

Fixing Britain's broken asylum system

BRIEFING PAPER

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SMF

Social Market
Foundation

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INTRODUCTION

The current Home Secretary, Priti Patel, appears to be using the rise in boat crossings by migrants over the English Channel this year to be seen to bear down toughly on 'illegal' migration to the UK. The rhetoric used in her Conservative Party Conference speech in pursuit of this target, taking aim at "the do-gooders, the lefty lawyers, the Labour Party", and lumping them in with "the traffickers" has inevitably led to a further escalation in the social media war of words between the Home Office and refugee advocates, and seemingly a further polarisation of their respective positions.

On the face of it, the Home Secretary's words seem to confirm that her Home Office is little inclined to offer any olive branches to those in the UK supporting and representing the cause of refugees, to discuss how the existing system might be reformed and what common ground there might be in doing so. In this context it may seem wilfully contrarian to even suggest the possibility that such common ground might exist or that there could be approaches to reforming the UK's asylum system which might be capable of gaining broader acceptance across the spectrum.

But such possibilities do exist. Because, counterintuitive though it may seem, there may in fact be considerable potential alignment between aspects of what the Home Secretary has suggested she wants to achieve, and what some of those advocating for a more expansive and welcoming approach to refugees in the UK would like to see. And fixing Britain's broken asylum system could contribute to a rethink of the global system of refugee protection, which could result in more, not fewer, refugees who are fleeing from desperate situations being allowed to find a home in, and contribute to, British society.

The Home Secretary's stated aim in fixing Britain's broken asylum system could be summed up in the seven words she used to end her Party Conference speech: "without firmness, there will be no fairness". But there are another seven words which could be used to best capture the essence of the asylum policy section of that speech: *No to asylum seekers, yes to refugees*.

NO TO ASYLUM SEEKERS

Is it just political?

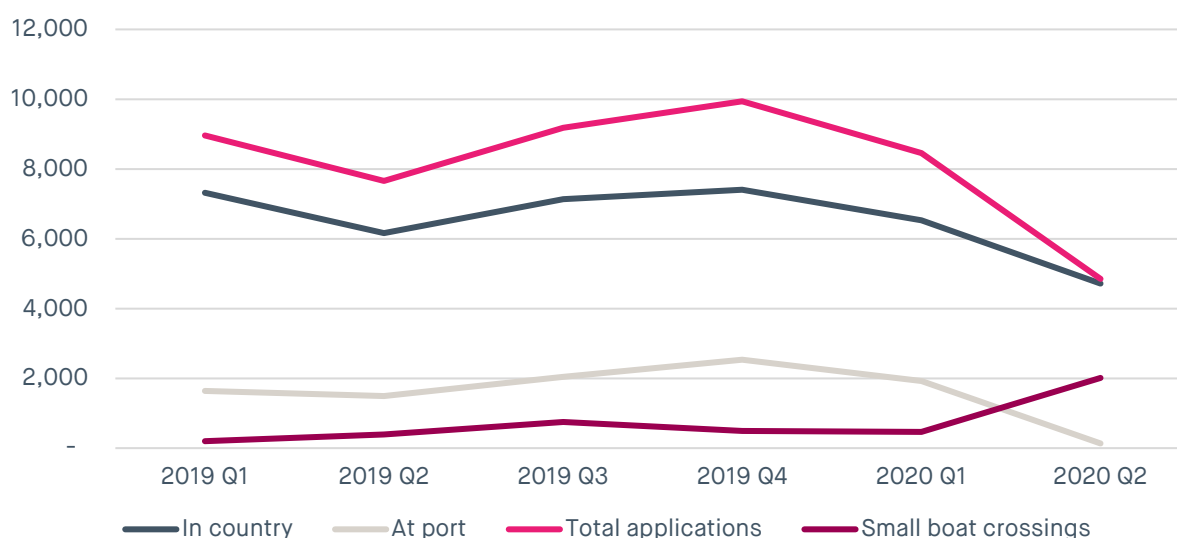
Most of the media and social media focus on the Home Secretary’s comments has understandably been on the *no to asylum seekers* part. That is what she likely intended. Why might she be homing in on asylum seekers now? A number of possible reasons suggest themselves.

One is simple political messaging. At first glance, the decision to turn the spotlight on asylum seekers may smack of little more than mere political opportunism, a chance to pick a fight which demonstrates to voters that: first, the Government’s asylum policy sits firmly within the context of its broader immigration control regime; second, bold steps are planned to achieve this; and, third, she is the person to deliver this. “After decades of inaction ... I will take every necessary step to fix this broken system, amounting to the biggest overhaul of our asylum system in decades”.¹

It is ironic that migrants crossing the English Channel in small boats have caused the perception that the UK’s borders may not be under control. In fact, those crossings are largely a consequence of the UK’s border controls becoming increasingly effective, with fewer other options for certain nationalities of asylum seekers to access the UK.²

As other routes into the UK closed down as a result of the pandemic, and taking advantage of a relatively benign weather season, the numbers of migrants taking their chance across the Channel have risen materially this year. And, unlike those coming in through other routes, or those simply overstaying who originally entered legally, who do so unannounced and unreported, these Channel crossings have become very visible, in terms of the both the political reaction and the mainstream and social media comment. This has meant that while the pandemic has unsurprisingly led to a significant overall *fall* in asylum applications in the UK in 2020, it has not necessarily felt that way to the British public.

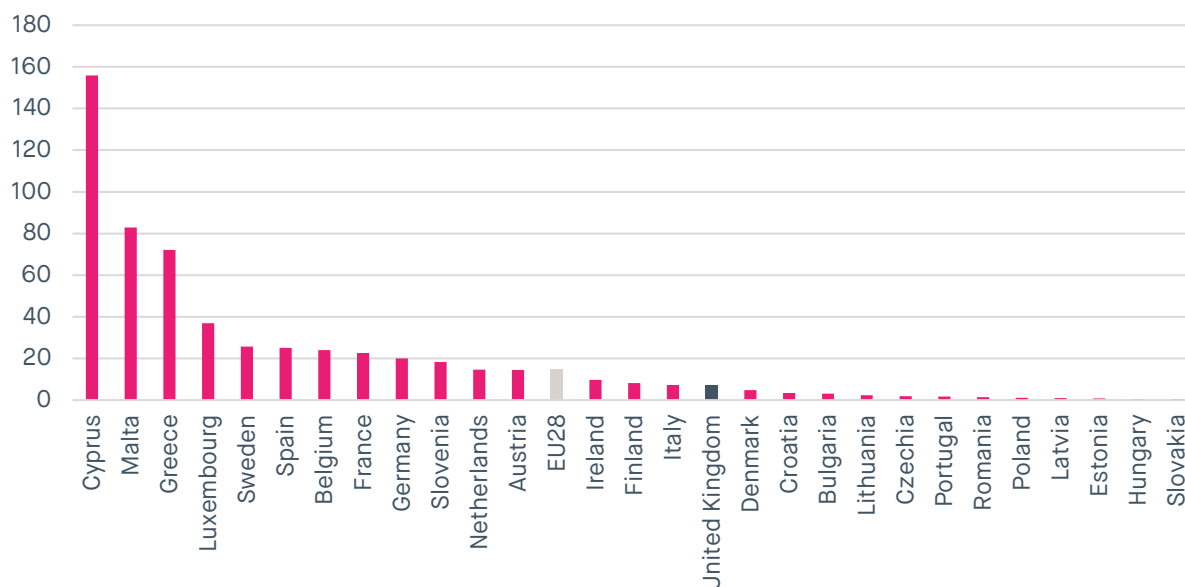
Figure 1: Location of asylum applications in the UK, quarterly figures since 2019, and Channel crossings for comparison



Source: Home Office immigration statistics; Letter from the Home Secretary following up on her appearance before the Committee in July, dated 2 September 2020, Annex A

As the SMF has previously pointed out, asylum seekers/refugees make up a small fraction of international migration, and a tiny fraction of those asylum seekers/refugees in turn make it anywhere near the UK.³ As a result asylum seekers have more recently made up just over 5% of long term international migrant flows to the UK.⁴ And, particularly in terms of its population size, the UK is hardly inundated with asylum applications.

Figure 2: Asylum Applications per 10,000 population in EU countries, 2019

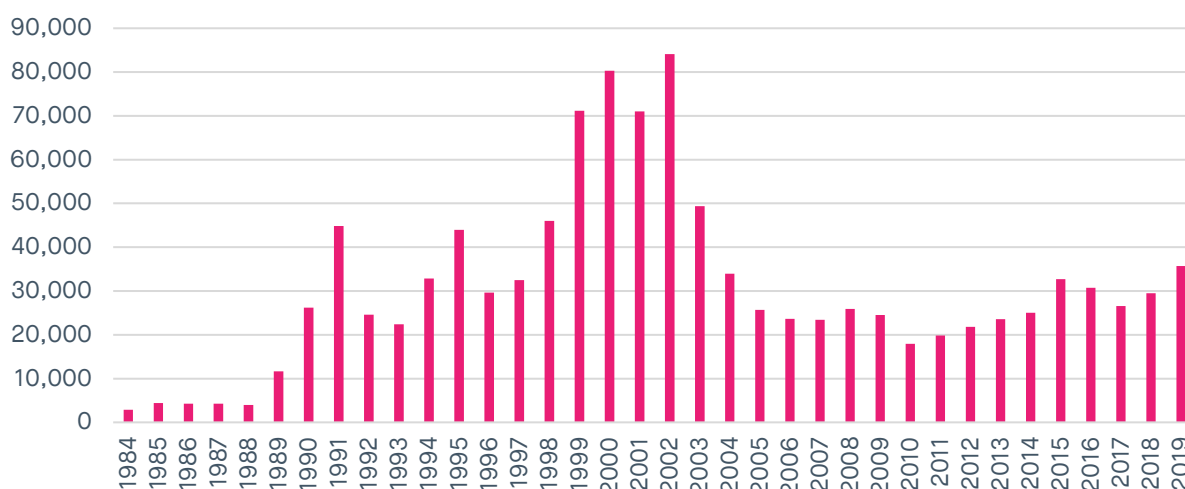


Source: Eurostat

The stresses and strains of the system

However, the Home Secretary may be concerned that, prior to the pandemic, asylum seeker numbers in the UK were nevertheless on a fairly steady upward trajectory. While significantly down from their peak in the early years of the millennium, the number of individuals covered by asylum claims in the UK in 2019 reached their highest level for over 15 years at nearly 45,000 (including dependants).⁵

Figure 3: Applications for asylum 1984 - 2019

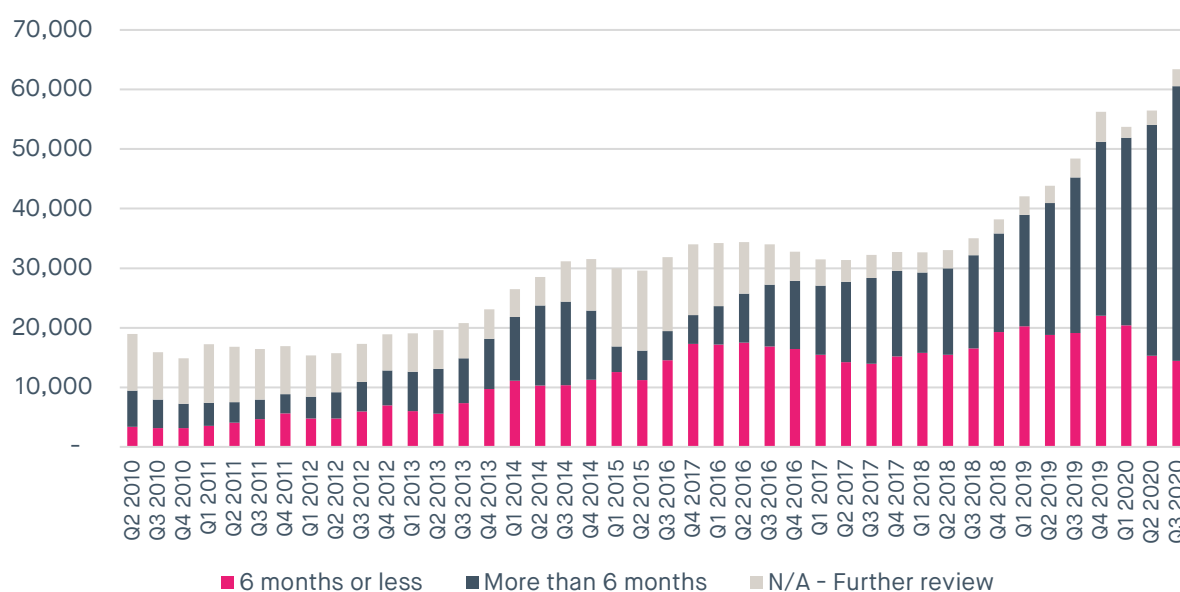


Source: Home Office immigration statistics

Another reason the Home Secretary may view the UK asylum system as ripe for reform is its seeming (in)ability to keep up with the demands that are made on it. In her Party Conference speech she referred to a Syrian asylum seeker who had arrived lawfully and as war had subsequently broken out in his home country “had no other option but to claim asylum here, but they had to wait over 17 months for a decision. That isn’t fair.”⁶

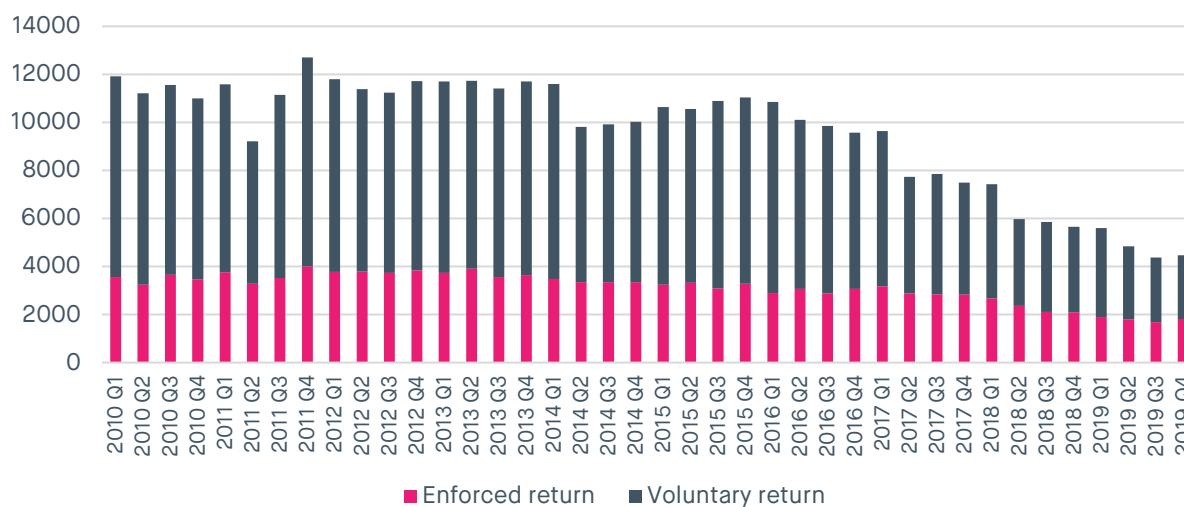
The last 20 years have been characterised by a persistent sense that the steady state of the UK asylum system is of being required to operate beyond its limits. And, as the pressure remorselessly builds upon it, occasional drastic steps are needed in order to avert complete meltdown. Much of the asylum case backlog was cleared 10 years ago by what was in effect an informal amnesty for those asylum seekers in the system at that point whose claims would have been rejected.⁷ But, since then the backlog has relentlessly begun to build back up again.

Figure 4: Pending asylum cases in the UK lodged since April 2006



Source: Home Office immigration statistics

These are the stresses and strains in terms of the inputs to the asylum process. But nor is the output of that process faring much better, in terms of the UK’s ability to return failed asylum seekers. That is, those asylum seekers who are adjudged not to meet the international legal definition of a refugee and therefore are not entitled to refugee status. Enforced returns of those people, including failed asylum seekers, who have come to the UK but have been assessed as having no rights to remain here, are now at their lowest level since records began. And voluntary returns have also fallen significantly in the last five years, as the SMF has previously focused on.⁸

Figure 5: Enforced and voluntary returns from the UK by quarter, 2010 - 2019

Source: Home Office immigration statistics

Failed asylum seekers are particularly hard to return. That may be especially so when they have secured legal representation to help assert any rights they may have to remain in the UK, and particularly when they have been in the UK for some time and have grounds for claiming the right to a family life here.⁹ Lawyers have a professional duty to represent their client as best they can. The evidence suggests that they are only likely to be inspired to do so all the more because they feel they have been unfairly insulted, even endangered, by the comments of the Home Secretary and her department.¹⁰

The Immigration Enforcement directorate of the Home Office has become increasingly exasperated though with what it sees as lawyers not merely representing asylum seekers, but actively seeking to create and encourage asylum claims. The directorate has cited “an increase in individuals making late or spurious claims for asylum while in detention” in order to be allowed to stay in the country.¹¹ However, the Public Accounts Committee has questioned what evidence there is to substantiate this claim,¹² and some lawyers argue that late claims arise not from any deliberate tactics of their own, but from the fact that they are often not made aware of, or given access, to those needing their advice until the last moment before they are planned to be removed from the country.¹³

The Home Secretary herself in her Party Conference speech used the example of a Syrian who had been in Britain for some time before claiming asylum here, as the situation had changed fundamentally in his home country meaning he could no longer return. In doing so she was acknowledging that there might be good reason why not all asylum claims are made immediately on entry to the UK.¹⁴

Those few countries regarded as having recently achieved material improvements in the speed, cost, credibility and efficiency of their asylum determination procedures, such as Switzerland and the Netherlands, have done so not by keeping lawyers at arm’s length, and by pushing them out of the process, as the Home Secretary seems to want to do, but by integrating them more comprehensively into the process.

In Switzerland the emphasis in its development of an accelerated procedure for some categories of asylum claims has been on ensuring that those asylum seekers channelled into that procedure still have access to free legal assistance, and that their legal representatives have an opportunity to be involved in all parts of the process; available to

advise the asylum seeker on their choices and options at each stage, providing a realistic assessment of the likely outcomes of their case, and having a chance to review and comment on the draft asylum decision before it is issued.¹⁵

Regardless of the recent furore over the role and actions of lawyers, the fact is that the practical hurdles to removing failed asylum seekers are formidable. This is not a struggle that is unique to the UK. For instance, between 2013-2017 Italy managed to return only one fifth of the failed asylum seekers on its territory, and, as with the UK, its returns numbers seem to have dwindled further since.¹⁶

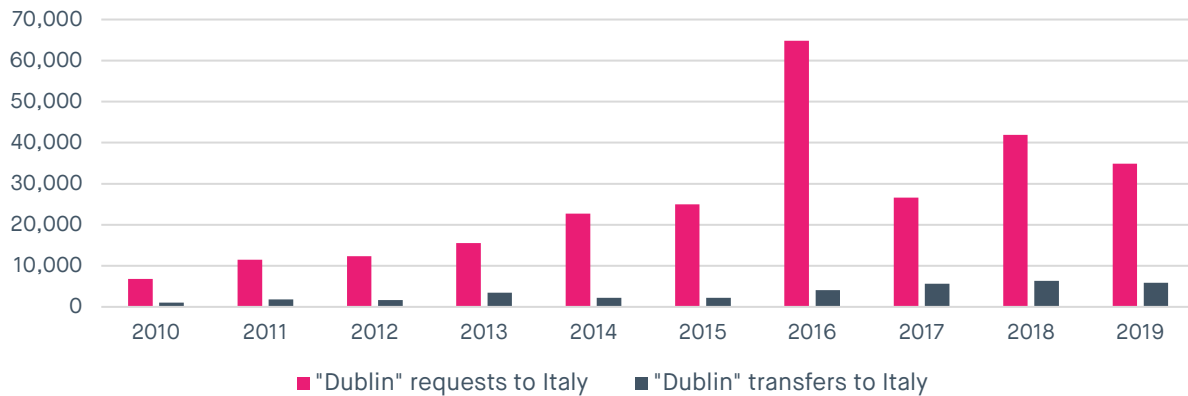
Most European countries receiving asylum seekers directly face the same challenges. Frequently without any identity documentation, or even clear evidence exactly who they are, or where they are from, it can be hard to even know where to return them to. Even if the UK has been able to determine this, and concluded it is safe for them to be returned, a number of countries do not accept the biometric identity document¹⁷ that the UK creates for such migrants, and it can be hard to get them to agree to take such people back.

Figures for 2019 show that even of those placed in immigration detention, which is meant to be reserved for those for whom there is a reasonable expectation that they can in practice be removed, 62% of those were released and not in fact removed. Two-thirds of migrants forcibly removed from the UK are now made up of foreign national offenders, a quite separate category from asylum seekers and who are in general easier to remove and whose identities and documents are often much clearer.¹⁸

Of course for the small number of asylum seekers coming across the Channel in boats, the Government is not generally seeking to return them to their home countries, but just to France, where they have demonstrably arrived from. But even that is not straightforward.¹⁹ The Dublin III Regulation²⁰ is an agreement between EU states to allocate responsibility between them for hearing an asylum claim in circumstances where the asylum seeker has passed through/into more than one of those states. For asylum seekers coming to the UK through another state in the EU therefore, in theory, unless those asylum seekers already have close family in the UK, Dublin III should provide the mechanism for the UK to transfer back the asylum seeker to that state for their asylum claim to be determined there. But in practice it does not quite work like that.

Given the main migration routes into the EU, EU countries in Northern Europe make a lot of Dublin 'take-back' requests to those in Southern Europe through which asylum seekers have passed on their way. But only a minority of such requests are accepted and actioned. By way of very relevant example, France is the main issuer of Dublin 'take-back' requests to Italy.

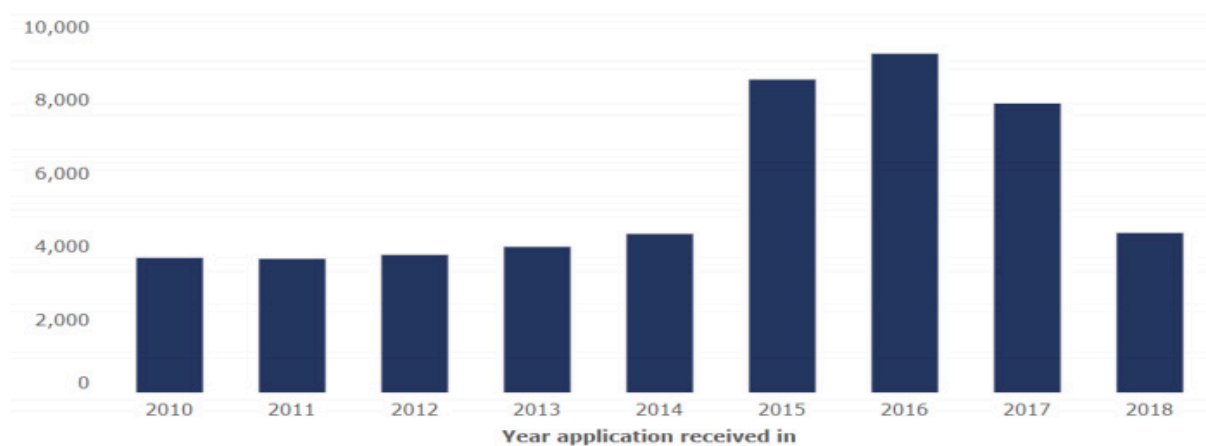
The next chart shows how Italy has responded to these 'take-back' requests from other EU states (including France as the main requester). The absolute numbers returned to Italy may have risen over the past decade, but the ratio of actual transfers back to Italy from other EU states in comparison to the number of 'take-back' requests actually received by Italy from other EU states has significantly declined.

Figure 6: Arrivals by the Dublin system

Source: Eurostat

It is in this context that France will be considering how to respond to Dublin ‘take-back’ requests received from the UK. In 2019 France agreed to 53 such requests from the UK.²¹ And what little leverage the UK currently has through the Dublin system seems destined to fall away after Brexit, as not surprisingly the EU do not seem particularly incentivised to agree to a continuation of a mechanism which, in theory at least, allows the UK to benefit from its geographical position at the far edge of Europe to push back asylum seekers on to EU states.²² In practice though, the end of its involvement in the Dublin system is perhaps not such bad news for the UK Government. Due to the primacy given to the existence of a close family connection, once again in 2019 the UK was in fact a net recipient of transfers under the system, transferring out 263 while accepting transfers in of 714.²³

The number of failed asylum seekers who have not left the UK and remain here is uncertain. The chart below from The Migration Observatory²⁴ uses the Home Office’s statistics to make an assessment. This only provides an upper bound though, rather than an estimate, not least because these numbers do not take into account successful asylum seeker appeals above the level of the first-tier immigration tribunal. Over the last two decades a perception has taken hold that many failed asylum seekers have been allowed to remain in the UK, and have swelled the size of the overall irregular migrant population here; that is the population of migrants in the UK without authorisation and the legal status to be here regardless of how they arrived.

Figure 7: Number of unsuccessful asylum seekers not recorded as having left the UK

Source: The Migration Observatory²⁵

The overall irregular migrant population in the UK is one that the Home Office maintains only limited contact with and knows little about. The Home Office has no idea of the size of it, having not attempted its own estimate since 2005.²⁶ Last year, in a joint statement issued with the Office for National Statistics, the Home Office made clear that it does not think that even coming up with such an estimate, is a useful exercise.²⁷ That has not stopped others though coming up with their own estimates of the UK’s irregular migrant population at various times over the past 15 years. These estimates have varied between a couple of hundred thousand and over one million.

Figure 8: Estimates of the UK’s irregular migrant population



Source: *The Migration Observatory*²⁸

Perhaps the Home Secretary was influenced to take a stand on asylum seekers now by the recent publicity that was given to this situation by the publication of the Public Accounts Committee’s report on the work of the Immigration Enforcement directorate of the Home Office,²⁹ following the National Audit Office’s report on the same back in June³⁰. The PAC’s report received significant media attention of the sort which did not speak about the Home Office’s engagement in this area in particularly glowing terms. A full-page story plus editorial comment on the report appeared in the Daily Mail under the headline ‘Q: How many illegal immigrants in UK? A: No idea, admit officials! Home Office hasn’t even checked since 2005’.³¹

In terms of the overall costs of the UK’s asylum system, the National Audit Office reported the annual budget of the Immigration Enforcement directorate of the Home Office alone as almost £400 million.³² The directorate’s remit is broader than just focusing on enforcement issues around the asylum system, but the Home Secretary claimed in her Party Conference speech that the asylum system costs “UK taxpayers over £1 billion each year”.³³ That sounds like an awfully convenient big, round number. It is not clear how she arrived at it. Yet, the number could conceivably be even higher, depending on what costs one chooses to include.

If you follow the journey of a failed asylum seeker through the system, the time, effort and resources needed, and their attendant costs, just keep piling up. It is not only the legal and infrastructure costs of supporting the asylum system through the initial determination, then the tribunal hearing, and then potentially the subsequent appeal process. What about also the costs of combatting people smuggling? Or the costs of the asylum support and dispersal system through which the Government supports asylum

seekers while they await the determination of their claim – the latest Home Office statistics show over 56,000 asylum seekers in the UK are currently receiving government support with accommodation and/or subsistence needs while their claim is pending?³⁴ Or the opportunity costs of asylum seekers being generally prohibited from working while their claim is determined? Or the costs of the ‘no recourse to public funds’ status to which failed asylum seekers are subject, the purpose of which is to save costs but instead just seems to transfer the financial burden of supporting them on to local authorities – in addition, Home Office figures show there are over 6,000 failed asylum seekers in the UK receiving government support as they are destitute and in practical terms unable to return to their country?³⁵ Or the costs of immigration detention and of attempted (non) removal? The list could go on. Viewed in this context it is no surprise that home secretary after home secretary in Britain has wondered how to make this all stop, and just go away. Or that the current Home Secretary views the system as “fundamentally broken”.

Designed to fail?

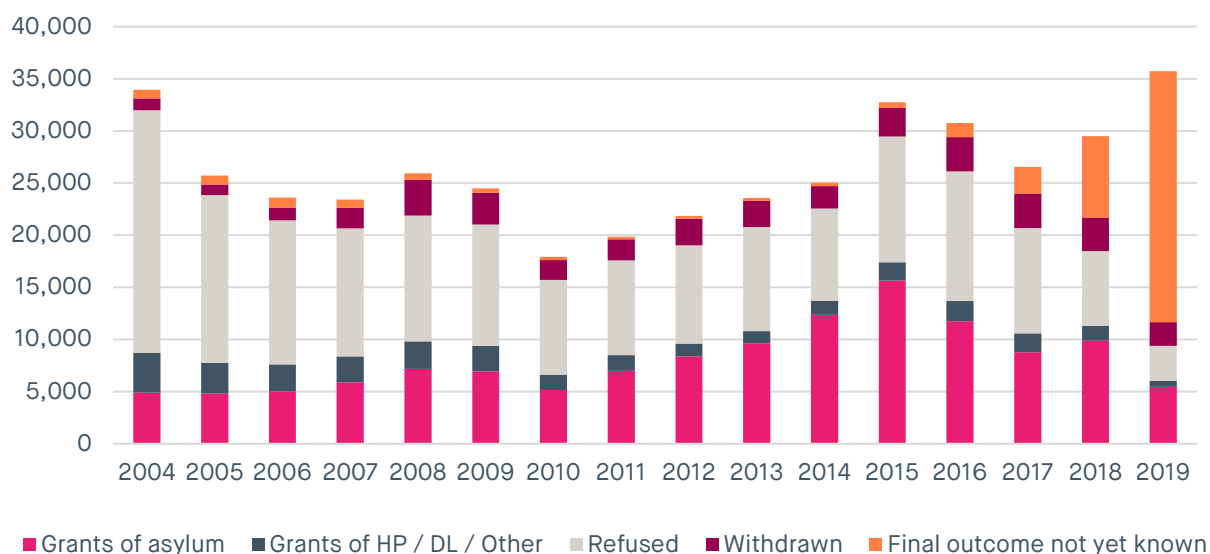
The current tension in the UK over the asylum system is primarily about how asylum seekers are able to access the opportunity to make an asylum claim and how the responsibilities for this should be shared between different states which asylum seekers pass through. This is also the case over so much of Europe. Witness the ongoing contortions which the European Union continues to put itself through on these questions, of which the European Commission’s recently issued ‘New Pact on Migration and Asylum’ is the latest effort to try to find some form of common way forward on this at the EU level.³⁶

Although they may differ in their reasons why, many refugee advocates in the UK would likely agree with the Home Secretary that the asylum system here is broken. And, for all the rhetoric, there is still important core common ground between both sides; agreement on the obligation to help those most in need fleeing desperate situations, that refugees should be protected under international law which sets out the circumstances that give rise to refugee status, and also on the rights that a refugee has once recognised as a refugee.

But when it comes to the message of ‘*No to asylum seekers*’, refugee advocates in the UK would be vehement in their defence of the rights of asylum seekers to come directly to this country to present their case for asylum in any way they might see fit. In broad terms, the special legal protections given under international law to those claiming refugee status specifically allow an asylum seeker to be able to enter a country illegally without impairing their claim, and allow them to choose where they submit their claim for asylum; they do not have to lodge their claim in the first country they come to.³⁷

The Home Office’s slow and allegedly poor decision-making has been blamed by some refugee advocates as the reason so many asylum claims in the UK are then appealed and have to go through the expensive and time-consuming tribunal system. Perhaps this is now improving; fewer asylum claims are now being rejected at the initial decision stage than at any time in the past thirty years. But the rejection figure is still over 40%, And even with some success on appeal – over the last 15 years a little over three quarters of rejections have been appealed, one third of those successfully³⁸ – there are always going to be asylum seekers whose claims are not accepted. Smarter, faster, fairer, more humane decision-making may impact the relative numbers slightly³⁹, but it is not going to change that fact that not all asylum seekers are refugees.

Figure 9: Final outcomes of asylum applications in the UK, at June 2020



Source: Home Office immigration statistics

The country that the asylum seeker is from does not determine the outcome of their asylum claim. But it does provide the context for that determination. For instance the recognition rate⁴⁰ of asylum claims across the EU from Venezuela has been very high in recent years. But understandably not many Venezuelan asylum seekers have sought to come to the UK, preferring Spain instead.

In 2019 the five countries of origin with the most asylum applications lodged in the UK (with their recognition rates across the EU by first instance decisions in brackets) were first Iran (40%), then Albania (7%), Iraq (41%), Pakistan (12%) and Eritrea (82%).⁴¹ The latest Home Office figures show that the current first instance recognition rates of Albanian and Pakistani claims in the UK is higher, at 32% and 39% respectively. But that is still clearly only around a one third success rate, albeit before appeal. Recognition rates can of course change over time, but the fact is that while the UK gets material numbers of asylum seekers from Albania and Pakistan there will likely be a significant number of asylum refusals and failed asylum seekers. And of course there are also asylum claims lodged in the UK from citizens of countries which currently have even lower recognition rates, such as India (4%), Bangladesh (17%) and China (22%).⁴²

The concept of a recognition rate tells us that one asylum seeker from a country might be granted refugee status and another might not. That is because refugee status is assessed on an individual basis. People who have left their homes elsewhere and end up in the UK do so for a wide variety of reasons and due to a wide variety of factors, which are rarely easy to disentangle. But making a determination of whether or not an asylum seeker's story meets the legal threshold, and credibility standards, for them to be granted refugee status under international law requires this disentangling. Almost always on imperfect evidence; in a refugee status determination most of the key witnesses are not available to be called. The Home Office and the immigration tribunals need to try to pick all this apart. To decide what story they believe, and to apply the letter of refugee law to that story. This is why the refugee status determination process takes so much time and requires so much infrastructure and support.

This equation: time and cost of the system multiplied by numbers of failed asylum seekers multiplied by the problems with (non) return, all taken together effectively sets a limit on the degree of support and consent the British public are willing to give to such a system. Particularly when they see a number claiming asylum who have already been in the country for some time, and some only when told they must leave.

In the public's mind the spectre of the 'bogus asylum seeker' can still loom large. The Home Secretary has now added the idea of the 'forum shopper', "shopping around for where they can claim asylum", assisted by "despicable criminal gangs".⁴³ It is understandably tempting to argue that if only the public were better informed about what international law requires, or allows with regard to the latitude permitted on where and how an asylum seeker can submit their claim for refugee status, or about the correct interpretation of the Dublin III Regulation's allocation of responsibility for asylum seeker applications between EU states, then all misunderstandings, and therefore tensions, over these issues would evaporate. But this seems wishful thinking. It seems unrealistic to think that most ordinary people are ever going to be influenced in their views on this topic by a better understanding of the letter of international law.

YES TO REFUGEES

Advance Australia Fair

Is there a marvellous magic trick that could make people smugglers and those who facilitate irregular migration, asylum lawyers, judges, tribunals, and destitute failed asylum seekers all disappear? One that could also make redundant public unease at 'bogus asylum seekers' and 'forum shoppers' in one fell swoop? Yet at the same time still "provide a safe haven to those fleeing persecution, oppression or tyranny"⁴⁴ as the Home Secretary says she wants to do? In effect a system that says *no to asylum seekers, yes to refugees*?

On the face of it such a system may seem paradoxical, if not nonsensical. How can you have refugees without having asylum seekers, if, at least in practical terms (international legal theorists look away now), a refugee is simply an asylum seeker whose claim to refugee status has been believed? Just as with other parts of the UK's immigration system currently undergoing reform, might the inspiration for the answer here be found on the other side of the world, Australia?

Alongside the UK's adoption of an 'Australian points-based system' for its work-based immigration system, there have been increasing signs that the UK has also begun to look no less enviously at Australia as a model for its asylum system. If any system could be said to be founded on a firm but fair mantra – if one's definition of firm but fair sits comfortably with aggressive repulsion of direct asylum seekers, combined with willingness to take resettlement of some of those already determined by the UN refugee agency (the United Nations High Commissioner for Refugees (UNHCR)) to be refugees from refugee camps run by the UNHCR elsewhere in the world – then Australia's is it.

States' commitment to international refugee law requires them to hear asylum claims presented by those who have reached their territory. But that law does not require states to allow asylum seekers to access their territory. This leaves open the possibility of states doing all they can to seek to prevent those who might claim asylum on their shores ever reaching their territory in the first place. This has given rise to the 'asylum paradox';⁴⁵ a "duplicious dichotomy" whereby those states which have the strongest desire to be able

to claim compliance with their international law obligations to refugees arriving on their territory may have the greatest incentive to seek to deflect and divert asylum seekers away from ever reaching their territory so they never have to hear those claims.⁴⁶ It is hard to think of an international system that could be better designed to spur the flourishing of people smuggling. And it might be regarded as a perfect corollary of the asylum paradox that the country in the world hosting the largest number of refugees on its territory – twice as many as the next largest – is Turkey,⁴⁷ one of the few countries in the world which has not in fact accepted the full suite of international law obligations owed to refugees.

What Australia did was to take the asylum paradox and push it to its limit. Arguably beyond its limit. Fully leveraging its position as an island nation, and its relative geographic isolation, Australia has been able to severely curtail any immigration it does not want, through a combination of pro-active interception of migrant boats at sea, high penalties for migrants and smugglers moving illegally, and the use of mandatory, offshore detention, with detention camps located in Nauru Island and Manus Island in Papua New Guinea. While at the same time resettling into Australia carefully selected refugees from elsewhere in the world that it has agreed to take in under annual quotas that it decides upon.

Most countries' geographical situation clearly makes it unfeasible for them to even contemplate an Australian-style approach to their refugee system, even were they to have the resources and stomach for it, and for the legal battles it would entail. At first blush though, the UK's island nation status, so conveniently geographically located behind the protective barrier of 'Fortress Europe', which for the most part itself does all it can to keep out asylum seekers from outside the EU, may suggest the Australian model as one that the UK could indeed emulate. The recent focus on the potential for intercepting and forcing seaborne migrants back to the French shore, along with ideas floated about the feasibility of offshore processing of asylum claims; on old ferries, or far away islands,⁴⁸ are all compatible with this line of thinking.

Whatever their misgivings about the current asylum system though, it must be open to considerable doubt whether either the British Government or the British public has the stomach for such an aggressive approach towards asylum seekers as the one Australia adopted. After all, this ultimately saw Australia referred to the International Criminal Court for crimes against humanity because of the conditions in the offshore camps.⁴⁹ Even Australia has now closed those down.⁵⁰ As Ipsos MORI have found, when the British public is asked "to choose between a system that is compassionate or hostile, two-thirds favour compassion".⁵¹ When tougher immigration control measures have occasionally gained sufficient prominence to come to the British public's attention, they rarely last long before being withdrawn amidst a barrage of criticism; thus far at least, neither British politicians nor public have truly had the stomach for them.⁵² We may soon see whether it is different this time.

Safe and legal routes

What though of the positive aspect of the *no to asylum seekers, yes to refugees* message? Here there could be considerable alignment of interests across the spectrum. The Home Secretary's reference in her Party Conference speech to her approach being "fair by welcoming people through safe and legal routes" is perhaps in part inspired by her own family's history – she referenced the expulsion of the Ugandan Asians, of which the UK took in 42,000 in 1972-1974. But she also mentioned "proudly resettling more refugees from outside Europe than any other EU country".⁵³

And in large part her reference to safe and legal routes, and indeed her use of a Syrian refugee as an example of someone the UK did want to help (and should have helped more quickly) is founded on the positive perception, across the political spectrum, of the Government's Vulnerable Persons Resettlement Scheme (VPRS). This scheme, run in partnership with UNHCR (and also the International Organisation for Migration which carries out certain pre-departure screening and orientation tasks) was established at the beginning of 2014 and subsequently expanded. It has resettled approximately 20,000 Syrian⁵⁴ refugees into the UK since its inception.

Along with three other much smaller resettlement schemes which the Government runs, including the Vulnerable Children's Resettlement Scheme (VCRS) – which resettles vulnerable children, whether unaccompanied or with their families, and is not specifically tied to the conflict in Syria – this commitment to refugee resettlement has seen the UK resettle more than 25,000 refugees over the last five years.⁵⁵ This is a higher figure than any other country outside of the United States and Canada, and has meant that of those from overseas granted humanitarian protection in the UK in that period, about a quarter have come through the resettlement route.⁵⁶

The degree of engagement with the VPRS and VCRS across the UK has also been impressive. Over 300 local authorities in the UK have resettled refugees through these schemes.⁵⁷ Separately, the Community Sponsorship Scheme was launched in mid-2016 and sits alongside the VPRS and VCRS in providing a process through which community groups can sponsor – providing emotional and practical support to – families resettled in the UK under these schemes.⁵⁸ Despite the challenges faced by the Community Sponsorship Scheme, and it being initially slow to take-off, this element of community involvement and engagement does appear to have had a positive impact on both refugees and host communities.⁵⁹ This stands in stark contrast to the perception of how the Government's asylum seeker dispersal programme – for those asylum seekers arriving directly in the UK – is working and how a number of communities who have received dispersed asylum seekers have reacted to that.⁶⁰

The UK's history of engaging in refugee resettlement has been a rather ad hoc and sporadic one. It has typically done so in response to specific, very defined, crises, whether the Ugandan Asians and the Vietnamese boat people in the 1970s or the Syrian civil war in the past five years. But in June 2019 the UK Government announced its intention to consolidate the three main existing resettlement schemes operating in the UK into a new 'UK Resettlement Scheme',⁶¹ which suggests that, despite its funding still being only on an annual rolling basis,⁶² the refugee resettlement route may have now become something of a more permanent fixture in the eyes of the Home Office.

This would move the UK closer to the position of countries such as the United States and Canada, which for many years have looked to resettlement as the primary route through which to take in refugees, and take larger numbers through the resettlement route. While the United States' commitment to refugees has recently been substantially scaled back as a result of President Trump's policies, for all his own rhetoric around this topic, and his avowed scepticism of the benefits of multilateralism, the outgoing President has still maintained the United States' position at the top of the charts in terms of both the number of refugees resettled,⁶³ and in terms of being by far the largest contributor to the funding of the UNHCR itself⁶⁴.

Taking in resettled refugees through UNHCR fundamentally changes the dynamic. There is no need for facilitators to arrange and assist the refugees in risky onward journeys to their ultimate destination country, or for refugee lawyers, judges and tribunals once they

get there. Instead, UNHCR processes the asylum applications in the country (within their region) to which the refugee has immediately fled, prioritising resettlement for those refugees who lack any foreseeable alternative solutions. UNHCR determines whether refugee status should be granted before submitting successful candidates into the resettlement programme. Those countries accepting refugees for resettlement then consider those candidates. UNHCR is desperate for more countries to agree to take in refugees for resettlement, and for those that already do so to agree to take in greater numbers. It estimates for the coming year close to 1.5 million refugees, currently hosted across over 60 countries, are in urgent need to resettlement.⁶⁵

The UK's approach to resettlement is to "offer a safe and legal route to the UK for the most vulnerable refugees". Unlike a number of other countries taking resettled refugees it does not take into account questions of skills, employability or integration potential."⁶⁶ A recent British Red Cross report highlighted the costs, difficulties and dangers that face families when, having split up, or been split up, one of their number successfully claims asylum in the UK and the immediate family members then seek to join them here.⁶⁷ An advantage of the resettlement route is that it reduces the risk that families will need to split up, or be split up; they can stay, and come to the UK, together. The majority of resettlements under both the VPRS and the VCRS have comprised four- or five-person family groups.⁶⁸

There are also a number of potential advantages of the resettlement route from the British public's perspective. One is that there is then no suggestion of 'bogus asylum seekers' or 'forum shoppers' to undermine support for the system, as only those already assessed to be refugees come to the UK. And, as such, those new arrivals can work and commence their integration into, and contribution to, the economy and society from the moment they arrive and are able, whereas asylum seekers in the UK are currently restricted from doing so until their claim is positively determined. There is also the opportunity under the resettlement route to assist refugee integration by providing pre-departure language and cultural training once refugees have been accepted for resettlement by the UK but are still waiting to be resettled.⁶⁹

While they may not like the *no to asylum seekers* element that has been packaged with it by the Home Secretary, unsurprisingly refugee advocates are very supportive of refugee resettlement to the UK. Immigration policy is endlessly counterintuitive; might it be possible that, if combined with an expansion of the resettlement programme, a tougher approach on asylum seekers could actually lead to an increase in the refugee population in the UK?

There is an old English proverb that *'he who sups with the Devil should have a long spoon'*. The responses of some of the largest refugee advocacy organisations to the Home Secretary's Party Conference speech were striking. Instead of, as might have been expected, simply attacking the Home Secretary for her approach to asylum seekers, they agreed the system was indeed broken and needed fixing. And they took the opportunity to push not only for a commitment to restart the UK's resettlement programme from its COVID-19 induced hiatus, but also for further commitments to the refugee resettlement route and providing more safe and legal routes to the UK which they have long argued for.

For example:

"The chief executive of charity Refugee Action, Stephen Hale, said it was a 'positive step' for the home secretary to 'realise what we've been trying to tell her – the asylum system is not fair or effective'. But he urged her to push for 'quicker decisions and better support' for those seeking asylum in the UK ... [He] said to

make the system fair her 'immediate priority' should be to 'honour her words and commit long-term to creating safe and legal routes for refugees to reach the UK' – including restarting resettlement schemes that were paused during the coronavirus outbreak.”⁷⁰

And:

“Andy Hewett, head of advocacy at the Refugee Council, said he agreed with Ms Patel that the current system was 'broken' and 'leaves vulnerable people languishing for months on end, fearful for the future and unable to start rebuilding their lives'. But he said it was wrong to say it was illegal for people to arrive in the UK via small boats for the purpose of seeking asylum – which is covered in the UN Refugee Convention – although they would like to see fewer people attempting the dangerous journey. 'To this end, we're calling on the home secretary to restart the resettlement programme without delay, dismantle the inhumane family reunion rules that prevent parents from being reunited with their children in the UK, and introduce humanitarian visas so that refugees can travel safely to the UK', added Mr Hewitt.”⁷¹

While perhaps not yet supping with someone they have sometimes regarded as at least partly diabolical, these organisations do appear to have realised the potential benefits in at least carefully approaching the cutlery drawer.

And it has now been announced that the pause on refugee resettlement into the UK caused by the COVID-19 pandemic (in place since 12 March 2020) will be lifted, and resettlement commenced. In doing so the Home Office commented that “we have to help more people directly from the affected regions and that is exactly what we are planning with the new firm and fair asylum system, which will welcome people through safe and legal routes”.⁷²

FIXING THE WORLD'S BROKEN ASYLUM SYSTEM

To most refugee advocates, suggesting that the current Home Secretary could play any sort of role more broadly in helping to fix the *world's* broken asylum system would probably fall into the same bucket as the suggestion that the outgoing President of the United States be nominated for the Nobel Peace Prize.

But let us consider how the world's system of refugee protection is currently looking.

“What cannot work is the status quo approach to asylum: what is unworkable is the fact that it imposes unlimited and one-sided obligations on a given community based upon the simple fact of arrival ... [this] requires real, affirmative action on our part to defuse the sense that the provision of asylum is inattentive to the concerns of receiving communities – to engage and answer the perception that there is no upper limit to the duty to provide asylum to those who arrive. And that is the challenge that we can and should meet.”⁷³

Those words would not have looked out of place in the Home Secretary's Party Conference speech. But in fact they were written by Professor James Hathaway, one of the acknowledged leading legal scholars on refugee law and the author of the 1200+ page hallowed legal textbook, 'The Rights of Refugees under International Law', and one of the leading advocates globally for refugees' rights and protection.

Professor Hathaway has come to his current conclusions after a lifetime of considering the issue of asylum from the other end of the telescope – from the perspective of the

refugee's individual rights and claims to protection – than the one that the Home Secretary is looking down. He has also seen what happens when well-intentioned multilateralism to support refugees' rights comes to be viewed by voters and their representatives as taking insufficient account of the impact to, and interests of, communities where asylum seekers are received.

Here is his snapshot of “the current broken, yet massively expensive, system”.

“...more than 13 million refugees – two-thirds of the total number of refugees – have been waiting an average of two decades for a durable solution, with none in sight. Of these, fewer than one per cent are resettled in any given year. In the result, just 10 – mostly very poor – countries now host more than 60 per cent of the world's refugees, with the entire developed world taking in only 15 percent of those in need of asylum. And yet those same rich countries spend at least US\$20 billion each year to fund their refugee reception efforts, more than four times the amount the United Nations refugee agency [UNHCR] has available to meet the needs of the 85 percent of refugees in poor countries ... most of the resources are spent to address the claims of a tiny number of refugees able to reach rich countries.”⁷⁴

Many refugees know that their chances of resettlement through UNHCR are currently very small. It is in this context that the offers of those facilitating migration and smuggling people across borders look so attractive. Some asylum seekers will decide to take significant risks, because the alternative looks so bleak. And this explains the seemingly nonsensical situation where some asylum seekers will do anything in their power to keep out of the UNHCR camps, and not fall under UNHCR's protection, even though UNHCR is the very agency which they are supposed to be able to depend on.⁷⁵

What then is Professor Hathaway's ‘solution’? He argues that the perfect is the enemy of the good, that the current broken system “argues strongly for the importance of sacrificing some of the relative privilege of refugees able to reach asylum in wealthier States in order to do right by the massive majority of refugees consigned to dramatically more difficult circumstances”.⁷⁶

In essence his argument is that asylum seekers be given access to protection, but that the country where they claim protection is just their *point of entry* into the refugee determination process of the international refugee system. And that point of entry does not determine where they will end up, if they are in fact determined to be a refugee by the international corps of decision-makers appointed for that purpose. For countries such as the UK, he is in effect suggesting a system that replaces the obligation to maintain an onerous and costly asylum system with an obligation instead to resettle refugees from elsewhere. In much greater numbers than they currently do, but still broadly balancing out the amount of asylum seekers currently arriving at their door. On a global scale:

“[compared with] only the paltry 100,000 or so resettlement places a year presently offered ... we would need about 1.7 million resettlement⁷⁷ spots per annum – almost identical to the 1.65 million persons now arriving to make asylum claims in OECD countries. The main responsibility-sharing tasks of these extra-regional countries would therefore change from offering asylum to providing resettlement ... A focus on resettlement commitments would allow the developed world to protect refugees in an orderly, managed way, even as it would meet a critical gap in the current system, which leaves millions of refugees in permanent purgatory.”⁷⁸

Professor Hathaway argues for the equal moral worth of all refugees, not just those we see in our midst, or find at our own borders. And to consider:

“the result produced by the current system under which massive resources are now expended on the 15 per cent of refugees able to reach the developed world – disproportionately young, male and mobile – while comparatively derisory resources are made available to the 85 per cent of refugees who remain closer to home”⁷⁹

Might this resonate with the current Home Secretary, and the sentiment in her Party Conference speech that “we will protect the most in need” but that the asylum seekers at the UK’s borders are “elbowing the most vulnerable to the side” and a fairer system would be to welcome people through safe and legal routes?⁸⁰ And also with Conservative MPs, some of whom have been urging “concentrating on helping the many rather than the relatively privileged few”.⁸¹

Could the potential to save money also make this approach attractive to the current UK Government? Under the system suggested by Professor Hathaway the need to spend money to combat people smuggling would largely fall away, because people smuggling, other than that necessary to escape the borders of one’s own country, would largely fall away. There is some suggestion that a proportion of asylum seekers who are smuggled into the UK currently are not necessarily always intent on reaching the UK, but can be influenced by people smugglers who have an interest in charging for as lengthy a journey as possible.⁸² But who would pay large amounts of money to be smuggled to a country when the international refugee determination system might then allocate⁸³ them elsewhere? And the US\$20 billion spent every year by rich countries to run their domestic asylum systems would no longer be required.

To be clear, there are a number of refugee advocates who would not agree with the position that Professor Hathaway now takes; not least because he has taken a position increasingly critical of, and at odds with, that of UNHCR and the UN Global Compact on Refugees. And nor is there any suggestion that he and the current Home Secretary should in any way be viewed as kindred spirits. And nor would Professor Hathaway likely view precipitate and unilateral action by any one country as a sustainable basis on which to found this revised model of refugee protection.

What is important though is that people and organisations coming from very different perspectives, and with very different aims, might still be able to find considerable common ground, where they might each see the potential to gain real benefit and advantages for their cause. For the Home Secretary, the cause is a workable system that delivers firm and fair immigration control – to her, freeing up resources currently needed to combat people smuggling and devoted to determining direct asylum claims, and concerns over ‘bogus asylum seekers’ and ‘forum shoppers’ might be key. For Professor Hathaway, and other refugee advocates, the cause is to improve the desperate plight of most of the world’s refugees and the huge risks that they often have to take to secure real protection and prospects for the future – to them, the fact that “refugees would not have to put their lives on the line to get access to solid protection”⁸⁴, and a better chance of keeping families together throughout, might be key. These causes are not mutually exclusive.

ENDNOTES

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- ² Although per the UK Independent Chief Inspector of Borders and Immigration, 'An inspection of the Home Office's response to in-country clandestine arrivals ('lorry drops') and to irregular migrants arriving via 'small boats' (May 2019 - December 2019)' (Published 11 November 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933953/An_inspection_of_the_Home_Office_s_response_to_in-country_clandestine_arrivals__lorry_drops__and_to_irregular_migrants_arriving_via__small_boats_.pdf it would be an over-simplification to argue that numbers of small boat crossings have necessarily increased as a result of 'lorry drop' numbers decreasing, at least prior to the pandemic.
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- ¹⁵ Comments by Thomas Segessenmann (Deputy Head, Staff Office Asylum, State Secretariat for Migration, Switzerland) at ICMPD Vienna Migration Conference 2020 (18 November 2020).
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The Home Office itself has commissioned Ipsos Mori to produce a "three-year qualitative longitudinal evaluation" of integration outcomes in respect of those resettled under the VPRS and VCRS, but this is as yet to report its findings.

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- ⁷⁵ Robin de Cresspigny, *The People Smuggler* (Penguin, 2012)
- ⁷⁶ James C Hathaway, *The Global Cop-Out on Refugees* (n 73).
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- ⁷⁹ *ibid.*
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- ⁸³ Professor Hathaway does not suggest completely sacrificing refugee autonomy in terms of the place where the refugee is allocated for resettlement, and does believe that some degree of 'preference matching' might be possible, and indeed preferable, within a formalised and fair international assignment system. But still the fact of the country where you had actually 'arrived' into the system by claiming asylum would not influence the outcome of this.
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