The unravelling of ‘administrative justice’ in immigration and asylum

**Abstract**

Since the 70’s UK immigration law and procedure have changed significantly. Recent changes have limited the categories under which people may enter or remain in the UK, and, by way of procedural and other policy changes, made it more difficult for people to make applications or challenge refusals. Rights of appeal and access to appellate tribunals and courts have been reduced and even abolished. Application fees have increased and fees introduced for appeals. Because of the specific ways in which procedures and controls affecting migrants are delivered, access to appeals and public law remedies have become less effective. The specific statuses granted to migrants have been limited, and ‘routes’ to settlement and citizenship have been lengthened and for some categories excluded altogether. Migrants accepted into ‘routes’ to settlement face ever longer periods legally defined as ‘precarious’ before acquiring permanent residence. These changes have served to distance those migrants, and the processes to which they are subject, from standard norms of public administration. This paper explores aspects of immigration control contracted out to private bodies, and procedures in which private bodies and individuals are recruited to carry out immigration checks, in order to examine the nature of that distancing, and consider to what extent the rule of law can be said to apply in this new world in which the migrant is less and less a party to legal operations affecting them.

1. **Introduction**

The common law legal position of foreigners[[1]](#footnote-1) in the UK from the beginning of the 20th century right up to 1969 was subject to royal prerogative. If the presence of an ‘alien’ in the UK was deemed not to be conducive to the public good, that alien could be deported without any entitlement to be heard, in any forum.[[2]](#footnote-2) The Immigration Act (IA) 1971 and subsequent legislation brought clear immigration categories, published policies and rights of of appeal. Legal aid brought improved access to the tribunal and to judicial review, and the Human Rights Act introduced proportionality into decision-making. Migrants therefore appeared to be subject to the rule of law in the same way as citizens. In *Alvi,* decided in 2012,[[3]](#footnote-3) the Supreme Court described immigration as entirely a creature of statute:

[the 1971 Act]… should be seen as a constitutional landmark which, for all practical purposes, gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative [31]

Though I would identify the specific period 1999 - 2012 as a high point in access to justice for some migrants (principally asylum-seekers and family members of British and EU citizens), the curtailment of legal aid in 2012[[4]](#footnote-4) and appeal rights in 2014 and 2016[[5]](#footnote-5) has led to a rapid descent. We now see the conscious construction of the UK-resident migrant as ‘precarious’,[[6]](#footnote-6) and, through both legislation and policy, the migrant’s weakening grip on legal processes previously applicable to and available to them, to the point where in many cases the migrant has little legal purchase on her situation, and is often not even a party.

I first summarise the main immigration and asylum legislative changes since 1971. Then I look at policy, procedural and structural changes, from within and outside the realm of immigration and asylum, and trace how these interacted with the legislative changes to affect the position of migrants under the common law. I aim to identify to what extent and in what way the migrant’s legal position has changed not just in terms of the immigration (and related) statuses theoretically available, but increased the difficulty of making meaningful applications and achieving effective access to relevant statutory and public law remedies. I suggest that we are seeing a transition from quality to quantity:[[7]](#footnote-7) the distancing of the migrant from legal remedies is no longer just practical, but *legal.*

1. **Legislative measures**

The Immigration Act 1971, which abolished all previous immigration legislation, was short and straightforward. The Act determines who may enter or remain in the UK ‘without let or hindrance’, and then by s3(2) provides that the Secretary of State ‘shall’ make ‘rules’ (as considered in *Alvi)* controlling the entry and stay of everyone else. Appeal rights were widened and a second appellate tier introduced. The Act introduced 3 basic criminal offences (entering or remaining without leave, assisting others to enter or stay without leave, and using false documents, deception, etc to enter or stay without leave), and provided for the deportation of those whose presence is found not to be conducive to the public good (with a right of appeal). The Act provided that those arriving without visas and not satisfying the requirements of any rule, and those found to be unlawfully on the territory (‘overstayers’), may be held on ’temporary admission’ i.e. deemed not to have entered the UK, until either granted permission to stay or excluded.[[8]](#footnote-8) Finally, the Act in s4 gives power of enforcement to the Secretary of State, with the mechanisms to be set out in schedules and statutory instruments.

The Immigration Rules, originally around 40 pages, are now in an online ‘collection’ amounting to several hundred pages. Frequent Statements of Changes set out the details of increasingly frequent amendments, to tighten entry requirements or to close perceived loopholes. Pressure to reduce migrant numbers first of all bore on marriage applications. The Rules at first permitted that a settled or British man could bring in a spouse from overseas, but a woman could not (struck down in the ECtHR in 1985).[[9]](#footnote-9) Fear that foreign men would use marriage to enter the UK to work led to the ‘primary purpose’ test[[10]](#footnote-10) (introduced in 1977 and abolished by Labour in 1997). Further formal measures included ‘virginity testing’ - intrusive physical examination for at UK entry points (abolished in 1979) , the requirement for migrants to obtain Home Office permission to marry,[[11]](#footnote-11) the proposed raising of the age at which a foreign spouse could enter the UK,[[12]](#footnote-12) and recent measures targeting sham marriages with EU nationals).[[13]](#footnote-13)

From the late 80’s the focus moved to asylum. Claims increased from hundreds each year dealt with by a few specialist officials to over 200,000 claims in a year in the early 2000’s. To restrict arrivals, a country becoming unstable and giving rise to asylum applications would have visa restrictions imposed on its citizens wishing to visit the UK. The 90’s saw several new immigration acts, all following a similar pattern of limiting rights of appeal, limiting access to mainstream social benefits and services, introducing new criminal offences, and recruiting other state and private bodies to cooperate in the processes of immigration control. I briefly describe the main changes.

The Asylum and Immigration Appeals Act 1993 curtailed appeals deemed to be ‘without foundation’, and withdrew appeal rights for visitors who had not applied for an entry visa before travelling. The Asylum and Immigration Act 1996 excluded ‘persons subject to immigration control’, including single asylum-seekers, from mainstream social assistance benefits and public housing.[[14]](#footnote-14) The Immigration and Asylum Act 1999 s10 introduced *removal*, a faster process for those overstaying or breaching conditions of stay, leaving deportation for those convicted of criminal offences. The Act set up an entirely new asylum support system,[[15]](#footnote-15) with subsistence set at 70% of income support, and less for ‘failed asylum-seekers’. The Act also limited certain appeal procedures, required register offices to report ‘suspicious marriages’ and widened carriers’ liability to hauliers caught transporting clandestine migrants.

The Nationality, Immigration and Asylum Act 2002 linked appeal rights to specific ‘immigration decisions’ (s82) and restricted potential grounds of appeal. Section 55 enforced a welfare distinction between those who claimed asylum ‘on arrival’ and those who claimed only after passing immigration control.[[16]](#footnote-16) The Asylum and Immigration (Treatment of Claimants) Act 2004 introduced new criminal offences, provided statutory backing for certain factors to count against an asylum-seeker’s credibility, provided for further controls on marriage ceremonies, and reduced the appellate structure to a single tier with a paper application to the High Court for review.[[17]](#footnote-17) (The resulting burden of immigration appeals arriving at the Court of Appeal led in 2010 to the restoration of a two-tier structure in line with the other statutory tribunals.)[[18]](#footnote-18) The Borders Act 2007 introduced ‘automatic deportation’ for anyone receiving a prison sentence of over 12 months.

Major changes were also effected through rule changes. In 2007 the Labour government introduced a points-based system for students and workers, tailoring the grant of entry to those with money or who could fill specific occupations, while eliminating discretion (and costs) in application processing. The 2010 coalition government’s pledge to ‘reduce net immigration to the tens of thousands’ led to further overhauls of the rules, with two aims. First to reduce the categories of migrant who could expect to eventually settle in the UK , especially students and workers under the points-based system; and secondly to fix *in the rules* the government’s understanding of how article 8 ECHR should apply in family migration and deportation cases.[[19]](#footnote-19) More recently, the long-running and ultimately unsubstantiated rhetoric of ‘benefits tourism’ was used as a basis for Cameron’s 2015 renegotiation of the rights of EU nationals enjoying free movement in the UK; and the equally unsupported rhetoric of ‘health tourism’ underlay the introduction of a £200-a-year ‘health surcharge’ to be paid each migrant with every application until indefinite leave to remain.[[20]](#footnote-20)

The Immigration Act 2014 removed many ‘appealable decisions’ and grounds of appeal altogether,[[21]](#footnote-21) and the Immigration Act 2016 enables the Secretary of State to ‘certify’ appeals so that they may be heard only after the applicant has left the UK. Finally, fees have been introduced for appeals, fees for judicial review have significantly increased, and application fees for entry and further stay have increased at payday loan rates.[[22]](#footnote-22)

1. **Changes in methods of delivery of operations concerning migrants**

*3.1 contracting out functions and procedures to private contractors*

The last 20 years have seen the contracting out of functions and procedures applying to or affecting migrants, including: providing accommodation and support for asylum-seekers, running immigration detention centres, providing ‘logistics’ and ‘escort services’ for deportations and removals, locating unlawful migrants and encouraging them to leave the country. It is clear from official and NGO reports that under such contracts the conditions endured by the migrant deteriorate and their legal position appears weaker. I first look at the legal position of service recipients generally where public services have been contracted out to private bodies, and then review a selection of contracts dealing with immigration control functions.

Contracting out of public functions began in the 1980’s, based on a view that competition would deliver more efficient, cheaper, innovative, flexible services, more responsive to consumer preference and demand. The question of what legal entity would deliver any particular service was considered to be purely practical. In 2011 prime minister David Cameron said: ‘*it shouldn’t matter if providers are from the state, private or voluntary sector – as long as they offer a great service’*.[[23]](#footnote-23)

There has been relatively little litigation or academic discussion of the impact of such contracts. Cases relevant here have considered (i) the the availability of public law remedies for the ultimate service user against the contractor (ii) whether the public authority still owed a duty of care directly to the ultimate service user; and (iii) democratic accountability for the quality or success of the contracted-out service.

*Servite Houses[[24]](#footnote-24)* considered whether a contractor, in that case a care home provider, could be liable in public law to the ultimate recipient in the event of delivery failure. Referring to *Datafin[[25]](#footnote-25)* and *Aga Khan[[26]](#footnote-26),* whichhad determined that the courts cannot impose public standards on a body whose source of power was contractual, the court stated: ‘*[the Act] created a mixed economy of provision and therefore the relationship between Servite Houses and the London Borough of Wandsworth was purely private’.* The resident, placed in the private home by the local authority pursuant to its statutory responsibilities, had no public law claim against Servite Houses, nor did she herself have any contract with them. Moses J noted in passing that ‘Parliament had given no thought to this issue’.

*Donoghue,[[27]](#footnote-27)* concerning an applicant declared intentionally homeless by the Council and then evicted by her temporary landlord (a housing association), decided that although the local authority had transferred its housing stock to the housing association, it had not transferred its statutory responsibility for dealing with homelessness: and that providing accommodation for rent is not, without more, a public function. In *Cheshire Homes,[[28]](#footnote-28)* another care home case, the court decided that there was no claim under the Human Rights Act 1998, since the relevant local authority still had a duty to provide care.[[29]](#footnote-29)

The case of *Heald v Brent[[30]](#footnote-30)* concerned the contracting out to a private company of the review stage in housing decision-making, a judicial function. The applicants argued breach of their art 6 ECHR right to a fair hearing. This was rejected. For Peter Cane,[[31]](#footnote-31) the importance of the case was its discussion of the issues of democratic accountability or ‘constitutional design’: whether there are any legal limits on the powers of government agencies to contract out functions to non-government entities. He suggests that from any political viewpoint there will be some core entity (the ‘state’) with functions definitional to that entity and which distinguish it from civil society: and thus there must be some set of functions which could not, as a matter of basic constitutional principle, be contracted out. However the court decided, just as in the care home cases, that the public authority charged by primary legislation with a public duty (to provide social care, or housing) according to a legislative scheme for assessing entitlement, remains charged with such duties despite any contracting out of any of the relevant ‘functions’. For Cane, such reasoning is unlikely to provide reliable protection against the ‘hollowing out of the state’.

This view echos Paul Craig’s 2002 comment that because of the judgments in *Donoghue* and *Cheshire Homes,* *‘contracting out will serve to preclude any meaningful action against the public body. Claims that could have been made against the public body if it had performed the service in house will no longer be possible where it has contracted this out’.[[32]](#footnote-32)* This issue was considered in *Woodland v Essex County Council,[[33]](#footnote-33)* which set narrow criteria for finding a personal non-delegable duty of care , and the specific circumstances in which a recipient of contracted out functions could make a claim in tort against the public authority, even where the negligent act had been carried out by a contracted-out body.

I now apply these principles to the contracting out of statutory functions concerning migrants. It is easy to see both the practical consequences and the legal difficulties which ensue.

* *Asylum support accommodation*

The Immigration and Asylum Act (IAA) 1999 set up the National Asylum Support Service (NASS), a section of the Home Office. Under s95 and s4, no-choice accommodation and subsistence was to be provided to asylum-seekers and ‘failed asylum-seekers’ respectively, in ‘dispersal areas’ around the UK. The standards of accommodation, etc, were laid down in NASS contract requirements.[[34]](#footnote-34) Provision of accommodation has always been contracted out, most recently under £1.7bn contracts with G4S, Serco and Clearel. National Asylum Support Forum stakeholder meetings minutes and NGO reports[[35]](#footnote-35) over more than a decade show the problems faced by recipients and the legal and practical difficulties in responding to them. On these particular contracts, *The Shadow State[[36]](#footnote-36)* comments:

…bids were put in at costs well below the incumbent providers, on the understanding that G4S, Serco or Clearel could sub-contract the accommodation to cheaper private landlords. … the new standards of accommodation are creating slum conditions ...

A recent Guardian report gives video evidence of a specific Clearsprings contract further subcontracted twice, for accommodating women and children asylum-seekers in West London, in which 18 women and 15 children share ‘squalid’ accommodation.[[37]](#footnote-37)

By the settled caselaw discussed above, any remedy sought by a resident continues to lie against the contracting government department. However, access to public law remedies has always been difficult for asylum support recipients. The law requires an applicant to exhaust all available remedies before applying for judicial review. This requires a complaint to the private contractor, obliged by the contract requirements to provide a complaints procedure, including an emergency response service;[[38]](#footnote-38) and only then can the asylum-seeker formally complain to the Home Office. An offer of alternative accommodation must be accepted, since acommodation is provided on a no-choice basis. [[39]](#footnote-39) Expert evidence, attesting to medical problems rendering the accommodation unsuitable, is difficult for asylum-seekers to obtain. Judicial review of failure to provide adequate accommodation is in scope for legal aid, but there are few lawyers specialising in that work. There are no leading judicial reviews solely on conditions in asylum-seeker accommodation. The leading cases show instead the demarcation struggle between the Home Office and local authorities over the provision of basic accommodation as distinct from facilities and services required to meet an applicant’s social care needs, leading to the development of the concept of ‘destitution-plus’. [[40]](#footnote-40) These cases show the determination of both the Home Office and local authorities to contest judicial reviews relating to asylum support.

In the Clearsprings case mentioned above, the publicity has alerted the Council’s Environmental Health Officer. The property may be condemned. Then the occupants will face a second problem: the simple lack of any better alternative if legal action is successful. NASS properties do not have to conform to the standards applying to private rented accommodation, and there is no security of tenure.[[41]](#footnote-41) That regime rests on the political decision to subject asylum-seekers to lower standards of accommodation and subsistence than the general population. Moreover, in relation to ‘failed asylum-seekers’, the UKBA stated in 2006 that s4 support was a ‘*regime’, ‘designed to convey the concept of return’* and should therefore be different (i.e. worse) from section 95 support.[[42]](#footnote-42) Any proposed improvement in asylum support is resisted as a ‘pull factor’.[[43]](#footnote-43)

* *Yarls Wood Immigration Removal Centre*

This detention centre, holding the largest number of female detainees in Europe, and subject of many serious complaints and public demonstrations, has been run by private contractors since its opening in 2001. In 2015 new contracts were awarded. There have been 5 independent reviews of the centre published in the mere 10 months between July 2015 and May 2016, and 35% of the recommendations from the HM Inspectorate of Prisons’ report[[44]](#footnote-44) had not yet been implemented, one year after their inspection.[[45]](#footnote-45) Between 2010-11 and 2014-15 the Home Office budget for the centre was reduced by 14.5%. The July 2016 report by the National Audit Office[[46]](#footnote-46) shows how contract price reductions directly impacted on the detainees. Increased contract penalties for absconded detainees led to an increase from 3% to 11% of women being handcuffed for hospital visits, with the effect that many women chose to forgo medical treatment to avoid the public humiliation of being handcuffed in hospital. Drugs and medication were administered in public rooms. Only a quarter of Serco staff had had any training on mental health issues. A 19% staff reduction (including a 30% reduction in management staff) was dealt with by providing ‘self-service kiosks’ from which the detainees (distressed, vulnerable and English not their first language) had to arrange their own legal appointments, order meals and send mail.

The NAO report[[47]](#footnote-47) states:

Many measures to secure value for money in public services do not easily apply

to services for people who may be vulnerable. Unlike some public services, Yarl’s Wood residents are not able to choose a different provider if they are unhappy with the service they receive**.** … Residents may not speak English, and may be unwilling to complain from a

fear that raising a complaint may have an impact on their immigration case. It is therefore

particularly important that departments commissioning services for vulnerable groups

consider how they will know whether the services that people receive represent good

value for money.

The public law responsibility for conditions in Yarls Wood rests with the Home Office. And because the migrants are *detained there,* conceivably there may also be a remedy in tort for negligence against the Home Office. We saw how in *Woodland v Essex* the Supreme Court decided that a personal or non-delegable duty arose where there was an antecedent relationship between the defendant and the claimant, and where there is a positive duty to protect a particular class of person (to which the claimant belongs) against particular risks.[[48]](#footnote-48) The court’s criteria include the vulnerability of the claimant (such as children, patients, prisoners) and an antecedent relationship independent of the claimed negligence involving a high degree of control, custody or care. Finding a duty also requires a lack of choice for the claimant on how the obligations may be performed; that the function delegated is integral to the positive duty owed by the defendant, and where the negligence is in the performance of the very function assumed by the defendant and delegated to the contracted out entity.[[49]](#footnote-49)

All of this could clearly apply in Yarls Wood. However, despite the numbers of public complaints and critical reports, we see few if any judicial reviews or tort actions against the Home Office from Yarls Wood detainees. Besides the legal aid cuts which have reduced the numbers of legal aid solicitors generally, for Yarls Wood detainees any legal action is rendered more difficult in practical terms by the sheer fact of being detained, with no staff to assist. The reports show how hard it is for detainees to obtain essential medical treatment. It is far harder for them to instruct medical specialists to prepare reports to support complaints: it is difficult enough for detained asylum-seekers to obtain the evidence they need to support their substantive asylum claim. The *Detention Action* litigation,[[50]](#footnote-50) ruling the Detained Fast Track asylum rules as ‘systemically unfair and unjust,’ provided cogent evidence of how detention both impedes adequate preparation and examination of the detainee’s asylum claim, and contributes to the detainee’s poor mental and physical health. Additionally, just as in relation to the contracts handed to G4S and Serco to manage the electronic tagging of offenders, and the contracts to run entire prisons handed to the private sector,[[51]](#footnote-51) the Yarls Wood reports highlight pressure on staffing, staff costs and other variable costs such as accommodation and catering standards, poor record-keeping, lack of access to medical and mental health care, and the publicised instances of brutality and negligence leading to expressions of concern and promises to do better.[[52]](#footnote-52)

* *The ‘migration refusal pool’, enforcement of removals*

Other immigration-related functions contracted out include the passing to Capita of the list of 174,000 ‘unlawful migrants’ from the Home Office ‘migrant refusal pool’ to get those people to leave the UK,[[53]](#footnote-53) and the contracts to transport those facing removal to the airport and enforce their removal.[[54]](#footnote-54) The Independent Chief Inspector of Border and Immigration reports on these contracts show how poorly run they are, and how that often arises out of poor Home Office record-keeping – so that frequently the ‘wrong migrants’ are contacted by Capita and told to ‘go home’; transport contractors bring the ‘wrong migrants’ to the airport and the Home Office supplies the ‘wrong documents’. [[55]](#footnote-55)

In the escort cases the public law responsibility of the Home Office is much clearer, as the migrant will know that the G4S van has been sent on Home Office instructions, and so the fact of contracting these functions to private companies does not distance, or separate, that migrant from their public law opponent. However, the migrant being told by Capita text to ‘go home’ often had no idea what authority lay behind it.[[56]](#footnote-56)

These cases raise more general issues about trends in litigation against the Home Office. With the advent of legal aid and the popularity of ‘strategic litigation’ from the mid-70’s, the numbers of judicial reviews rose from the very few hundreds a year in the 70’s to over 11,000 a year in 2011, of which over 8500 concerned immigration and asylum.[[57]](#footnote-57) This led the government to transfer two categories of immigration judicial review (fresh claims for asylum and young asylum-seekers’ age disputes) and then, in 2013, all immigration judicial reviews, to the Immigration and Asylum Chamber of the Upper Tribunal. The effect of this on the migrant has been significant. Where a simple judicial review of a Home Office mistaken treatment of a migrant leading to, say, a loss of a job, used to take less than a week in the High Court to produce a result,[[58]](#footnote-58) the Upper Tribunal has been taking over 6 months to look at applications.[[59]](#footnote-59)

*Arguably, these practical barriers together amount a legal distance from legal remedies:*

Clearly, migrants (whether asylum-seekers, other lawful migrants or irregular migrants) face increasing legal and practical problems caused by bureaucratic errors and poor decision-making, which in turn arise from pressure on public expenditure and emphasis on speed of processing. These pressures are prevalent in but not confined to contracted-out services. Two examples: first, the *Detention Action* litigation shows the unacceptable consequences of imposing very short timescales on asylum claims and appeals for detained asylum-seekers (though we note that the Detained Fast Track has not yet been abolished). Secondly, the Independent Chief Inspector of Borders and Immigration stated that Home Office performance standards required staff in a particular Visa Section (an in-house service, not contracted out) to make a substantive decision every 10 minutes (45 decisions a day) including considering the entire application and writing a reasoned refusal letter.[[60]](#footnote-60) Mistakes both legal and practical are entirely probable under such a regime, yet for many applicants the only remedy will be to make, and pay for, a new application. However, where there is a contracting arrangement, the difficulties of challenging mistakes are increased because of the institutional distancebetween the migrant and the Home Office imposed by the specifics of the contracting arrangement.

Poor contractors’ record-keeping, noted in reports covering all the detention and prison contracts, contributes particularly to the distancing of migrants from potential legal remedies. Richard Clayton QC highlights this specific issue as potentially impeding the public authority from properly responding to service users’ complaints against contracted-out services.[[61]](#footnote-61)

*3.2 recruiting other public authorities, NGOs, private companies and individuals to carry out immigration control processes*

The ‘hostile environment’ was Theresa May’s title for a series of measures intending to substitute what has previously been referred to as ‘destitution by design’[[62]](#footnote-62) for the Home Office’s attempts to enforce removal of ‘unlawful migrants’ (illegal immigrants, overstayers or failed asylum-seekers).[[63]](#footnote-63) The declared intention is to make those irregular migrants’ continued survival in the UK impossible through prohibiting, and criminalising, illegal working, renting property, holding a bank account, keeping any money earned or held in a bank account, holding a driving licence or driving a car. Access to medical treatment is for emergencies only, and access to any type of support or accommodation will be available in only the most exceptional circumstances.

The recruitment of other public bodies and private entities and individuals to investigate and control the entitlement of a migrant to receive a certain service (health, education), to take an active role in society (by working or volunteering) or take advantage of a private service by way of a contract (airlines, ferries, hauliers, employers) is not new. The most recent policy measures are stated to be aimed at ‘unlawful migrants’, but similar measures affecting those here lawfully have been in place for some time. What is gathering speed is the investigative burden placed on these other bodies and individuals, and concomitant punishments ; and the effects of such regimes on all migrants whether here lawfully or not.

* *NHS responsibility for imposing charges for health care*

Powers to charge for access to health services for ‘overseas visitors’, defined as those not ‘ordinarily resident’, were introduced through the NHS (Amendment) Act 1949, but were not enacted until the 1982 regulations.[[64]](#footnote-64) These charges were, and remain, only applicable to hospital treatment. The operation of the scheme required hospital staff to assess each prospective patient’s liability to pay for each particular treatment. For the first time, those providing a service intended to be universal and free at the point of use were expected to question and examine patients about matters that were not to do with their health, but their immigration status and financial circumstances. The charging regime was and continues to be extremely complex, since ‘ordinary residence’ cannot be mapped to immigration status,[[65]](#footnote-65) and there are currently 7 exempted types of medical services, 33 exempted categories relating to immigration status and a long list of exempted presenting medical problems. In 2012 the Department of Health reviewed the charging policy. The review noted that less than 20% of estimated chargeable costs are recovered, amounting to about £15-25m per year, against administrative costs of around £15m. It noted that *‘clinical staff have little interest in supporting [administrators] in the [charging] process and may individually be resistant to the whole principles and process’*, and concluded that *‘the NHS is not currently set up structurally, operationally or culturally to identifying a small subset of patients and charging for their NHS treatment’*. [[66]](#footnote-66) The report stopped short of recommending the abolition of the scheme. The 2015 DOH Guidance provides 130 pages of detailed instructions to NHS staff, prefaced by the statement: ‘*All staff, including clinicians and managers, have a responsibility to ensure that the charging rules work effectively’.[[67]](#footnote-67)*

Reports on the effects of health charging[[68]](#footnote-68) note: administrators’ pressure on clinicians to change their view on what constitutes ‘emergency’ or ‘immediately necessary’ treatment; individuals too scared or too poor to seek medical treatment; sick people afraid to approach a GP even though primary care services are not covered by the scheme; GPs refusing or failing to register overseas-born patients; patients presenting with emergencies (which are treated free of charge) who would have been more effectively treated earlier: and even the unnecessary spread of communicable diseases such as tuberculosis or virus infections such as HIV/AIDS. Despite all this, despite the evidence that the scheme is not cost-effective, and despite the 2015 introduction of the Immigration Health Surcharge,[[69]](#footnote-69) the scheme continues.

A migrant wrongly levied a charge for hospital treatment, or refused hospital treatment unless they pay, may bring a judicial review against the hospital. As with claims in respect of asylum support and accommodation, such a claim would fall under community care law and is still eligible for legal aid. But many factors, including the lack of practitioners, the difficulty of obtaining medical evidence of urgency, etc (more acute where the legal issue is precisely the denial of medical treatment without payment), and finding a separate immigration lawyer (not legally aidable) to identify the migrant’s status and argue that they are not liable, etc, often preclude action. A migrant refused registration with a GP faces an unclear legal path. GPs are not obliged to register anyone, and so migrants must hawk themselves around local GPs until they find one willing to register them, or contact the local primary health care trust - who cannot compel any GP to register the migrant. In some areas refugee charities are able to direct migrants to sympathetic GPs or walk-in clinics. Many migrants fail to receive the treatment they need and which they are entitled to receive.

* *Privatisation of control on entry: carriers’ liability*

The Immigration (Carriers’ Liability) Act 1987 introduced a charge to be imposed on the owners, agents or operators of a ship or aircraft responsible for carrying a person who requires leave to enter but who fails on arrival produce a valid immigration document showing not just his nationality and identity but also a valid visa. Section 40 Immigration and Asylum Act (IAA) 1999 extended the liability to haulage companies whose trucks are found, even unknowingly, to be carrying illegal immigrants.

Compared to the complexity of the health charging regime, it may be felt that expecting airlines, etc, to check immigration status documents is not such a big step, since their business is precisely the carrying of passengers across international frontiers. But assessing the validity of entry documents often requires judgement and specialist knowledge. It appears unlikely that a person incorrectly excluded from a flight on the basis of an airline employee’s mistake about their visa would have any effective remedy against the airline, or be covered by their travel insurance.[[70]](#footnote-70) A passenger’s only remedy would appear to be against the visa issuing post abroad, and may amount simply to making a second application, at great expense and loss of time. It is not known how many people are incorrectly excluded from flights into the UK because of a mistake about their visa, but there must be pressure on carriers to refuse when faced with any doubt. In the famous ‘DNA fingerprinting’ case, [[71]](#footnote-71) my client, 14-year-old Andrew Gyimah, carrying a British passport with his baby picture, was stopped at Heathrow in 1983, but granted temporary admission for the 3 years it took to establish that he was the child of his mother and therefore a British citizen as claimed. If the Carriers Liability Act had been in force, he may well have been stranded in Ghana with no family.

In relation to hauliers the issues are different. The migrants themselves are clearly unlawfully present, but once having set foot on UK soil, have a right under international and domestic law to claim asylum. Those who are not asylum-seekers, or who do not claim asylum, are served with removal notices and either detained or released on temporary admission. The hauliers themselves faces fines in respect of each unlawful migrant found in their truck even where sophisticated equipment, not available to the haulier, is necessary to detect them. The industry has made strong representations about the unfairness of the penalty system.[[72]](#footnote-72)

* *employers’ responsibility for checking the right to work*

Civil penalties on employers for employing a person without permission to work were first imposed in 1996.[[73]](#footnote-73) Subsequently the Immigration, Asylum and Nationality Act 2006, in effect from 29 February 2008, introduced a criminal offence for employers who knowingly employ illegal migrant workers, and a system of continuing responsibility to check a migrant employee’s entitlement to work in the UK. Failure to check can result in a civil penalty of up to £10,000 per illegal worker. The employer must be able to show that they followed due process in accordance with the regulations. In addition to this, employers are expected to check the UKBA website for policy and procedural changes. The UKBA set up an employer checking service, which in 2008 was accessed by telephone, but subsequently accessible only online.

Once again, reports show that many migrants face legal and practical problems because of Home Office errors and poor administration. A 2014 ILPA letter[[74]](#footnote-74) gives examples of employer checking service mistakes, including where migrants who have an outstanding application or appeal (and therefore continuing leave)[[75]](#footnote-75) are wrongly stated not to have the right to work, and those for whom the Home Office has unlawfully not provided an EEA residence permit within the required 6 months.

If the decision is right the employer is protected against any claim for unfair dismissal. A person dismissed by or not employed by an employer on the basis of an erroneous report of their immigration status has a remedy in judicial review against the Home Office if the decision is wrong. Again, such judicial reviews are difficult because of lack of access to lawyers, and hard to mount urgently because these types of cases often depend on formally obtaining a copy of the applicant’s Home Office file to show that an application is outstanding, which is currently taking more than the statutory 40 days. Neither can a judicial review achieve financial compensation for loss of earnings or loss of a chance to take up a job offer. A recent tightening of the list of documents acceptable to show right to work has led employers to face penalties for continuing to employ someone who is entitled to work, but whose visa is in an expired foreign passport. Now the migrant must make an application for a biometric residence card, at a current cost of £223, taking several weeks during which they may not work.

This scheme displays a new feature. The employer is obliged on pain of penalties to take action against a migrant, where the migrant herself has no or only limited redress. The migrant herself cannot access the employer checking service: and if a wrong answer is given the migrant herself has no quick or effective means of correcting the mistake. The migrant is simply not a party to that process – she is *legally* distanced from any remedies. She remains an applicant in her immigration situation. But judicial review, her only recourse against the relevant public authority (the Home Office), is rarely granted where the real issue is delay in resolving a case:[[76]](#footnote-76) and we have seen how judicial review is now a far less effective remedy in immigration for other than urgent matters such as imminent removal, and so are little help to someone erroneously dismissed from their job because of poor Home Office record-keeping.

The third important aspect of this scheme is that the employer faces *criminal* charges. The implications of this are discussed in section 4 below.

* *The ‘hostile environment’: controls on bank accounts, driving licenses and the ‘right to rent’*

The two immigration acts of 2014 and 2016 broadened and intensified the recruitment of outside bodies to the task of immigration control, with the declared aim of creating a ‘really hostile environment’ for unlawful migrants. The 2014 Act determined that an unlawful migrant may not hold a bank account or a driving licence. Many found their driving licences summarily revoked. Those migrants had no direct legal avenue for representations. The 2016 Act created a new criminal offence of ‘driving when unlawfully in the UK’ and provided for a car driven by an unlawful migrant to be detained, and money held in unlawful migrants’ bank accounts to be frozen.[[77]](#footnote-77) The Act imposes a duty on banks to check a holder’s immigration status and notify the Home Office of their findings without informing the holder, and a freezing order may be imposed without notice.[[78]](#footnote-78)

Both Acts also imposed Draconian controls on access to private accommodation. The 2016 Act now makes it a criminal offence to let property where any one of the occupants do not have leave to remain, and provides for new forms of possession proceedings to enable rapid eviction of such occupants. The ‘right to rent scheme’ does appear to include a measure of discretion. Section 21 (3) says:

(3) But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a residential tenancy agreement.

However the Home Office has provided no application procedure, and it transpires[[79]](#footnote-79) that there is no intention that *a migrant* should be able to apply for permission to rent, despite new guidance setting out circumstances in which permission is likely to be given. An application for permission can only be made by a potential landlord, and consists merely of an online procedure in which the landlord provides his potential tenant’s Home Office reference number and receives the answer Yes or No. There is no place *in that procedure* for the migrant, or anyone on her behalf, to present arguments in favour of being granted permission The new guidance says this:

How can an individual enquire upon their permission to rent?

A migrant without leave who is looking to take up a new tenancy and considers that they meet the criteria set out above can enquire whether they have permission to rent through their established contacts points with the Home Office, such as at a reporting event, interview appointment or through the team dealing with their case. If somebody without leave is not in contact with the Home Office then they should rectify this by contacting the voluntary returns team; or by making an application to remain in the United Kingdom.

This may look promising, but note the interesting wording: the migrant ‘can enquire whether they have permission to rent’ – not ‘may apply for permission to rent’. There is still no room for representations (on the basis of such as awaiting an appeal against refusal of a meritorious application, or having been wrongly classified *by the Home Office* as not having leave to remain, etc). Clearly this is not ‘an application procedure’ in the common-law sense – and, since the migrant is not a party, she has no remedy whatever for refusal. Once more, the migrant is not, or at least not straightforwardly, a party *to the decision to give them permission to rent,* but is expected to *accept a decision made about them*, or try to make urgent representations to the Home Office in circumstances where, commonly, ‘the team dealing with their case’ will not respond for several months.

And, as with employers, landlords found letting property to irregular migrants face *criminal* penalties.

1. **Conclusion: Impacts on migrants and citizens – the *legal distancing* of migrants from the rule of law**

*4.1 the diminution of rights and distancing of migrants from the legal systems and processes of immigration control*

I began by claiming that legal developments since 1971 had served to bring migrants (lawful or otherwise) closer into the citizens’ realm of statutes, rules and procedures, governed by the legal principles of fairness, equality of arms, proper consideration of applications and unbiased adjudication: and, just as importantly, to create an expectation of this, both among citizens and migrants themselves.

However, before considering how the developments discussed above have distanced the migrant from that legal system, some particular features of immigration and asylum law must be mentioned. There are three major differences from other areas of law dealing with rights and entitlements on a large scale.[[80]](#footnote-80) First, unlike in the civil law jurisdiction, the *burden of proof lies on the applicant.* This underpins all other inequalities of arms in immigration law. In particular the Home Office ‘culture of disbelief’[[81]](#footnote-81) owes its prevalence precisely to the lack of a shared burden or responsibility for establishing the facts. Secondly, the European Court of Human Rights has long held that immigration decisions, and immigration tribunal proceedings, do not treat of ‘civil rights’ nor do they ever involve the ‘determination of a criminal charge’, and so migrants are not protected by art 6 or art 7 ECHR.[[82]](#footnote-82) Finally, for some time, and certainly during the Blair years, the immigration tribunal system was run under a common budget along with immigration control and including immigration legal aid, and subject to performance measures of throughput, case completion and so on. So, for example, until the 2014 realignment of all the Tribunal procedure rules, the immigration tribunal procedure rules, distinct from those of the other tribunal chambers, emphasised speed as well as the interests of justice.

All these features of immigration law already posed limits to access to rights and entitlements for migrants even during the heyday of legal aid and effective judicial review. And then, as described in section 2 above, the legal position of migrants has since faced restrictions both in *the statutory appeal system*, with the withdrawal of legal aid from non-asylum claims, the introduction of appeal fees, and the successive restrictions since 1971 on appealable decisions, on grounds of appeal, and on the right to remain in the UK until an appeal is decided: and *in the realm of public law* by the increases in judicial review fees as well as the decline in effectiveness of that remedy arising from transfer to the Upper Tribunal and public expenditure cuts to that body.

I now argue that, for many migrants, their access to the very process of pursuing applications so as to enter or remain under the immigration rules, and their ‘quiet enjoyment’[[83]](#footnote-83) of the benefits of leave granted to them as prescribed in the rules, is hampered by the two wider trends I have discussed – contracting out immigration-related functions to private bodies, and recruiting public and private bodies and individuals to carry out immigration control functions. I argue that both these processes serve to create *legal distance* between the migrant and the Home Office. We see how, for example, the migrant has no remedy against Capita for wrongly deeming their presence to be unlawful, and cannot themselves check their Home Office records to ensure that employers and landlords will not be given wrong information.[[84]](#footnote-84) We have also seen how migrants receiving a statutory service such as asylum support, and especially those subject to detention while their case is considered, have little prospect of using the law to achieve adequate conditions, because they have no contract with the private provider, while the fact of the contracting out imposes additional layers of bureaucracy and inefficiency, poor record-keeping etc, between the migrant and the public authority legally responsible for their treatment.

I argue that not just the straightforward diminution of migrants’ substantive rights and access to legal remedies, but the erosion of such access through the legal distancing described above, *are imposing a distance between migrants and the law itself*. We note a distance, in terms of onerous requirements, short time limits and high fees, etc, between the migrant and a potential application provided for under the immigration rules, that is so great that few who need to make an application can succeed.[[85]](#footnote-85) We note barriers, such as lack of access to or non-existent records, or ineffectiveness of public law procedures, between the migrant and standard public law remedies for poor or unlawful treatment, that are insurmountable except for the few assisted by pro bono lawyers, doctors, etc. We note statutory appeals processes *for meritorious appeals* which for many will not be accessible unless they leave the country, imposing not just extra costs and difficulties of participating in legal proceedings from abroad, but actual distance between that applicant and their family and society. I argue that all of this suggests a transformation of practical distancing into *legal distance –* a transition from quantity into quality in the relationshp between that migrant and the law.

I argue also that the coopting or recruiting public and private bodies, and individuals, into carrying out immigration control functions, must have a baleful and even corrosive effect on social attitudes not just to ‘unlawful migrants’ but to all migrants. I have shown above that there is general resistance in NHS hospitals to this role, (but the health charging scheme is nevertheless does act to dissuade sick migrants from seeking treatment) while GPs’ right to resist providing a service to anyone leads to confusion and restricted access to healthcare for many migrants, irregular or otherwise. Early evidence from the ‘right to rent’ pilot showed that the principal effect was to deter landlord from letting to BAME tenants.[[86]](#footnote-86) The employment regulations prevent employers from giving the benefit of the doubt to long-service workers, and the university sponsor licensing scheme is so strict that at least one university[[87]](#footnote-87) is limiting foreign student working hours to below the legal limit. All of this will serve to impose distance between migrants and citizens.

*4.2 Criminalising citizens and its effects*

In 1966 Lord Chief Justice Parker, in *Rice v Connelly,[[88]](#footnote-88)* said:

It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, **and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority,** and to refuse to accompany those in authority to any particular place; short, of course, of arrest. (writer’s emphasis)

We saw in section 2 above that the 1971 Act provided straightforwardly for criminal offences directly related to unauthorised crossing of the physical border. We saw that since then the number of immigration offences has grown significantly, describing specific types or methods of harbouring, facilitating, smuggling, trafficking, using or providing false documents, etc, and civil penalties introduced for providing services to or engaging in contracts with migrants who do not have permission to remain. We have seen how prevalent mistakes are in the bureaucratic processes applying to migrants. Nevertheless we now see the criminalising of wider society for contracting with or providing services to migrants who may not be entitled.

I suggest that such measures also represent a transition from quantity to quality. There are two new aspects. This draws not just formal legal entities such as companies but also private individuals into the immigration control process. More importantly, these measures both require and will engender a regime where society’s relation to the migrant involves or requires a prior acceptance or agreement that an irregular migrant’s presence is not just technically unlawful, but *always anti-social and always and indubitably unacceptable.* These measures represent an attempt to equate in the eyes of wider society the (alleged, temporary, potentially challengeable, subject to application, potentially excusable in the compassionate circumstances) irregularity of any particular migrant’s presence with the unassailable public unacceptability of, for example, allowing one’s house to be used for sexually assaulting children.[[89]](#footnote-89) In contrast, the letting of property to (or the making of other types of contracts with) ‘criminals’, whether convicted or suspected, is not itself a crime;[[90]](#footnote-90) and only in particular circumstances is it a criminal offence to use premises for other criminal activity.[[91]](#footnote-91) On the other hand, just one indication of society’s real day-to-day views about irregular migrants can be gleaned from the numbers of applications for regularisation under the Immigration Rules family life 10-year routes and private life routes.[[92]](#footnote-92) These applications are based on family life and links with the community, under rules the government itself has introduced. The presence of such migrants is simply not regarded as or accepted as antisocial in the way that, say, abusing children is, or even as is theft, if indeed at all. Even among those with strong political views ‘against migration’, the presence of some particular irregular migrant living next door with his or her family will not necessarily be deplored, and may even be supported and campaigned about – because ‘human beings are social animals’, and individual irregular migrants, in their daily social lives, engender the whole gamut of emotions from individual love and friendship all the way to tolerant indifference. And yet the criminalising of citizens for entering into contracts with them will effectively require and encourage citizens to *develop* the view that the mere unlawfulness of a migrant makes *that migrant* antisocial, corrosive, corrupting and so on. And, given the significant chance that the decision on the unlawfulness might be a bureaucratic mistake, and the lack of access to effective legal challenges, such views may be applied by mistake to lawful migrants.

Besides diminishing the apparent legal rights of all migrants, all of this must ultimately be corrosive of all society’s respect for each other’s rights as equal before the law.

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25/8/2016

1. i.e. not a citizen [↑](#footnote-ref-1)
2. *R v Inspector of Leman St Police Station, R v Secretary of State for Home Affairs, ex p Venicoff* [1920] 3 KB 72 [↑](#footnote-ref-2)
3. *Alvi [2012] UKSC 33,* deciding that any requirement potentially leading to refusal must be contained in the Immigration Rules. [↑](#footnote-ref-3)
4. Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 (which also determined that a migrant’s criminal convictions will never be ‘spent’). And only litigation has so far prevented all legal aid from being subject to a lawful residence test - see *R(Public Law Project) v Lord Chancellor* [2016] UKSC 39 [↑](#footnote-ref-4)
5. Immigration Acts 2014 and 2016 [↑](#footnote-ref-5)
6. Immigration Act 2014 s117; *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC); See *Private life in the balance: constructing the precarious migrant* Richard Warren, Journal of Immigration, Asylum and Nationality Law Vol 30 no.2 2016. [↑](#footnote-ref-6)
7. ‘It is said that there are no sudden changes in nature ... Yet we have seen cases in which the alteration of existence involves not only a transition from one proportion to another, but also a transition, by a sudden leap, into a … qualitatively different thing; an interruption of a gradual process, differing qualitatively from the preceding, the former state’ Science of Logic, Georg Friedrich Hegel (quoted in *The transition from quantity to quality: A neglected causal mechanism in accounting for social evolution* Robert L. Carneiro American Museum of Natural History, New York, NY 10024 [↑](#footnote-ref-7)
8. IA 1971 Section 11, s 4 and schedule 2 para 21, See *Revisiting removability in the ‘hostile environment’* Sheona York, Birkbeck Law Review Vol 3 Issue 2, Decenber 2015, and also Richard Warren n6 [↑](#footnote-ref-8)
9. *Abdulaziz, Cabalez and Balkandali,v UK,* 15/1983/71/107-109 [↑](#footnote-ref-9)
10. A spouse seeking entry had to prove that the ‘primary purpose’ of their marriage was not to evade immigration control. [↑](#footnote-ref-10)
11. Unless the marriage was to be solemnised in the Church of England - struck down as discriminatory in the case of *R (on the application of Mahmoud* Baiai *& Others)* v SSHD[2008] UKHL 53. [↑](#footnote-ref-11)
12. Struck down as disproportionate by the case of *Quila & Anor, R (oao) v SSHD* [2011] UKSC 45 [2011] 3 WLR 836 [↑](#footnote-ref-12)
13. *Reg 21B* of the Immigration (European Economic Area) Regulations 2006 as amended [↑](#footnote-ref-13)
14. Certain applicants had to show ‘maintenance and accommodation without recourse to public funds’ but until 1996 such applicants once in the UK had not been precluded from accessing public funds. [↑](#footnote-ref-14)
15. National Asylum Support Service (NASS) [↑](#footnote-ref-15)
16. Both the 1996 Act and the 2002 Act gave rise to streams of High Court injunctions, the 1996 injunctions leading to the setting up of NASS and the ‘dispersal’ of asylum-seekers; and the 2002 injunctions eventually to the case of *Limbuela (Adam, Limbuela & Tesema v SSHD,* [2005] UKHL 66) [↑](#footnote-ref-16)
17. After significant Parliamentary opposition prevented the exclusion of judicial review altogether. [↑](#footnote-ref-17)
18. Tribunals, Courts and Enforcement Act 2007 [↑](#footnote-ref-18)
19. *Family migration Statement of Intent* Home Office 14 June 2012; Immigration Rules Appendix FM, para GEN.1: see also *Immigration control and the place of Article 8 in the UK courts – an update* Sheona York 2015 JIANL vol 29 Issue 3 [↑](#footnote-ref-19)
20. Official reports confirmed little evidence for either. See <http://www.independent.co.uk/news/uk/politics/minister-admits-david-cameron-has-no-factual-evidence-to-prove-benefit-tourism-causes-mass-eu-a6802326.html> accessed 13/7/16; <http://www.theguardian.com/politics/reality-check/2013/oct/22/health-tourists-costing-nhs-2bn> accessed 13/7/2016 [↑](#footnote-ref-20)
21. The plan to ‘reduce the numbers of appeal from 17 to four’ (see e.g. [http://www.bbc.co.uk/news/uk-24477823 accessed 13/7/16](http://www.bbc.co.uk/news/uk-24477823%20accessed%2013/7/16)), was based on a misrepresentation. The 17 ‘appealable decisions’ in the Nationality, Immigration and Asylum Act 2002 were not all available to every migrant, but referred to the type of decision being made. [↑](#footnote-ref-21)
22. Since 2010 the fee for entry clearance for spouse and 2 children has increased by 789%, and the fee for indefinite leave for a dependant by 3750% (from the author’s presentation to the South Eastern Regional Migration Partnership seminar 19/5/2016)/ For current fees see <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510922/Fees_Table_for_website_2016-17_v0.2.pdf> [↑](#footnote-ref-22)
23. Cameron’s speech on open public services, Pime Minister’s Office 2011 [↑](#footnote-ref-23)
24. Servite Houses (2001) 33HLR 35 QBD (unreported) [↑](#footnote-ref-24)
25. *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] WLR 699, [1987] 1 All ER 564 [↑](#footnote-ref-25)
26. *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan Reference* [1993] 1 WLR 909 [↑](#footnote-ref-26)
27. Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595 [↑](#footnote-ref-27)
28. *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 36 [↑](#footnote-ref-28)
29. (by the Health and Social Care Act 2008 s145, provision of care in a private care home has been defined as an act of a public nature for the purposes of the Human Rights Act s6(3)(b)). [↑](#footnote-ref-29)
30. *Heald v Brent LBC* [2009] EWCA Civ 930; [2010] 1 WLR 990 [↑](#footnote-ref-30)
31. *Outsourcing administrative adjudication* Peter Cane, LQR 2010 126 (July) 343-347 [↑](#footnote-ref-31)
32. *Contracting out, the Human Rights Act and the scope of judicial review* Paul Craig, LQR 2002, 118 (Oct) 551-568. [↑](#footnote-ref-32)
33. *Woodland v Essex County Council* [2013] UKSC 66, finally concluded this week: <https://www.theguardian.com/uk-news/2016/aug/21/woman-awarded-2m-compensation-over-near-drowning-16-years-ago> accessed 24/8/2016 [↑](#footnote-ref-33)
34. Though not provided to the asylum-seeker herself, see *Far from Home,* Deborah Garvie, Shelter 2001, Appendix 2. Home Office asylum support policy bulletins specify procedures for rehousing victims of domestic violence or racial harassment, but disrepair is mentioned merely as a reason ‘for moving the asylum-seeker’. See <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487402/Asylum_Support_Policy_Bulletin_Instructions_Public_v7.pdf> q59, page 69 accessed 20/8/16. [↑](#footnote-ref-34)
35. *The impact of section 4 support* Refugee Agencies Policy Response September 2006; *Far from Home* n36 found that almost 17% of accommodation was unfit for human habitation. The majority, 86% ,of the accommodation was unfit for the number of inhabitants. [↑](#footnote-ref-35)
36. *The Shadow State*, Social Enterprise UK December 2012 [↑](#footnote-ref-36)
37. <https://www.theguardian.com/uk-news/2016/aug/02/dozens-of-asylum-seekers-crammed-into-single-home-office-property> accessed 4/8/2016 [↑](#footnote-ref-37)
38. Home Office asylum support policy bulletins require contractors to provide detailed response procedures in cases of domestic violence and racist incidents. There is nothing similar dealing with disrepair. [https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/487402/Asylum\_Support\_Policy\_Bulletin\_Instructions\_Public\_v7.pdf accessed 20/8/16](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487402/Asylum_Support_Policy_Bulletin_Instructions_Public_v7.pdf%20accessed%2020/8/16). See also Willman, n41 [↑](#footnote-ref-38)
39. An asylum support appeal held that conditions in the Sunnyside Hotel in Liverpool were bad enough to justify the asylum-seekers’ abandoning their no-choice accommodation. (Sue Willman speech, HLPA Minutes 9/1/2002). At p7 Willman summarises the housing laws which apply, and critiques the complaint process. [↑](#footnote-ref-39)
40. A need for care and attention not caused by the applicant’s destitution: Section 21(1A) of the NAA 1948, *R. v Wandsworth LBC Ex p. O; R. v Leicester City Council Ex p. Bhikha* [2000] 1 W.L.R. 2539, *Westminster City Council v NASS* [2002] UKHL 38, See also *Asylum-seekers with care needs* UK Visas and Immigration 2004, still current. [↑](#footnote-ref-40)
41. Willman n40 [↑](#footnote-ref-41)
42. Jeremy Oppenheim, former Director of NASS, speaking at the NASS Stakeholders Forum, March 2006, quoted in *The impact of Section 4 support* n35. [↑](#footnote-ref-42)
43. For a critique of asylum policy-making based on the ‘pull-factor’, see *Chance or choice? Understanding why asylum seekers come to the UK* Heaven Crawley, Refugee Council January 2010. [↑](#footnote-ref-43)
44. Joint unannounced inspection by HM Inspector of Prisons and the Care Quality Commission of Yarls Wood, April 2016, referred to in the NAO report n51 [↑](#footnote-ref-44)
45. *Yarls Wood Immigration Renoval Centre,* report by the Comptroller and Auditor-General, National Audit Office 7 July 2016 [↑](#footnote-ref-45)
46. Ibid, Key findings [20] [↑](#footnote-ref-46)
47. Ibid [x] [↑](#footnote-ref-47)
48. *Woodland v Essex* n33 [7] [↑](#footnote-ref-48)
49. Ibid [23] [↑](#footnote-ref-49)
50. *The Lord Chancellor and Detention Action v SSHD* [2015] EWCA Civ 840; *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom* A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration March 2015 [↑](#footnote-ref-50)
51. *Prisons: the role of the private sector* House of Commons Library Report 30/1/14 [↑](#footnote-ref-51)
52. T*he Shadow State* discusses outsourcing contracts concerning prisons, children’s homes, adult social care homes, and prisons, as well as the UKBA contracts referred to above. Baroness Nuala O’Loan, in *Report to the UKBA on ‘outsourcing abuse’* March 2010, examines all the allegations of abuse in the UKBA detention estate between 2002 and 2008, and identifies the same ‘managerial’ issues as in the NAO report on YarlsWood and in the Independent Chief Inspector’s reports cited at n54 and 55: but none of these reports discuss the legal or practical impact on the migrant of being subject to these arrangements. [↑](#footnote-ref-52)
53. The ‘migrant refusal pool’ was one of the backlogs identified to Theresa May in 2013, of applicants who had been refused but who had not yet left the UK. Capita were promised £65 for every one who they persuaded to go home. <http://immigrationmatters.co.uk/contract-to-%E2%80%98bounty-hunt%E2%80%99-174000-illegal-immigrants-awarded-to-capita.html>; <http://www.bbc.co.uk/news/uk-politics-19637409> accessed 14/7/16, critiqued by ILPA, see ILPA briefing for the Immigration Bill (Part 3, Chapter 1) House of Lords Report 3 April 2014 ff [↑](#footnote-ref-53)
54. Tascor (part of Capita) (escorting), Carlson Wagonlit Travel (ticketing); G4S and Barnardo’s (Cedars) – *An inspection of Home Office Outsourced Contracts for Escorted and Non-Escorted Removals and Cedars Pre-departure Accommodation* Independent Chief Inspector of Borders and Immigration March 2016. [↑](#footnote-ref-54)
55. See *An Inspection of Overstayers: How the Home Office handles the cases of individuals with no right to stay in the UK May – June 2014*, Independent Chief Inspector of Borders and Immigration, section 5; also note 60. [↑](#footnote-ref-55)
56. And, on being told to contact the Home Office, received incorrect advice. Our ‘go home’ client, who had leave to remain, paid £649 for a new application which he did not need to make. [↑](#footnote-ref-56)
57. Robert Thomas, Electronic Immigration Network blog 12 September 2013 [↑](#footnote-ref-57)
58. A paper application to the High Court for permission with a request for an order ordering the SSHD to promptly correct its mistake would generally provoke a prompt response from the SSHD, and if not, paper permissions took at most 6 weeks in London and less in the provincial administrative courts. [↑](#footnote-ref-58)
59. FOI request no 105464 to Robert Thomas, 16 June 2016. Cuts in Government Legal Department (ex Treasury Solicitors) staff have also virtually elimited any prompt Home Office response. [↑](#footnote-ref-59)
60. . <http://icinspector.independent.gov.uk/wp-content/uploads/2013/12/An-Inspection-of-Decison-Making-Quality-in-the-Warsaw-Visa-Section.pdf> accessed 20/7/16 [↑](#footnote-ref-60)
61. ‘*Routinely, public bodies run contracts in ways which do not adhere to the formal contractual provisions, and fail to lay the paper trail needed to translate councillors’ complaints of bad practice into specific and cogent evidence, which could justify treating the service agreement as repudiated*’. Richard Clayton QC, see <https://ukconstitutionallaw.org/2015/11/30/richard-clayton-qc-accountability-judicial-scrutiny-and-contracting-out/> accessed 10/7/16 [↑](#footnote-ref-61)
62. *Destitution by Design* London Mayoral office 2004: <http://icar.livingrefugeearchive.org/3679/research-directory/destitution-by-design.html> ; *Between Destitution And A Hard Place: Finding Strength To Survive Refusal From The Asylum System: A Case Study From The North East Of England* Fiona Cuthill & ors, University of Sunderland 2013 [↑](#footnote-ref-62)
63. The best estimates of the numbers of unlawful migrants in the UK range from around 400,000 to 900,000 people. Removals have been falling from around 15,000 a year to 12,000 in the last year for which figures are officially available. See *Revisiting removability in the Hostile Environment* Sheona York, n8 [↑](#footnote-ref-63)
64. National Health Service (Charges to Overseas Visitors) (No 2) Regulations 1982 SI 1982/863 [↑](#footnote-ref-64)
65. For example, returning expatriate British citizens are not ‘ordinarily resident’ on arrival [↑](#footnote-ref-65)
66. *2012 Review of overseas visitors charging policy summary report* Department of Health April 2012, pp 17 and 22 [↑](#footnote-ref-66)
67. *Guidance on implementing the overseas visitor hospital charging regulations 2015* Department of Health [↑](#footnote-ref-67)
68. See for example *First do no harm: denying health care to people whose asylum claims have failed* Nancy Kelley and Juliette Stevenson, June 2016 Refugee Council/Oxfam; *Hostile health care: why charging migrants will harm the most vulnerable* Hannah Kilner, British Journal of General Practice 20914 Sept 64(626) published online; *Access to Health Care for Undocumented Migrants: A Comparative Policy Analysis of England and the Netherlands* Kor Grit, Institute of Health Policy and Management, Erasmus University Rotterdam; Joost J. den Otter, International Rehabilitation Council for Torture Victims; Anneke Spreij, Dutch Transplantation Foundation; Journal of Health Politics, policy and Law Vol 37 no 1 February 2012 [↑](#footnote-ref-68)
69. This requires every applicant (and dependant) to pay an up-front Health Surchagre fee of £200 per year of any proposed leave to remain. [↑](#footnote-ref-69)
70. There is plenty of internet discussion complaining about airlines failing to compensate, and no cover from travel insurance, in cases of refusals of visas as well as airlines refusing to carry people with visas [↑](#footnote-ref-70)
71. The first ever legal case to rely on DNA fingerprinting – dramatised in ITV’s *Code of a Killer* [↑](#footnote-ref-71)
72. See for example <https://www.theguardian.com/uk-news/2015/aug/05/hauliers-face-hefty-fines-over-migrant-stowaways-even-if-they-alert-police> In fact, there is a growing legal practice providing representation to hauliers at penalty appeal hearings – reported at Garden Court Chambers conference 30/6/2016 [↑](#footnote-ref-72)
73. Asylum and Immigration Act 1996 s8 [↑](#footnote-ref-73)
74. Immigration Law Practitioners Association letter to the Chief Inspector of Borders and Immigration 14 November 2014; the report itself merely notes the concerns of ILPA and others and recommends that the Home Office produces accurate information – see *An Inspection of How the Home Office Tackles Illegal Working* October 2014 – March 2015 [↑](#footnote-ref-74)
75. Section 3C Immigration Act 1971 [↑](#footnote-ref-75)
76. *FH & Ors v SSHD* [2007] EWHC 1571 (Admin) [21] (dealing with the Case Resolution Directorate or ‘legacy’ cases) held: The need to deal with so many incomplete claims has arisen as a result of the past incompetence and failures by the Home Office. … It is not for the court to require greater resources to be put into the exercise … unless persuaded that the delays are so excessive as to be unreasonable and so unlawful.’ More recently, *TN & MA (Afghanistan) v SSHD* [2015] UKSC 40 decided that the so-called *‘Rashid’* principle, under which a person who suffered from a previous Home Office error could expect a ‘corrective remedy’, was not to be followed. [↑](#footnote-ref-76)
77. Immigration Act 2016 s44, sch 7 [↑](#footnote-ref-77)
78. There are provisions for the migrant to request access to the money for ‘reasonable living expenses’. [↑](#footnote-ref-78)
79. Following 2 judicial review pre-action letters and a freedom of information request from the writer, and a debate in the House of Lords on 12 April 2016 (Hansard Online 12 April 2016 Volume 771), following which new guidance *A short guide on right to rent* was issued in June 2016. (Neither my 2 clients nor I received any indication of whether they were recorded as having permission to rent). [↑](#footnote-ref-79)
80. Such as access to welfare benefits and social housing [↑](#footnote-ref-80)
81. This refers among other things to the prevalence of refusals based on ‘credibility’ and the identification of ‘inconsistencies’ [↑](#footnote-ref-81)
82. Maaouia v France 2000, (Application no. [39652/98](http://hudoc.echr.coe.int/eng#{"appno":["39652/98"]})). The writer has critiqued this case in *Rehabilitation or Transportation,* submitted to the Society of Legal Scholars conference 2015 [↑](#footnote-ref-82)
83. Contrast the ‘quiet enjoyment’ of a tenancy, without interference from the landlord, enforceable in court, with the migrant’s legal weakness in the face of subsequent Home Office mistakes or incompetence in respect of them [↑](#footnote-ref-83)
84. This can be compared to most consumers’ easy access to their credit score [↑](#footnote-ref-84)
85. Especially in relation to family and private life applications under Appendix FM and para 276ADE of the rules (see *MM (Lebanon)* [2014] EWCA Civ 985 – Supreme Court judgement awaited) [↑](#footnote-ref-85)
86. *Right to Rent Checks Result In Discrimination Against Those Who Appear ‘Foreign’* JWCI 3 September 2015 <https://jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99> accessed 24/8/2016 [↑](#footnote-ref-86)
87. Kent, in fact [↑](#footnote-ref-87)
88. ##  *Rice v Connelly* [1966] 3 W.L.R. 17, (420)

 [↑](#footnote-ref-88)
89. *Permitting girl under 13 to use premises for sexual interco*urse: Sexual Offences Act 1956 s25; *Permitting girl under 16 to use premises for sexual intercourse*; Sexual Offences Act 1956 s26 [↑](#footnote-ref-89)
90. Only in particular circumstances. The offence of *harbouring an escaped prisoner (etc),* Criminal Justice Act 1961 s22, requires *knowledge*. The Immigration Act 1971 introduced the offence of ‘harbouring’ (*Assisting illegal entry or harbouring persons* Immigration Act 1971 s25, as amended) - which also required *knowledge*. [↑](#footnote-ref-90)
91. See n89, and also *Occupier knowingly permitting drugs offences etc* Misuse of Drugs Act 1971 s8 [↑](#footnote-ref-91)
92. n85 [↑](#footnote-ref-92)