Asylum Kingdom: Reforming the UK Policy on Asylum

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A Dissertation in Partial Fulfilment of the Requirements

For the degree of Master of Law

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Abbreviations

European Court of Human Rights – ECtHR

Home Office - HO

High Court – HC

Human Rights Act - HRA

Independent Chief Inspector of Borders and Immigration - ICIBI

Immigration Appellate Authority - IAA

Immigration Rules - IR

The Law Commission – Commission

Qualification Directive - QD

Secretary of State – SoS

Supreme Court – SC

United Nations High Commissioner for Refugees 1951 Convention - Convention

United Nations High Commissioner for Refugees Handbook – Handbook

United Nations Human Rights Commission – UNHCR

United Kingdom - UK

Contents

Preface

"Every civilised person on the face of the earth must be fully aware that this country is the asylum of nations, and that it will defend the asylum to the last ounce of its treasure, and the last drop of its blood. There is no point on which we are prouder or more resolute. We are a nation of refugees." - The Times 1853[1]

The Kingdom of Refugees

The purpose of this Practitioner Article is to consider the historical evolution and current position of Refugee and Asylum Law within the UK with regards to asylum-seekers and determine areas of needed reform. The emergence of Asylum law has not been clear cut, but instead moulded from history past, ever-changing and adapting to ongoing global change. Much of its manifestation is owed by a contemporary framework, ushered through pre-war antecedents under political guise. The principles of International Humanitarian Law followed, embodying themselves within, and penultimately scrutinised by English Courts to create the fragile mechanism we have today.

[1] The Times, February 28, 1853, p. 4.

The First Refugee

'Every man is either alienigena, an alien born, or subditus, a subject born. Every alien is either a friend in league, or an enemy in open war, every alien enemy is either pro tempore, temporary for a time, or perpetuus, perpetual, or specialiter permissus, permitted especially.'

- Coke CJ [2]

Calvin's Case[3] was the first attempt to restate Middle Age rules on subjects and aliens, laying down the principle of acquisition of the status of natural born subjects, birth within a king's domain.[4] Those fleeing Norman invasion were classified as 'alien,' before being recognised for their persecution.[5] The use of the term 'alien' justified circumspection, resulting in persecution and expulsion from the land. This early period laid down the foundation of British attitude towards 'asylum' as a principle. There was no legal notion of refugee status; all foreigners, whether refugees or not were labelled as 'alien'.

By the sixteenth century migration patterns began to change, with the Protestant exile 'aliens,' would arrive by force, and not choice, seeking safer havens. The Protestants owed to a well-founded fear of being persecuted for their religion. In 1891, it was held that an alien had no legal right to enter British territory in relation to Chinese migrants arriving on boat.[6] This was followed by *Poll*,[7] which reinforced that the supreme executive must be held to absolute, and that a friendly alien could not sue the state. The case of *Cain*,[8] cemented this idea, and that it remained the Crown's Prerogative to expel aliens.

The Great Wars

To address the ever-growing issue of asylum, Parliament enacted the 'Aliens Act,' regulating the right of entry for 'aliens'. When Britain entered the First Great War, Parliament swiftly amended the Bill, exempting those "seeking admission to this country solely to avoid prosecution on religious or political grounds or for an offence of a political character, or persecution,"[9] introducing the principle that asylum-seekers had to prove their refugee status. After the brutal impact of the Second Great War, a new climate of hope emerged with the

[2] Coke CJ, Calvin's Case, 1608, 7 Co. Rep. 1a, 17a.
[3] ibid
[4] W. Holdsworth, A History of English Law, VOL IX (Sweet & Maxwell/Methuen, 1966), p.72.
[5] W. Cunningham, Alien Immigrants in England, (London: Sonnenschein, 1897) Ch. 2.
[6] Musgrove v Chun Teeong Toy [1891] AC 272.
[7] Poll v Lord Advocate [1899] 1 F. (Ct. of Sess.) 823, at 827-28.
[8] Attorney General for Canada v Cain [1906] AC 542.
[9] Aliens Bill 1905 (Bill 187), s.1 (2).

creation of the UN Charter,[10] the UDHR,[11] and the Convention,[12] providing the modern definition of 'refugee.'

The Millennium Laws

The end of the Millennium saw asylum applications skyrocket across Europe[13] resulting in radical change to UK Law. The Asylum and Immigration Appeals Act[14] paved the way, defining a claim for asylum, granting a right of appeal in all cases, but also empowering immigration officials. The HRA[15] followed with further legislative changes undertaken as a clear response to pressures brought to bear on the post-war asylum regime. The changing nature of asylum applications gave rise to the belief that the power of legislation could reduce and deter asylum-seekers from arriving.[16]

The Government introduced the 'White List,' for clearly unfounded cases, and became a signatory of the 'Dublin III Regulation,' that determined which participating state should hear asylum applications.[17] The turn of the millennium saw seven immigration based statutes and the government attempting to curtail powers of judges to apply and interpret human rights, ultimately restricting the application of Article 8 in 2014.[18]

UK immigration control shifted from being a Royal Prerogative power,[19] to being largely governed by statute and immigration rules made pursuant by Parliament's statutory powers under the Immigration Act[20]. This transfer of power culminated in the cases of *Munir*,[21] and *Alvi*,[22] in which the SoS argued that their policies were issued under the Prerogative. The SC ultimately ruled that the Immigration Act embodied earlier laws into a single code of legislation and gave authority to the judiciary, a constitutional landmark.[23]

[10] United Nations Charter, June 1945.
[11] Universal Declaration of Human Rights, 10 December 1948.
[12] The UN Convention Relating to the Status of Refugees, 28 July 1951.
[13] Eurostat, Statistics in focus, Asylum applications in the European Union, 110/2007, 30 August 2007.
[14] Asylum and Immigration Appeals Act 1993.
[15] Human Rights Act, 9 November 1988.
[16] Dallal Stevens, UK Asylum Law and Policy, Sweet & Maxwell, London 2004, p219.
[17] Dublin Convention, 604/2013.
[18] Gina Clayton & Georgina Firth, Immigration Et Asylum Law, 8th Edition, Oxford University Press, 2018, p14.
[19] Christopher Vincenzi and David Marrington, Immigration Law: The Rules Explained, 1992, p101.
[20] Immigration Act, 1971.
[21] R (on the application of Munir) v SSHD [2012] UKSC 32.[2012] 1 WLR 2192.
[22] R (on the application of Alvi) v SSHD [2012] UKSC 33.[2012] 1 WLR 2208.
[23] Gina Clayton & Georgina Firth, Immigration Et Asylum Law, 8th Edition, Oxford University Press, 2018 p29.

Legal Issues of Refugee and Asylum Law

The Immigration Rules

Statutory law provides the regulatory framework to control asylum in the UK, but its effectiveness is limited by HO policy which remains the principal guidance through the IR.[24] The policy interprets UK laws in such a way that in practice they have been open to regular appeals, sparking criticism.[25] This situation has been further exasperated by the adoption of online databases, causing the law to be in a constant state of change. In theory, this allows the law to be flexible, adapting to ongoing global situations. However, the drawbacks are principally in determining current law, and in practice results in a never-ending battle for practitioners, civil servants, and asylum-seekers alike. The lack of uncertainty is so profound that the IR encompasses over 1100 pages, with 5700 changes since 2010[26] of 'badly written, ambiguous words with different laws contradicting one another and the structure nonsensical.'[27] This leads to confusion amongst the practitioners using it, and the civil servants applying it, let alone the asylum-seekers who themselves are subject to it.

The HO have guidance on how to straighten out these profound issues, the Commission published a report detailing present issues with the IR, recommending solutions including, but not limited to: a simplification of the rules, limits on the ability to revise the law, and more seamless integration with legislation to prevent contradictions.[28] The government responded,[29] highlighting a complete overhaul of the IR by 2021, incorporating Commission solutions which will be of great benefit, but only in the short-term. The reason for the excessive size and constant revisions of the IR is the substantive immigration policy itself, an issue the Commission refused to address, likely due to its political, divisive nature. By the Commission shying-away from this issue, they are acting in error. Concerns will continue until the political apparatus develops a solution that works, something we have yet to see happen, and are unlikely to in future, given the current political attitude towards asylum. The solution is to go

[24] The Immigration Rules, Home Office, 25 February 2016.
[25] The Guardian, Home Office 'bases immigration policies on anecdotes and prejudice', 17 September 2020.
[26] Martha Bozic, Caelainn Barr and Niamh McIntyre, with additional reporting by Poppy Noor, 'Revealed: immigration rules in UK more than double in length', The Guardian, 27 August 2018.
[27] Colin Yeo, Welcome to Britain: Fixing Our Broken Immigration System, Biteback Ltd, London, 2020 p68.
[28] The Law Commission, Simplification of the Immigration Rules, Report, Chapter 12, p187.
[29] Home Office, Simplifying the Immigration Rules: a response. A response to the Law Commission's report and recommendation on Simplification of the Immigration Rules, March 2020.

further than the Commission, to critically rethink our Immigration Policy altogether in how we view asylum-seekers, and that begins with how they claim asylum in the first instance.

Claiming Asylum

To claim asylum a refugee must pass two tests: the first being whether the asylum-seeker is 'credible' in their claim for asylum, in that they are believed. The second is if that asylum-seeker has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and would be unable to obtain protection within their country if returned.

Part I – Credibility

An applicant's credibility will entail considering evidence of immigration history and relative country guidance. The HO guidelines are in summary:

- fails without reasonable explanation to make prompt & full disclosure of material facts;
- fails without reasonable explanation to apply forthwith on arrival in the UK;
- adduces false evidence/representations to support an application;
- without reasonable explanation disposes of relevant documents and evidence;
- undertaken activities in the UK inconsistent with submitted beliefs.[30]

These factors have been rightly criticised by the UNHCR on grounds that; 'evaluation of credibility is a process which involves the consideration of many complex factors, both objective and subjective, which are impossible to enumerate… singling out any of these factors, will by necessity, be incomplete and arbitrary.'[31] Article 4 of the QD[32] protects asylum-seekers whose statements are not evidentially supported, given they make genuine effort to substantiate their claim, submitting all material factors and otherwise establishing general credibility, in direct contradiction to the IR Paragraph 339L (iv) that states delays in applications are averse to credibility. The recommendations by the Commission will incorporate UNHCR standards providing corrective procedures to otherwise poor practice. What the Commission fails to address is the impact the hostile interview system has on asylum-seekers with policy that effectively dehumanises, damages, and disempowers those

[30] Statement of Changes in the Immigration Rules HC 395.
[31] Cited in JCWI, immigration, Nationality and Refugee Handbook – A User's Guide (London: JCWI, 19990, p.101.
[32] Qualification Directive, 2011/95/EU, 13 December 2011.

who rely on it to make life-changing decisions.[33] Even if guidance is perfected, if Caseworker's are not adhering to them, problems will persist, as observed within the Interview system.

The Interview

I didn't know what asylum was when I arrived. I told them I needed protection. They put me in detention. In a prison. They took my fingerprints and interviewed me… The interpreter didn't understand me, but I was too scared to tell the interviewer that I didn't understand. The whole time, I thought maybe they'll send me straight back. So I said nothing.

– Yousef [34]

The interview is where the asylum-seeker provides evidence, mainly a witness statement, to support their claim. The quality of interpretation, training of the interviewer, and general fairness of the interview are all imperative to the proper determination of the outcome. Interviewers have strict principles to follow under the Handbook, however, abuses of process are commonplace.[35]

Applicants should be given the opportunity to explain apparent discrepancies, and their case should be considered by all the evidence submitted. Currently, majority of failed asylum-seeker applications are deemed 'not credible,' hence the HO do not believe their account.

HO guidance and Commission recommendations neglect to consider why there are inconsistencies with asylum-seekers accounts. The HO do not consider psychiatric health when assessing 'credibility' to a sufficient degree.[36] Asylum-seekers suffering from traumatic events may have difficulty in recalling them.[37] Cultural and social barriers may make them apprehensive to speak about the atrocities they faced, particularly in cases of sexual-

[33] Refugee Action, Waiting in the Dark: How the Asylum System Dehumanises, Disempowers and Damages.
[34] Refugee Action, Waiting in the Dark Report: How the Asylum System Dehumanises, Disempowers and Damages, May 2018, p12.
[35] Home Affairs Select Committee's 2013 inquiry, Asylum Seventh Report of session 2103-14 HC 71.
[36] Professor Chris Brewin, 'Memory and PTSD', speaking at BMA Conference, Recent Research into Memory and its Relevance to Asylum Seekers, London, March 18, 2003.
[37] Professor Ray Bull, 'Research and development on enhancing victim/witness recall,' speaking at BMA Conference, Recent Research into Memory and its Relevance to Asylum Seekers, London, March 18, 2003.

violence.[38] Even modern phycologists fail to fully understand the extent of trauma, and how it represses itself in the mind, yet it is expected of refugees to be wholly consistent.[39]

With dramatic cuts to legal aid, many are without legal representation, and unfamiliar with legal procedure. They may not have understood the ramifications of failing to mention relevant facts,[40] or failed to grasp the correct procedure in applying for asylum,[41] and should not be punished accordingly. Failing to explain the process creates a culture of fear for asylum-seekers, terrified of making a mistake in case they are imprisoned or deported. This partly stems from the HO treating asylum-seekers as statistics, to be assessed via checklists, and not for who they are, vulnerable and traumatised individuals.

Being subject to interrogation, detention and held with disbelief on arrival is inhumane and degrading treatment. This reduces the asylum-seeker's willingness to engage, resulting in poorer quality of information and further detriment. Treating asylum-seekers as criminals, having committed no crime, is contrary to achieving equality and justice, fundamentally against the rule of law.

1) Appeals

A consequence of poor practice is the subsequent high appeal rates. Majority of refusal letters breach credibility guidance established by the HO themselves.[42] An ICIBI report found 24% of decisions were below 'satisfactory,'[43] with over a third successfully appealing. For some nationalities, HO decisions are shown to be wrong for over half of those who appeal with Afghan (52%), Libyan (61%), Somali (54%), and Yemeni (70%) showing possible racial bias.

Poor practice during interviews exacerbates distress to vulnerable individuals, and intensifies anxiousness about subsequent contact with the HO. In the worst cases, poor interview practice was a key factor in an incorrect decision. An incorrect decision that costs the taxpayer money, causes backlog in the system, and more importantly creates needless suffering for asylum-seekers. Instead of investing in initial decision-making processes, the Government have cut

[38] HJ (Iran) v SSHD [2010] UKSC 31.
[39] Myth buster: "memories of trauma are engraved on the brain", Centre for the Study of Emotion and Law, Free Movement, 21 January 2016.
[40] UNHCR's Beyond Proof – Credibility Assessment in EU Asylum Claims.
[41] Adimi, &Ors [1999] Imm AR 560.
[42] Amnesty International, A question of credibility: Why so many initial asylum decisions are overturned 19 April 2013.
[43] Independent Chief Inspectors of Borders and Immigration, Annual Report 2017.

appeal procedures,[44] attempting to 'achieve fair and sustainable decisions at an early stage,'[45] and this approach while quickening the initial process has resulted in breaches of practice.

2) Breaches of Practice

"The substantive interview [was] *an experience I don't ever want to experience again in my life. I'd rather die. Because the lady who interviewed me, there was no sign of empathy… She wasn't putting into consideration the fact that I had been through hell."*

- Rose[46]

The Guardian reports gay asylum-seekers faced 'humiliation' in interview,[47] the 'Home Office official had asked a series of increasingly explicit questions… bordering on the pornographic.'[48] Caseworkers were found to decide cases on instinct; "another, who was gay, said they relied on their 'gaydar' when deciding how hard to fight cases based on sexuality."[49]

Interviewers should not be asking applicants any intrusive questions about their past or current sexual behaviour.[50] Offensive questioning leads to abuses of process, and further traumatises vulnerable individuals, humiliating them further. Legislative changes will not prevent Caseworkers over-stepping guidance and attempting to become investigators and interrogators. The culture of treating refugees with disbelief must stop, and that begins with mutual understanding, and that is achieved with adequate training.

3) Empathy

An area under-researched by academics is the impact of the emotional burden evident in asylum claims on practitioners. This is demonstrated in the report by Baillot, Cowan and Munro, where they state; 'it was common for officials (and judges) to refuse to engage with

[44] Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.
[45] Home Affairs Select Committee HC 218, para 144.
[46] Refugee Action, Waiting in the Dark Report: How the Asylum System Dehumanises, Disempowers and Damages, May 2018, p3.
[47] 'Gay Asylum seekers face "humiliation", The Guardian, 8 February 2014.
[48] Missing the mark: decision making on Lesbian, Gay (Bisexual, Trans and Intersex) asylum claims', UK Lesbian and Gay Immigration Group, September 2013.
[49] Colin Yeo, Welcome to Britain: Fixing Our Broken Immigration System, Biteback Publishing Ltd. London, 2020, p114.
[50] MP v Secretary of State for the Home Department [2016] UKSC 32 & C-148/13 to C-150/13 *A, B and C v Stattssecretaris van Veilighied en Justitie*.

particularly traumatic incidents such as rape, and to avoid asking questions about them. Instead, decision-makers would focus on other, less unpalatable aspects of the case.' [51]

This consideration weighted with the under-research in this field, and the noticeable impact psychology has been proven to make in areas where decision-makers are effectively judges, gives rise to the impression that one of the primary causes of disproportionate outcomes for refugees, and the current ambiguities remains the interviewers inability to engage meaningfully with the experiences of the asylum-seeker. Decision-makers are unable to handle the extreme emotional burden it places on them, refusing to truly absorb the hardships of asylum-seekers, and instead, treating them with disbelief simply makes the job easier.

4) Mental Health

It is understandable why officials tend to stray away from the more traumatic experiences of the asylum-seeker and offers merit to a neglected issue. While Commission amendments can rectify many IR complications, they fail to resolve an underlying and ever-growing concern, mental health. In a climate curtailing freedom of the world's most vulnerable, the issue of mental health of legal professionals is seldom mentioned. Many lawyers appear to be 'surviving but not thriving,'[52] and there is no one 'wellbeing problem' within the legal community.

Lawyers suffer from significantly lower levels of psychological and psychosomatic health wellbeing than other professionals',[53] Government and Legal professionals rank consistently near the bottom for access to mental health facilities.[54] The culture of long hours, poor life-work balance and working with vulnerable clients is worn as a badge of honour, exacerbated in the Human Rights Sector, and remains increasingly difficult to disassociate from.

Underscoring these discussions about how the legal community responds to evidence of a far greater awareness of the complex interactions between mental health and the workplace; of

[51] Helen Baillot, Sharon Cowan and Vanessa E. Munro, 'Second-hand emotion? Exploring the Contagion and impact of Trauma and Distress in the Asylum Law Context', Journal of Law and Society, vol 40, no. 4, November 2013, pp. 509-40.
[52] Professor Richard Collier, 'Mental Health, wellbeing and resilience' Future of Legal Education and Training Conference 22 May 2019.
[53] Dr Rebecca Michalak, University of Queensland, Causes and Consequences of Work-Related Psychosocial Risk Exposure A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals, 2015.
[54] Law Gazette, Melanie Pritchard, 'Moving Mental Health to the top of the Legal Agenda, 18 May 2020.

the need to work in more effective, efficient and safer ways; and, looking to generational shifts in attitudes, we can achieve a better system at every stage from decision making to wider policy decisions. If we continue down this trajectory, many in this sector and industry will leave, for their own sanity. This creates a devastating ripple effect, that limits access of availability, to legal professionals and to legal aid. If we purposely continue to avoid asking the hard questions, and having the tough conversations with ourselves, let alone the asylum-seeker, are we really providing justice, or just the mere illusion of it.

Credibility Remedies

For the asylum process to run efficiently it should be conducted expeditiously from claim to decision, while upholding a standard of fairness.[55] The HO adoption of a streamlined fast-track process in an attempt to handle cases quickly has given rise to a high margin of error, high appeal rates and most importantly the disregard for refugee welfare. A fast-track system should either be conducted by readily qualified professionals, or ultimately given to the judiciary provided with sufficient resources and training to handle them.

Bull[56] advocates a seven-phase approach to interviewing: greet and establish rapport, explain aims of interview, initiate rapport, questioning, varied and extensive retrieval, summary, close. The methodology should incorporate wellbeing, support, and psychological training into the stages, but otherwise remains an effective strategy.

This may increase time and resources spent at the interview stage, but the result is better-quality legal advice and interpretation, recruitment of more experienced caseworkers with specialist knowledge of asylum-seeker countries. Introducing reviews of overall training and efficiency could see reductions in the appeals system and would benefit the refugee by upholding their rights and maintaining their dignity, but also the HO by ameliorating both system and staff.

[55] Ex. Communication Report, 28th Session 1977, and UNHCR Handbook, para. 192 for basic procedural requirements.
[56] Dr. Becky Milne, DCI Gary Shaw, and Prof. Ray Bull, Department of Psychology, Investigative Interviewing: The Role of Research May 2008.

Part II – Well Founded Fear of Persecution

Having looked at policy regarding the assessment of credibility, we now consider the second limb, by critically analysing legal issues with the modern definition of 'refugee,' the protected characteristics, and how it is interpreted in the UK. While the Law has not been entirely successful to curtail hostile policy, it has provided a platform for improvement, but overall, fails to grasp the complexity and nature of asylum-seeker claims to a sufficient degree.

The HO guidance states:

i. Has the Applicant expressed a fear of return to their home country?
ii. What is the harm feared?
iii. Is the harm related to one or more of the five Convention grounds?
iv. Who are the agents of persecution and is effective state protection available?
v. Is the fear well-founded?
vi. Is the fear well-founded as to the whole of the country of origin?
vii. Is the applicant excluded from international protection by operation of the exclusion clauses of the Convention?[57]

The factor proven most difficult to establish remains the 'well-founded fear of persecution,' a subjective element in an otherwise objective criterion. Yet despite the importance, there is no standard test for determination provided. This subjects the test to the principles of treaty interpretation; 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose,'[58] enabling signatory countries to have their own reasonable requirements and allows countries to tailor their policy depending on different scenarios. This approach is practical, as having the law act as an open instrument ensures protection for a wide-range of atrocities without the need to amend law and policy for every new 'fear' that emerges within the world.

[57] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para. 3.
[58] Vienna Convention on the Law of Treaties 1969, Art. 31(1).

Definition of Term - 'Fear'

The case of *Sivakumaran*[59] established the standard of proof for 'well-founded fear of persecution' to be subjective, based on an individual's frame of mind. The term 'well-founded' however, gave rise to an objective interpretation, resulting in the HO 'checklist.' In reality, the frame of mind of the individual matters little in context of approving a claim, as every serious refugee has some element of 'fear,' but it remains the conditions of the 'fear,' which is tested.[60] In *Gurmeet*, the HC held:

'A well-founded fear involves both a subjective element and an objective element. The individual whose status is under consideration must in fact have the fear and that fear must be one which from an objective standpoint would be regarded as well-founded.'[61]

The precedent for the ambiguity of the rules is to identify genuine refugees as soon as practicable. The asylum-seeker's evidence is broken down into four devolving categories:

- Evidence whose validity they are certain about;
- Evidence they think is probably true;
- Evidence to which they are willing to attach some credence, but would not go so far as to say that it is probably true; and
- Evidence to which they are not willing to attach any credence at all.

The area of contention is the third category, as this falls below the standard of proof that would warrant reliance upon it in civil claims. In *Kaja*,[62] it was held that decision-makers should not exclude any such evidence, but *Karanakaran*[63] steers decision-makers away from a mechanistic approach to the 'standard of proof,' as asylum-seekers do not have to prove matters alleged to the standard of reasonable likelihood. Actions, events, and risks cannot be proved to a quantifiable degree, a claim for asylum is not a civil claim with two competing sets of evidence, with one of which the judge prefers. Rather, it is the inherent uncertainty of future possibilities and the evaluation of evidence that must be appreciated, and not simply

[59] R v Secretary of State for the Home Department, ex parte Sivakumaran [1988] A.C. 958.
[60] A. Grahl-Madsen, The Status of Refugees in International Law Vol. II (The Netherlands: A.W. Sijthoff-Leiden, 1972), pp. 173-4.
[61] R. v SSHD, ex parte Gurmeet Singh & Others [1987] Imm AR 489, at 495.
[62] Koyazia Kaja v. SSHD [1995] Imm. A.R. 1.
[63] Karanakaran v SSHD [2000] Imm. A.R. 271.

finding of fact. It must be approached wholly, similar to a public law enquiry, into the need for protection, rather than the need to satisfy checklists to a sufficient standard.[64]

Definition of Term – 'Persecution'

Persecution is central to the recognition of refugee status, yet there is no universally accepted definition of 'persecution' for the purposes under the Convention.[65] Caseworkers are advised to infer that threats to life, or freedom of protected characteristics, or serious violations of human rights would constitute 'persecution.' [66] The Handbook adds that prejudicial acts or threats should be dependent on the circumstances of the particular case.[67] The QD identifies persecution in significantly more detail,[68] but only lists specific acts of persecution, rather than defining it outright. The main requirement the HO establish is for the 'persecution' to be sufficiently serious, constituting a basic attack on fundamental human rights.[69]

In this instance HO guidance is again fit-for-purpose, it provides a wide scope allowing cases to be tried on merit. A definition would attempt to apply an abstract concept to a wide range of unique circumstances. In *Gashi*,[70] the Tribunal held that 'persecution' must be interpreted to best achieve its humanitarian purpose, and it would be a mistake attempting to define 'persecution', as doing so could restrict its power to meet the changing circumstances in how the Convention operates. This human rights approach to 'persecution' was broadly adopted by both the UNHCR and English Courts as an extremely useful framework, but with some limitations. There must be an analysis of whether what is feared amounts to 'persecution,' but the decision-maker should not attempt to define it, but instead identify it.

[64] Batayav v SSHD [2003] EWCA Civ 1489.
[65] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para. 7.3.
[66] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para. 8.
[67] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para. 52.
[68] Qualification Directive Article 9.
[69] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para. 8.2.
[70] Gashi and Nikshiqi [1997] INLR 96.

Persecution by non-state agents

The HO adopts the UNHCR approach accepting that seriously discriminatory acts committed by the local population may be considered as persecution where knowingly tolerated by authorities, or whether they refuse/unable to provide adequate protection.[71] In *Horvath*,[72] the HoL ruled that 'for the purposes of the Convention not only involves unjustifiable severe ill-treatment, but also a failure by the state to make protection available.'[73] The current HO guidance is to determine whether the country of origin has laws to punish attacks by non-state agents and whether there is a 'reasonable willingness to enforce the law.' This approach is known as the protection theory, focusing on whether the state should be regarded as culpable, rather than the failure of state protection, but remains confusing in principle:

In *Noune*,[74] it was held that:

the law in relation to persecution by non-state actors was unsettled and difficult to understand… that where the law enforcement agencies are doing their best and are not being either generally inefficient and incompetent (as that word is generally understood implying a lack of skill rather than a lack of effectiveness) this was enough to disqualify a potential victim for being a refugee, [this would be] *an error of law.*

Lord Hope in *Horvath*, stated that the 'general purpose of the Convention is to enable the person who no longer has the benefit of state protection… to turn for protection to the international community,' establishing the principle of surrogacy.[75] The Convention does not directly refer to sources of 'persecution' feared by asylum-seekers, and no necessary linkage between persecution and government authority is formally required,[76] it remains ideal for the continuation of the Convention to be an open instrument in this regard.

An issue that arises is determining the standard of state protection offered, and in many cases can be circumstantial resulting in many asylum-seekers being rejected. Ever-changing and unstable conditions are difficult for decision-makers to assess, and are not truly reflected by

[71] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para. 8.5.
[72] Horvath v Secretary of State for the Home Department [2001] 1 A.C. 489.
[73] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para 8.5.
[74] Noune v SSHD [2000] EWCA Civ 306, Paragraph 28.
[75] Gina Clayton & Georgina Firth, Immigration Et Asylum Law, 8th Edition, Oxford University Press, 2018, p447.
[76] Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law, 2007:98.

HO country guidance. Arguably, despite the wide-ranging scope, the rules require a stricter approach to provide proper direction to both the HO and the judiciary alike.

Gender-based Violence

While the HO regulations include acts of sexual violence as 'persecution,' in practice there remains breath-taking deficiencies at all stages of decision-making to recognise rape and other sexual violations as forms of persecution.[77] Guidelines were produced by the IAA,[78] to directly address the use of sexual violence as a form of torture/inhumane treatment, refuting the idea that rape is sexually motivated,[79] but were abandoned. Current gender guidelines are out of date, replaced by non-binding case law. HO guidance neglects the impact of sexual violence,[80] subsequently failing to recognise one of the main challenges facing women asylum-seekers is 'failure to recognise the political nature of seemingly private acts of harm to women.'[81]

Research shows that harm against women is often minimised,[82] with accounts of rape simply not being believed. Caseworkers cite a lack of supporting evidence but even by Criminal Standards proving rape remains a high threshold with only 1.7% of reported rapes being prosecuted.[83] There remains social and political repercussions of rape which may inhibit disclosure,[84] in addition to the traumatic experience itself being repressed in the individual's mind. Despite this, Case Law has been slow to recognise claims of sexual violence, even systematic rape by armed forces has not been necessarily recognised as 'persecution.'[85]

In *PS*,[86] the Appellant was raped multiple times in her home by soldiers, to the extent that she tried to commit suicide, and subsequently fled to the UK, where she was refused asylum. The Tribunal held that the fact she had been raped multiple times had no bearing on whether it would happen again, as the rapes were actions of rogue officers, unsanctioned by authorities.

[77] Equality and Human Rights Commission, Research report 52, Refugees and asylum seekers: A review from an equality and human rights perspective, Peter Aspinall and Charles Watters, University of Kent.
[78] Immigration Appellate Authority, Asylum Gender Guidelines, Nathalia Berkowitz, Catriona Jarvis, 1 November 2000.
[79] Assistant Commissioner Wyn Jones, Metropolitan Police, Policing London, Hansard, 18 October 1991.
[80] Women's Asylum News, Issue no. 96, October 2010.
[81] UNHCR Global Consultations Summary Conclusions on gender-related persecution, Paragraph 4,
[82] Helen Baillot, Sharon Cowan and Vanessa E. Munro, 'Hearing the Right Gaps': Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process, 26 October 2013.
[83] Lizzie Dearden, The Independent, Only 1.7% of reported rapes prosecuted in England and Wales, Tuesday 17 September 2019 https://www.independent.co.uk/news/uk/crime/rape-prosecution-england-wales-victims-court-cps-police-a8885961.html
[84] International Association of Refugee and Migration Judges, Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive Judicial criteria and standards, 2013.
[85] R (N) v SSHD [2002] EWCA Civ 1082.
[86] PS (Sri Lanka) v SSHD [2008] EWCA Civ 1213.

This case illustrates the failure of understanding of the risk of repeated sexual violence in the context of militarised, hostile environments where women are systemically vulnerable.[87]

Gender-based violence encompasses a range of atrocities, female genital mutilation, domestic violence, rape, forced-marriages, and forced-abortions. [88] Much of this violence is socially sanctioned by law, practice and even culture. In this context, social and sometimes legal acceptance means that a woman may not be protected by the state against these actions. Generally, a nation's formal laws are not adhered to by the nation's military, police or judiciary, therefore the issue of state protection is often critical in these cases, and given the confused case law surrounding state protection, results in many genuine asylum-seekers being returned to continue being subjected to the violence they attempted to escape from.

The HO has improved its approach when handling victims of sexual violence, there have been developments of better techniques for building mutual trust between interviewer and applicant, and increased sensitivity regarding contextual questions around a person's biographical and health details, whilst also ensuring that the right questions were being asked.[89] What both the HO and Courts are slow to grasp however, remains the power dynamics, and the subservient role of woman in many of these countries. It remains exceptionally challenging to even leave a nation as a woman, given all the risks entailed in travelling alone through country and continent. This is exacerbated by social and cultural pressures, where the shame of being raped is as terrible, if not worse than the act itself.

5) Discrimination as Persecution

In an age of bitter inter-ethnic wars and discrimination against minorities normalised, minority groups have been subject to an expulsion of fundamental human rights, an issue international human rights framework never contemplated when drafting the Convention. The HO and UNHCR agree that in some certain circumstances, 'discrimination' may amount to persecution. The 'discrimination' would have to be of 'substantially prejudicial nature for the person concerned,'[90] with the HO identifying specific violations such as freedom of thought,

[87] PP (Sri Lanka) v SSHD [2014] EWCA Civ 1828.
[88] Gina Clayton & Georgina Firth, Immigration Et Asylum Law, 8th Edition, Oxford University Press, 2018, p450.
[89] Helen Baillot, Sharon Cowan and Vanessa Munro, Research briefing: Rape narratives and credibility assessment (of female claimants) at the AIT, p2.
[90] Home Office, Asylum Policy Instructions, 'Deciding Claims – Assessing the Claim Pt 1', para 54.

detention, privacy, access to normally available services and equal protection of the law.[91] In *Gashi*,[92] two ethnic Albanians from Kosovo evaded military service, and thus would be unable to obtain employment, satisfying the asylum-seeker criteria.

The Tribunal continued with its evaluation of the Convention being a living instrument, it was crucial to look at an assessment of social policies and practices of the respective government. Subsequently, decisions based on discrimination are more intrusive, as it reflects on the government and people rather than non-derogable rights. This approach is inconsistent, as evidence of the Roma people who have faced century long discrimination in Europe. The UK Home Minister,[93] at the time of surging Roma Applicants stated that majority of claims would not be entertained as it was respective governments jobs to resolve issues of discrimination, and they would not interfere with internal matters of other states.

The QD Article 9 states that persecution may arise from 'an accumulation of various measures, including violations of human rights,' while the Handbook lists 'serious restrictions on his right to earn a livelihood… and access to normally available educational facilities.' In *DH*,[94] the ECtHR found majority of Roma children were being placed in special schools for children with learning disabilities or low intelligence. In *Kalanyos*,[95] Roma houses were being burnt down after threats resorting to them living in stables without heating or water. These cases fall under the criteria in *Gashi*; however, applications were still rejected.

Despite the openness of the surrounding legal framework of asylum law, there remains irregularities in many areas. Arguably, these inconsistencies do not show abstract failings of the law itself as the general treatment of the Convention as an open instrument has been successful, but instead, looks to be politically motivated. Accepting Roma applications would have been against government policy at the time, and opens the possibility of a large-scale movement of the Roma population to seek relocation for safer havens. Here politics is seen taking precedent over International Law, and that is where the issue arises, and remains evident.

[91] Ibid., para. 8.3.
[92] Gashi and Nikshiqi [1997] INLR 96.
[93] Campaign against Racism and Fascism, Whose Hard Choices? Legal Aid Cuts, No Refuge For Roma Issue 41, December 1997.
[94] DH v Czech Republic (Application no. 57325/00) 15 November 2007.
[95] Kalanyos v Romania (Application no. 57884/00) 26 July 2007.

Current Policy, Reform and Solutions

The Hostile Environment

Having looked at the established law and assigned policy for asylum-seekers, we now look at why they are in place, and how to remedy them. The current policy is aimed to reduce and deter asylum-seekers, and the policy is working. Total asylum claims have been falling since September 2019, furthermore, grants on both initial decision and appeal are higher.[96] While achieving their aim, the consequences of the 'hostile environment' persist, as the system continues to deter, dehumanise and disenfranchise all asylum-seekers, bogus or genuine.

Deterrence

The emergence of the 'hostile environment' was introduced by the rollout of new Immigration laws in the early 2000's, stripping refugees of the right to benefits, public funding for legal representation, housing, and limiting financial support. Asylum-seekers are banned from working, including voluntary-work and cannot study.[97] Hopeful asylum-seekers on average wait six months for decisions, some wait for years.[98] The HO is attempting to ensure resettlement programmes remain the only route for asylum-seekers, delegitimising those arriving spontaneously to justify attacks on their rights.

The HO must make decisions far more quickly, to ensure asylum-seekers are not waiting in limbo, to utilise the rule of law to separate those genuine and those bogus as soon as practicable. Asylum-seekers should be given the right to work after 6 months of lodging a claim, unconstrained by the shortage occupation list. They should have access to education, including free ESOL classes, doing so will give them purpose and allow them opportunity to contribute.

[96] Home Office, Immigration Statistics, Applications, Initial Decisions, and resettlement, 27 August 2020,
[97] Colin Yeo, Welcome to Britain: Fixing Our Broken Immigration System, Biteback Publishing Ltd. London, 2020, p230.
[98] Refugee Action, Waiting in the Dark Report: How the Asylum System Dehumanises, Disempowers and Damages, May 2018, p2.

Detaining on arrival

Immigration Officials have the power to detain asylum-seekers.[99] It was held to breach Article 5(1)(f) of the ECHR in *Saadi*,[100] but overturned,[101] allowing detainment for 'reasonable conditions, and the period of detention was not regarded as excessive.' This subjects it to the 'reasonableness' test, compared to our European counterparts, with Portugal (60 days), France (90 days), and Germany (18 months).[102] Detainees without access to legal aid are unaware of their right to bail,[103] and given there is no defined period, are unaware of how long they serve.

Between 2010-2018, 33 migrants were detained for over three years, with the longest period being over six years.[104] The cost of housing one detainee was £87.71 per day, and the annual upfront cost of detention ending March 2018 was £108 million.[105] HO officials consistently exercise poor planning, failing to identify high-risk applicants, and subsequently ensuring proper procedure, Given the vagueness of the arbitrary power of detention, the resulting poor-decision making remains unchallenged.[106]

The Shaw Report was conducted to address the welfare of vulnerable immigration detainees,[107] revealing that detainees had been subject to inhuman and degrading treatment. The mechanisms installed to protect the vulnerable remained ineffective amongst a culture of disbelief among staff. Recommendations included protections of the most vulnerable, and the HO attempted to incorporate them, but a Parliamentary Committee found that the new policy 'has not only failed to mitigate the harmful impact of detention on vulnerable people, but has failed to deliver a reduction in the number of vulnerable people in detention.'[108]

[99] 2002 White Paper, Home Office, Secure Borders, Safe haven – Integration with Diversity in Modern Britain, Cm 5387 (London: The Stationery Office, 2002), paras. 4.78-9.
[100] R. v Secretary of State for the Home Department, ex parte Saadi et al [2001] EWHC Admin 470.
[101] R (on the application of Saadi & ors) v Secretary Of State For Home Department, [2002] INLR 523, HL.
[102] Asylum Information Database available at: https://www.asylumineurope.org./reports
[103] Colin Yeo, Welcome to Britain: Fixing Our Broken Immigration System, Biteback Publishing Ltd. London, 2020, p230.
[104] Detention Tables, "Table dt_14_q: Top 20 longest lengths of detention of people in detention by sex', Home Office Immigration Statistics.
[105] 'Immigration detention: Fourteenth Report of Session 2017-19', cited in Home Affairs Committee, 12 March 2019 p. 7.
[106] Colin Yeo, Welcome to Britain: Fixing Our Broken Immigration System, Biteback Publishing Ltd. London, 2020, p240.
[107] Stephen Shaw, 'Review into the welfare in detention of vulnerable persons', 14 January 2016, available at: https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons
[108] 'Immigration detention: Fourteenth Report of Session 2017-19', Home Affairs Committee, 12 March 2019.

Consequently, the HO have paid out over £43 million in compensation for wrongful detention between 2011 and 2019.[109]

Safer Routes

'No one leaves home unless home is the mouth of a shark, no one puts their children in a boat, unless the water is safer than the land.' - Warsan Shire[110]

The body of Mohammed Ayez was discovered in a car park after he fell from a plane in 2001,[111] in 2016, orphan Carlito Vale suffered the same fate.[112] Masoud Niknam attempted to swim the channel and died at sea,[113] he is just one out of three-hundred since 1999. These statistics are dwarfed compared to those dying in the Mediterranean, with over 25,000 within the last decade.

David Blunkett suggests opening safe and legal routes for asylum that would reduce demand for services of smugglers and traffickers.[114] Asylum-seekers would find harbourage in a neighbouring country, with controlled numbers being admitted to the UK. Currently the world has thirty million refugees, and 80% live in refugee camps in neighbouring countries,[115] so this seems a practical solution. This was to be expanded by David Cameron to include 20,000 Syrian refugees, but was scrapped during Theresa May's tenure. The Conservatives pledged to reduce the net migration target, and reducing the influx of refugees became the solution.

For the adoption of Blunkett's policies to work, amendments to the Convention itself would be necessary. Case law affirms that protection from refoulement does not prevent someone who qualifies for refugee status from being sent to another country which would accept them, and where they were not at risk under the terms of the Convention.[116] The issue remains is whether Article 33 is limited to those who have arrived in the territory of the contracting state, as the Convention does not apply to those who are still in their country of origin,[117] but once they reach their destination state.

[109] 'Annual Report and Accounts 2018-2019', Home Office, 6 June 2019.
[110] Warsan Shire, Home, 2 September 2015.
[111] 'The man who fell to earth, the guardian, 18 July 2001.
[112] 'Heathrow Stowaway who fell to death identified as Mozambican migrant', The Guardian 10 January 2016.
[113] 'Lonely death of migrant who tried to swim the Channel', Sunday Times, 22 September 2019.
[114] David Blunkett, Labour Party Conference 2 October 2003.
[115] 'Figures at a glance, UNHCR, https://www.unhcr.org/uk/figures-at-a-glance.html.
[116] Gina Clayton & Georgina Firth, Immigration Et Asylum Law, 8th Edition, Oxford University Press, 2018, p436.
[117] R v Immigration Officer at Prague Airport ex p European Roma Rights Centre [2005] 2 A.C. 1.

A Time for Change

Our hostile approach towards refugees has been seen throughout history, from as early as 1276 with the Jewish community.[118] Refugees were constantly reminded of their difference, that their identity remained 'other', reinforcing their position in English society. The government were acutely conscious of the possible liability of refugees arriving, the financial burden and increased public hostility. They were also prepared to exploit exiles for political and economic benefit, whether to fulfil needed occupations, or used as pawns in international extradition or to further global influence. The influx of Huguenots established England's dominance as a vital Protestant hub at the peak of Christian-tension, ushering in an age of technological and economic advancement to rural England and the industrious cities alike. The shift in attitude towards refugees led to a period of prosperity, the general wealth and cultural enrichment of the nation began to flourish.[119]

Our colonial past and global influence have maintained our status in the developing years, making us an attractive destination for many, including refugees. Refugees who bring with them a diversity of skills and experiences that would provide well-needed contributions to our economy and society. Refugees are doctors, teachers, and lawyers hoping to rebuild the livelihoods they once had. By providing them with the right to work, to health, and to education, refugees can begin productive and meaningful lives here. The quicker and better they can integrate, the more productive members of society they can become.

Refugees benefit their host nations' economies within five years of arrival. A study finds that soon after a spike in migration, the overall strength and sustainability of the country's economy improves while unemployment rates drop.[120] The UK now have more than 1,300 refugees registered as doctors,[121] they teach our schools providing new perspectives,[122] and even become practitioners in asylum law.[123] Michael Clemens states refugees also have big-picture impacts,

[118] H Henriques, The Jews and English Law (London: Bibliophile Press, 1908) p59.
[119] L. Yungblut, Strangers settled here amongst Us – Policies, Perceptions and the Presence of Aliens in Elizabethan England (London: Routledge, 1996), p90.
[120] American Association for the Advancement of Science, Macroeconomic evidence suggests that asylum seekers are not a "burden" for Western European countries, Hippolyte d'Albis, Ekrame Boubtane, Dramane Coulibaly, 20 June 2018.
[121] Building Bridges Programme, https://buildingbridgessw.org.uk/about/partner/
[122] The Guardian, https://www.theguardian.com/teacher-network/2017/jul/14/the-refugees-rebuilding-their-lives-as-teachers-in-british-schools 14 July 2017.
[123] UNHCR, Refugee turns lawyer to help asylum-seekers rebuild in Britain, Mark Tran, 5 October 2017.

enhancing all aspects of our society. [124] From intellectuals such as Sigmund Freud and Albert Einstein, to authors Anne Frank and Judith Kerr. Refugees enrich our culture, artists like Freddie Mercury and Rita Ora, and even politicians David Miliband and America's Ilhan Omar.

The Asylum Kingdom

To conclude, while statutory legislation and case law provides the framework for Asylum Law, its effectiveness is limited by policy implemented by the HO, who adhere to their political party's policy on the matter at the time. The current asylum policy has laid bare the issues we face, and shows with it the dire consequences it brings. The best way to curtail these violations, and hold those responsible to account, is our legal system. The Royal Prerogative is a symbol of past governments, the rule of law continues to be our ultimate authority.

The Government must ensure a comprehensive, public review of current legal aid provision. A complete rehaul of the Immigration Rules is fundamental, with a supreme Immigration Legislation, encompassing the culmination of statute and case-law alike. The HO should improve information to asylum-seekers, uphold their given rights and understand their position. The UK must stand with her European neighbours, strengthen the commitment of participating states, take stock of developments in asylum law and structure protection policy matters that are both attainable and achievable. Together. we need to create safe avenues for asylum-seekers, utilising the rule of law to distinguish between those who are in genuine need of protection and those who are not.

Human Rights Law remains one of the brightest constructions of humanity, demonstrating compassion and unity in times of darkness. Most asylum-seekers who enter the UK are now genuine refugees, giving us a choice; to leave them isolated and destitute, or to provide them an opportunity, to educate and settle them like our own, to aid them in building new lives for themselves, just like our ancestors were given generation ago. Borders are no longer means of separation, but bridges. As the nation of refugees, we paved the way, but have effectively cut the ropes behind us, and we all end up falling. We know first-hand of the horrors within this world, that is why we established fundamental human rights law, to never let those atrocities reoccur, but they are. We are not only obliged, but bound to act, and that is something we should never forget.

[124] Michael Clemens, *Director of Migration, Displacement, and Humanitarian Policy and Senior Fellow*, Centre for Global Development, 13 July 2017.