html?utm_term=.6aebd90072d1.

Arguably an even greater testament to the controls exercised by the UK and the other Global North states is the number of people who would like to migrate there, but never try, because of the huge barriers placed in the way.

Carrier Sanctions Cases: For the UK specifically, one metric for considering this question is the number of carrier sanctions fines in the UK since their introduction in 1987. From the table one can see that since the turn of the millennium there has been a significant drop off in these (although most recently this seems to have reversed slightly³²⁵), which would be indicative of these controls biting, the airlines becoming more serious and sophisticated in their document checks, and increasing numbers of migrants being dissuaded from even attempting to enter by these means.

Table 1: The number of cases and fines since the introduction of Carrier Sanctions from 1987 to 2012

Year	Demands/Invoices issued	Income received
1987	3,923	£1,403,000
1988	4,402	£2,274,000
1989	7,863	£1,721,000
1990	9,631	£3,433,000
1991	10,738	£7,581,000
1992	6,360	£4,789,000
1993	5,520	£11,500,000
1994	6,617	£8,652,000
1995	6,185	£11,212,000
1996	6,191	£10,735,000
1997	6,164	£11,307,000
1998	6,390	£9,478,000
1999	5,736	£9,756,000
2000	6,897	£9,098,398
2001	5,392	£7,358,551
2002	3,844	£5,125,281
2003	3,775	£5,585,448
2004	2,959	£6,000,854
2005	2,437	£4,645,237
2006	2,343	£4,296,700
2007	2,414	£4,623,380
2008	2,430	£4,628,000
2009	2,387	£3,986,000
2010	1,891	£4,382,000
2011	1,605	£3,444,000
2012	1,342	£2,890,000

Source: FOI Release 30000 from Home Office and Immigration Enforcement, 'Number of cases and fines since introduction of carrier sanctions from 1987 to 2012' (26 March 2014)

<https://www.gov.uk/government/publications/number-of-cases-and-fines-since-introduction-of-carrier-sanctions-from-1987-to-2012>.

³²⁵ Goodhart (n 4).

In effect this metric can be viewed as the flipside of the growth of people smuggling and the deaths in the Mediterranean. The evidence suggests that obtaining forged/doctored/stolen documentation that escapes detection has become sufficiently difficult that the potential to immigrate into the UK by the safest means (ie scheduled flight) is now only realistically accessible to customers at the very top end of the people smuggling market. Havocscope, a security consultancy, reports that stolen UK passports sell for an average price of \$15,000-\$20,000³²⁶, a price that at least partly reflects the success of the UK in exerting control over other entry routes. Such costs are why so many migrants have taken to alternative, much more circuitous and dangerous, routes.

The 99.8%: For the US, there are 272 applicants for every slot offered in the US Diversity Visa Lottery³²⁷. Based on numbers of applicants for US visas, and estimates for illegal border crossers and overstayers, Nathan Smith calculates that the US “border regime deters or prevents 99.8% of unauthorized would-be entrants to the United States ... The US border regime must be one of the most effective systems of mass coercion in human history”³²⁸.

For the UK, the Gallup Global Survey surveying the intentions of those who want to migrate provides evidence that the potent mixture of legal constraints, administrative barriers and negative branding of the EU referendum vote and the hostile environment have had an impact, even in a very competitive environment where most other countries of the Global North are playing a similar game. The Survey shows that, from the prior period, the UK has become a relatively less popular destination for migrants, now overtaken by Germany.³²⁹

And it also shows, comparing the Gallup figures for those who say they would like to migrate to the UK with the estimates of irregular overstayers in the UK, broadly the same figure as in the US; that 99.8% of unauthorised would-be migrants to the UK are kept out.

³²⁶ Tinti and Reitano (n 120).

³²⁷ Michael Clemens, ‘Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?’ (2011) 25(3) Journal of Economic Perspectives, 83.

³²⁸ Smith, ‘Don’t Restrict Immigration, Tax It’ (n 265).

³²⁹ Gallup World Poll, ‘Number of Potential Migrants Worldwide Tops 700 Million’ (8 June 2017) <https://news.gallup.com/poll/211883/number-potential-migrants-worldwide-tops-700-million.aspx>.

SCENE 6 – AN ANNUAL MIGRATION REPORT: A NEW ERA

The Home Affairs Committee has proposed that:

“Members of the public, organisations and businesses need access to better information about migration flows and the Government’s policy approach to managing them. We believe that the Government should table an Annual Migration Report and set aside parliamentary time for debate on that report. The report would detail the previous year’s migration flows, the economic contribution from migration to the Exchequer and the measures taken by the Government to manage impacts and pressures.”³³⁰

Regardless of whether there is to be such an Annual Migration Report (AMR), the methods by which immigration controls are exercised by the UK Government on behalf of the public should surely be a central aspect of immigration policy debate going forward. Without proper acknowledgement of the controls described in this Report, it is hard to see how the greater transparency, information, openness, and accountability, and much greater confidence that there is control over immigration all of which the UK public seem to desire³³¹, can be achieved. Because without it there can be no clear, open and honest debate about what is achievable in immigration control, and how this is in fact achieved.

This could be set out very clearly in narrative form in the foreword to the AMR. This is what the inaugural version could look like:

Foreword to the First Annual Migration Report:

“It is an honour to be able to write the foreword to this country’s first ever Annual Migration Report.

It is important that as a country we are able to discuss and debate the many complex aspects of migration. And that, in order to properly appreciate what is in the main body of this Report, the Government provide the public with the detail of how we think about immigration control, of how we seek to achieve that control, of how we view what has been achieved, and of what is realistically achievable.

We are aware that there is a feeling that successive UK governments have been insufficiently responsive to the public’s concerns on this issue, that politicians have not listened. And more recently, the fact that the Government has committed to a net migration target that it has not been able to meet may have accentuated, rather than addressed, this feeling. We are therefore taking this opportunity to tackle some misperceptions head on, to provide a much clearer explanation of the controls over immigration which are exercised on the public’s behalf on a daily basis, and how to think about these.

When people think about immigration controls they inevitably think about control at the borders. But successive UK governments have vastly extended our country’s controls far beyond our borders. We have previously referred to this as “a

³³⁰ Home Affairs Committee ‘Building Consensus’ (n 1).

³³¹ Rutter and Carter, ‘National Conversation’ (n 9).

comprehensive, ‘whole of route’ approach that includes interventions at every stage of the migrant journey”³³². How have we done this?

First, either on our own, or in concert largely with our fellow European governments, we have committed large sums of money and other resources, and offered incentives, to countries that are either potential sources of migrants or key migrant transit countries. By supporting the efforts of those countries’ governments to reduce the flow of migrants from or through their country, our aim is very clear; to ensure that those migrants do not even enter Europe in the first place.

Second, by imposing visa requirements on all migrant producing countries, and combining those with sanctions against air carriers and other transportation providers for carrying any migrant who does not have permission to enter, ably supported by our immigration officers posted abroad, our administrative ability to prevent migrants from even reaching our borders is effectively unchallengeable.

Third, our membership of the EU has been fundamental in helping us to achieve this favoured position. This may sound surprising. Most of the UK public might consider the EU as a source of migration, rather than a check on it. We will come to EU freedom of movement rules later. For now, you should understand though that through its visa and travel restrictions, data sharing, border enforcement regimes, cooperation and readmission agreements, the EU has put up formidable barriers to immigration from outside the EU. The UK greatly benefits from this. The EU acts as a shelter and a shield for the UK, dramatically pushing out our effective border and maximising the power of our geographical isolation.

But you should also understand that where we have considered that EU initiatives gave migrants greater rights than we wished, and believed our borders were better protected by the UK going it alone, our special relationship with the EU has meant that we have been able to opt-out of those EU measures and pursue our own agenda³³³.

Fourth, while we are a signatory to the United Nations Refugee Convention and the European Convention of Human Rights, do not overestimate the impact of international law in constraining our action in the UK. Whether it is by not signing up to international legal commitments that protect migrants, such as the Migrant Workers Convention, or by signing up to those commitments which in practice constrain migrants, such as the UN Smuggled Migrants Protocol, or by exploiting gaps in those international legal commitments we have agreed to, such as the Refugee Convention where we have been able to exploit its gaps to effectively take significant control over the numbers of refugees arriving in this country, we can largely mould international law to our own ends.

Look at the estimates of irregular immigrants within our borders relative to the numbers who say they want to come here. Look at the evidence of fines against those who try to bring in irregular immigrants, or at the consistent level of deaths in the Mediterranean. Look at the costs of people-smuggling. All the evidence points to the

³³² UK Government, (Brexit White Paper) (n 6).

³³³ Sir Ivan Rogers to Home Affairs Committee (n 27).

fact that, within the context of what is achievable, the UK exercises a great deal of control over immigration.

Of those who say that they would like to emigrate to the UK, less than 1% are able to actually gain access to our country illegally. That is even when you count those who first come in legally but then overstay.

We should be under no illusions that this has some challenging consequences for the migrants themselves. But as Daniel Trilling has said: "People develop attachments to places, they move, they develop attachments to new places, and to new people. If you think people have a right to do that, then the question is how to support it. If you don't, then you need to ask yourself: what level of violence are you prepared to tolerate to keep people in their place?"³³⁴

The fact that most migrants who do evade immigration controls do so having initially come to the UK legally suggests that our border controls are largely effective. It also demonstrates what we already know - that much of our administrative control, through visa restrictions and airline sanctions, is effectively unchallengeable in effectively preventing access to the country. But it also demonstrates that we cannot completely control immigration simply through border controls, at least if we are also happy to let in, indeed welcome, foreign visitors, tourists and students.

Once migrants are in the UK, things become a lot more complicated, if we hope to track and remove them. It is much harder and more costly to remove someone once they are here, and we do not pretend to have all the answers. But we have certainly not been sitting on our hands. Instead we have, brick by brick, painstakingly constructed the "hostile environment", to persuade unwanted migrants who are not yet here to go elsewhere, and to convince those who are already here, to leave. This is not easy.

First, because the majority of the UK public say that they are uncomfortable with the use of registration schemes, or the introduction of identity cards, which could more clearly identify and track those who are in our country illegally. As a result we have designed a system that is effectively controlled by the public, and where ordinary people, including employers and landlords, are co-opted into a joint effort to control immigration together.

Second, this is a very competitive field. We are not alone. Most other developed migrant-receiving countries have themselves pursued their own variants of our hostile environment, of which Denmark's 'jewellery confiscation law' is just one of the most well publicised³³⁵. Yet there is evidence that the dedication with which we have pursued this approach is beginning to reap its rewards. The most recent Gallup Global survey that tracks would-be migrant preferences shows that, whilst still understandably very popular, the UK has now become a relatively less popular

³³⁴ Daniel Trilling, 'Should we build a wall around North Wales' (13 July 2017) 39:14 London Review of Books, 15 <https://www.lrb.co.uk/v39/n14/daniel-trilling/should-we-build-a-wall-around-north-wales>.

³³⁵ Harriet Agerholm, 'Denmark uses controversial 'jewellery law' to seize assets from refugees for the first time' *The Independent*, 1 July 2016 <https://www.independent.co.uk/news/world/europe/denmark-jewellery-law-migrants-refugees-asylum-seekers-unhcr-united-nations-a7113056.html>.

destination for migrants than it was previously. We are now a less popular destination than Germany, despite the natural pull of our language and culture³³⁶.

We understand that the phrase “hostile environment’ may divide opinion, which is why we have changed it. But the key animating principle behind it remains: we exert forceful immigration control through measures that span the whole spectrum of interactions with immigrants in our country. There are a range of measures you should know more about: we make significant use of administrative detention of immigrants (that does not require the sanction of a court); we impose very significant fees and costs for certain categories of immigrants to regularise their immigration status; we criminalise the acts of those who assist irregular immigrants, or employ them, or give them accommodation.

Indeed since the further stepping up of the hostile environment measures we have focused relentlessly on immigrants’ evidence as to whether and why they are permitted to be here. We acknowledge that the Windrush generation episode may have caused some embarrassment. But it is a prime example of this demand for evidence of the right to remain. Because of the public concerns that prevent the adoption of a registration or an identity card system, it is not always easy to get this right. But that is not evidence of lack of responsiveness or control on our part. If anything, it points to an overzealousness of both, within the constraints under which the public have said that they want us to operate.

The cost, logistics and practicalities of removing immigrants is significant; sometimes it is difficult to know even where they are from, and then to persuade countries to take them back. But when we do so, you should not underestimate our determination to see this through. Even if it means taking severe action against those of our own citizens who may assist irregular migrants.

And the control we have been able to exercise over numbers of asylum seekers coming in has meant that the number of asylum seekers we are now having to remove is at a record low, allowing us to properly dedicate more of our resources to dealing with foreign national offenders whose removal numbers have recently hit a record high.

At the domestic legal level, we have dramatically reduced the availability of legal aid for most types of immigrants to fight for their rights. Of course there can still be legal challenges to immigrants’ removal. And we do not deny that the law can be used to challenge our freedom to control immigration as we would ideally wish, and can achieve some successes against us in headline legal cases. But this should not detract from the fact that most of the core building blocks of control that we have set out in this foreword are actually protected, indeed enhanced, by the law. And that only a small proportion of migrants ever find themselves in a position where they can realistically access legal advice to be able to defend their position, let alone endeavour to use the law to turn the tables on the state.

Finally, we must address the EU right to free movement in the context of immigration control. The UK has of course been constrained in its control by the right to free movement. But we should be very clear that the EU right to free movement rules do not

³³⁶ Gallup World Poll (n 329).

prevent us from tracking who is coming (through registration requirements) and going (through exit checks). Nor from taking action against those EU immigrants who are not productive or self-sufficient, and might therefore be a burden rather than a benefit to the state, or who have committed criminal acts and have forfeited their right to stay.

We may have been lax in our approach to these matters in the past, for which we apologise. But even if the EU referendum vote had not now given us a chance to reconsider and revisit this, more recently we have already begun to more aggressively enforce the parameters of these rules, focusing particularly on applying restrictions on benefits and the removal of EU criminal offenders.

To sum up, you should be clear that the Government has not only heard you, but has responded, decisively and extensively. While we have allowed some immigration where we have considered that fair to those fleeing warzones, and/or beneficial to our country's economy, where we have viewed otherwise we have done all we can to not only maintain our borders and indeed to build out those borders further than any other country has ever attempted.

Of course at the micro level things may on occasion have looked a little chaotic³³⁷. And we accept that "poor management, lax record-keeping and inconstant decision making" may have hampered efforts³³⁸, and sometimes resulted in a gap between policy and implementation³³⁹. In this regard we should, and must, improve. But that should not deflect from the clarity of the bigger picture, which we hope you can now much better appreciate. And that picture shows the very significant degree of control which we can and do exercise in order to carry out the public's wishes over immigration."

³³⁷ Tim Ross 'Officials 'just don't know' who is in Britain and who isn't, admits former border chief' (*Daily Telegraph*, 8 April 2013) <https://www.telegraph.co.uk/news/uknews/immigration/9978294/Officials-just-dont-know-who-is-in-Britain-and-who-isnt-admits-former-border-chief.html>.

³³⁸ Oliver Wright 'John Vine: What's gone wrong with immigration – by a man who should know' (*The Independent*, 4 August 2014) <https://www.independent.co.uk/news/uk/politics/john-vine-what-s-gone-wrong-with-immigration-by-a-man-who-should-know-9647820.html>.

³³⁹ Consterdine, 'One Step Forward, Two Steps Back' (n 54).

CONCLUDING THOUGHTS

“We want a bit of honesty and not politicising immigration so much. It’ll be a good day when they actually tell us the truth instead of what they want us to hear”³⁴⁰.

What might be the outcome of such plain-speaking transparency in the Annual Migration Report? Some people might be pleasantly surprised. Some might be unpleasantly surprised. But almost all would be surprised. And much better informed.

The story that legal constraints have materially impacted the UK Government’s ability to control immigration has been a powerful one, indeed so ingrained that it now goes almost completely unchallenged. This Report has sought to add some balance, arguing that there is a very different story to be told in the UK about legal constraints on immigration control. While of course the Government is not unconstrained at the micro level, at the macro level the UK Government has far greater freedom to manage immigration than it has admitted. Telling this very different – and more accurate -- story about immigration control would allow proper examination of several potential outcomes for immigration policy that are currently not being seriously debated.

Means versus Ends

Certainly addressing not just the ends, but also touching on the means of immigration policy, would not be the most comfortable experience. Occasionally a brief snapshot of the reality of some of the unpleasant consequences of aggressively controlling immigration slips out into the press and public consciousness: whether Aylan Kurdi lying lifeless on a beach, or the plight of a Windrush generation. And it is not nice. Large sections of the public seem quite horrified, before moving on to something else. But while it lasts it is a deeply uncomfortable experience. Even for the Daily Mail; see Piers Morgan’s Daily Mail article on the Aylan Kurdi story³⁴¹.

The US appears to have undergone a similar experience recently, with the furore over the Trump administration’s policy of separating migrant families at the border. But there is a difference. Particularly since the ascension of President Trump the US administration has become increasingly transparent about the steps that it is taking to seek to control immigration. From the UK it is easy to deride this approach. It seems totally alien, not least the style of quoting passages from the bible to justify the policy impact³⁴².

But it is worth noting that whereas the Windrush issue in the UK took years to come to light, in this example from the US the announcement of the policy, followed by the publicity around its impact, and then the subsequent response and amending of the policy by the President³⁴³, was all done in a little over a month. Dysfunctional though it may have seemed, its effect was at least to allow some form of real-time engagement with the

³⁴⁰ Quote from member of the public in Rutter and Carter, ‘National Conversation’ (n 9).

³⁴¹ Piers Morgan, ‘Don’t shut your eyes to this picture because WE did this. Now we have to make it right’ *Mail Online* (4 September 2015) <<http://www.dailymail.co.uk/news/article-3221090/PIERS-MORGAN-Don-t-shut-eyes-picture-did-make-right.html>>.

³⁴² Chris Riotta, ‘Sessions denies intention to separate families after defending policy with Bible verse’ *The Independent*, 21 June 2018 <https://www.independent.co.uk/news/world/americas/us-politics/jeff-sessions-immigration-border-bible-verse-families-separate-us-mexico-trump-a8410891.html>

³⁴³ ‘Trump backs down on migrant family separations policy’ *BBC*, 21 June 2018 <https://www.bbc.co.uk/news/world-us-canada-44552852>.

public on an important aspect of immigration policy which in turn allowed a swift response to the public reaction.

Perception Shift Opens up Debate ...

More fundamentally though, a clear conclusion from the findings of the National Conversation is that coming to the realisation that the UK does not have the porous, swamped immigration system that many narratives have implied could have a potentially significant impact on public perception and attitudes. It would not necessarily of itself convince people who did not much like immigration before to suddenly feel completely comfortable with it. But it might make them more comfortable with it. Recent research evidences that perhaps not surprisingly “those who feel that their country has control over immigration are less likely to be hostile toward immigrants”³⁴⁴.

But it would not even need to have this effect in order to open up space for a far more reasoned debate on immigration policy. Because if the primary concern is one of (mis)trust in controls, this information might at least cause a recalibration of the strength of feeling and anxiety that some feel about immigration, and of the perceived salience of immigration as an issue³⁴⁵. Even this of itself could be hugely important in creating the space for a calmer, more nuanced debate about immigration policy.

At the least, “take back control” claims would be subjected to meaningful scrutiny, and important angles of the immigration debate could be opened up that currently lie largely undiscussed. How much more control can be realistically exercised and what might the consequences of that be? How should the ethical tensions of immigration control best be managed? What are the financial costs of immigration control and how do we best measure the outcomes? Who profits from the current system and how is that managed?

We are told that the immigration debate in the UK is dominated by the extremes³⁴⁶. But is it really? In the UK, immigration tends to be a far more salient issue for its opponents, who blame it for a wide range of social ills, than for its supporters; those with more liberal views on immigration tend to simply view it as a non-issue³⁴⁷.

In the UK, unlike say in the US, even amongst those sympathetic to the plight of immigrants on humanitarian grounds there is very little advocacy in support of *more* immigration. And the EU referendum vote has significantly narrowed the debate still further, anchoring it in a restrictionist approach which provides only a Henry Ford-like choice; you can choose any colour of immigration policy you want as long as it is more restrictive than the current one. Such an anchoring is supported by the silence around the real nature and extent of the UK’s control of immigration.

³⁴⁴ Alison Harrell, Stuart Soroka and Shanto Iyengar, ‘Locus of Control and Anti-Immigrant Sentiment in Canada, the United States, and the United Kingdom’ (2017) 38(2) Political Psychology, 245.

³⁴⁵ Evidence suggests that salience of the immigration issue varies much more over time than people’s attitudes to immigration; James Dennison, ‘Explaining variation in attitudes to immigration in Europe’ (presentation at ‘Attitudes towards immigration in Europe: myths and realities’, European Parliament, 19 June 2017) https://www.europeansocialsurvey.org/docs/findings/IE_Handout_FINAL.pdf.

³⁴⁶ Rutter and Carter, ‘National Conversation’ (n 9).

³⁴⁷ Robert Ford, ‘Three things I have learned about immigration attitudes’ (presentation at ‘Attitudes towards immigration in Europe: myths and realities’, European Parliament (19 June 2017), 10 https://www.europeansocialsurvey.org/docs/findings/IE_Handout_FINAL.pdf).

Something that is clearly fundamental enough to the Government to be included in the Brexit White Paper is something worth coming clean about with the public. But equally importantly, a clearer public exposition of the extent, but also the challenges, of Government control on immigration would truly allow a more balanced debate. This is not about somehow disrespecting “the will of the people” as expressed in the reference vote; in fact quite the opposite. It is about respecting the demand of the people for a proper debate, properly informed, about issues such as immigration. Such a debate would allow alternative visions on immigration to be put forward and discussed.

Indeed, it would also pose the question: how much actual policy change is really needed to satisfy public demand? Could some of the demand for greater ‘control’ be satisfied by better communicating the reality of existing policy and practice? And to the extent that there is to be policy change, rooting this change in a better understanding of the reality of the existing regime can only lead to better policy that enjoys greater public support³⁴⁸.

... Including On Regional Immigration Policy and on Temporary Migration Schemes

Providing greater confidence around the immigration controls that are exercised could also allow for a more nuanced and productive debate around other important aspects of immigration policy. Voters who were better informed about the Government’s ability to exert control might well be more open to accepting arrangements that allow immigration on new terms. Would a policy allowing groups of temporary migrants best suit some industries and/or regions? Would a regional immigration policy work, allowing different UK nations or different regions within them to allow different kinds of immigration on different bases?

The Home Affairs Committee makes this observation:

“We note that much of the British public want a say over the volume and type of immigration in their own area, while recognizing that different priorities exist in different parts of the country. However, it is also clear that any regionally-specific migration policy raises concerns about enforcement and public skepticism about whether it is workable and, as we set out earlier in this report, credibility on enforcement is a crucial part of building broader consensus on immigration.”³⁴⁹

This is a perfect illustration that at the moment proper debate on many immigration policy strands tends to be deflected away by what one might call ‘enforcement scepticism’, a view that arises directly from the ‘out of control’ mantra. Yet as a number of experts have pointed out, there is no practical reason that for instance a regional approach to immigration policy could not be made to work using existing enforcement mechanisms.³⁵⁰

³⁴⁸ See for instance the suggested modifications to free movement in Portes, ‘Policy Options’ (n 61).

³⁴⁹ Home Affairs Committee, ‘Building Consensus’ (n 1).

³⁵⁰ Ian Robinson, ‘UK has little to fear from a Scottish visa’ *The Scotsman* (24 March 2018)

<https://www.scotsman.com/news/ian-robinson-uk-has-little-to-fear-from-a-scottish-visa-1-4712380>.

See also Written Evidence of Jonathan Portes to Home Affairs Committee on Post-Brexit migration policy HC 857 (26 June 2018)

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/postbrenxit-migration-policy/written/85609.html>.

See also Madeleine Sumption, ‘Location, Location, Location: Should different parts of the UK have different immigration policies?’ (The Migration Observatory, 25 October 2017)

https://migrationobservatory.ox.ac.uk/wp-content/uploads/2017/10/Report-Location_Regional_Migration_Policy.pdf.

This does not mean that such an approach should be adopted, but nor should it be lazily ruled out on enforcement grounds.

The same goes for immigration policy approaches based on temporary migration. Scepticism of enforcing temporary migration regimes clearly runs through the responses to the National Conversation, yet there are plenty of temporary migration schemes across the globe that are perfectly well-managed and enforced. In fact there is one in the UK. Indeed, as the National Conversation itself points out, international student visitors are arguably the most popular migrant category with the UK public, and the Tier Four regime that controls the admission of international students into the UK is now very well trusted³⁵¹.

It is certainly true that this particular regime has been flexed and tightened and flexed again³⁵², at least partly in response to enforcement concerns. But these concerns now seem to have been largely addressed, and a robust system of controls (sponsoring institution, Home Office interview, Biometric Residence Permit)³⁵³ supports a much more satisfactory control outcome than some descriptions of the regime once suggested³⁵⁴.

What If? Realism and Honesty Versus Anxiety and Anger

What if the practical limits to, and likely consequences of, immigration control were honestly addressed? What if some effort were actually made to inform and prepare the public for some difficult facts of immigration life?

What if there was more explanation that, when it comes to immigrants working and living in the UK, it is unrealistic to believe that immigration controls imposed at the border can ever be enough in themselves? For a country “with tens of millions of annual visitors without the right to stay or work, not having strict internal controls is equivalent to not really having a border”, so controls and enforcement exercised within the border will always be required, regardless of which immigration system the UK chooses³⁵⁵.

The immigration policy tensions brought to the surface by the UK’s EU referendum makes this honesty and clarity even more important, not less. Indeed without a more accurate and nuanced acknowledgement of what is practically possible in immigration control, the UK runs the risk of a further escalation of public anxiety and anger, possibly even political rupture, when misplaced expectations of what ‘control’ will look and feel like are disappointed.

³⁵¹ Rutter and Carter, ‘National Conversation’ (n 9).

³⁵² Migration Advisory Committee, ‘Impact of international students in the UK’ (September 2018) <https://www.gov.uk/government/publications/migration-advisory-committee-mac-report-international-students>.

³⁵³ Goodhart (n 4).

³⁵⁴ Heather Stewart, ‘Exit checks data raises questions over May’s focus on student overstayers’ *The Guardian* (24 August 2017) <https://www.theguardian.com/uk-news/2017/aug/24/exit-checks-data-raises-questions-over-mays-focus-on-student-overstayers>.

‘Full Fact: Why official estimates about the number of student migrants staying in the UK were wrong’ (25 August 2017) <https://www.independent.co.uk/news/uk/home-news/uk-net-migration-student-figures-government-wrong-overstayers-full-fact-in-fact-a7913206.html>.

³⁵⁵ Goodhart (n 4), and Jonathan Portes, ‘Brexit: Six of the biggest myths we’ve heard about immigration since the EU referendum vote, debunked’ *The Independent* (2 November 2016) <https://www.independent.co.uk/news/business/news/brexit-immigration-uk-freedom-movement-myths-eu-referendum-theresa-may-amber-rudd-a7393136.html>.

There are a number of historic examples, from the UK's experience with placing restrictions on Commonwealth immigration to the US experience with restricting Mexican immigration, where increased immigration restrictions resulted in increased, not decreased, anxiety amongst the very people who most wanted the controls in the first place. This can be because previously legal immigration is then diverted into the irregular stream. Or because more restrictive immigration controls, initially at least, tend to lead to a rise, not a reduction, in the permanent immigrant population, as sojourners convert into settlers as circular migration becomes more difficult and immigrants are forced into a decision on whether or not to stay. If this reality is not appropriately explained to the public the outcome may be a further deterioration of public confidence over the control of immigration, even as actual immigrant flows going forward may decline.

Whatever else arises from it, the vote to leave the EU means that the UK is going to make changes to its immigration regime, and heightened public sensitivities over immigration are not simply going to be put back into the bottle. More likely they are here to stay, and will need to be engaged with. To bring about a better debate and more sustainable immigration policies, the Government should come clean about the degree of control it has, and how it exercises that control.

Only then can policymakers and the public debate address the system *as it is*, rather than that as it is *seen to be*. That no UK government in the last thirty years has been honest about the extent, but also the limits and the nature, of its control is one of the greatest tragedies of the UK's approach to immigration policy. Doing so now could have a significant impact on public confidence and perception of the issue. Never mind "Take back control"? It is time to tell the truth.