

A tale of two human rights lawyers: Could a Labour government realise a better future in the UK for refugee protection with control?

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By Jonathan Thomas, Senior Fellow

Judgment on the legality of the government's 'Rwanda plan' response to the irregular migrant flows across the English Channel is currently awaited from the Supreme Court. In her recent Washington DC speech, the Home Secretary also took the opportunity to raise difficult, but important, questions around the entire rationale, but also specific provisions, of the International Refugee Convention. The question of whether and, if so, how countries can construct arrangements to transfer asylum seekers to other countries is viewed with alarm by most supporters of refugee rights. But this need not be so. Labour's focus on the potential for tough action on Channel crossings combined with improved responsibility sharing for refugees across Europe may represent the best opportunity for balancing refugees' need for protection with states' and their publics' priorities and concerns around achieving better control and fairness around such flows, and is perfectly compatible with the existing Refugee Convention.

KEY POINTS

- Greater public support for providing practical protection to refugees requires states to be able to:
 - Exercise greater control over refugee flows
 - More fairly share the burden and responsibilities to which those flows give rise
- Rather than thwarting states' ability to do so, the International Refugee Convention in fact gives states leeway to do just that
- Sir Keir Starmer's statements suggest that Labour are considering how greater control and responsibility sharing might best be achieved within the European region, allied to a 'get tough' message on people smuggling
- The latter though is doomed to failure unless coupled with a fundamental reform of the refugee system to break the link between where a refugee makes their claim and where they are settled if their claim succeeds
- For the UK, there is currently a window of opportunity to be a key contributor to the development of a revised refugee responsibility sharing system within Europe, one that sees the UK bearing its fair share but also gaining important protections in terms of its own potentially significant exposure to refugee flows in the future.

ANATHEMA?

In the political context in which she delivered her recent speech in Washington DC on migration, asylum, multiculturalism, and more, it was not at all surprising that Suella Braverman, the current Home Secretary, would pose the question: is the Refugee Convention still “fit for our modern age”?¹ Rather more surprising though is that two leading human rights lawyers, both supportive of refugee rights, have, separately, advocated sending arriving asylum seekers (back) to other countries when, on the face of it, this would seem anathema to their belief in the moral and legal obligation to offer refugees protection.

One of these people is Professor James Hathaway, one of the leading legal scholars of refugee protection and the staunchest of global advocates for refugee rights. The other is Sir Keir Starmer, now leader of the British Labour Party, and current front-runner to be the UK’s next prime minister.

At the Social Market Foundation we are similarly supportive of upholding refugees’ rights and their ability to practically access protection. But we also understand the public’s concerns around a seemingly chaotic border and uncontrolled inflows of migrants. We positively cited Professor Hathaway’s ideas in both our 2020 briefing: ‘Fixing Britain’s broken asylum system’², and in our 2022 report: ‘Routes to resolution: Finding the centre ground in Britain’s immigration debates’³.

In that latter report, with specific reference to the irregular migrant flows across the English Channel, we also argued that the best approach for the UK to practically curb those flows, protect lives, and reassert control, is to strike an agreement with France/the EU. An agreement that would allow the UK to swiftly and formulaically return those irregularly crossing the Channel, in return for which the UK would agree to take in a quota of refugees from France/the EU to share the responsibility for refugees being hosted across Europe. We argued that both “liberals and restrictionists alike should support such an outcome”.⁴ This is consistent with the position Sir Keir has now begun to sketch out⁵ as the Opposition’s alternative to the government’s ‘Rwanda plan’ – ie the plan to send some asylum seekers from the UK to Rwanda to dissuade future Channel crossers.

A plan involving returns of asylum seekers would have previously been unthinkable for Labour. But the government’s Rwanda plan has now created the space for the Opposition to begin to map out an alternative which stakes a claim to combining control with compassion; a tough, but fair, regional solution which, notwithstanding its toughness – indeed perhaps because of its toughness – could end up practically advancing the cause of refugee protection, and actually helping more refugees overall.

So what is going on? Is this approach compatible with the Refugee Convention? And how does this stack up coherently for those supportive of refugees’ right to protection? This briefing seeks to answer these questions.

THE FOUR 'WHY'S': HOW THE INTERNATIONAL REFUGEE SYSTEM DOES – AND DOES NOT – WORK

The Canadian legal academic, Professor Hathaway, and the British politician, Sir Keir, may both be human rights lawyers, but they have very different practical concerns and perspectives. The fact that they appear to be thinking along the same lines though might have something to do with their respective appreciation of the practicalities of how the international refugee system does – and does not – work, as embodied in the following four 'why's' of that system:

No. 1: Why the international refugee system does not provide meaningful protection to most of the world's refugees

The United Nations' Convention and Protocol Relating to the Status of Refugees (the 'Refugee Convention')⁶ was a significant diplomatic achievement. A broad suite of signatory states were able to reach common agreement on the definition of the circumstances that confer refugee status on an individual, and on a broad suite of rights that such an individual should be given once on a signatory state's territory.

One of the most pervasive myths surrounding this diplomatic achievement – riffed on by the Braverman speech⁷ – was that the horrors of the second world war led to an aberrant situation in which states were willing to subsume their national interests in an unrealistic and ultimately insupportable international commitment to protect refugees. The course of the negotiations and the reality of what was agreed, however, suggest something quite different.⁸ In negotiating the Refugee Convention, states were, on the contrary, most concerned to protect their national interests and room for manoeuvre. As a result, one of the things that the Refugee Convention does not do is to oblige signatory states to actually open up their territory at all so as to allow access by those claiming to be refugees.

The outcome has been that states do the exact opposite; doing what they can to stop potential refugees arriving, so that in practice states do not then need to provide refugees with the rights that they are entitled to once they get there. For their part, of course, refugees do all that they can to arrive, so that they can get access to protection and to those rights. Hence, alongside other migrants, they make use of 'people smugglers' and the services of those facilitating migration. Thus begins what *The Economist* has likened to "a dystopian television gameshow"⁹, where a glittering prize awaits those refugees who manage to successfully run the gauntlet and sidestep states' repelling efforts, but immiseration, or even worse, is the outcome for those who do not.

Those who do not make it, or do not even try, have a very slim second chance to move to the Global North. This comes via the refugee resettlement program coordinated by the United Nations High Commissioner for Refugees (UNHCR). But there is no obligation in the Refugee Convention for states to share the burden of, and responsibilities for, refugees, and in practice only a small minority of states provide any resettlement opportunities at all to refugees. And even those that do, do so in numbers far smaller than the need articulated by UNHCR, which is tasked with looking after those of the world's refugees to whom states do not want to give a home.

States can also help the cause of global refugee protection through their financial contributions to UNHCR, which relies on states to fund its operations to protect and support refugees around the world. But here, once again, only a small minority of states provide any meaningful support to UNHCR. Indeed, UNHCR is overwhelmingly reliant on one country, the United States, for its funding. In the final year of the administration of President Trump, hardly renowned as a paragon of refugee protection, the United States provided 42% of UNHCR's entire funding.¹⁰ No other country came anywhere close to that. The UK stood just above Sweden, at 3%. That UNHCR was essentially dependent on President Trump's administration for the funding of its global refugee supporting operations tells you something about how robust and resilient this system might be.

The international refugee system is underfunded and hugely skewed, relative to needs, towards spending on the minority of refugees who reach the countries of the Global North. As Professor Hathaway argues, rich countries spend far more money trying to either keep refugees away from their own territory, or processing those few who do make it in, than is spent on the entirety of the remaining 85% of refugees living in often desperate situations in the rest of the world, often denied the ability to work, to properly educate their children, and to move on with their lives. Protection of refugees on paper then becomes a life of stagnant immiseration in practice.¹¹

Faced with the evolutionary development of the international refugee system down this path, those focused on realising the intention of the Refugee Convention that refugees should be given the opportunity for a productive and fulfilling life, not just bare protection and subsistence, understandably throw their arms up in exasperation and horror. Surely all that is required is to identify and support more open, enlightened leaders of nation states who can then properly fulfil their states' commitment to refugees, rather than, as they seem to focus on instead, using all the tricks in the book to seek to slalom around that commitment? But this ignores the practical real-world situation and incentives at play here for states and their leaders.

No. 2: Why states do not much like the international refugee system

While states' contortions to avoid receiving refugees are often laid at the door of inhumane politicians – and, to be fair, there seems to be no shortage of politicians willing to play this part by appearing to paint themselves in the harshest possible light – this should not mask the fact that there are quite understandable reasons why states are circumspect at best, hostile at worst, to the prospect of receiving refugees:

- (1) **Uncontrolled, unlimited and unknowable:** Refugees can be generated from any country in the world, in any numbers – there is no upward limit – at any time, by a wide range of unforeseen events. And in theory every one of those refugees can turn up at *your* border and all claim asylum in *your* country.
- (2) **Sole responsibility:** As the Refugee Convention lacks an agreed mechanism to ensure that protection burdens and responsibilities are fairly shared among states, if all refugees in the world arrive on *your* territory then they are *your* responsibility.

- (3) **Relativity:** If you are seen to be materially more generous than other states in accepting refugees, this may attract greater numbers of refugees to your territory, per the experience of Germany in the summer of 2015.

These three factors are primarily why the sensible-sounding idea of ‘safe and legal routes’ for refugees – to allow refugees to file claims for asylum without having to make an irregular, dangerous journey to your territory – struggles to survive contact with public perception and political reality, save in very proscribed circumstances. Because if you were to establish such a route, other than on a very restricted basis, it would do away with your state’s only established mechanism for controlling refugee numbers, instead opening up a portal to your territory directly from overseas.

- (4) **Mixed flows:** The package of rights to which refugees are entitled if they can access your territory and be recognised as a refugee is understandably also attractive to those who are irregularly migrating, who may therefore be incentivised to claim refugee status on your territory, even if they are not, in fact, refugees.
- (5) **Practical difficulty of returns:** Even an unsuccessful asylum claim may provide the claimant with the practical opportunity to remain on your territory, albeit without access to the full package of refugee rights, as removing and returning people against their will is costly and complex at best, often practically impossible at worst.

So the endemic lack of control which the international refugee system builds in, combined with the lack of any operating mechanism for the sharing of responsibility for refugees fairly between states, inevitably incentivises states to exercise the one practical form of control that the Refugee Convention in effect leaves open to them. Which is to do all that they can to keep refugees from entering their territory in the first place. States become scared stiff that, unless they act as tough as the toughest in their approach to refugee arrivals, then it is they who will then bear a greater responsibility for refugees and get no help from other states. This results in the very opposite of providing refugees with practical protection. It is hard to think of a system that could be better designed to risk the lives of refugees and spur the flourishing of people smuggling.

The combination of these realities – most particularly the fact that they impose potential “unlimited and one-sided obligations on a given community based on the simple fact of arrival”¹² – has led Professor Hathaway, a lifelong advocate for refugee rights and protections, to conclude that politicians’ and public’s support for such a system will always be inherently circumscribed as a result. The international refugee system is therefore in need of fundamental reform if it is to be more broadly democratically supported. But the reform he proposes is one which he views as still perfectly compatible with, and achievable within, the provisions of the Refugee Convention as it currently stands.

No. 3: Why states are not obliged to give protection to refugees where they arrive

The core protection provided to a refugee by the Refugee Convention is ‘non-refoulement’; i.e. protection against being returned to somewhere where their life or freedom would be threatened. The Convention though does not require the opposite, i.e., that states admit a refugee in order that they can claim asylum. Thus, while UNHCR continues to fight against what it calls “externalisation of asylum states’ obligations” – the removal of claimants to ‘safe third countries’ where they will not be in danger in order to have their asylum claim heard there – this externalisation approach does not appear inconsistent with the Refugee Convention. In the ongoing legal battle over the government’s Rwanda plan in the English courts, it is the government that has prevailed on the question of whether removal to a safe third country is allowed under international law¹³ (although there is a separate issue around a retained EU law requirement that an asylum seeker removed to a safe third country must have some form of connection with that country).

The point on which the government has not (yet) prevailed is the question of whether Rwanda *is* a safe third country. This is not primarily due to concerns over conditions in Rwanda as such, but over whether Rwanda’s asylum determination process can assure a fair and full hearing of the asylum claim. If it cannot, there is an indirect risk of refoulement; i.e. that asylum seekers transferred by the UK to Rwanda might then be wrongly removed from Rwanda to danger.

In terms of the potential to return those irregularly crossing the Channel to the UK, France and many other European countries would appear perfectly safe in this context. Indeed, at the EU level, the safe third country removal concept has been enshrined at the heart of the EU’s approach to asylum protection through the Dublin Regulation mechanism.¹⁴ This provides for the obligation to hear an asylum claim made in one EU member state to be transferred to another member state if the asylum claimant falls within set criteria for demonstrating connection with that other state.

For all the seemingly endless tweaking by the government of the legal framework of the UK’s asylum system, and the regular barbs aimed by it at supposedly obstructive ‘lefty lawyers’, the primary hurdle to sending irregular Channel crossers elsewhere is not legal, but political. It is that there is no actual safe third country, such as France, currently willing to take the irregular Channel crossers. Ultimately the matter is – as with negotiations over the Refugee Convention in the first place – a multilateral, diplomatic one.

The idea of removing asylum claimants to safe third countries understandably has its critics. It self-evidently embeds some risks. But it also potentially creates important opportunities. For:

- better controlling refugee flows so that the obligation of protecting refugees becomes more acceptable to the public,
- more fairly sharing and allocating states’ respective responsibilities for protecting refugees,
- undermining the key driver of modern people smuggling operations.

It is these opportunities which Professor Hathaway's global proposals seek to tap into, and which appear to underpin Sir Keir's European thoughts.

In Professor Hathaway's proposed revised model of how the international asylum system should practically best work under the Refugee Convention, the state where the asylum claim is made is merely the place at which the claimant enters the international asylum determination system. It does not determine the state where the claimant will be placed should their claim for refugee status be successful. The link is therefore broken between the state where the asylum claim is made and, if the claim is accepted, in which country the refugee is then settled. As refugees would access the same protection system regardless of whether they crossed the nearest border to claim protection, or instead travelled thousands of miles to a country far away before doing so, the incentive to make the most dangerous journeys would then fall away.

This would create a system that better protects refugees overall, but there would be winners and losers. Those refugees currently in the relatively privileged position of being able to access their chosen country of protection – usually because of their ability to utilise more substantial social and financial resources – would see their right diminished. By contrast, those not in this position – those refugees currently stuck, without access to such resources, out of sight and out of mind of Global North countries in places like Lebanon, Turkey and Kenya – would see their position improved.

In agreeing to share responsibility for the world's refugees in a much more orderly fashion, willing states would demonstrate their commitment to take and share responsibility for refugee protection and to working responsibly and cooperatively with neighbouring countries to deliver it. Such an agreement on responsibility sharing should much better assuage states', and their publics', fears of losing control or being overburdened. Providing states with more control over admitting refugee flows, and as a result more willing to actually provide practical protection to refugees, is a win-win solution based on compromise and cooperation. Instead of the current lose-lose system which sees states unable to exercise sufficient control over refugee arrivals to make them comfortable and, as a result, doing all they can to avoid having to provide practical protection to refugees.

To get to that point, willing states would need to agree between themselves the framework and formula of the allocation mechanism for appropriately sharing the obligations of taking in such displaced people. Most of these displaced people would still be best served by being hosted and supported in countries in their own region rather than necessarily further afield. But a quid pro quo of that should be that the countries further afield contribute financial support to the major refugee hosting countries, rather than the latter having themselves to pick up the whole tab for that.

For the UK, the outcome of such a reformed system would be to end the obligation to maintain two very onerous and costly systems: one designed to seek to repel asylum claims, the other to process the asylum claims that it has failed to repel. Instead, the UK would have an obligation to resettle from elsewhere in the world, in a controlled fashion, a share of those already determined to be refugees.

Professor Hathaway – who as one of the foremost academic experts on the intricacies of international refugee law should know – views such as a system as this as entirely compatible with the existing Refugee Convention. No amendment would be required to the existing Convention. There is no legal reason why this system could not be adopted tomorrow. The challenges are not legal but political and operational.

No. 4: Why states find it so hard to stop people smuggling

In the UK media, the demonic image of the irregular migrant from the 2000s has largely been replaced in the 2020s by the demonic image of the people smuggler.

In the 2000s the British public was constantly assailed with vitriolic ‘fake’ media stories in the anti-immigration wing of the British press; from tales of asylum seekers barbecuing the Queen’s swans to AIDS-infected asylum seekers overwhelming British hospitals.¹⁵ But nowadays, even this wing of the press is as likely to publish ‘human interest’ stories of British women who have accommodated refugees in their spare rooms¹⁶, or publish arguments that banning asylum seekers from working is “morally and economically unjustifiable”¹⁷, or commission a piece from the chief executive of the Refugee Council outlining how the UK should be proud of the sanctuary that it has provided to refugees¹⁸.

This is not to say that these media outlets are sanguine about the situation in the Channel. Far from it. But, rather, that even the most critical articles, highlighting that not all of those coming across the Channel are in fact refugees, often still at least articulate the perspective of those coming, for instance referencing the fact that they may still be escaping terrible levels of poverty and corruption.¹⁹

For all the seemingly continuous political furore over the Channel crossings in recent years, and notwithstanding the latest further ramp up of the rhetoric from the Home Secretary, the government has mainly targeted its war of words at the people-smugglers and traffickers, rather than at the migrants themselves. And the media has largely followed suit. The moral opprobrium is now heaped much less on those moving, and much more on those assisting them in moving; the ‘TikTok traffickers’ aggressively advertising their services²⁰.

Human traffickers and people smugglers make an easy and satisfying scapegoat for both sides, offering a rare topic of consensus between the two main parties and their leaders. The Prime Minister talks of the immorality of migrants being propelled by criminal gangs.²¹ One of the least surprising elements of Sir Keir’s recent immigration soundbite was his determination to prosecute an anti-terrorism style crackdown to smash the gangs behind the “vile trade”²².

Targeted enforcement action in this area may achieve results. But it may well not. It is not as if no one has been trying. For the last 25 years, Global North states have relentlessly criminalised not just people traffickers and people smugglers, but many incidental facilitators of irregular migration – but with limited results. Considered and in-depth assessments of the people smuggling ‘industry’ are relatively few and far between, but those that there are²³ have tended to highlight five main reasons for the persistence of people smuggling:

- (1) **Culturally embedded:** For people escaping and/or moving, whose ability to do so under their own steam is practically restricted, there have always been those willing to assist them, for money. Eighty years ago, the Danish harbourmasters and fishermen helping Jewish people flee across the Oresund did so in a well-organised operation, for a price per passenger of around €4,200 in today's money²⁴, which looks very similar to the recent price for a Channel crossing.
- (2) **Disorganised crime:** People smuggling is so hard for states to meaningfully combat not because it is the exclusive domain of super-organised and vicious criminal gangs, but because it is not. Rather than structured hierarchies, it is generally a much more modular, networked, ad hoc, and opportunistic activity, with many different actors in the chain. The 'migration industry' is made up of organised crime elements operating in some more highly skilled parts of the chain – such as document forgery – combined with large numbers of ordinary people in other parts of the chain simply going about their everyday business of providing transport, food, rooms, and money transfer services.

On top of which, stopping migration movements en route may only serve to further cement the transit chain. Smuggling services along the route are often provided by migrants who are themselves stuck in transit – having run out of money, or luck, for now – and who are now seeking to make a living where they are and/or fund themselves for the next leg of their own journey in one of the few ways that they are able.²⁵

Targeting the migration industry 'upstream' sounds sensible. But it can be the toughest task of all. Many communities along the main transit routes lack few viable alternatives for pursuing such profitable livelihoods. Facilitating movement of people can therefore form a vital part of the local economy, and most of its functions are relatively low skill, meaning that if people are arrested their roles can quite simply be filled by others.

- (3) **Criminality ratchet:** Securitisation of borders has gone hand-in-hand with increasingly labelling those who facilitate irregular migration as engaging in criminality just by the very act of that facilitation. In this sense accusing people smugglers of criminality is therefore a self-fulfilling statement. But it has also proven to be self-fulfilling in a broader sense, driving a self-reinforcing spiral. As border controls and greater security measures have ratcheted up versus people smugglers, more amateur, opportunistic actors have tended to withdraw from the sector, and more organised criminal elements have tended to move in.

Tighter controls and stricter security increase the need for more professional, sophisticated and innovative smuggling services in order to circumvent them. They also create higher-profit opportunities for those willing and able to provide those services. This in turn attracts more organised criminal elements. It also incentivises the remaining players to more aggressively market and seek to actively shape the market for those services in order to maximise those profits. This itself can then actively contribute to migration, and influence migration routes and decisions around end destinations.

- (4) **Financial incentives:** From those providing services and assistance along the migration route, to those manning the border controls along the way, the financial incentives are heavily stacked in favour of assisting migratory movements rather than thwarting them. Jobs manning the control points are generally relatively low status and poorly paid. Thus, along the route, relatively low investment by facilitators of movement in building connections and relationships, supported by facilitation payments, can create a compelling incentive for a sufficient number of those manning the controls to look the other way.
- (5) **Migrant agency:** Everyone seems to hate people smugglers, apart from the people who use their services. People smugglers may often be conflated in political rhetoric and the popular imagination with people traffickers. But most migrants using people smugglers' services do not see themselves as victims of a crime at all, but, rather, as informed purchasers of a service; of course, a risky service, but one which could transform their lives. Migrants see themselves as willing participants in a joint enterprise in support of their dreams of a new life in a destination country. Of course, some migrants are over-promised or actively misled, and the desperation of others can create a dangerous imbalance in their relationship with those helping them to move. But many migrants are well-informed and considered about their choices, and view themselves as having agency in their decisions around how and where to move, and whom they trust to help them do so.

More than anything else it is this last factor – willing demand for its services – which makes people smuggling not just a tough, but in reality probably an impossible, nut to crack, at least under the current set up of the international refugee system. It is from this angle that Professor Hathaway approaches the issue. Only a multilateral system in which the state where an asylum seeker's claim for protection is made does not determine the state where they will end up if they are determined to be a refugee, could realistically undermine the incentives that drive the extended people smuggling model that has built up around the international refugee system in its current form. In this revised system, refugees might still need smugglers to help them escape their immediate danger, as the Jewish people did in 1943 to cross the Oresund. But if the system provided refugees with the same access to the same protection regime, regardless of whether they had simply crossed the nearest border or had travelled thousands of miles across multiple borders, who then would be willing to pay smugglers to travel thousands of miles?

Of course, even if Professor Hathaway's suggestion is correct that the international refugee system can be fundamentally reformed along these lines without the Refugee Convention needing to be revised, practically such an outcome remains a long shot and would inevitably be a long haul. But, importantly, as he himself suggests, the ideas he puts forward have the potential to be transformative much sooner than that, if they are used as the inspiration for such an approach to begin to take hold and be piloted at a regional or sub-regional level. ²⁶

What might this look like in the case of the Channel? Ending irregular boat crossings across the Channel safely, humanely, and legally requires fundamentally undermining the economics of the people smuggling arrangements that are operating there. Removing the incentive for making the crossing would require the near immediate return of most of those making the crossing. This means accepting that France is a safe country from the perspective of the Refugee Convention. Only those with a separate valid human rights claim to remain in the UK – outside of their rights under the Refugee Convention – would not be returned to France. Taking control of the route in this way is needed to practically put an end to dangerous journeys across the Channel, and to open up the space for the public acceptability of the UK taking in its fair share of refugees.

Can the formidable European hurdles be overcome?

There are though two fundamental hurdles at the European level to such a potential solution. On the face of it these seem to represent a double whammy of hopelessness for any realistic prospect of progress on this front. That it is worth trying to overcome such significant hurdles is testament to the prize at stake though if they can be cleared.

The first hurdle is how and why France and the EU would want to help out the UK at all, and allow the UK to access and benefit from any European system for sharing responsibility for refugees. As we have previously pointed out, there are those in Europe who acknowledge that there is an interest in France/the EU concluding a migration agreement with the UK, and that allowing irregular transit through Europe to enter the UK causes problems for more than just the UK. There is potential broader EU interest in showing that cooperative migration control can work to dissuade irregular movements of migrants and to demonstrate control over borders, to prevent the build-up of irregular migrants in other countries in order to make the journey to the UK, to disrupt people smuggling and criminal operations, and to put an end to the diversion of resources currently required to seek to stop these journeys.²⁷

The second hurdle, though, is that there is not a currently a well-functioning EU system for sharing responsibility for refugees which the UK could simply (re)join. Some have argued that the UK should rejoin the EU's Dublin system if it can.²⁸ It is true that, in theory at least, this EU-wide system, which the UK left after Brexit, should be well suited for the UK's particular position as, on the one hand, it provides a safe route into the UK for those with existing family connections here, and, on the other hand, it provides a way for the UK to remove those who do not have such connections back to other European countries through which they have passed en route.

But the administrative bureaucracy of the Dublin system is such that, not for the UK (while it was a participant) nor for any other EU country, has it ever worked on the scale, and with the certainty and immediacy, that would be needed to deal with the flows coming across the Channel. Nor does the system work well for the EU's front-line states, such as Italy. The large majority of transfer requests made by states under the Dublin system are not accepted and actioned.²⁹ Recognising this failure, the EU has since 2015 sought to come up with a better alternative for solidarity between its

states in respect of sharing responsibility for refugees on European soil. But thus far unsuccessfully.

The recent rise in numbers crossing the Mediterranean to arrive on the EU's shores, evoking memories of the 2015 'migrant crisis' has resulted in some countries making noises that seem to point in the opposite direction to solidarity. Some have seen this as evidence that practical agreement at the EU level on responsibility sharing for refugees remains further away than ever³⁰. Certainly, the tensions within the EU between national and multilateral interests have thus far proven intractable when it comes to the issue of responsibility sharing for refugees. Once again, we are now seeing Schengen states in practice getting cold feet about the practical consequences of free movement across the EU's internal borders that allows the free flow of irregular migrants who have breached the EU's external border³¹.

Yet an upswing in uncontrolled flows can also be a catalyst in helping to convince some more willing states in the EU, whatever they may say publicly, that something different and better has to be done on responsibility sharing. The EU now seems to be inching forward again, but still struggling, in this regard. There is still a concern at the EU level to only allow the 'safe third country concept' to apply where there is at least some form of existing link between the asylum seeker and the third country. And, even in 'crisis' situations the proposal is still only that frontline states can request solidarity, not necessarily receive it.³²

This continued lack of clear direction at the EU level though, alongside the move towards a 'multi-speed Europe', could be regarded as an advantage for the UK. The fact that there is currently no well-functioning EU system in this area, and that EU states' response on this issue is so divided, means that any revised approach on responsibility sharing within the EU is almost certain in practice to have to proceed without the full cooperation of all EU states. Which in turn provides an opportunity for states outside the EU to engage, as Rishi Sunak has also understood, albeit within a narrower frame, with his recent joint messaging with Italy's Giorgia Meloni.³³ Rather than asking to be admitted to an established, well-functioning responsibility sharing system, the UK is therefore in a position where it could help to design, and find its own role within, a better system that could bring greater order to how refugees are accommodated and protected in Europe, and is fairer in its treatment of refugees and the distribution of responsibility for them between states.

Is UK policy too focused on looking at the world through the rear-view mirror?

In the light of the size of the current backlog of asylum claims awaiting determination in the UK, it may seem counterintuitive to argue that the UK has more recently had it good in terms of the number of asylum claims it has received. But in more recent times the main refugee flows around the world have generally been from countries which have not had very large populations, nor particularly close existing connections with the UK. This has largely insulated the UK from having to take in large numbers of asylum seekers.

Indeed, counterintuitively, the furore since the irregular crossings of the Channel started in earnest could at least partly be viewed as the result of how good the UK had more recently had things in this respect. Protected from material asylum inflows by its geographical position, an intervening continent of largely safe and prosperous countries, and finally a sea which surrounds it, the UK was spared the border chaos of 2015. It could seemingly convincingly tell itself that it could in fact control refugee flows and that – like those tempting arms-length models of Australia and Canada – it could repel direct arrivals and offer quotas of refugee resettlement places instead. But when these flows turned out not to be quite so controllable, tensions and temperatures quickly rose.

The currently relatively privileged position of the UK in this respect though means that when Keir Starmer talks of a multilateral approach to sharing the burden of refugees in the region, this is immediately open to attack from those who argue that the outcome of this will be that the UK will as a result inevitably have to accept more refugees than it does currently, on the basis that other countries in the region currently receive more asylum claims and refugees than the UK does.

There are though two important points that such arguments miss:

First: it would be wrong to conclude that increased refugee numbers would necessarily be unacceptable to majority British public opinion. On the one hand, it is true that voters are, understandably and correctly, sceptical that all asylum seekers are refugees, and are not comfortable with the spectacle of refugees so publicly arriving in such an uncontrolled manner. But on the other hand, there has been not a murmur of discontent about the hundreds of thousands of refugees and humanitarian migrants that the UK has taken in in recent years in a much more controlled manner – under UNHCR refugee resettlement, the government's Ukrainian schemes and the Hong Kong British National (Overseas) route. And the aggregate numbers accepted more recently under these schemes have been significantly in excess of those the UK would likely need to agree to take in under any responsibility sharing deal with the EU.³⁴

Second: a regional responsibility sharing arrangement in respect of refugees would not necessarily always mean a net inflow to the UK. In considering flows of people generated by uncontrollable geopolitical forces and events, it is a mistake to solely approach policy based on the relatively benign landscape of the recent past, as viewed through the rear-view mirror. Will it always necessarily be the case that the UK is more insulated from refugee flows than the rest of Europe? Of course, the UK's geographical position provides it with an important element of remove and control. But its history, language and soft power provide the opposite. Indeed, they mean that the UK is potentially particularly exposed to what would be among the largest refugee flows on earth were they ever to occur.

There has been much heat generated by a number of aspects of Suella Braverman's recent speech on migration and asylum in Washington DC³⁵, not least the fact that she touched on both the question of how many potential refugees worldwide there might currently be, as well as, separately, the 40 million worldwide who, in the latest Gallup world survey polling, recorded an aspiration to migrate and who had the UK as their preferred destination.³⁶

Surely more pertinent though than these abstract numbers are the very real numbers that the UK has unique, deep, longstanding connections with some of the world's most populous countries: India, Pakistan, Nigeria, and Bangladesh. As a result, these countries all have large existing diaspora in the UK and are continuously at or near the top of the charts for those nationalities making the most significant use of the main regular migration routes into the UK – work, student, and family. Even with the relatively low proportion of refugees those countries have generated in recent times, their size and deep connections to the UK have meant that they have all generated a steady flow of refugees to the UK in the last twenty years.

These societies span multiple tensions and fault-lines. The possibility cannot be discounted that at some point something happens in one of them which may trigger a material rise in those leaving from them and claiming asylum elsewhere. If this were to happen, there are scenarios in which those flows could dwarf anything seen previously in terms of refugee numbers, and in which it is the UK that may bear the brunt of them. In such a situation, the UK having agreed to a broader regional responsibility sharing mechanism for refugees could seem less of a burden and more of a lifeline.

ENDNOTES

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- ¹⁵ Russell Hargrave, 'Dividing Lines: Asylum, the media and some reasons for (cautious) optimism' (Asylum Aid, 2014) <https://www.refworld.org/pdfid/5301d4fd4.pdf>.
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